**[Cite as *State v. Carlisle*, 2009-Ohio-6004.]**

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

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| STATE OF OHIO | : | |
| Plaintiff-Appellee | : | C.A. CASE NO. 22970 |
| v. | : | T.C. NO. 2007 CR 3028 |
| CHARLES P. CARLISLE | : | (Criminal appeal from Common Pleas Court) |
| Defendant-Appellant | : | |
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**O P I N I O N**

Rendered on the 13th day of November, 2009.

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DONOVAN, P.J.

**{¶ 1}** Defendant-appellant appeals his conviction and sentence for one count of murder (proximate result of committing felonious assault [deadly weapon]), in violation of R.C. § 2903.02(B), one count of murder (proximate result of committing felonious assault

[serious physical harm]), in violation of R.C. § 2903.02(B), one count of felonious assault (deadly weapon), in violation of R.C. 2903.11(A)(2), and one count of felonious assault (serious physical harm), in violation of R.C. § 2903.11(A)(1).

**{¶ 2}** On December 26, 2007, Carlisle was charged by indictment with two counts of murder, one count of felonious assault (deadly weapon), and one count of felonious assault (serious physical harm). Carlisle was arraigned on January 3, 2008, stood mute, and the trial court entered a not guilty plea on his behalf. Carlisle filed a motion to suppress on January 16, 2008. In a written decision filed on April 28, 2008, the trial court overruled Carlisle's motion to suppress.

**{¶ 3}** Following a jury trial held which began on September 22, 2008, and concluded on September 26, 2008, Carlisle was found guilty of all counts in the indictment. At the sentencing hearing held on September 30, 2008, the trial court merged all of the counts and sentenced Carlisle to an aggregate term of fifteen years to life in prison. Carlisle filed a timely notice of appeal with this Court on October 3, 2008.

I

**{¶ 4}** The incident which forms the basis for the instant appeal occurred on July 26, 2007, when Carlisle and the victim, Geramie Treadwell, became engaged in a heated argument at Carlisle's apartment. The argument centered around Treadwell's refusal to leave the apartment at Carlisle's request. As the argument escalated, Carlisle and Treadwell began to shove each other. At that point, Carlisle retrieved a small knife from his bedroom and stabbed Treadwell three times. Shortly thereafter, Treadwell died from his injuries.

**{¶ 5}** Carlisle and Treadwell became acquainted in January 2007, when Carlisle

moved into an apartment located on Quitman Avenue in Dayton, Ohio. Treadwell was known as someone who sold drugs in that area. Carlisle testified that he was addicted to crack cocaine. He admitted to buying drugs from Treadwell from time to time.

**{¶ 6}** On the evening of July 25, 2007, Carlisle met up with Treadwell, who was accompanied by an unnamed friend, and the three men went to a party at the home of one of Carlisle's neighbors. After the party, Carlisle invited Treadwell and his friend to come back to his apartment to spend the night. Carlisle testified that Treadwell gave him a $25.00 piece of crack cocaine in exchange for allowing the two men to sleep at his apartment. Carlisle further testified that he smoked some of the crack at 3:00 or 4:00 a.m. At approximately 5:00 a.m., all three of the men went to sleep.

**{¶ 7}** Carlisle and Treadwell awoke at approximately 7:00 a.m. At around 8:30 a.m., Carlise and Treadwell left the apartment in order to purchase a cell phone for Treadwell. Carlisle testified that as a favor to Treadwell, he planned on purchasing a cell phone in his name because Treadwell was unable to purchase one due to unpaid phone bills. Treadwell's friend remained at Carlisle's apartment asleep.

**{¶ 8}** At the cell phone store which was also a convenience store, Carlisle attempted to purchase a phone for Treadwell. While the pair waited for the cell phone to be activated, Treadwell bought beer that he and Carlisle drank outside the store. Carlisle testified that he and Treadwell shared approximately three or four 40 oz. beers while they were at the store.

**{¶ 9}** While at the store, Treadwell met his seventeen year-old girlfriend, A.B., who was accompanied by her sister, fifteen year-old B.P., and another friend, fourteen year-old

B.H. Treadwell invited the girls to come back to Carlisle's apartment with him and Carlisle after the phone was activated. The owner of the store, however, was unable to activate the phone, so Carlisle and Treadwell left with the girls and returned to Carlisle's apartment.

**{¶ 10}** Before Treadwell left the store, he bought the girls alcohol which they drank on the way back to Carlisle's apartment. Upon returning to Carlisle's apartment, the girls continued drinking the alcohol which Treadwell had purchased for them. Carlisle testified that after a short period of time, the girls began acting as if they were intoxicated. Carlisle also suspected that the girls were underage, and he confirmed this fact by asking Treadwell. Carlisle testified that he asked Treadwell to tell the girls to leave his apartment, but Treadwell initially refused. Carlisle then left to get some money that he owed Treadwell for a prior drug purchase.

**{¶ 11}** By the time Carlisle returned, the girls had already left at the request of Treadwell. Treadwell's unnamed friend also left the apartment approximately five minutes after Carlisle returned. Treadwell, who felt that he had been insulted, began arguing with Carlisle. Carlisle eventually told Treadwell to leave, but he refused. As the argument escalated, Treadwell shoved Carlisle two or three times. At this point, Carlisle testified that he pulled out a knife that he carried for protection and Treadwell was in fact, stabbed in the neck, the left shoulder, and the left arm. Treadwell, who was bleeding profusely, left the apartment and collapsed near a fence across the street from Carlisle's apartment. Treadwell was taken to Miami Valley Hospital, where he subsequently died from his injuries.

**{¶ 12}** After the stabbing, Carlisle fled the scene, but eventually turned himself in to the police and confessed to stabbing Treadwell. At trial, Carlisle testified that the stabbing

was an accident because he only wanted to scare Treadwell so he would leave the apartment. As stated previously, Carlisle was found guilty of all of the counts in the indictment and sentenced accordingly.

**{¶ 13}** It is from this judgment that Carlisle now appeals.

II

**{¶ 14}** Carlisle's first assignment of error is as follows:

**{¶ 15}** "AS A MATTER OF LAW, THE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN DEFENSE COUNSEL FAILED TO ASSERT THE AFFIRMATIVE DEFENSE OF SELF DEFENSE, AND THEREBY SAID REPRESENTATION VIOLATED DEFENDANT[']S CONSTITUTIONAL RIGHTS TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE 1 SECTION 10 OF THE OHIO STATE CONSTITUTION."

**{¶ 16}** In his first assignment, Carlisle contends that the he received ineffective assistance since his trial counsel failed to request an instruction on self defense at the close of trial.

**{¶ 17}** "When considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether defendant's Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness." *State v. Bradley* (1989), 42 Ohio St.3d 136,

538 N.E.2d 373, citing *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, 358 N.E.2d 623, 627, vacated in part on other grounds (1978), 438 U.S. 910, 98 S.Ct. 3135.

**{¶ 18}** The above standard contains essentially the same requirements as the standard set forth by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, supra, at 687-688. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id*. Thus, counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. *Id*.

**{¶ 19}** For a defendant to demonstrate that he has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, absent counsel's errors, the result of the trial would have been different. *Bradley*, supra, at 143. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, supra, at 694.

**{¶ 20}** Initially, it should be noted that Carlisle's trial counsel raised the affirmative defense of self defense in his opening statement. Defense counsel suggested that the evidence adduced during the trial would establish that Carlisle acted in self defense when he stabbed Treadwell. The following excerpt from defense counsel's opening statement

presents all of the elements a defendant must demonstrate to prove the affirmative defense of self defense:

**{¶ 21}** "Defense Counsel: ***And what the evidence will show is that Mr. Carlisle was not at fault in creating the fight that started between [Treadwell] and Mr. Carlisle; the escalation of that fight was not caused by him either.

**{¶ 22}** "And Mr Carlisle had a bona fide belief that in his home he was left with only one option and he was in fear – I mean, in danger of death or great bodily harm. And his only means of escape from this was to use the force that he used with this knife. He didn't have a duty to retreat from his own home but even if he did, the only exit from the home was being blocked by [Treadwell] who is five inches taller and easily about 30 pounds heavier than Mr. Carlisle.

**{¶ 23}** "And as you are listening to the evidence, we ask – my client and I ask you to ask yourselves, was this deadly force that he was intending to use or were these actions somebody defending himself? You have to look at the mind of Mr. Carlisle."

**{¶ 24}** In order to demonstrate self defense, the following elements must be established:

**{¶ 25}** "***(1) the [accused] was not at fault in creating the situation giving rise to the affray; (2) the [accused] has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) the [accused] must not have violated any duty to retreat or avoid the danger." *State v. Robbins* (1979), 58 Ohio St.2d 74, ¶ 2 of the syllabus, citing *State v. Melchior* (1978), 56 Ohio St.2d 15.

**{¶ 26}** "The proper standard for determining in a criminal case whether a defendant has successfully raised an affirmative defense under R.C. 2901.05 is to inquire whether the defendant has introduced sufficient evidence, which, if believed, would raise a question in the minds of reasonable men concerning the existence of such issue." *State v. Robbins* (1979), 58 Ohio St.2d 74.

**{¶ 27}** It is customary that when a defendant raises the affirmative defense of self defense, he must testify on his own behalf during trial in order to provide his version of the events forming the foundation for the use of the affirmative defense. In the instant case, Carlisle testified on his own behalf. His testimony during cross-examination, however, was inconsistent with a claim of self defense which is evident from the following excerpt:

**{¶ 28}** "Q: Are you saying that it was an accident, what happened in your house?

**{¶ 29}** "A: I feel that – I didn't mean to do it. I didn't mean to do it.

**{¶ 30}** "Q: But are you saying it was an accident?

**{¶ 31}** "A: I'm just saying I didn't mean to do it.

**{¶ 32}** "Q: But are you saying it was an accident?

**{¶ 33}** "A: In so many – *yes it was . It wasn't meant to be. It was just to scare him. It wasn't meant to harm.*

**{¶ 34}** "Q: But you meant to pull out your knife, correct?

**{¶ 35}** "A: *To get him – to scare him to get out of my house*."

**{¶ 36}** After Carlisle testified, the defense rested. Prior to closing statements, the trial court held an in-chambers conference in which defense counsel chose to withdraw his request for a jury instruction on self defense in light of Carlisle's testimony. This is

reflected in the following discussion:

**{¶ 37}** "The Court: ***Initially, defense counsel asked for self defense. Based upon our discussions last night, we are withdrawing that request; is that correct?

**{¶ 38}** "Defense Counsel: Yes, Your Honor. When I look at what the instructions for self defense were and I compared that with my client's testimony, which is kind of what the self defense argument hinged, I understood that we didn't fulfill – I don't know if any, but we didn't fill all of the elements that were required for self defense. So at that point, I decided to withdraw that particular argument.

**{¶ 39}** "The Court: I agree that under the facts as presented, a jury would not have the appropriate facts here to consider self defense."

**{¶ 40}** Rather, defense counsel stated that based on Carlisle's testimony, the evidence supported an instruction on accident. The court agreed with defense counsel, and an instruction on the affirmative defense of accident was provided to the jury. We find that defense counsel's decision to withdraw his request for an instruction on self defense in favor of an instruction on accident was a tactical decision based on the counsel's professional assessment of what the evidence established. "Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Bradley* (1989), 42 Ohio St.3d 136, 142. A court must presume that numerous choices, perhaps even disastrous ones, are made on the basis of a tactical decision and do not constitute ineffective assistance of counsel. *State v. Carpenter* (1996), 116 Ohio App.3d 615, 626, citing *Bradley*, supra, at 144. In light of Carlisle's

testimony, defense counsel acted reasonably in deciding to withdraw his request for an instruction on self defense, and as such, did not provide ineffective assistance.

**{¶ 41}** Carlisle's first assignment of error is overruled.

III

**{¶ 42}** Carlisle's second assignment of error is as follwos:

**{¶ 43}** "AS A MATTER OF LAW, THE TRIAL COURT ERRED BY FAILING TO ALLOW TESTIMONY UNDER EVID. R. 404 ANDD 405 REGARDING THE CHARACTER TRAITS OF THE VICTIM."

**{¶ 44}** In his second assignment, Carlisle argues that the trial court erred when it impliedly overruled his motion to permit testimony of Dayton Police Lieutenant Patrick Welsh in regards to Treadwell's violent nature and gang affiliation. Carlisle asserts that this evidence would have bolstered his initial claim that he acted in self defense when he stabbed Treadwell.

**{¶ 45}** We note that the court did not rule on Carlisle's motion to introduce the testimony of Lt. Welsh prior to the beginning of trial. "Where a trial court fails to rule upon a motion, however, we will presume the motion was overruled." *Bolling v. Marzocco* (July 9, 1999), Montgomery County App. No. 17456. Moreover, at trial, Carlisle never objected to the court's implied denial of his motion, nor did he seek introduction of Lt. Welsh's testimony by proffer in order to properly preserve this issue for appeal. *Garrett v. Sandusky* (1994), 68 Ohio St.3d 139. Just as importantly, such testimony would only be relevant to a self defense claim, which was not presented. Thus, no issue in this regard has been preserved for appeal, and we have nothing to review.

**{¶ 46}** Carlisle's second assignment of error is overruled.

IV

**{¶ 47}** Carlisle's third and final assignment of error is as follows:

**{¶ 48}** "AS A MATTER OF LAW, THE TRIAL COURT ERRED WHEN IT FAILED TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSES OF INVOLUNTARY MANSLAUGHTER, VOLUNTARY MANSLAUGHTER AND/OR RECKLESS HOMICIDE."

**{¶ 49}** In his final assignment, Carlisle contends that the trial court erred when it overruled his request that the jury be instructed on the elements of the lesser included offense of reckless homicide. Carlisle also argues that he was afforded ineffective assistance when his defense counsel failed to request that the jury be instructed on involuntary manslaughter and voluntary manslaughter.

**{¶ 50}** "A criminal defendant has the right to expect that the trial court will give complete jury instructions on all issues raised by the evidence." *State v. Williford* (1990), 49 Ohio St.3d 247, 251. Jury instructions should be tailored to fit the facts of the case. *Avon Lake v. Anderson* (1980), 10 Ohio App.3d 297, 299.

**{¶ 51}** "[A] jury instruction must be given on a lesser included (or inferior-degree) offense when sufficient evidence is presented which would allow a jury to reasonably reject the greater offense and find the defendant guilty on a lesser included offense." *State v. Shane* (1992), 63 Ohio St.3d 630, 632-633.

**{¶ 52}** The relevant elements of the offense of murder (proximate result), R.C. 2903.02(B), are as follows:

**{¶ 53}** "(B) No person shall cause the death of another as a proximate result

of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code."

**{¶ 54}** A conviction under R.C. 2903.02(B) requires the State to prove that the defendant acted with the mental state essential to the underlying offense, which for felonious assault is "knowingly." *State v. Elwell*, Lorain App. No. 06CA008923, 2007-Ohio-3122, ¶60.

**{¶ 55}** The relevant elements of the offense of reckless homicide, R.C. 2903.041, are as follows:

**{¶ 56}** "(A) No person shall recklessly cause the death of another ***.

**{¶ 57}** "(B) Whoever violates this section is guilty of reckless homicide, a felony of the third degree."

**{¶ 58}** Carlisle argues that the evidence presented at trial demonstrated that he acted recklessly, rather than knowingly, when he stabbed Treadwell three times in the neck and shoulder area. Thus, Carlisle argues that the trial court had before it reasonable evidence that warranted the inclusion of an instruction to the jury on the lesser included offense of reckless homicide.

**{¶ 59}** Pursuant to R.C. 2901.22(B), "a person acts *knowingly*, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." "A person acts *recklessly* when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature." R.C. § 2901.22(C).

**{¶ 60}** In the instant case, Carlisle testified that when he stabbed Treadwell, he was swinging the knife in a reckless, haphazard manner while he covered his face with his free arm. Carlisle argues that viewed in light most favorable to him, a reasonable person could find that he was acting recklessly, and therefore, guilty of reckless homicide, not murder. The trial court, however, found that Carlisle's testimony was totally inconsistent with that of the coroner who performed the autopsy on Treadwell, who testified as follows:

**{¶ 61}** "The State: Can you determine from the wounds whether or not they were inflicted by swinging motions of the hand as opposed to a precise infliction?

**{¶ 62}** "The Coroner: *The wounds imply – because they are stab wounds, they imply precise infliction not a slashing type manner across the skin, which again would create an incised wounds, a cut on the skin surface*. ***"

**{¶ 63}** We also note that Carlisle stabbed Treadwell three times, one of which was a wound three and one/half inches deep which severed the subclavian artery in Treadwell's neck and, ultimately, caused his death. That, and the fact that the wounds suffered by Treadwell were all precisely inflicted stab wounds, establish that Carlisle acted knowingly when he attacked the victim, rather than merely acting in a reckless manner. Thus, the trial court did not err when it held that an instruction on the lesser included offense of reckless homicide was not warranted because the evidence adduced at trial did not support such a charge being given.

**{¶ 64}** Lastly, in light of Carlisle's theory of the case presented at trial that the stabbing was accidental, it would not necessarily amount to ineffective assistance

for defense counsel to have implemented an "all or nothing" defense in order to seek an outright acquittal for his client. *State v. Scott*, Franklin App. No. 00AP-868. As stated by the Ohio Supreme Court in *State v. Griffie*, 74 Ohio St.3d 332, 333, 1996-Ohio-71, "the record may reveal that trial counsel did not request a certain jury instruction, but, without more, the court of appeals would have to guess as to why trial counsel did not make the request. Failure to request instructions on lesser included offenses is a matter of trial strategy and does not establish ineffective assistance of counsel." *Id*., citing *State v. Clayton* (1980), 62 Ohio St.2d 45, certiorari declined, (1980), 449 U.S. 879, 101 S.Ct. 227, 66 L.Ed.2d 102. Therefore, defense counsel was not ineffective for failing to request that the jury be instructed on the lesser included offenses of involuntary manslaughter and voluntary manslaughter.

**{¶ 65}** Carlisle's third and final assignment of error is overruled.

V

**{¶ 66}** All of Carlisle's assignments of error having been overruled, the judgment of the trial court is affirmed.

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BROGAN, J. and FROELICH, J., concur.

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