**[Cite as *State v. Cobb*, 2015-Ohio-2752.]**

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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| STATE OF OHIO<br><br>Plaintiff-Appellee<br><br>-vs-<br><br>X'AVIRE LAMAR COBB<br><br>Defendant-Appellant | JUDGES:<br>Hon. William B. Hoffman, P.J.<br>Hon. Sheila G. Farmer, J.<br>Hon. John W. Wise, J.<br><br>Case No. 2014CA00226<br><br>O P I N I O N |

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| CHARACTER OF PROCEEDING: | Appeal from the Stark County Court of Common Pleas, Case No. 2014CR1238B |
| JUDGMENT: | Affirmed |
| DATE OF JUDGMENT ENTRY: | July 6, 2015 |

APPEARANCES:

| For Plaintiff-Appellee | For Defendant-Appellant |
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| JOHN D. FERRERO,<br>Prosecuting Attorney,<br>Stark County, Ohio<br><br>By: RENEE WATSON<br>Assistant Prosecuting Attorney<br>Appellate Section<br>110 Central Plaza, South - Suite 510<br>Canton, Ohio 44702-1413 | BERNARD L. HUNT<br>2395 McGinty Road N.W.<br>North Canton, Ohio 44720 |

*Hoffman, P.J.*

**{¶1}** Defendant-appellant X'Avire Lamar Cobb appeals his conviction entered by the Stark County Court of Common Pleas. Plaintiff-appellee is the state of Ohio.

STATEMENT OF THE FACTS AND CASE

**{¶2}** On July 25, 2014, Appellant was a passenger in a car driven by Zebulum Schoolcraft, the victim herein. Everyone in the car, including Schoolcraft and Appellant, was high and drunk. Schoolcraft lost control of the car and crashed into a utility pole. Appellant, who was seated in the backseat and unrestrained, hit his mouth and loosened a front tooth.

**{¶3}** Later the same evening, Appellant went looking for Schoolcraft as he was angry about his tooth. An argument ensued between Appellant and Schoolcraft. During the argument, Appellant asked a friend for a gun, and the friend told Appellant to shoot Schoolcraft. Appellant fired seven shots at Schoolcraft, ending his life.

**{¶4}** The Stark County Grand Jury indicted Appellant on one count of murder, one count of felonious assault, and one count of tampering with evidence. The charges of murder and felonious assault also carried firearm specifications.

**{¶5}** The matter proceeded to a jury trial. Prior to closing arguments, Appellant moved for a jury instruction on the lesser offense of voluntary manslaughter. The trial court denied the motion.

**{¶6}** The jury found Appellant guilty of all charges contained in the indictment. The trial court sentenced Appellant to fifteen years to life and a mandatory three years on each firearm specification. The felonious assault conviction and gun specification merged with the murder conviction. On the tampering with evidence charge, the trial

court sentenced Appellant to thirty six months, to be served consecutive to the murder charge.

**{¶7}** Appellant appeals, assigning as error:

**{¶8}** "I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S REQUEST FOR JURY INSTRUCTIONS.

**{¶9}** "II. THE APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, WHICH VIOLATED HIS RIGHTS UNDER THE 6TH AND 14TH AMMENDMENT [SIC] TO THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 10 OF THE OHIO CONSTITUTION."

I.

**{¶10}** In the first assignment of error, Appellant maintains the trial court erred in failing to instruct the jury on voluntary manslaughter.

**{¶11}** When reviewing a trial court's jury instructions, the standard of review for an appellate court is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case. *State v. Wolons,* 44 Ohio St.3d 64, 541 N.E.2d 443 (1989). When, as in this case, a defendant requests an instruction on an inferior offense, the burden is on the defendant to persuade the fact-finder of the mitigating elements of the offense. *State v. Rhodes,* 63 Ohio St.3d 613, 590 N.E.2d 261 (1992).

**{¶12}** The Supreme Court of Ohio discussed when a jury instruction on voluntary manslaughter is warranted in its holding in *State v. Shane,* 63 Ohio St.3d 630, 590 N.E.2d 272 (1992),

Voluntary manslaughter is an inferior degree of murder, for " 'its elements are * * * contained within the indicted offense, except for one or more additional mitigating elements * * *.' " *State v. Tyler* (1990), 50 Ohio St.3d 24, 36, 553 N.E.2d 576, 592, quoting *State v. Deem* (1988), 40 Ohio St.3d 205, 209, 533 N.E.2d 294, 298. See *Rhodes, supra,* 63 Ohio St.3d at 617, 590 N.E.2d at 263. Even though voluntary manslaughter is not a lesser included offense of murder, the test for whether a judge should give a jury an instruction on voluntary manslaughter when a defendant is charged with murder is the same test to be applied as when an instruction on a lesser included offense is sought. *Tyler, supra,* 50 Ohio St.3d at 37, 553 N.E.2d at 592.

Thus, a defendant charged with murder is entitled to an instruction on voluntary manslaughter when the evidence presented at trial would reasonably support both an acquittal on the charged crime of murder and a conviction for voluntary manslaughter. *Tyler, supra,* at 37, 553 N.E.2d at 592; *Deem, supra,* 40 Ohio St.3d at 211, 533 N.E.2d at 299–300; *State v. Thomas* (1988), 40 Ohio St.3d 213, 216, 533 N.E.2d 286, 289.

When the evidence presented at trial going to a lesser included offense (or inferior-degree offense) meets this test, the trial judge must instruct the jury on the lesser (or inferior-degree) offense. *State v. Loudermill* (1965), 2 Ohio St.2d 79, 31 O.O.2d 60, 206 N.E.2d 198, syllabus. On the other hand, when the evidence presented at trial does not meet this test, a charge on the lesser included (or inferior-degree) offense

is not required. *State v. Kidder* (1987), 32 Ohio St.3d 279, 282–283, 513 N.E.2d 311, 315–316.

Past decisions of this court have sometimes given the erroneous impression that, whenever there is "some evidence" that a defendant in a murder prosecution may have acted in such a way as to satisfy the requirements of the voluntary manslaughter statute, an instruction on the inferior-degree offense of voluntary manslaughter must always be given. See, *e.g., State v. Muscatello* (1978), 55 Ohio St.2d 201, 9 O.O.3d 148, 378 N.E.2d 738, paragraph four of the syllabus. See, also, *Tyler, supra,* 50 Ohio St.3d at 37, 553 N.E.2d at 592. That clearly never has been the law in this state, nor is it the law today. The "some evidence" referred to in those cases is simply an abbreviated way of saying that 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 (or inferior-degree) offense.

To require an instruction to be given to the jury every time "some evidence," however minute, is presented going to a lesser included (or inferior-degree) offense would mean that no trial judge could ever refuse to give an instruction on a lesser included (or inferior-degree) offense. Trial judges are frequently required to decide what lesser included (or inferior-degree) offenses must go to the jury and which must not. The jury would be unduly confused if it had to consider the option of guilty on a

> lesser included (or inferior-degree) offense when it could not reasonably return such a verdict.

**{¶13}** "Reasonably sufficient" means the provocation was "sufficient to arouse the passions of an ordinary person beyond the power of his or her control." Id. "Mere words" cannot be sufficient provocation to reduce a murder charge to voluntary manslaughter, no matter how inciting or insulting. Id.

**{¶14}** Here, Appellant bore the burden of proving by a preponderance of the evidence, some serious provocation by Schoolcraft which was reasonably sufficient to incite Appellant to deadly force. We find Appellant did not meet this burden.

**{¶15}** Murder is defined as R.C. 2903.02(B), which reads,

> (B) No person shall cause the death of another as a proximate result of the offenders 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.

**{¶16}** Voluntary Manslaughter is defined as,

> (A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another or the unlawful termination of another's pregnancy.

R.C. 2903.03(A).

**{¶17}** Appellant asserts his teeth were important to him and were his only reminder of his mother; therefore, he was angry and incited to violence against

Schoolcraft. Appellant further asserts he was incited to violence due to Schoolcraft's threatening actions during the incident.

**{¶18}** A review of the trial testimony demonstrates Schoolcraft had his hands at his side, and was trying to get away from Appellant with his hands in the air. Tr. at 155-157. An eyewitness who lived across the street testified at trial, he was awakened by the argument, and he saw Appellant fire the gun at Schoolcraft while the victim and another man attempted to run away. Appellant continued to shoot at Schoolcraft as he ran away.

**{¶19}** We find the testimony at trial did not support an instruction on voluntary manslaughter, and the trial court did not abuse its discretion in denying Appellant's motion requesting the instruction. The testimony demonstrates Appellant sought the fight with Schoolcraft hours after the automobile accident, wherein Appellant damaged his tooth. The evidence does not demonstrate Appellant acted under a sudden fit of passion or rage sufficient to justify use of deadly force. Neither does the evidence demonstrate Appellant reacted to the "threatening" actions of Schoolcraft, as Appellant shot Schoolcraft as he was walking away and shot him seven times, ending his life. It was Appellant who asked for the firearm during the altercation, Schoolcraft had his hands at his sides and was walking away when shot.

**{¶20}** The first assignment of error is overruled.

II.

**{¶21}** Appellant's second assignment of error asserts ineffective assistance of trial counsel in conceding Appellant's guilt on the charges of felonious assault, tampering with evidence and the attendant gun specifications.

**{¶22}** To succeed on a claim of ineffectiveness, a defendant must satisfy a two-prong test. Initially, a defendant must show that trial counsel acted incompetently. *See, Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984). In assessing such claims, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Id.* at 689, citing *Michel v. Louisiana,* 350 U.S. 91, 101, 76 S.Ct. 158 (1955).

**{¶23}** "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Strickland,* 466 U.S. at 689. The question is whether counsel acted "outside the wide range of professionally competent assistance." *Id.* at 690.

**{¶24}** Even if a defendant shows that counsel was incompetent, the defendant must then satisfy the second prong of the *Strickland* test. Under this "actual prejudice" prong, the defendant must show "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694.

**{¶25}** Decisions which constitute trial strategy do not generally rise to the level of ineffective assistance of counsel. A reviewing court must adopt a deferential attitude to the strategic and tactical choices counsel made as part of a trial strategy. *State v. Griffie,* 74 Ohio St.3d 332, 333, 658 N.E.2d 764 (1996).

**{¶26}** Here, we find counsel's decisions to concede guilt as to felonious assault, tampering with evidence and the attendant firearm specifications were decisions made

as part of a sound trial strategy to be given deference on review. Further, Appellant has not demonstrated, but for any presumed error on the part of trial counsel, the outcome of the trial would have been otherwise.

**{¶27}** Accordingly, the second assignment of error is overruled.

**{¶28}** Appellant's conviction in the Stark County Court of Common Pleas is affirmed.

By: Hoffman, P.J.

Farmer, J. and

Wise, J. concur