[Cite as *State v. Hively*, 2015-Ohio-2297.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
GALLIA COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	
	:	Case No. 13CA15
v.	:	
	:	DECISION AND
	:	JUDGMENT ENTRY
BRUCE A. HIVELY,	:	
	:	
Defendant-Appellant.	:	Released: 06/08/2015

APPEARANCES:

Timothy P. Gleeson, Logan, Ohio for Appellant.

C. Jeffrey Adkins, Gallia County Prosecuting Attorney and Eric R. Mulford, Assistant Prosecuting Attorney and Britt T. Wiseman, Assistant Prosecuting Attorney, Gallipolis, Ohio for Appellee.

Hoover, P.J.

{¶ 1} Appellant-defendant Bruce A. Hively appeals his conviction and sentence from the Gallia County Court of Common Pleas. A jury found Hively guilty of Aggravated Murder. As a result, the trial court sentenced him to a total of thirty-three years in prison. Here on appeal, Hively presents two assignments of error: (1) The trial court erred by denying Hively's request for a castle doctrine jury instruction and (2) The guilty verdict for Aggravated Murder was against the manifest weight of the evidence. After reviewing the record in its entirety, this Court overrules Hively's assignments of error and affirms the judgment of the trial court.

{¶ 2} On April 10, 2013, Bruce A. Hively ("Hively") was indicted on one count Murder, a first degree felony, in violation of R.C. 2903.02(A), one count Aggravated Murder, a first

degree felony, in violation of R.C. 2903.01(A), and one count Tampering with Evidence, a third degree felony, in violation of R.C. 2921.12(A)(2). The charges stemmed from the death of Charles T. Addis ("Addis") that occurred on April 4, 2013. Hively shot and killed Addis after an altercation involving Hively, Addis, Addis's older brother Aaron Addis, and Addis's friend Anthony Kyle Knepper ("Knepper").

{¶ 3} At trial, the state presented a total of 11 witnesses including Aaron Addis and Knepper. The evidence admitted at trial included two cell phone recorded videos taken by Knepper that captured a portion of the April 4, 2013 altercation and the moment the shooting occurred. The state also admitted a video of an interview between Hively and two agents of the Bureau of Criminal Identification and Investigation ("BCI").

{¶ 4} The record reveals the following facts. During the afternoon of April 4, 2013, Hively was on his way home after checking property he owned in the area when he drove past Dickey Chapel Church on Elliot Road in Gallia County. As he drove by the church, he noticed three men, Addis, Knepper, and Aaron Addis in the church parking lot. Hively stopped at the intersection of Hannan Trace Road, which ran perpendicular to Elliot Road. The church parking is located to the right of Elliot Road as one approaches Hannan Trace Road. Hively was worried that the men saw him leaving. In his interview with Agent Trout, Hively stated that the men had a history of threatening and harassing him. Hively believed that when three of "them" were siting at the church, they were up to no good. In the interview Hively declared that he was "tired of this," so he decided to turn around.

{¶ 5} According to Knepper's testimony, Hively's vehicle was stopped for "about two or three minutes," before Hively turned his vehicle around and headed back on Elliot Road. Hively stopped his vehicle on the side of Elliot Road nearest the church parking lot. Between the church

parking lot and Elliot Road is a small embankment that slopes towards the road. Hively rolled his window down and yelled at the men. At trial both Knepper and Aaron Addis testified that Hively rolled down his window and waved his pistol out the window. They also testified that Hively said that he had all three of them now, and asked which one wants to go first.

{¶ 6} At some point, Knepper took out his phone and began to record the altercation. The recording provides both video and audio coverage. On two separate occasions during the recording, only audio is provided because the phone's video had been obstructed. Aaron Addis remained sitting inside his vehicle parked at the top of the embankment for the entirety of the altercation except when the shooting occurred. Aaron Addis's voice was heard on the recording only a few times. The voices most predominantly featured on the recording were those of Hively and Knepper.

{¶ 7} The first recording began with Hively getting out of his vehicle as Knepper and Addis walk down the embankment towards him. Without transcribing the entire video, it is clearly shown that the three men each issued their own threats and taunts. Both Addis and Knepper come face to face with Hively, with Hively holding up his fists each time. Addis told Hively to "Let's step out here," pointing to an area away from the vehicle. Hively can be heard saying to Knepper: "I slapped you once boy." Knepper stated to Hively that he would knock his lights out; Knepper also made reference to a 12 gauge and that he had "***killed fucking bigger pieces of shit than your fucking ass." After approximately seventy seconds of constant back and forth yelling and taunting, the situation slightly calmed down. The video recording became obstructed for the rest of the first video because Knepper put his phone, with the camera still recording, in his pocket. Hively explained his suspicions regarding the thefts of his property. Addis and Knepper maintained that they had nothing to do with it. Aaron Addis can be heard

telling Hively that he was tired of him (Hively) coming up there and running his mouth. The last statement on the first video is from Knepper stating: "Don't be pulling a god damn gun."

{¶ 8} The second video began by showing Addis and Hively standing a few feet away from one another with Knepper on the left side of Addis. Hively was standing just outside the driver's seat of the vehicle with the door open. The open door was somewhat between Hively and Knepper but not between Hively and Addis. Knepper and Addis then talked about Hively holding a gun behind his back. Knepper insisted the gun was in Hively's right hand tucked behind his back. Hively asked where the gun was and shows his left empty hand. Then the following exchange between Hively and Addis occurs, briefly on video:

Hively: "What was you going for?"

Addis: "What?"

Hively: "Dick sucker, what was you going for?"

Then Knepper turned the video away from Hively and Addis and back towards the embankment. Seconds pass when the audio captured two gunshots. The audio on the recording then became primarily the emotional outbursts of Knepper and Aaron Addis. However, the recording briefly displayed Addis on the ground, writhing in pain, with Hively standing over top of him. Hively still had the gun pointed at Addis. As the video again turned away from Hivley and Addis, another gunshot can be heard. The video ended as Knepper and Aaron Addis run from the scene, retreating to a nearby cemetery.

{¶ 9} Sometime after these events, Amanda Nibert ("Nibert"), a corrections officer for the Gallia County Sheriff's office, who was heading home on Hannan Trace Road, turned onto Elliott Road and saw a man motionless on the road beside Hively's white Kia. Nibert saw Hively in the church parking lot. Nibert testified that Hively had blood running down his left wrist and a

red mark on his left cheekbone. Nibert asked Hively if he needed help, to which Hively responded that three boys had jumped him, he warned them to leave him alone and that he would shoot them. Hively also told Nibert that "Charlie had a knife and had cut his left wrist and that they stomped him with their boots." Nibert called 911 and advised them of the situation. Nibert also testified that Knepper and Aaron Addis returned to the scene. Nibert informed them that the sheriff had been called and that there did not need to be any more trouble.

The state also questioned Nibert about the cell phone reception in the area:

[Prosecutor]: Okay. And um, to your knowledge is cell phone reception kind of sparse throughout that area?

[Nibert]: Yes.

[Prosecutor]: And uh, have you ever went to that church parking lot to use the cell phone reception?

[Nibert]: Yes.

[Prosecutor]: Okay. And explain to me why you would go there?

[Nibert]: Um, just if you want to send a text message. There are only a few places that you can. It either has to be at the top of my driveway, my window or the church.

{¶ 10} BCI Agent Shane Hanshaw processed the scene of the shooting. He located four spent shell casings. One casing was found in front of the vehicle. A second was found near the driver side door. The third and fourth casings were found near Addis's body. Agent Hanshaw also found a small knife in the open position near the upper torso of the back of Addis's body. It is also notable that on cross-examination, Agent Hanshaw testified that he took "several" swabs of blood evidence from the front driver's side interior door of Hively's car. Agent Hanshaw

released those swabs to the Sherriff's office. Agent Hanshaw testified that it was not his decision to determine what evidence would be submitted to BCI for testing.

{¶ 11} Later in the trial, the state called Deputy Nathan Harvey to testify. On cross-examination, defense counsel asked about the blood swabs from the interior of the driver side door. Deputy Harvey stated that the swabs were not submitted to the lab for testing. Deputy Harvey explained that the swabs were not submitted because the lab has a limit on the number of items that can be submitted. The swabs were not submitted "Based on the fact that he [Hively] admitted to cutting his own hand …" and they were "***not as important as other items."

{¶ 12} BCI Agents Mike Trout and John Jenkins interviewed Hively after the shooting. Before speaking with the BCI agents, Hively signed a waiver of his Miranda rights. Video footage of the interview was shown during the trial. During the interview, Hively told Agent Trout about his history with Addis, Knepper and Aaron Addis. Hively stated that Addis did not like him because Hively had complained about Addis's riding his four wheeler down the street. Hively stated that when the boys were at the church they "were up to no good." Worried that the men had seen him when he initially drove by the church, Hively stated that he turned his car around and told the men that they should not be up there.

{¶ 13} During the interview, Hively asked Agent Trout if he had found his knife. Hively explained that he used the knife in his fist to make his fist solid. When Knepper and Addis came down the embankment, Hively stated that he placed the gun in the passenger seat before exiting the vehicle. At this point, Hively explained that he was "gonna whoop Charlie and get it over with." Hively maintained that he grabbed his gun and came up firing in response to Knepper pushing Hively back against the car and Addis kicking him in the face. Hively admitted to emptying the clip; but insisted that he was pushed back into his car.

{¶ 14} Prior to interviewing Hively, Agent Trout viewed the video captured on Knepper's cell phone. Agent Trout testified at trial that: "I didn't see anything, um, in uh, Mr. Hively's hand. I didn't see the knife that was in his hand that he referenced." Towards the end of the interview, Agent Trout revealed to Hively that Knepper was in fact recording video of the incident. Hively admitted that at one point he held the gun down to his side, but he put the gun back in the car. After a few more questions, Hively admitted that he cut himself with his knife and that he placed the knife near Addis. Hively stated that he did that so "***there was no question of me that they done that to me." Although Agent Trout questioned Hively's story relating to being pushed back into the car, Hively maintained that the gun was in the car; he was pushed back into the car; and he grabbed the gun and fired at Addis.

{¶ 15} The physician who performed the autopsy on Addis identified, both at trial and on his reports, several gunshot wounds. The wounds included two graze gunshot wounds involving the nose and right eyebrow, a gunshot wound with an entry and exit wound on the chin, two distant range gunshot wounds of the chest, both of which lacerated Addis's heart, and an intermediate range wound of the left wrist. The coroner explained that a distance range wound is a range greater than twenty-four inches. The coroner testified the intermediate wrist wound had a range of six to twenty-four inches. He concluded: "no fewer than four [gunshots] caused the injuries on [Addis]. He also stated that it "may have been as many as five or six, depending on if the gunshot wound through the wrist then re-entered either in the chest or one of the graze injuries of the um, face."

{¶ 16} The jury found Hively not guilty of the first count of Murder, guilty of the second count of Aggravated Murder with a gun specification and guilty of count three, Tampering with Evidence. The trial court sentenced Hively to thirty years imprisonment for count two, and

additional three years for the gun specification to be served consecutively, and thirty months imprisonment for count three to be served concurrently. Hively then filed this timely appeal. Appellant's First Assignment of Error:

THE TRIAL COURT ERRED BY DENYING HIVELY'S REQUEST FOR A *CASTLE DOCTRINE* JURY INSTRUCTION.

{¶ 17} In his first assignment of error, Hively argues that the trial court erred when it denied his request for a castle doctrine jury instruction. Hively contends that his statements provide sufficient evidence to warrant the castle doctrine jury instruction. Hively states that after he was shoved back into his car and kicked in the face, he reached for his handgun that was in the car to repel the attack. Hively argues that sufficient evidence was provided to show that he was an occupant of his own vehicle, entitling him to the instruction regarding the castle doctrine. Hively contends that the trial court's denial of his request prejudiced him by "saddling him with a duty to retreat that Ohio law has eliminated for a person lawfully occupying his own motor vehicle."

{¶ 18} A trial court generally has broad discretion in deciding how to fashion jury instructions. *State v. Hamilton*, 4th Dist. Scioto No. 09CA3330, 2011-Ohio-2783, ¶ 69. However, "a trial court must fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder." *State v. Comen*, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990), paragraph two of the syllabus. "Additionally, a trial court may not omit a requested instruction, if such instruction is 'a correct, pertinent statement of the law and [is] appropriate to the facts * * *.' " [Alteration sic.] *Hamilton* at ¶ 69, quoting *Smith v. Redecker*, 4th Dist. Athens No. 08CA33, 2010-Ohio-505, ¶ 51, in turn quoting *State v. Lessin*, 67 Ohio St.3d 487, 493, 620 N.E.2d 72 (1993).

{¶ 19} " 'In determining whether to give a requested jury instruction, a trial court may inquire into the sufficiency of the evidence to support the requested instruction.' " *Hamilton* at ¶ 70, quoting *Redecker* at ¶ 52; *see also Lessin* at 494. Therefore, a trial court is vested with discretion "to determine whether the evidence is sufficient to require a jury instruction * * *." *State v. Mitts*, 81 Ohio St.3d 223, 228, 690 N.E.2d 522 (1998); *see also State v. Wolons*, 44 Ohio St.3d 64, 541 N.E.2d 443 (1989), paragraph two of the syllabus. " 'If, however, the evidence does not warrant an instruction a trial court is not obligated to give the requested instruction.' " *Hamilton* at ¶ 70, quoting *Redecker* at ¶ 52. Thus, " 'we must determine whether the trial court abused its discretion by finding that the evidence was insufficient to support the requested charge.' " *Id*. The term abuse of discretion implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Adams*, 62 Ohio St.2d 151, 157, 404 N.E.2d 144 (1980).

{¶ 20} To establish a claim of self-defense, a defendant generally must show by a preponderance of the evidence that (1) he or she was not at fault in creating the situation giving rise to the event, (2) he or she had reasonable grounds to believe and an honest belief that he or she was in imminent danger of death or great bodily harm and that the only means of escape from such danger was by the use of force, and (3) he or she did not violate any duty to retreat or avoid the danger. *State v. Goff*, 4th Dist. Lawrence No. 11CA20, 2013-Ohio-42, ¶ 17.

{¶ 21} Here, Hively requested the jury instruction pursuant to R.C. 2901.05(B)(1). This instruction, also referred to as the "Castle Doctrine," relieves the defendant's burden to prove the foregoing three elements. "Under R.C. 2901.05(B), a defendant is rebuttably presumed to have acted in self-defense

> 'when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is

> in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force.' "

State v. Bundy, 4th Dist. Pike No. 11CA818, 2012-Ohio-3934, ¶ 38.

{¶ 21} This rebuttable presumption means that the defendant no longer carries the initial burden to produce evidence that (1) the defendant was not at fault in creating the violent situation, (2) the defendant had a bona fide belief that she was in imminent danger of death or great bodily harm and that her only means of escape was the use of force, and (3) that the defendant did not violate any duty to retreat or avoid the danger. Instead, the rebuttable presumption, by definition, presumes the existence of these facts. *Id.*

{¶ 22} For the presumption to apply, a defendant must establish that (1) the person against whom the defendant used defensive force was in the process of unlawfully entering, or had unlawfully entered, the residence or vehicle that the defendant occupied, (2) the defendant was in the vehicle lawfully, and (3) the victim did not have a right to be in the vehicle. If the presumption applies, the state may rebut it. R.C. 2901.05(B)(3); *State v. Wilson*, 8th Dist. No. 97350, 2012-Ohio-1952, 2012 WL 1567202, ¶ 43 (construing complementary statute, R.C. 2901.09(B), the no-duty-to-retreat statute); State v. Petrone, 5th Dist. No. 2011CA67, 2012-Ohio-911, ¶ 73 (recognizing that state may rebut presumption by showing that defendant was at fault and did not have a bona fide belief that defendant was in imminent danger and that the only means of escape was use of force).

{¶ 23} The trial court denied Hively's request for the Castle Doctrine jury instruction stating: "Although the defendant was originally in his vehicle when he pulled up to the scene, he then exited the vehicle. Furthermore there is no evidence that the victim tried to enter the vehicle

at any time, much less while the defendant was in the vehicle. However, the Court is going to give an instruction on self defense as agreed upon by the parties."

{¶ 24} R.C. 2901.05(B)(1) contemplates a scenario of a home or car invasion. *State v. Nye*, 3rd Dist. Seneca No. 13-13-05, 2013-Ohio-3783, 997 N.E.2d 552, ¶ 29. The rebuttable presumption in R.C. 2901.05(B)(1) does not apply when the person using defensive force in not occupying his/her vehicle. *State v. Miller,* 12th Dist. Warren No. CA2009-10-138, 2010-Ohio-3821, ¶ 38; *Patrone*, 2012-Ohio-911 at ¶ 73.

{¶ 25} Here, the altercation and shooting took place outside Hively's vehicle. Moments before the shooting it is clear that Hively was standing beside his vehicle's open door, with Addis approximately a few feet away. All the spent shell casings were found outside Hively's vehicle. There is no doubt that Knepper and Addis were threatening and taunting Hively throughout this altercation. However, while it remains Hively's story that he was shoved back into his car, no other evidence supports the conclusion that Knepper or Addis attempted to enter Hively's vehicle. Therefore, we cannot find that the trial court abused its discretion when it denied Hively's request for the R.C. 2901.05 instruction. Accordingly, Hively's first assignment of error is overruled.

Appellant's Second Assignment of Error:

THE GUILTY VERDICT FOR AGGRAVATED MURDER WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE

{¶ 26} In his second assignment of error, Hively argues that the manifest weight of the evidence supported the conclusion that the shooting in this case was a spontaneous, tragic eruption of events and did not support a conviction for Aggravated Murder. Hively adds that BCI Agent Trout summarized it best by stating, in his interview with Hively, that the incident

occurred because Hively reached a breaking point with the boys and shot Addis. Hively explains that while it may be murder, it is not aggravated murder. It is Hively's contention that he did not shoot Addis with prior calculation and design.

{¶ 27} Hively's argument here focuses on the prior calculation and design element of the charge of Aggravated Murder. Admittedly, Hively lists three things upon which the jury could have found evidence of prior calculation and design: 1) Hively knew Charles Addis 2) Hively believed Charles Addis was causing trouble on his property, and 3) Hively shot Charles Addis four times with a handgun. Hively, however, points out that the jury overlooked more evidence which supports that Hively did not meet the prior calculation and design element. This evidence was 1) this event was an unplanned encounter 2) the location was not chosen by Hively 3) it was broad daylight 4) two witnesses were present for the entire incident 5) Knepper had a cell phone in his hand 6) Hively believed he was taking photos with said cell phone 7) Addis and Knepper were aggressively yelling at Hively 8) Hively remained near his car when Addis and Knepper approached him 9) the incident was not drawn out and lastly 10) Hively did not leave the scene of the shooting.

{¶ 28} "When an appellate court considers a claim that a conviction is against the manifest weight of the evidence, the court must dutifully examine the entire record, weigh the evidence, and consider the credibility of witnesses." *State v. Topping*, 4th Dist. Lawrence No. 11CA6, 2012-Ohio-5617, ¶ 60. "The reviewing court must bear in mind, however, that credibility generally is an issue for the trier of fact to resolve." *Id.*, citing *State v. Issa*, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001), and *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. "The trier of fact 'is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing

the credibility of the proffered testimony.' " *State v. Pippen,* 4th Dist. Scioto No. 11CA3412, 2012–Ohio–4692, ¶ 31, quoting *Seasons Coal Co. v. Cleveland,* 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶ 29} "Once the reviewing court finishes its examination, the court may reverse the judgment of conviction only if it appears that the fact-finder, when resolving the conflicts in evidence, clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." (Quotations omitted.) *State v. Davis*, 4th Dist. Ross No. 12CA3336, 2013-Ohio-1504, ¶ 14.

{¶ 30} If the prosecution presented substantial evidence upon which the trier of fact reasonably could conclude, beyond a reasonable doubt, that the essential elements of the offense had been established, the judgment of conviction is not against the manifest weight of the evidence. *State v. Cooper*, 170 Ohio App.3d 418, 2007-Ohio-1186, 867 N.E.2d 493, ¶ 16 (4th Dist.). A reviewing court should find a conviction against the manifest weight of the evidence only in the " 'exceptional case in which the evidence weighs heavily against the conviction.' " *State v. Thompkins,* 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin,* 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983); *see also State v. Lindsey,* 87 Ohio St.3d 479, 483, 721 N.E.2d 995 (2000).

{¶ 31} Hively was convicted of Aggravated Murder, in violation of R.C. 2903.01(A), which states: "No person shall purposely, and with prior calculation and design, cause the death of another ***." "No bright-line test exists that 'emphatically distinguishes between the presence or absence of 'prior calculation and design.' Instead, each case turns on the particular facts and evidence presented at trial.' " *State v. Maxwell,* 139 Ohio St.3d 12, 9 N.E.3d 930, 2014-Ohio-1019 quoting *State v. Taylor,* 78 Ohio St.3d 15, 20, 676 N.E.2d 82 (1997). "The apparent

intention of the General Assembly in employing [the phrase 'prior calculation and design'] was to require more than the few moments of deliberation permitted in common law interpretations of the former murder statute, and to require a scheme designed to implement the calculated decision to kill. Thus, instantaneous deliberation is not sufficient to constitute 'prior calculation and design.' " *State v. Cotton*, 56 Ohio St.2d 8, 10 O.O.3d 4, 381 N.E.2d 190 (1978).

> In *State v. Jenkins*, 48 Ohio App.2d at 102, 2 O.O.3d at 75, 355 N.E.2d at 828, the court of appeals found three factors important in determining whether prior calculation and design exists: (1) Did the accused and victim know each other, and if so, was that relationship strained? (2) Did the accused give thought or preparation to choosing the murder weapon or murder site? and (3) Was the act drawn out or 'an almost instantaneous eruption of events'?"

Taylor at 19.

{¶ 32} In contrast, Ohio courts have, at times, upheld findings of prior calculation and design in short, explosive situations. *Id.* For example, in *State v. Robbins*, 58 Ohio St.2d 74, 12 O.O.3d 84, 388 N.E.2d 755 (1979), appellant-defendant and decedent were drinking at appellant's apartment when appellant asked decedent to go pick up some food. *Id.* at 74. When decedent returned after using appellant's money to buy just alcohol, an argument ensued. *Id.* at 75. Appellant-defendant struck decedent, went back into his apartment and retrieved a sword from under his bed. Appellant-defendant went outside his apartment and stabbed the decedent. *Id.* The Ohio Supreme Court stated that the evidence established: "***that appellant used extreme aggression against a helpless victim, then leaving the victim in the hallway and returning to his apartment to secure the weapon which he used to stab the victim to death

instants later." *Id.* at 78-9. The Court found the evidence to be sufficient to support the jury's finding of prior calculation and design. *Id*. at 79.

{¶ 33} A different scenario is presented in *State v. Davis*, 8 Ohio App.3d 205, 8 OBR 276, 456 N.E.2d 1256 (1982), the Eighth District Court of Appeals overturned a jury's conviction of aggravated murder on the basis that the facts did not support the finding of prior calculation and design. In *Davis,* the appellant-defendant was refused entry into a bar because he did not have his identification. *Id.* at 206. The bar doorman and appellant-defendant got into a verbal argument. *Id.* The bar owner and another patron joined in the confrontation and it evolved into physical confrontation. *Id.* Appellant-defendant fired three shots from a gun he had in his pocket at the time, injuring the doorman and causing the death of the bar owner. *Id.* The Court concluded:

> We agree with defendant's contention that the evidence does not support a finding that defendant killed the owner of the bar with prior calculation and design. Defendant did not go to the bar with the intent of shooting either of these two men. Rather, defendant went to the bar "to have a good time" but was refused admittance. After defendant demanded entrance, verbal threats grew into a physical confrontation between defendant and the three persons within the bar. Defendant did not reach for his gun in his pocket until he was outnumbered and getting the worse of their treatment. No evidence was presented which demonstrated a previous strained relationship between defendant and the doorman or the bar owner. The mere fact that defendant was carrying a gun on this occasion but was not carrying a gun on some earlier visit to a different bar is not sufficient to demonstrate a prior calculation and design to kill someone at this bar.

Id. at 207.

{¶ 34} Here, we must examine the weight of the evidence to determine if the jury clearly lost its way in finding prior calculation and design existed to support Hively's conviction of Aggravated Murder. It is certain that Hively had prior history with Addis, Knepper and Aaron Addis. Hively admitted to having slapped Knepper before and discussed with Agent Trout that he suspected the boys of being involved with past thefts on his property. It is also clear, that Hively intended to have a confrontation, at the very least verbally, with the three men when he turned his car around and headed back their way. Knepper and Aaron Addis both testified that Hively showed his gun to the boys at the beginning of the incident. Knepper makes reference to the gun in the beginning of the cell phone video.

{¶ 35} The cell phone video captures various moments where Hively would be in the face of Addis or Knepper and even a moment when the confrontation seemed to deescalate. The second half of the video though shows Hively had returned to his car. Now, something was in his right hand behind his back. Hively raised and showed his empty left hand while Knepper continued to tell Hively to show him the gun. Apparently, Hively was holding his gun behind his back at that point. Hively and Addis look at each other and have the following conversation:

Hively: "What was you going for?"

Addis: "What?"

Hively: "Dick sucker, what was you going for?"

Knepper's recording turns back towards the church, causing Hively and Addis to be out of view for about two seconds. The audio of the video recording captures two gunshots. Knepper directs the camera back and reveals Hively standing over Addis, still pointing a gun at him as he lays on

the ground writhing in pain. Hively fires another shot at Addis. The coroner who performed the autopsy testified that Addis had been shot four times.

{¶ 36} In the interview with Agent Trout, Hively stated that he was not going to back down and that he wanted to whip Addis. A history existed between the parties involved in this confrontation. Hively wanted, at the very least, a verbal confrontation with Addis, Knepper, and Aaron Addis. Although the interaction was heated at times, no spontaneous eruption of events occurred until Hively pulled his gun from behind his back and shot Addis twice. Then after Addis lay on the ground, Hively shoots Addis at least two more times. The jury duly charged with deciding this case found that Hively acted with the required prior calculation and design. Considering these facts, we do not find that the jury clearly lost its way in convicting Hively of Aggravated Murder. Additionally we do not find that the evidence "weighs heavily against the conviction." *Davis*, 2013-Ohio-1504, at ¶ 15. Therefore, the second assignment of error is overruled.

{¶ 37} Having overruled both appellant Hively's assignments of error, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

Harsha, J., dissenting:

{¶ 38} I conclude the jury lost its way when it found the state had proved the element of prior calculation and design beyond a reasonable doubt. The record reveals that a "plan" to murder Addis did not develop until the confrontation escalated. Although Hively may have been willing to kill Addis prior to shooting him, there is little concrete evidence that Hively had already decided to murder one of the three men when he stopped at the church. Rather, the confrontation was a chance occurrence, not at a location Hively chose. It occurred during broad daylight, in front of two witnesses, who Hively supposedly believed were involved in the theft that sparked the incident, yet they remained unharmed. Hively knew one of the witnesses had a cell phone and thought he was taking pictures. And the decedent and one of the eyewitnesses were aggressively confronting Hively.

{¶ 39} Based upon this evidence I conclude the jury lost its way and created a manifest miscarriage of justice when it failed to find Hively not guilty of aggravated murder, but guilty of murder.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellant shall pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Gallia County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of the proceedings in that court. If a stay is continued by this entry, it will terminate at the earliest of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to the expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

Abele, J.: Concurs in Judgment and Opinion.

Harsha, J.: Dissents with Dissenting Opinion.

For the Court

By:_____
Marie Hoover
Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.