[Cite as *State v. Rodvold*, 2012-Ohio-619.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
HURON COUNTY

State of Ohio	Court of Appeals No. H-10-012
Appellee	Trial Court No. CRI-2009-0916
v.	
Steven J. Rodvold	**DECISION AND JUDGMENT**
Appellant	Decided: February 17, 2012

* * * * *

Russell V. Leffler, Huron County Prosecuting Attorney, for appellee.

Terice A. Warncke, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} Appellant, Steven J. Rodvold, appeals from a murder conviction entered by the Huron County Court of Common Pleas, in the above-captioned case. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} In September 2009, appellant was indicted on a one count of aggravated murder and one count of murder, both resulting from the shooting death of appellant's father, Keith Rodvold, on September 17, 2009.

{¶ 3} A jury trial took place in the matter beginning on May 11, 2010, and ending on May 19, 2010. The first two days of the trial were devoted to jury selection. The first portion of the selection process involved individual voir dire of the potential jurors. Among the issues explored during this portion of the process were pretrial publicity and the impact that such publicity may have had on the potential jurors' ability to fairly determine appellant's case. Many from the pool had never heard of the case. Of those who had, a large number indicated that they had only glanced at the headlines or had merely taken note of a homicide involving a father and son.

{¶ 4} Review of the record reveals that the majority of the potential jurors who purported to have any measure of particularized knowledge about the case were excused for cause. Of those who were not excused, the trial court stated on the record, "Even with the few folks that had some detailed information, I think those folks have been thoroughly questioned."

{¶ 5} Following individual voir dire, the remaining potential jurors were subject to additional questioning by both the trial court and counsel, during open voir dire. At this time, counsel for both sides were given the opportunity to exercise their peremptory challenges. The state chose to exercise all four of its peremptory challenges, and defense

counsel elected to exercise only three. The state and defense counsel each waived their additional peremptory challenge as against any of the potential alternate jurors.

{¶ 6} At the conclusion of the voir dire proceedings, the trial court determined on the record that venue was appropriate in the case and, further, denied a motion that had been previously filed by defense counsel for change of venue based upon pretrial publicity.

{¶ 7} During the evidentiary portion of the trial, evidence of the following was adduced. Appellant and his father lived in appellant's father's house at 92 State Route 60, New London, Ohio. Appellant began living in the house when he was ten years old. At the age of 18, appellant, having only reached the tenth grade, left school and joined the army. He remained in the service for the next seven and one-half years.

{¶ 8} On February 27, 2008, appellant left the army and, having nowhere else to go and nothing else to do, returned to Ohio to live with his father. Appellant's father earned a living teaching plumbing at Sandusky High School and doing odd carpentry jobs and roof jobs. Appellant secured unemployment benefits for a time and spent his military savings. Eventually, appellant took a job at a nearby water park, but he quit soon thereafter. He subsequently began work at a fish hatchery, but again, within a very short time, quit the job.

{¶ 9} By the time appellant left his job with the fish hatchery, he was low on money and angry with his father, who had suggested that since appellant did not have any real skills, he should consider reenlisting in the army. Appellant withdrew unto himself,

refusing to eat his father's food and severing relations with his grandparents. He also secured a concealed carry permit, and began wearing a gun around the house. He claimed that his father wanted him out of the house and that he had to wear the gun for his protection while in the house.

{¶ 10} On the day of the homicide, appellant's father spent the morning completing a roof job with his friend, Bernie Bong. The two returned to appellant's father's residence at approximately 1:00 p.m. Bong helped the elder Rodvold put away the roofing gear and then left the premises.

{¶ 11} That same afternoon, appellant received in the mail the results of an initial unemployment appeal that he had filed following his receipt of a previous claim rejection. The appeal was denied. Appellant reacted to the denial by calling state unemployment offices and berating the unemployment officials. His first call to unemployment was placed at around 2:00 p.m., and his second was placed at around 4:00 p.m. During the calls, appellant threatened unemployment workers that he would be forced to go out and kill people and that he had a truck full of guns and ammunition.

{¶ 12} Following the first call, at 2:00 p.m., unemployment official Patty Craig contacted the state highway patrol. Craig, in turn, called the Huron County sheriff. Ted Patrick, of the sheriff's office, alerted Huron County Job & Family Services. Shortly before 5:00 p.m., Patrick instructed the dispatcher to send deputies to the Rodvold home. Two unrelated calls prevented the deputies from getting to the home before 5:37 p.m.

{¶ 13} Appellant, after his first call to unemployment, went outside and fired some rounds into a dead tree that was located in the backyard. He then changed guns, arming himself with a more reliable weapon. Appellant testified that after making his second call to unemployment, he went outside with a pad of paper and a pen, intending to write a letter to unemployment that would provide additional information in support of his claim.

{¶ 14} Testimony by appellant provides that he was in the backyard, writing this letter, when his father joined him outside. Sitting on the deck with a mug of coffee, appellant's father attempted to engage appellant in small talk, at one point noting a bi-plane that was flying above. Appellant testified that he did not want to talk to his father at that time, and that he just wanted to be left alone. Appellant's father asked appellant what he had received in the mail that day. Appellant testified that he told his father about the letter rejecting his unemployment appeal, and that an argument between the two ensued.

{¶ 15} Telephone records reveal an apparent attempt on appellant's part to call unemployment a third, and final time, at approximately 5:00 p.m. Following the attempted phone call, appellant shot his father no less than six times. He shot from a distance of some two to three feet, with the final shot to the top of appellant's father's head. Appellant's father's body was found lying on the deck, without a weapon and with his blood-spattered coffee mug, cell phone and glasses lying next to him.

{¶ 16} Appellant told police that after "emptying his gun" into his father, he reloaded the gun and made his way around his father's lifeless body to cut a hole in the

adjacent screen door. He entered the house through the hole in the door, and then commenced a systematic search for Bernie Bong. Finding no one else at the residence, appellant, at approximately 5:37 p.m., called 911.

{¶ 17} At trial, appellant testified that he shot his father because his father, at some point during their argument, threatened to kill him. Appellant initially told police that from where he was standing in the yard at the time the threat was being made, he could see his father's prized Kimber handgun lying out in the open in the house. On this basis, appellant stated that he knew the threat was real and, as a result, he killed his father.

{¶ 18} After police pointed out to appellant that the Kimber could not, in fact, be seen from where appellant claimed to have been standing during the altercation, appellant changed his story, this time saying that his father expressly stated to him that he had loaded the Kimber and, further, that he was going to kill appellant with it. At trial, appellant retreated from the latter version of the story, conceding on cross-examination that he no longer remembered his father saying those words.

{¶ 19} Following the presentation of the evidence, the jury found appellant guilty of murder and the attendant gun specification. The trial court sentenced appellant to fifteen years to life in prison, together with a three-year mandatory, consecutive sentence for the gun specification. Appellant timely appealed his conviction, raising the following assignments of error:

I. "Appellant was prejudiced by the court's failure to excuse one of the jurors for cause, and the resulting composition of the jury denied him of his constitutional right to an impartial jury."

II. "The trial court abused its discretion and denied appellant his right to a fair trial by an impartial jury when it overruled his motion for a change of venue."

III. "Appellant was denied effective assistance of counsel as guaranteed by the Ohio and U.S. constitutions due to counsel's cumulative failures to adequately advocate appellant's defense and to present such skill and knowledge as would render confidence in the fairness of appellant's trial and its verdict."

IV. "The trial court's above errors, when taken together, deprived appellant of a fair trial as guaranteed by the Ohio and U.S. constitutions' due process clauses."

V. "The verdict was against the manifest weight of the evidence."

{¶ 20} Appellant argues in his first assignment of error that he was prejudiced by the court's failure to excuse potential juror Nancy Fink for cause, and that such failure denied appellant an impartial jury. We note that although Fink was not excused for cause, defense counsel did eventually use one of its peremptory challenges to eliminate her from the jury pool. Thus, any objection to Fink's presence on the panel was effectively rendered moot.

{¶ 21} Appellant next argues that defense counsel's having to exercise one of its peremptory challenges on Fink later deprived the defense of any chance to rid the pool of Cynthia Schimpff, another juror to whom appellant presently objects. This argument is clearly specious, inasmuch as the record demonstrates that defense counsel used only three of its four allowable peremptory challenges. There is nothing in the record to suggest that the remaining challenge could not have been used on Schimpff. Accordingly, we find that any error that there may have been on the part of the trial court in failing to dismiss Fink for cause—and we do not, in fact, find that there was any such error—had no unfairly prejudicial effect upon appellant.

{¶ 22} Appellant's objection to Schimpff's service on the jury is based upon appellant's claim that Schimpff was uncertain as to whether she could be fair. During individual voir dire, Schimpff indicated that she thought she could set aside anything regarding the case that she may have heard or read outside the court and could make her decision based solely on the facts and evidence presented at trial. When asked by the court if she thought she could be fair to the state and to appellant in making that decision, she answered in the affirmative.

{¶ 23} Later, when discussing possible scheduling conflicts, Schimpff mentioned that her youngest daughter was scheduled to have a C-section in the coming days and that Schimpff would like to be present for the procedure. When asked by the state if she could pay attention and be fair if asked to sit on the jury, she answered, "I could be, yes." During follow-up questioning by defense counsel, Schimpff acknowledged that if "things

began to develop" for her daughter at an earlier time than expected, she would probably be distracted but would try to be fair. In fact, Schimpff was seated and the case was over before the baby was born.

{¶ 24} The Supreme Court of Ohio in *State v. Perez*, 124 Ohio St.3d. 122, 2009-Ohio-6179, 920 N.E.2d 104, ¶ 140, relevantly stated the following regarding challenges for cause:

> On a challenge for cause, "[t]he ultimate question is whether the 'juror sw[ore] that he could set aside any opinion he might hold and decide the case on the evidence, and [whether] the juror's protestation of impartiality [should be] believed.'" White v. Mitchell (C.A.6, 2005), 431 F.3d 517, 538, quoting Patton v. Yount (1984), 467 U.S. 1025, 1036, 104 S.Ct. 2885. 81 L.Ed.2d 847. A trial court's resolution of a challenge for cause will be upheld on appeal unless it is unsupported by substantial testimony, so as to constitute an abuse of discretion. State v. Tyler (1990), 50 Ohio St.3d 24, 31, 553 N.E.2d 576.

{¶ 25} R.C. 2313.42(J) provides that "good cause" exists to challenge any person called as a juror if that individual "discloses by his answers that he cannot be a fair and impartial juror or will not follow the law as given to him by the court." R.C. 2945.25(B) relevantly provides that an individual called as a juror in a criminal case may be challenged for cause if "he is possessed of a state of mind evincing enmity or bias toward the defendant or the state." *See also* Crim.R. 24(C)(9) (providing that a person called as

a juror may be challenged for cause if the juror is possessed of a state of mind evincing enmity or bias toward the defendant or the state).

{¶ 26} In the instant case, the record supports the trial court's ruling on the challenge for cause. Schimpff clearly indicated that she could set aside anything regarding the case that she may have heard or read outside the court and that she could make her decision based only on the facts and the evidence. She further indicated that she could be fair to both the state and to appellant in making that decision. Based on the foregoing, we conclude that the trial court's findings were supported by sufficient substantial testimony and, therefore, did not constitute an abuse of discretion. *See Perez*, *supra*. Accordingly, appellant's first assignment of error is found not well-taken.

{¶ 27} Appellant argues in his second assignment of error that the trial court abused its discretion and denied him a fair trial by an impartial jury when it overruled appellant's motion for a change of venue.

{¶ 28} R.C. 2901.12(K), which governs venue in a criminal case, relevantly provides:

> Notwithstanding any other requirement for the place of trial, venue may be changed upon motion of the prosecution, the defense, or the court, to any court having jurisdiction of the subject matter outside the county in which trial would otherwise be held, when it appears that a fair and impartial trial cannot be held in the jurisdiction in which trial otherwise would be held or when it appears that the trial should be held in another

jurisdiction for the convenience of the parties and in the interests of justice. See also, Crim.R. 18(B) (providing that "upon the motion of any party or upon its own motion the court may transfer an action to any court having jurisdiction of the subject matter outside the county in which trial would otherwise be held, when it appears that a fair and impartial trial cannot be held in the court in which the action is pending").

{¶ 29} This court has previously held that "a careful and searching voir dire provides the best test of whether pretrial publicity has prevented the defendant from obtaining a fair and impartial jury from the locality." *State v. Gravelle*, 6th Dist. No. H-07-010, 2009-Ohio-1533. Further, except in rare cases where prejudice may be presumed, a defendant claiming that pretrial publicity has denied him a fair trial must show that one or more of the jurors was actually biased. *Id.* Lastly, "where it appears that jurors' opinions as to the guilt of the defendant are not fixed but would yield readily to evidence, it is not error to deny a motion for change of venue, in the absence of a clear showing of an abuse of discretion." *Id.*

{¶ 30} As indicated above, extensive voir dire was conducted in this case, with wide-ranging and comprehensive questioning of the potential jurors by the prosecution, defense counsel and the judge. All of those individuals who were ultimately admitted onto the jury panel—even those who acknowledged some previous knowledge of the case—clearly indicated that they could be fair and impartial and could fairly judge the case solely on the facts presented at trial. Based on the foregoing, and the fact that

appellant has failed to demonstrate actual bias on the part of any juror, we cannot conclude that the trial court abused its discretion in denying appellant's motion for a change of venue. Accordingly, appellant's second assignment of error is found not well-taken.

Appellant argues in his third assignment of error that he was denied effective assistance of counsel due to his trial counsel's "cumulative failures to adequately advocate appellant's defense and to present such skill and knowledge as would render confidence in the fairness of appellant's trial and its verdict."

{¶ 31} In order for a defendant to obtain a reversal of a conviction or sentence based on ineffective assistance of counsel, he must prove "(a) deficient performance ('errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment') and (b) prejudice ('errors * * * so serious as to deprive the defendant of a fair trial, a trial whose result is reliable')." *State v. Adams*, 103 Ohio St.3d 508, 2004-Ohio-5845, 817 N.E.2d 29 ¶ 30, citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

{¶ 32} In evaluating appellant's claim of ineffective assistance of counsel, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at ¶ 31, citing *Strickland*, *supra*, at 689. In addition, we are mindful that "[t]rial counsel cannot be second-guessed as to trial strategy decisions." *Id*.

{¶ 33} In the instant case, appellant alleges that trial counsel was ineffective in failing to utilize all of the allotted peremptory challenges during voir dire, "causing great prejudice to [a]ppellant with the result being a tainted jury."

{¶ 34} The Ohio Supreme Court in *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, 873 N.E.2d 828, held that the use of peremptory challenges is inherently subjective and intuitive and, as a result, an appellate record will rarely reveal reversible incompetence in this process. *Id.* at ¶ 83. Upon our review of the record, we do not find "reversible incompetence" in defense counsel's decision not to use the last of its peremptory challenges, either on juror Schimpff or on any of the other jurors.

{¶ 35} Next, appellant argues that his trial counsel unreasonably failed to question any of the prospective jurors on their "feelings toward self-defense." According to appellant, the result of this failure "was the selection of a jury for a murder trial premised on self-defense without having any idea whether any of the jurors even understood or accepted the concept as a viable defense."

{¶ 36} Courts have consistently declined to second guess trial strategy decisions or impose hindsight views about how current counsel might have questioned the jury differently. *Mundt* at ¶ 63. Further, "trial counsel is entitled to exercise broad discretion in formulating voir dire questions." *Id.* at ¶ 84. We do not find defense counsel's voir dire questioning to have been outside its discretion. Further, addressing appellant's specific concern that the jurors may not have understood or accepted the concept of self-defense as a viable defense, we note that during voir dire, the jurors expressed their

willingness to follow the law and the instructions of the court. And among the court's instructions was a thorough and accurate instruction on the law of self-defense.

{¶ 37} Appellant further argues that trial counsel's failure to request a preliminary jury instruction on self-defense was unreasonable "in that it resulted in the jurors listening to testimony without receiving the knowledge of the elements of self-defense beforehand." We find neither error nor prejudice in the asserted failure, which we conclude amounted to a trial strategy decision.

{¶ 38} The affirmative defense of self-defense generally has three elements: (1) the defendant was not at fault in creating the violent situation; (2) the defendant has a bona fide belief that he was in imminent danger of death or great bodily harm and his only means of escape was the use of force; and (3) the defendant did not violate any duty to retreat. *State v. Thomas*, 77 Ohio St.3d 323, 326, 673 N.E.2d 1339 (1997). In the instant case, defense counsel argued extensively in his opening remarks that appellant, in shooting and killing his father, acted in self-defense. In describing the events leading up to the homicide, as told from appellant's point of view, defense counsel expressly stated that appellant was not at fault, that appellant reasonably believed that he was in imminent danger, and that appellant had no duty to retreat. Thus, the jurors were apprised of appellant's defense in advance of the presentation of trial testimony.

{¶ 39} We note, in addition, that the trial court, in giving its preliminary instructions, specifically directed the jury that they were to consider all of the instructions as a whole, and that they were to consider each instruction as it relates to the others. The

court further instructed, "The fact that I give you some of the instructions now and some at the conclusion of the evidence has no significance as to their relative importance nor does the order in which I give them to you." We find that this instruction cured any even arguable prejudice arising from the fact that the instruction on self-defense was given following the presentation of the evidence, and not with the preliminary instructions.

{¶ 40} Next, appellant argues that defense counsel was ineffective in failing to bolster appellant's defense of self-defense with evidence that appellant suffered from battered child syndrome. "Battered child syndrome is not an independent defense; however, it can support the affirmative defense of self-defense or justify a lesser included offense instruction on voluntary manslaughter." *State v. Vaughn*, 7th Dist. No. 683, 2003-Ohio-7023, ¶ 13.

{¶ 41} In the instant case, however, the only evidence pointing to possible battered child syndrome comes in the form of a self-serving affidavit, filed by appellant after his conviction, while the case was on appeal. (The forensic diagnostic center report that was generated before trial and provided a thorough and extensive psychological evaluation of appellant reveals no mention whatsoever of appellant suffering from battered child syndrome.) The law is well settled that only those issues occurring on the record can be evaluated in a direct appeal. *State v. Hartman*, 93 Ohio St.3d 274, 299, 754 N.E.2d 1150 (2001) (holding that if establishing ineffective assistance of counsel requires proof outside the record, then such claim is not properly considered on direct appeal); *State v. Ishmail*, 54 Ohio St.2d 402, 406, 377 N.E.2d 500 (1978) (holding that the appellate court

is limited to that which transpired in the trial court as reflected in the record on direct appeal, and cannot rely upon evidence dehors the record). Accordingly, appellant's claim of ineffective assistance based on his trial counsel's failure to include evidence of battered child syndrome is not appropriately considered in this appeal.

{¶ 42} We additionally conclude that trial counsel could have reasonably determined that expert testimony about battered child syndrome, even if applicable, was unnecessary and irrelevant in this case. Considering appellant's account of the shooting, including his testimony that his father threatened to kill him with a gun that appellant knew to be readily available to his father, expert testimony on battered child syndrome was unnecessary to demonstrate an honest belief in the imminent danger of death or great bodily harm. The real issue in this case was not whether appellant suffered from battered child syndrome, but rather whether appellant's version of the facts was credible. If the jury believed that events transpired as appellant claimed they did, it could have properly determined that appellant reasonably believed that he was in imminent danger of death or great bodily harm and, thus, acted in self-defense.

{¶ 43} Finally, appellant argues that he was denied effective assistance of counsel by trial counsel's failure to renew the change of venue request. First, a failure of defense counsel to object to a trial court's denial of a motion for change of venue is not evidence of ineffective assistance of counsel, because no such objection or exception is necessary to preserve for appeal a claim of error based on a trial court's ruling on a motion during trial. *State v. Quinn*, 3d Dist. No. 12-90-1, 1992 WL 19322 (Jan. 30, 1992). Secondly, as

discussed above in connection with appellant's second assignment of error, defense counsel's motion for change of venue was appropriately denied in this case.

{¶ 44} Because appellant has failed to establish either error on the part of his counsel or prejudice arising from his counsel's performance, let alone cumulative error, appellant's third assignment of error is found not well-taken.

{¶ 45} Appellant argues in his fourth assignment of error that,

> the aggregate effect of numerous errors by the trial court—failure to dismiss a biased juror for cause, denial of [a]ppellant's motion for a change of venue, failure to include self-defense questioning as part of voir dire, and failure to provide a preliminary jury instruction on self-defense—deprived [appellant] of a fair trial as guaranteed by our state and federal constitutions.

{¶ 46} We have stated that "although a particular error by itself may not constitute prejudicial error, the cumulative effect of the errors may deprive a defendant of a fair trial and may warrant the reversal of his conviction." *State v. Hemsley*, 6th Dist. No. WM-02-010, 2003-Ohio-5192, ¶ 32, citing *State v. DeMarco*, 31 Ohio St.3d 191, 509 N.E.2d 1256 (1987), paragraph two of the syllabus. "'However, in order even to consider whether "cumulative" error is present, we would first have to find that multiple errors were committed in this case.'" *Id.* at ¶ 32, quoting *State v. Madrigal*, 87 Ohio St.3d 378, 398, 721 N.E.2d 52 (2000). In light of our findings with respect to the other assignments of error, we find that the doctrine of cumulative error is inapplicable and provides no

basis for reversal. Accordingly, appellant's fourth assignment of error is found not well-taken.

{¶ 47} Appellant argues in his fifth assignment of error that his conviction was against the manifest weight of the evidence. This court has articulated the applicable standard of review as follows:

> Our function when reviewing the weight of the evidence is to determine whether the greater amount of credible evidence supports the verdict. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. Under this standard, this court sits as a "thirteenth juror" and reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses, and determines whether the trier of fact clearly lost its way and created a manifest miscarriage of justice. Id., citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175. If we decide that the fact finder clearly lost its way, we must reverse the conviction and order a new trial. Id.
>
> Nevertheless, we will not reverse a conviction so long as the state presented substantial evidence for a reasonable trier of fact to conclude that all of the essential elements of the offense were established beyond a reasonable doubt. *State v. Getsy*, 84 Ohio St.3d 180, 193-194, 1998-Ohio-533. Moreover, we must keep in mind that the credibility of the witnesses who testified at trial is chiefly a matter to be determined by the trier of fact. *State v. McDermott*, 6th Dist. No. L-03-1110, 2005-Ohio-2095, ¶ 25,

quoting *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. *State v. Terry*, 6th Dist. No. L-06-1298, 2007-Ohio-4088, ¶ 12-13.

{¶ 48} Appellant argues that the jury lost its way in failing to accept appellant's affirmative defense of self-defense. We disagree. There was ample evidence to show that appellant was at fault in creating the violent situation. His behavior on the day of the killing—from arming himself while around the house, to his repeated threats to unemployment workers about killing someone—strongly suggests that he, and not his father, was the one ready to kill. In addition, appellant's own testimony—including his changing stories about why he felt threatened, together with various claims that were not consistent with the physical evidence—all contributed to the jury's reasonable conclusion that appellant, in killing his father, did not act in self-defense.

{¶ 49} Based upon all of the foregoing, we find that there was abundant substantial evidence upon which the jury could conclude that appellant murdered his father and did not act in self-defense. The record contains no indication that the jury "lost its way" or "created a manifest miscarriage of justice." *See State v. Terry, supra*. Accordingly, appellant's fifth assignment of error is found not well-taken.

{¶ 50} For all of the foregoing reasons, the judgment of the Huron County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J.
CONCUR. _____
JUDGE