[Cite as *State v. Waller*, 2016-Ohio-3077.]

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

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 15CA3683 15CA3684
vs.	:	
JEFFREY R. WALLER,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	

APPEARANCES:

Timothy Young, Ohio State Public Defender, and Terrence K. Scott, Assistant State Public Defender, Columbus, Ohio, for Appellant.[1]

Mark E. Kuhn, Scioto Count Prosecuting Attorney, Portsmouth, Ohio, for Appellee.

CRIMINAL CASE FROM COMMON PLEAS COURT
DATE JOURNALIZED: 5-11-16
ABELE, J.

{¶ 1} This is a consolidated appeal from two Scioto County Common Pleas Court judgments of conviction and sentence. A jury found Jeffrey Waller, defendant below and appellee herein, guilty of (1) murder in violation of R.C. 2903.02(B) with a firearm specification; (2) felonious assault in violation of R.C. 2903.11(A)(2) with a firearm specification; (3) tampering with evidence in violation of R.C. 2921.12(A)(1); and (4) unlawful possession of dangerous ordnance in violation of R.C. 2923.17(A). The trial court merged the murder and felonious assault convictions

[1]Different counsel represented appellant during the trial court proceedings.

and sentenced appellant to serve a total of twenty years to life in prison.

{¶ 2} Appellant assigns the following error for review:

> "JEFFREY WALLER WAS DENIED HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL WHEN THE JURY FOUND HIM GUILTY OF MURDER AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 3} On August 27, 2012, appellant shot James Thurman, his girlfriend's (Anna Thurman) estranged husband. The shot gravely injured James, and he subsequently died from his injuries. Appellant was charged with James' murder, along with other related offenses.

{¶ 4} On October 21 and 22, 2013, the trial court held a jury trial. Anna Thurman testified regarding the circumstances that led to the shooting and explained that she and her husband had been separated, and were not living together, at the time of the incident. Instead, appellant, her boyfriend, was living in the home. Anna stated that at the end of August 2012, her husband arrived at her residence to visit their children and he stayed overnight for several days. Anna stated that the living arrangements were "[v]ery uncomfortable" and that during James' stay, appellant and the victim had "their good times and their bad times."

{¶ 5} Anna testified that on the evening of August 27, 2012, she and James were discussing the state of their marriage, when appellant entered the room. Anna stated that James called appellant "a kitchen bitch," and upon hearing the comment, appellant's "eyes kind of got big and he gave me this weird look and he stormed off into the back bedroom, like he expected me, I guess to * * * * say something, but I just stood there." Approximately twenty-five to thirty minutes later, she went to the back bedroom and saw a sawed-off shotgun sitting beside the dresser. She explained that it was the first thing she noticed because she has three kids and "guns

don't get left out." Anna testified that she normally kept the gun in the closet, hidden in the back: "It was hidden out of sight where my kids could never find it or anything." Anna stated that she questioned appellant about the gun, and he informed her that he saw a deer earlier that day and shot at it. Appellant claimed that he put the gun through the window and propped it up against the dresser, so he would not walk through the residence with the gun in his hand in front of the kids and James.

{¶ 6} Anna explained that after she entered the room, she sat beside appellant on the bed and told him she was sorry that James called him a "kitchen bitch." Appellant told her that James "needed to leave." Anna then informed appellant that James would be leaving on Tuesday. James then entered the room and shoved appellant with his foot (Anna also demonstrated to the jury how James shoved appellant) and, after James shoved appellant, she "jumped up," "turned around," and "went towards" James. She told James that "he needed to go" and that "they weren't going to fight." Anna stated "this look came over [James'] face and his eyes got humungous [sic] * * * * and his hands kind of went up." When he raised his hand, she thought he was going to hit her. At trial, however, she explained that she had further reflected upon the incident and now believes that James "was trying to get [her] out of the way" and that he looked scared. Anna explained the moments surrounding the shooting as follows: "[James'] hands went up and I kind of like threw my hands up in defense, like to cover my face, and moved a little bit. And I felt the bullet go by me and I watched it go into him."

{¶ 7} After appellant shot James, appellant exited the room through the bedroom door. Anna helped James to the porch in the hopes that the children would not see their father with a gruesome shotgun blast to the stomach.

{¶ 8} On cross-examination, appellant's counsel sought to show that James and Anna shared a volatile relationship. Counsel asked Anna if James was "a very violent person." Anna responded: "No, he wasn't very violent. No. We had marital problems, husband and wife normal things happened." Anna stated that she never feared for her life. Anna admitted that she had filed a protection order against James and stated that she did not believe that she had filed more than one. Appellant's counsel, however, presented evidence that Anna filed a protection order in August 2005, and another in May 2011. Appellant's counsel asked Anna if she filed the 2005 protection order because she thought James was going to kill her. Anna responded that even though James "may have choked" her, she did not "fear for [her] life." Appellant's counsel then requested Anna to read the protection order petition, which stated: "My husband got angry and sucker punched me in the back of the head and then grabbed my face and threatened to kill me. My husband beat on me for years, busted my eardrums and much more. I'm afraid for my life. I'm afraid he will kill me." Appellant's counsel asked Anna whether she was lying when she stated in the petition that she feared for her life. Anna explained that she was not lying; "[i]t just sounds worse than what it was."

{¶ 9} Appellant's counsel also questioned Anna regarding inconsistencies between the statement she gave to law enforcement officers immediately after the shooting and later statements that she made. Appellant's counsel pointed out that immediately after the shooting, Anna indicated that James "kicked" appellant in the back of the head, but that she now states that the victim "shoved" appellant. Anna explained that she thinks a "kick" and a "push" are the same thing and that she does not know how much force James used, but "[i]t wasn't no kick to hurt him." She further stated that just after the shooting, her "train of thought wasn't right," and she

"had so much going through [her] head." Anna stated: "I love my husband and I cared about my boyfriend and it was a very awkward situation and I was confused at what even happened and why it happened." Anna related her belief that the shooting "was unnecessary" and "uncalled for": "There was no reason why someone should shoot somebody because they shove them or kick them or whatever."

{¶ 10} Scioto County Sheriff's Detective Denver Triggs testified that the crime scene investigation revealed "blowback" and that he found the presence of blowback significant because "the closer the weapon [is] to the body," the "more blowback." Detective Triggs stated: "[W]e knew that the shot had been up close."

{¶ 11} Detective Triggs interviewed appellant shortly after the shooting. Appellant explained that tensions had been mounting during the course of James' stay at the residence and James had threatened him. Appellant stated that on the night of the shooting, he went to the bedroom to avoid arguing. Appellant claimed that James then entered the room and punched him in the back of the head "[a]s hard as he could." The detective asked appellant to show him the back of his head. The detective thought the area appeared "swollen." The detective asked appellant whether James could have kicked him in the back of the head, and appellant stated that he did not know because his back was towards James. Appellant stated that after James hit his head, appellant "blacked out." Appellant recalled "getting in the closet" and trying not to shoot Anna. Appellant stated that he shot James from a distance of approximately one foot and after the shot, he jumped out of the window with the gun.

{¶ 12} Detective Triggs informed appellant that although getting hit in the head was dangerous, appellant "reacted with deadly force. What you should have done is when he hit you,

is went to a phone and called us." Appellant stated "I should have done that. I don't [know] why I didn't do that." The detective stated: "[Y]ou have to understand that that [sic] you can't use deadly force on somebody that just uses regular force on you. Okay. That'd be like you slapping me, and me shooting you."

{¶ 13} At trial, appellant testified and claimed that he shot James in self-defense. He stated that Anna had told him that James was violent and easily provoked to aggression, and that Anna had expressed her fear that James was going to kill her. Anna also relayed threats that James had made against appellant.

{¶ 14} Appellant stated that on the night of the shooting, James called appellant a "kitchen bitch" and indicated that he "should just beat [appellant's] ass and he don't know why he just don't come in and just go ahead and like punch me in the face or something." Appellant testified that he went to the bedroom to avoid any further confrontation and that he was nervous and afraid. Appellant claimed that, as he was sitting on the bed, he "just got hit in the back of the head and [he] went forward and hit the wall." Appellant stated that he felt "dazed for a second" and "got up." He then noticed Anna near James and saw James raise his hand as if to strike her. Once appellant saw James look as if he was going to strike Anna, he "feared for both of our safety," and pulled the gun from the closet and shot James. Appellant stated that he believed that shooting the victim was his only option at the time. Appellant stated that after he pulled the trigger, he jumped out the window and left.

{¶ 15} Appellant also stated that Anna's trial testimony was "mixed up a lot" and that he did not retrieve the gun from the closet and lean it against the dresser. He thinks Anna stated that the gun was by the dresser "[t]o take up for [the victim]."

{¶ 16} During closing arguments, the prosecutor argued that appellant used more force than needed to defend himself and that James' kick to appellant's head did not warrant the use of deadly force. Appellant, however, asserted that the evidence shows that he acted in self-defense and that Anna lied on the witness stand and changed her story.

{¶ 17} On October 23, 2013, the jury found appellant guilty of all charges, except for one of the tampering with evidence counts. On October 25, 2013, the trial court sentenced appellant serve twenty years to life in prison. This appeal followed.[2]

{¶ 18} In his sole assignment of error, appellant asserts that his conviction is against the manifest weight of the evidence. In particular, appellant contends that the weight of the evidence shows that he acted in self-defense, and thus, that he is not guilty of murder. The state, however, asserts that the jury could have reasonably determined that appellant did not possess a bona fide belief that he was in imminent danger of great bodily harm or death and that his use of deadly force was excessive and disproportionate.

A

STANDARD OF REVIEW

{¶ 19} 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 all reasonable inferences, and consider the witness credibility. State v. Dean, 2015-Ohio-4347, ¶151, citing State v. Thompkins, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). A reviewing court must bear in mind, however, that credibility generally is an issue for the trier of fact to

[2] On April 15, 2015, we granted appellant leave to file a delayed appeal.

resolve. State v. Issa, 93 Ohio St.3d 49, 67, 752 N.E.2d 904 (2001); State v. Murphy, 4th Dist. Ross No. 07CA2953, 2008–Ohio–1744, ¶31. "'Because the trier of fact sees and hears the witnesses and is particularly competent to decide "whether, and to what extent, to credit the testimony of particular witnesses," we must afford substantial deference to its determinations of credibility.'" Barberton v. Jenney, 126 Ohio St.3d 5, 2010–Ohio–2420, 929 N.E.2d 1047, ¶20, quoting State v. Konya, 2nd Dist. Montgomery No. 21434, 2006–Ohio–6312, ¶6, quoting State v. Lawson, 2nd Dist. Montgomery No. 16288 (Aug. 22, 1997). As the court explained in Eastley v. Volkman, 132 Ohio St.3d 328, 2012–Ohio–2179, 972 N.E.2d 517:

> "'[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment must be made in favor of the judgment and the finding of facts. * * *
>
> If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.'"

Id. at ¶21, 972 N.E.2d 517, quoting Seasons Coal Co., Inc. v. Cleveland, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn.3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978). Thus, an appellate court will leave the issues of weight and credibility of the evidence to the fact-finder, as long as a rational basis exists in the record for its decision. State v. Picklesimer, 4th Dist. Pickaway No. 11CA9, 2012–Ohio–1282, ¶24; accord State v. Howard, 4th Dist. Ross No. 07CA2948, 2007–Ohio–6331, ¶6 ("We will not intercede as long as the trier of fact has some factual and rational basis for its determination of credibility and weight.").

{¶ 20} 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.'" Thompkins, 78 Ohio St.3d at 387, 678 N.E.2d 541, quoting State v. Martin, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). If the prosecution presented substantial credible 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. E.g., State v. Eley, 56 Ohio St.2d 169, 383 N.E.2d 132 (1978), syllabus, superseded by state constitutional amendment on other grounds in State v. Smith, 80 Ohio St.3d 89, 684 N.E.2d 668 (1997). Accord Eastley at ¶12, quoting Thompkins, 78 Ohio St.3d at 387, quoting Black's Law Dictionary 1594 (6th ed.1990) (explaining that a judgment is not against the manifest weight of the evidence when "'"the greater amount of credible evidence"'" supports it). Thus, "'"[w]hen conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the jury believed the prosecution testimony."'" State v. Cooper, 170 Ohio App.3d 418, 2007-Ohio-1186, 867 N.E.2d 493, ¶17, quoting State v. Mason, 9th Dist. No. 21397, 2003-Ohio-5785, 2003 WL 22439816, ¶17, quoting State v. Gilliam, 9th Dist. No. 97CA006757, 1998 WL 487085 (Aug. 12, 1998). Instead, 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.'" Thompkins, 78 Ohio St.3d at 387, quoting Martin, 20 Ohio App.3d at 175, 485 N.E.2d 717. Accord State v. Lindsey, 87 Ohio St.3d 479, 483, 721 N.E.2d 995 (2000).

{¶ 21} In the case at bar, appellant does not dispute that the evidence established the elements of the murder under R.C. 2903.02(B). Instead, he argues that the jury committed a manifest miscarriage of justice by rejecting his claim of self-defense.

B

SELF-DEFENSE

{¶ 22} "Self-defense is an affirmative defense that, if proved, relieves a defendant of criminal liability for the force that the defendant used." State v. Kozlosky, 195 Ohio App.3d 343, 2011-Ohio-4814, 959 N.E.2d 1097, ¶22. "'The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.'" State v. Nucklos, 121 Ohio St.3d 332, 2009-Ohio-792, 904 N.E.2d 512, ¶7, quoting R.C. 2901.05(A). We observe that affirmative defenses such as self-defense "'do not seek to negate any of the elements of the offense which the State is required to prove' but rather they 'admit[] the facts claimed by the prosecution and then rel[y] on independent facts or circumstances which the defendant claims exempt him from liability.'" State v. Smith, 3d Dist. Logan No. 8–12–05, 2013-Ohio-746, 2013 WL 793208, ¶32, quoting State v. Martin, 21 Ohio St.3d 91, 94, 488 N.E.2d 166 (1986).

{¶ 23} To establish self-defense, a defendant must establish, by a preponderance of the evidence, the following three circumstances: "'(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.'" State v. Goff, 128 Ohio St.3d 169, 2010-Ohio-6317, 942 N.E.2d 1075, ¶36, quoting State v. Thomas, 77 Ohio St.3d 323, 326, 673 N.E.2d 1339 (1997). The "elements of self-defense are cumulative. * * * [Thus, i]f the defendant fails to prove any one of these elements by a preponderance of the evidence he has failed to demonstrate that he acted in self-defense." State v. Jackson, 22 Ohio St.3d 281, 284, 490

N.E.2d 893 (1986) (emphasis sic). Accord State v. Cassano, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶73; State v. Hargrave, 4th Dist. Adams No. 11CA907, 2012-Ohio-798, 2012 WL 642680, ¶16.

{¶ 24} In the case sub judice, appellant claims that the preponderance of the evidence establishes all three of the foregoing circumstances. He asserts that he was not at fault in creating the violent situation, but instead, the victim created the situation by kicking him in the head. Appellant also contends that his knowledge of the victim's violent propensities gave him a bona fide belief that the circumstances presented an imminent danger of death or great bodily harm. Appellant further contends that he did not violate any duty to retreat or avoid the danger. We focus first on the second element, i.e., whether appellant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape was the use of deadly force. Goff at ¶36.

{¶ 25} In a deadly force case, the second element of self-defense requires a defendant to show that the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape was the use of deadly force. See State v. Cassano, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶76, quoting State v. Robbins, 58 Ohio St.2d 74, 388 N.E.2d 755 (1979), paragraph two of the syllabus (determining that defendant had "no basis for a 'bona fide belief that he was in imminent danger of death or great bodily harm' and could 'escape from such danger' only by using deadly force"). This second element "is a combined subjective and objective test." Thomas, 77 Ohio St.3d at 330. The defendant's belief must be objectively reasonable under the circumstances, and he must subjectively believe he needed to resort to deadly force to defend himself. Id. at 330–331. "Thus, the jury first must

consider the defendant's situation objectively, that is, whether, considering all of the defendant's particular characteristics, knowledge, or lack of knowledge, circumstances, history, and conditions at the time of the attack, she reasonably believed she was in imminent danger." Id. at 330; accord State v. Hendrickson, 4th Dist. Athens No. 08CA12, 2009-Ohio-4416, 2009 WL 2682158, ¶30. "Then, if the objective standard is met, the jury must determine if, subjectively, this particular defendant had an honest belief that she was in imminent danger." Thomas, 77 Ohio St.3d at 331.

{¶ 26} Another component contained within the second element is the defendant's bona fide belief that the use of force was "reasonably necessary to repel the attack." Hendrickson at ¶23, citing State v. Williford, 49 Ohio St.3d 247, 249, 551 N.E.2d 1279 (1990), citing State v. McLeod, 82 Ohio App. 155, 157, 80 N.E.2d 699 (9th Dist. 1948). In other words, a defendant must show that "that the degree of force used was 'warranted' under the circumstances and 'proportionate' to the perceived threat." Hendrickson at ¶31, citing State v. Palmer, 80 Ohio St.3d 543, 564, 687 N.E.2d 685 (1997). "If * * * the amount of force used is so disproportionate that it shows an 'unreasonable purpose to injure,' the defense of self-defense is unavailable." State v. Macklin, 8th Dist. Cuyahoga No. 94482, 2011-Ohio-87, 2011 WL 208315, ¶27, quoting State v. Speakman, 4th Dist. Pickaway No. 00CA035 (Mar. 27, 2001). Accord State v. Kimmell, 3rd Dist. Wyandot No. 16-10-06, 2011-Ohio-660, ¶20, quoting Hendrickson at ¶33 ("Self-defense * * * is inappropriate if the force used is 'so grossly disproportionate as to show revenge or as criminal purpose.'"). "[I]t is only when one uses a greater degree of force than is necessary under all the circumstances that it is not justifiable on the ground of self-defense." McLeod, 82 Ohio App. at 157. As we explained in State v. Bundy, 4th Dist. No. 11CA818, 2012-Ohio-3934, 974 N.E.2d 139, 156-58, ¶56:

> "'Any civilized system of law recognizes the supreme value of human life, and excuses or justifies its taking only in cases of apparent absolute necessity.'" [State v.] Pellegrino, 577 N.W.2d [590,] 596, quoting People v. Jones, 191 Cal.App.2d 478, 12 Cal.Rptr. 777, 780 (1961). Thus, when "'the character and manner of the [attack] do not reasonably create a fear of great bodily harm, there is no cause for the exaction of human life.'" Id., quoting People v. Ceballos, 12 Cal.3d 470, 116 Cal.Rptr. 233, 238, 526 P.2d 241, 246 (1974).

{¶ 27} In the case sub judice, after our review of the record we believe that the jury could have justifiably determined that the character and manner of the victim's attack upon appellant did not warrant the use of deadly force. None of the evidence suggests that the victim used such force upon appellant that it threatened appellant's life or placed him in danger of great bodily harm. Instead, the evidence shows that the victim kicked, pushed, or shoved appellant in the back of the head and that appellant quickly rebounded and shot the victim. Moreover, although appellant testified that he believed that the victim was about to strike his girlfriend, none of the testimony suggests that this strike would have been fatal to his girlfriend or to appellant. While the situation may have been volatile, the evidence does not show that deadly force against the victim was the only way to defuse it. We again point out that appellant even admitted in his interview with Detective Triggs that he should have called the police instead of shooting the victim. Simply stated, appellant has not shown that the circumstances present in the instant case warranted the taking of another human life in order to protect his own. Thus, the jury had a sound basis to reject appellant's claim of self-defense. Cf. State v. Purdin, 4th Dist. Adams No. 12CA944, 2013-Ohio-22, ¶¶ 18-19 (determining that jury did not commit manifest miscarriage of justice by rejecting defendant's claim that he shot victim in self-defense when no evidence that victim was armed or that defendant believed victim was armed); State v. Hogg, 10th Dist. Franklin No. 11AP♥50, 2011♥Ohio♥6454, ¶39 (concluding jury's rejection of self-defense not against manifest

weight of the evidence when defendant responded to victim's swinging fist by fatally stabbing victim). Also, Detective Triggs explained that the presence of "blowback" at the crime scene indicated that the victim was shot from very close range, not at the distance that appellant claimed. The jury may have credited Anna's testimony that the gun was already out of the closet when she entered the bedroom, which could have led the jury to believe that appellant thought about shooting the victim and had the weapon ready at hand before the victim entered the room.

{¶ 28} After our review, based upon the totality of the evidence contained in the record we are unable to conclude that appellant's murder conviction is against the manifest weight of the evidence.

We recognize appellant's concerns that Anna's account of the events that surrounded the victim's murder conflicted with his account, and that Anna gave somewhat inconsistent accounts of the events. Nevertheless,

> "'"the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness. * * * Accordingly, [t]his court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of facts lost its way in arriving at its verdict."'"

State v. Maynard, 4th Dist. Washington No. 10CA43, 2012-Ohio-786, ¶17, quoting State v. Breidenbach, 4th Dist. Athens No. 10CA10, 2010–Ohio–4335, ¶19, quoting State v. Rhines, 2d Dist. Montgomery No. 23486, 2010–Ohio–3117, ¶39 (alterations sic). In the case at bar, we do not believe that the jury clearly lost its way when it resolved the conflicts and inconsistencies to conclude that appellant was guilty of murder, and that he did not act in self-defense. Furthermore,

we note that the trier of fact is free to believe all, some, or none of a witness's testimony. E.g., State v. Murphy, 4th Dist. Ross No. 15CA3475, 2016-Ohio-1165, ¶37. The jury thus was free to believe or disbelieve any part of a witness's testimony to piece together the events that transpired the night appellant shot the victim. Here, none of the conflicts or inconsistencies detract from the fact that appellant used deadly force in response to the victim's non-deadly attack. We find nothing in the record to indicate that the jury committed a manifest miscarriage of justice by convicting appellant of murder.

{¶ 29} Appellant nevertheless asserts that because he presented a prima facie case and, and he argues, the state failed to rebut it, the jury was obligated to find that he acted in self-defense. We, however, have previously rejected this argument. State v. Hall, 4th Dist. Ross No. 13CA3391, 2014-Ohio-2959, ¶29. In Hall, we stated:

> "Once the state presents a prima facie case, it has satisfied any burden it had to go forward with evidence. When a defendant presents an affirmative defense there is no mandatory duty that requires the state to produce rebuttal evidence. Obviously, it may choose to do so, but the lack of rebuttal evidence is not fatal to the state's effort to prove the defendant guilty beyond a reasonable doubt. As apparently happened in this case, the jury can simply reject the defendant's defense and find the evidence in the state's case-in-chief more persuasive."

Accord State v. Hancock, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶37 (citation omitted) (stating that proof of an affirmative defense does not detract from proof that an accused committed a crime beyond a reasonable doubt).

{¶ 30} Furthermore, our conclusion that the evidence supports a finding that appellant used more force than necessary to repel the attack renders his arguments concerning the remaining elements of self-defense moot. See Jackson, supra (explaining that failure on any element means defendant did not act in self-defense). Therefore, we do not address them. See App.R.

12(A)(1)(c).

{¶ 31} Accordingly, based upon the foregoing reasons, we hereby overrule appellant's sole assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant 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 Scioto 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, it is continued for a period of sixty days upon the bail previously posted. The purpose of said stay is to allow appellant to file with the Ohio Supreme Court an application for a stay during the pendency of the proceedings in that court. The stay as herein continued will terminate at the expiration of the sixty day period.

The stay will also terminate if appellant fails to file a notice of appeal with the Ohio Supreme Court in the forty-five day period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Ohio Supreme Court. Additionally, if the Ohio Supreme Court dismisses the appeal prior to the expiration of said sixty days, the stay will terminate as of the date of such dismissal.

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

Harsha, J. & Hoover, J.: Concur in Judgment & Opinion

For the Court

BY:_____
Peter B. Abele, 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.