[Cite as *State v. Booker*, 2013-Ohio-45.]

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

State of Ohio — Court of Appeals No. L-10-1140

Appellee — Trial Court No. CR0200902310

v.

Dejuan Booker — **DECISION AND JUDGMENT**

Appellant — Decided: January 11, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
David F. Cooper, Assistant Prosecuting Attorney, for appellee.

Stephen D. Long, for appellant.

* * * * *

YARBROUGH, J.

I. INTRODUCTION

{¶ 1} This is an appeal from a judgment of the Lucas County Court of Common Pleas in which a jury found appellant, Dejuan Booker, guilty of felony murder, an unclassified felony in violation of R.C. 2903.02(B) and 2929.02, and the attached firearm

specification in violation of R.C. 2941.145. Appellant was sentenced to serve a prison term of 15 years to life for the felony murder charge in addition to a mandatory and consecutive term of three years for the firearm specification, for an aggregate term of 18 years to life.

Facts and Procedural Background

{¶ 2} On May 1, 2009, appellant shot and killed Armond Parker ("Parker") and shot Markees Turner ("Turner") following a marijuana sale which abruptly ended when Turner "pistol whipped" and robbed appellant at gunpoint.

{¶ 3} On the evening of Parker's death, the record reflects that Parker, Turner, and Kevin Garrett ("Garrett") were at two separate apartments in the Elmdale Court Apartments. Parker and Garrett were at Garrett's sister's apartment drinking alcohol and Garrett additionally smoked marijuana. Turner was in an apartment rented by two females. He was also drinking alcohol and smoking marijuana. At some point in the evening, Turner, Parker, and Garrett encountered each other in a park connected to the Elmdale Court Apartments. The three eventually headed to a convenience store located on the corner of Elmdale and Airport Highway to purchase cigars, drinks, and cigarettes. At the time, Garrett possessed 14 grams of marijuana and a scale on his person. Furthermore, unbeknownst to Garrett and Parker, Turner was carrying a 9 millimeter Jennings handgun in his waistband under his shirt.

{¶ 4} At approximately 11:30 p.m., appellant, in his mother's white Ford Aerostar van, stopped to get gas at the same convenience store that Garrett, Parker, and Turner

were patronizing. Prior to entering the convenience store, Garrett approached appellant and indicated that he had marijuana for sale. Appellant indicated his interest in purchasing marijuana, and the two agreed to continue their discussion once Garrett made his purchases in the convenience store. From this point, appellant, Garrett, and Turner's testimony diverged.

{¶ 5} While in the store, Garrett's testimony was that Turner informed Garrett of Turner's intention to rob appellant. Garrett requested that Turner not rob appellant, and did not take Turner seriously. Turner's testimony was that this conversation never occurred.

{¶ 6} Upon exiting the store, Garrett, Parker, and Turner entered appellant's vehicle. Garrett sat in the passenger's seat next to appellant. Turner sat directly behind appellant, and Parker sat beside Turner. Garrett's testimony was that he intended to complete the drug transaction at the Elmdale Court Apartments, while Turner testified that he believed that appellant was just giving the three a ride back to the apartments. Appellant testified that it was his preference to complete the drug sale at the convenience store.

{¶ 7} On the way back, appellant missed the road leading to the apartments, so he completed a U-turn at the corner of Mercer and Williamsville streets. At that point, one of the occupants indicated that the three could be let out at that location. Appellant pulled his vehicle over, turned off the lights, but left his vehicle running. Garrett and appellant then began negotiations for the marijuana sale. Appellant testified that the

marijuana did not meet his quality standards, and therefore he informed Garrett that he was no longer interested in purchasing the marijuana.

{¶ 8} Turner testified that at that point, he decided to rob appellant. Turner pointed a gun at appellant and ordered him to turn over his property. Appellant resisted turning over his property. Testimony reveals that Turner "pistol whipped" appellant on the side of his forehead around his eye. Appellant then held out his money, marijuana, and cell phone for Turner to take. Turner ordered appellant to unlock the doors.

{¶ 9} The testimony of the three further deviates at this point. Appellant's version is as follows. Appellant observed that Garrett had a large gun on his lap, and appellant tried to grab the gun, at which point a struggle ensued. After gaining control of the gun, appellant exited the vehicle from the driver's side door. Appellant claims that Garrett alerted the others that appellant took his gun, Garrett then fled the scene, while Parker ran toward the front of the van. Appellant shot Parker not knowing whether he was armed, and began returning fire he believed was coming from Turner at the rear side of the van. Appellant testified that he fired a total of three or four shots and that the same number of shots were fired at him.

{¶ 10} Garrett testified that he exited the vehicle after Turner robbed appellant. Garrett opened the cargo door and saw Parker and Turner exit appellant's van. Garrett then turned to head towards Airport Highway, and heard a gunshot. As he began running, Garrett saw Turner run behind the van with a gun in his hand and his arm extended. Garrett heard a second shot, and then saw Turner fall down. Garrett testified

that he did not see Parker. Garrett managed to flee the scene, heading down Williamsville to a dead end. Garrett returned to the scene twice—once prior to the police arriving, and once after the police arrived. While speaking to the police, Garrett indicated that his brother-in-law, Parker, went to a convenience store, but had not returned. Garrett then returned to the Elmdale Court Apartments, but was stopped by the police as he fit the description of the suspect as indicated by a witness. Eventually, Garrett told the police his version of the events that occurred, and pointed out appellant as the shooter from a photo lineup.

{¶ 11} Turner testified that upon exiting the vehicle, he intended to return to the Elmdale Court Apartments. As he cleared the rear of the van, he heard two gunshots, felt that he had been hit, so he drew his gun and fired toward the driver's side of the van. Turner was able to fire three shots before his gun jammed. While Turner did not see Garrett, he saw Parker on the ground with a shot in his head. After he was shot, Turner tried to walk to get help, but collapsed near Parker and lost consciousness.

{¶ 12} Appellant then fled the scene in his van, and went to visit a friend at the Weiler Homes in Toledo. Appellant threw the gun out of the van after turning onto Airport Highway because he was on probation in the federal court system and was prohibited from possessing firearms. Upon arriving at the Weiler Homes, appellant backed into a parking space and parked his vehicle, which had the back window shattered and mostly missing. Appellant then went with his friend to St. Charles Hospital where he received six to eight stiches to close the wound on his head caused by Turner. Appellant

told the hospital that he had been hit by an ashtray to avoid disclosing that he was robbed while trying to purchase marijuana—also prohibited under appellant's probation. The next day, after learning that someone had been killed during the shootout, and seeing his picture on the news, appellant decided to flee to Columbus until his family had enough money to hire an attorney. While he was in Columbus, U.S. Marshals tracked down and arrested appellant. He was then returned to Toledo.

{¶ 13} Evidence found at the scene included a jammed 9mm Jennings handgun, which contained DNA from Turner, Parker, and an unknown third person. Furthermore, the projectile that was removed from Turner was determined to be .45 caliber, possibly fired from one of the following guns: a Ruger .45 caliber, a Llma .45, or an "Auto-Ordinance Thompson .45 submachine gun" [sic]. Blood collected from the driver's side door handle, the exterior of the van behind the driver's side door, and the steering wheel was consistent with appellant's DNA. Furthermore, a cell phone found at the scene contained DNA consistent with that of appellant.

{¶ 14} The deputy coroner testified that there was no gunpowder stippling on Parker's body, which indicated that the gun which killed Parker was fired from an indeterminate range. Testimony from the coroner also reveals that Parker died from a six and one-half inch graze-type gunshot wound to the head caused by a large caliber weapon. Furthermore, the entrance wound was on the right side of Parker's scalp, which indicates that the shooter would have been looking at the side of Parker's head at the time

of the shooting. Photographic evidence reveals that glass from the minivan window was found on Parker.

{¶ 15} On July 7, 2009, appellant was indicted on one count of felony murder in violation of R.C. 2903.02(B) and 2929.02, an unclassified felony with an accompanying firearm specification in violation of R.C. 2941.145, and one count of carrying a concealed weapon in violation of R.C. 2923.12(A)(2) and (F), a fourth degree felony. At his arraignment on July 24, 2009, appellant pleaded not guilty to all charges, and a jury trial was eventually held on March 22, 2010. On March 26, 2010, the jury reached a guilty verdict on the felony murder charge and the attached firearms specification. Appellant was acquitted on the carrying a concealed weapon charge. A presentence investigation report was prepared and appellant was sentenced on April 22, 2010. This appeal followed.

Assignments of Error

A. THE TRIAL COURT ERRED WITH ITS JURY INSTRUCTIONS WHERE IT MANDATED THAT MR. BOOKER'S CONVICTIONS FOR FELONY MURDER REGARDLESS OF THE [SIC] ANY CONSIDERATION OF "SERIOUS PROVOCATION" IN ITS DELIBERATIONS REGARDING THE UNDERLYING FELONIOUS ASSAULT ALLEGATION.

B. THE TRIAL COURT ERRED IN DENYING MR. BOOKER'S MOTION FOR ACQUITTAL WHERE THE STATE FAILED TO

PRESENT SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION (TT4 AT 28-30; TT4 AT 139-40).

C. MR. BOOKER'S CONVICTION FOR FELONY MURDER AND THE ATTENDANT FIREARM SPECIFICATION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

II. ANALYSIS

Jury Instructions

{¶ 16} Appellant raises two distinct issues in his first assignment of error. First, appellant argues that an instruction on aggravated assault should have been given to the jury. Second, appellant argues that the manner in which the trial court instructed the jury on the felony murder charge precluded the jury's ability to consider the "lesser-included offense" of voluntary manslaughter.

{¶ 17} Appellant first argues that the jury could have found him guilty of aggravated assault, a fourth-degree felony, rather than felonious assault, a first-degree felony, and therefore an instruction of aggravated assault was required. Appellant was never charged with either felonious assault or aggravated assault. Nevertheless, appellant contends that the instruction was required.

{¶ 18} Generally, we review the denial of a jury instruction under an abuse of discretion standard. *State v. Wolons*, 44 Ohio St.3d 64, 68, 541 N.E.2d 443 (1989). An abuse of discretion will be found where the trial court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140

(1983). However, because no objection was made to the trial court's omission of the aggravated assault instruction, our review is limited to plain error. *State v. Underwood*, 3 Ohio St.3d 12, 13, 444 N.E.2d 1332 (1983); *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978). Plain error is an obvious error or defect in the trial court proceedings, affecting substantial rights, where, "but for the error, the outcome of the trial clearly would have been otherwise." *Underwood* at syllabus; Crim. R.52(B). The Supreme Court of Ohio has admonished courts that notice of plain error under Crim.R. 52(B) is to be taken "'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.'" *Id.*, quoting *Long* at paragraph three of the syllabus.

{¶ 19} "The analysis whether a defendant is entitled to have the jury instructed on an offense for which the defendant has not been indicted begins by first determining whether the requested instruction falls within the statutory definition of a lesser included offense or inferior degree offense." *State v. Ledbetter*, 2d Dist. No. 93-CA-54, 1994 WL 558996, *3 (Oct. 14, 1994). The Ohio Supreme Court has explained that, under Crim.R 31(C) and R.C. 2945.74, a jury may consider lesser, unindicted offenses only if the evidence supports the lesser charge and the lesser charge falls into one of three groups. *State v. Deem*, 40 Ohio St.3d 205, 208, 533 N.E.2d 294 (1988). A jury may consider lesser, unindicted crimes that are (1) a lesser-included offense of the crime charged, (2) an inferior degree of the crime charged, or (3) an attempt to commit the crime charged, if such an attempt is an offense at law. *Id.*

{¶ 20} Lesser-included offenses are said to be necessarily included within the higher charge because the greater offense can never be committed without the lesser offense being committed, as statutorily defined, and some element of the greater offense is not required to prove commission of the lesser offense. *Id.* at 209. In contrast, "[A]n offense is an 'inferior degree' of the indicted offense where its elements are *identical* to or contained within the indicted offense, except for one or more additional mitigating elements which will generally be presented in the defendant's case." *Id*.

Aggravated Assault Instruction

{¶ 21} Based upon a plain error analysis, we conclude that the trial court did not err by omitting the instruction for aggravated assault.

{¶ 22} R.C. 2903.11, defines the offense of felonious assault as follows,

> (A) No person shall knowingly do either of the following:
>
> (1) Cause serious physical harm to another * * *;

{¶ 23} Aggravated assault, codified in R.C. 2903.12, provides:

> (A) No person, *while under the influence of sudden passion or in a 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:
>
> (1) Cause serious physical harm to another * * *. (Emphasis added.)

{¶ 24} The elements of felonious assault are identical to the elements of aggravated assault, except that aggravated assault has an additional mitigating element.

Deem, 40 Ohio St.3d at paragraphs two and four of the syllabus, 533 N.E.2d 294. Thus, aggravated assault is an offense of an inferior degree to felonious assault. *Id*.; *State v. Elmore*, 111 Ohio St.3d 515, 857 N.E.2d 547, 2006-Ohio-6207, ¶ 80.

{¶ 25} In a trial for felonious assault, where the defendant presents sufficient evidence of serious provocation, such that a jury could both reasonably acquit defendant of felonious assault and convict defendant of aggravated assault, an instruction on aggravated assault, as an inferior degree of felonious assault, *must* be given. *Deem*, 40 Ohio St.3d at 211, 533 N.E.2d 294. However, we conclude that there was insufficient evidence that appellant acted under "sudden passion or fit of rage" and appellant was not entitled to an instruction on aggravated assault.

{¶ 26} "Provocation, to be serious, must be reasonably sufficient to bring on extreme stress and the provocation must be reasonably sufficient to incite or to arouse the defendant into using deadly force. In determining whether the provocation was reasonably sufficient to incite the defendant into using deadly force, the court must consider the emotional and mental state of the defendant and the conditions and circumstances that surrounded him at the time." *State v. Mabry*, 5 Ohio App.3d 13, 449 N.E.2d 16 (8th Dist.1982), paragraph five of the syllabus.

{¶ 27} In *State v. Shane*, 63 Ohio St.3d 630, 635, 590 N.E.2d 272 (1992), the Supreme Court elaborated on what constitutes "reasonably sufficient" provocation in the context of voluntary manslaughter. First, an objective standard must be applied to

determine whether the alleged provocation is reasonably sufficient to bring on a sudden passion or fit of rage. That is, the provocation must be "sufficient to arouse the passions of an ordinary person beyond the power of his or her control." *Id*. If this objective standard is met, the inquiry shifts to a subjective standard, to determine whether the defendant in the particular case "actually was under the influence of sudden passion or in a sudden fit of rage." *Id.* at 634-635.

{¶ 28} As applied in this case, we find the evidence insufficient to establish that appellant was subjectively under the influence of sudden passion or in a sudden fit of rage to incite the use of deadly force. Appellant's testimony, corroborated for the most part by Turner and Garrett, asserts that Turner "pistol whipped" and robbed appellant prior to the shooting. Nevertheless, appellant admitted that he was not mad after being hit by Turner. Appellant testified that he was afraid at the time, and that his fear was due, in part, by his memory of the death of his sister during a robbery. Thus, the record contains no evidence that appellant's actions were influenced by sudden passion or fit of rage at the time he shot Parker and Turner. It is well established that fear alone is insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or fit of rage. *See State v. Collins*, 97 Ohio App.3d 438, 445-446, 646 N.E.2d 1142 (8th Dist.1994); *State v. Cunningham*, 2d Dist. No. 2759, 1991 WL 216410 (Oct. 17, 1991); *State v. Williams*, 8th Dist. No. 60819, 1992 WL 198114 (Aug. 13, 1992). Thus, even if the events leading up to the shootings could be viewed as sufficiently provocative under an objective standard in the instant case, there is no

evidence that appellant subjectively acted under the influence of sudden passion or fit of rage brought on by serious provocation occasioned by the victim that was reasonably sufficient to incite defendant into using deadly force. *See Shane*, 63 Ohio St.3d at 634, 590 N.E.2d 272.

{¶ 29} Accordingly, the trial court did not err by omitting an instruction on the offense of aggravated assault as an inferior degree offense of felonious assault.

Voluntary Manslaughter Instruction

{¶ 30} Appellant next argues that he was entitled to an instruction on voluntary manslaughter and that the trial court erred by instructing the jury not to consider the offense of voluntary manslaughter, should it find appellant guilty of felony murder.

{¶ 31} In concluding its instruction on the felony murder charge, the trial court stated,

> If you find that the State proved beyond a reasonable doubt all of the essential elements of murder, and that the Defendant failed to prove the defense of self-defense, which will be later defined, by the preponderance of the evidence, you must first find the Defendant guilty of the offense of murder. You should then consider the firearm specification to [sic] murder charge. *You should not consider the lesser offense of voluntary manslaughter if you find the Defendant guilty of murder*." (Emphasis added.)

The trial court went on to state,

> If you find that the State failed to prove any one of the essential elements of the offense of murder, and if you find that the Defendant failed to prove the defense of self-defense, you will continue your deliberations to consider the lesser offense of voluntary manslaughter and a firearm specification.
>
> If all of you are unable to agree on a verdict of either guilty or not guilty of murder then you will continue your deliberations to consider the lesser offense of voluntary manslaughter and the firearm specification. Thereafter, the trial court gave the jury an instruction for voluntary manslaughter.

{¶ 32} Voluntary manslaughter, codified in R.C. 2903.03, provides:

> (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 * * *.

{¶ 33} The manner in which the trial court instructed the jury is similar to the instructions given in *State v. Osburn*, 9 Ohio App.3d 343, 460 N.E.2d 314 (9th Dist.1983). In *Osburn*, after defining the offense of murder, the trial court instructed the jury as follows: "If you find that the State has proved beyond a reasonable doubt all the essential elements of the lesser offense of murder, your verdict must be guilty of murder,

and in that event you will not consider any further lesser offense. * * *." *Id*. at 333. On appeal, the court determined that the trial court was in error for charging the jury with this instruction because it precluded the jury from considering the lesser offense of voluntary manslaughter. The *Osburn* court specifically concluded,

> In a prosecution for aggravated murder, a jury instruction directing the jury to disregard the lesser offense of voluntary manslaughter until after it decided defendant's lack of guilt on the lesser offense of murder was erroneous, as it precluded the jury from considering the mitigating circumstances of acting under extreme emotional stress while considering the offenses of murder and aggravated murder. But under certain circumstances, such error may be harmless. *Id*. at the syllabus.

{¶ 34} The *Osburn* court ultimately concluded that the record failed to disclose any evidence of Osburn's extreme emotional stress and therefore the instruction was not prejudicial.

{¶ 35} Given our previous conclusion that appellant was not subjectively acting under sudden provocation of a fit of rage at the time he shot Parker, we conclude that appellant was not entitled to any inferior degree instruction. Therefore, even if the trial court erred in its instruction to the jury, any error is harmless. Therefore, appellant was not prejudiced when the trial court advised the jury to not consider the mitigating element contained in the voluntary manslaughter instruction should it find him guilty of felony murder.

{¶ 36} Accordingly, we find appellant's first assigned error not well-taken.

Sufficiency of the Evidence

{¶ 37} In his second assigned error, appellant argues that his conviction for felony murder was not supported by sufficient evidence. We disagree.

{¶ 38} "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. To support this assignment of error, appellant contends,

> [T]he evidence did not support a finding of the element of Felony Murder, that being that Mr. Booker was not acting under serious provocation, thus reducing any assault to Aggravated Assault. Again, Aggravated Assault, being a felony of the fourth degree, cannot support a conviction for Felony Murder.

{¶ 39} This argument is unavailing given our analysis in appellant's first assignment of error where we concluded that appellant failed to set forth evidence that he was subjectively acting under sudden provocation or a fit of rage.

{¶ 40} R.C. 2903.02(B) sets forth the elements of felony murder:

> No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit an offense of violence that is a felony of the first or second degree and that is not a violation of section 2903.03 or 2903.04 of the Revised Code.

{¶ 41} "Offense of violence" is defined in R.C. 2901.01(A)(9) and includes felonious assault in violation of R.C. 2903.11, a felony of the first or second degree. Felonious assault, defined in R.C. 2903.11(A)(1), provides, "No person shall knowingly * * * cause serious physical harm to another * * *."

{¶ 42} Appellant admitted that he shot Parker with a firearm and that he saw Parker "twist and duck" after he shot him. The coroner's testimony confirms that Parker died as a result of a gunshot wound caused by a large caliber firearm. This testimony shows that appellant knowingly shot Parker, causing serious physical harm to Parker, which ultimately resulted in his death. From the record before us, we conclude that a rational trier of fact could have found the essential elements of felony murder beyond a reasonable doubt.

{¶ 43} In regard to appellant's affirmative defense of self-defense, appellant argues that "the trial court erred and the verdict was not supported by sufficient evidence that [appellant] did not sufficiently prove self-defense by a preponderance of the evidence." Thus, appellant disputes whether the jury should have rejected a felony murder conviction when he presented evidence of presumptive self-defense, an

affirmative defense. Because this argument does not challenge the sufficiency of the state's evidence to establish the elements of felony murder, we find it inappropriate in the sufficiency-of-the evidence context. We do, however, find it cognizable under a manifest weight of the evidence standard.

Weight of the Evidence

{¶ 44} In his third assignment of error, appellant argues that the felony murder and firearm specification convictions were against the manifest weight of the evidence. We disagree.

{¶ 45} When reviewing a manifest weight claim,

> The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, quoting *Thompkins* at 387.

{¶ 46} We do not find that this is the "exceptional case in which the evidence weighs heavily against the conviction." Here, the evidence before the jury tends to prove that appellant shot Parker causing serious physical harm which ultimately resulted in

Parker's death. Furthermore, appellant admitted that he used a firearm when shooting Parker. Appellant admitted that he threw a weapon that he described as a large gun out of his van window once he turned onto Airport Highway, and a large caliber firearm was not found at the scene. Furthermore, witnesses placed appellant's minivan at the scene at the time of the shooting and Parker's blood and bodily tissue was discovered on appellant's minivan. There was no evidence to the contrary. Rather, appellant attempted to show that he acted in self-defense.

Self-defense

{¶ 47} Finally, as part of appellant's second assigned error, he argues that "the trial court erred and the verdict is not supported by sufficient evidence that Mr. Booker did not sufficiently prove self-defense by a preponderance of the evidence." We disagree.

{¶ 48} Self-defense is an affirmative defense a defendant must prove by a preponderance of the evidence. *State v. Smith*, 12th Dist. No. CA2010-05-047, 2011-Ohio-1476, ¶ 33. To establish self-defense in a case where a defendant used deadly force, "the defendant must prove: (1) he was not at fault in creating the situation giving rise to the affray; (2) he had a bona fide belief he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was the use of deadly force; and (3) he did not violate any duty to retreat or avoid the danger." *State v. Robbins*, 58 Ohio St.2d 74, 388 N.E.2d 755 (1979), paragraph two of the syllabus. 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). *See also State v. Williford*, 49 Ohio St.3d 247, 249, 551 N.E.2d 1279 (1990); *State v. Caudill*, 6th Dist. No. WD-07-009, 2007-Ohio-1557, ¶ 82; and *State v. Clark*, 6th Dist. No. F-10-025, 2011-Ohio-6310, ¶ 22.

{¶ 49} It is well-settled that a jury is free to believe or disbelieve all, part, or none of the testimony of any witness since the jury is in a much better position than a reviewing court to view the witnesses, observe their demeanor, and assess their credibility. *State v. Nichols*, 85 Ohio App.3d 65, 76, 619 N.E.2d 80 (4th Dist.1993). Testimony emerged that could have convinced the jury that appellant shot and killed Parker and shot and wounded Turner while both men were at the back of the vehicle. Thus, the jury could have concluded that appellant was not in imminent danger and had means to escape other than by use of deadly force—specifically by getting into his vehicle and driving away. Further, the jury could have also concluded that Parker, Garrett, and Turner all exited on the right side of the vehicle and started to flee. At that point, appellant was not in imminent danger and had a duty to retreat and avoid any further danger.

{¶ 50} We cannot say the jury clearly lost its way in rejecting appellant's self-defense argument. The jury was required to assess the credibility of the witnesses and determine which version of the events it believed. The testimony of Turner and Garrett, along with the physical evidence, provides competent, credible evidence upon which the

jury could find appellant failed to prove by a preponderance of the evidence that he acted in self-defense.

{¶ 51} Therefore, appellant's second and third assignments of error are not well-taken.

III. CONCLUSION

{¶ 52} We find that substantial justice was done. Appellant's three assignments or error are found not well-taken. The judgment of the Lucas County Court of Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

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

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE