[Cite as *State v. Gott*, 2013-Ohio-4624.]

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

State of Ohio — Court of Appeals No. L-11-1070

Appellee — Trial Court No. CR0201001636

v.

Ray Gott — **DECISION AND JUDGMENT**

Appellant — Decided: October 18, 2013

* * * * *

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

Timothy W. Longacre, for appellant.

* * * * *

JENSEN, J.

{¶ 1} Following a jury trial, defendant-appellant, Ray Gott, timely appeals his February 23, 2011 conviction for voluntary manslaughter with a firearm specification, violations of R.C. 2903.03(A) and 2941.145. For the reasons that follow, we affirm Gott's conviction.

I. Factual Background

{¶ 2} Gott's conviction for voluntary manslaughter stems from the shooting death of Edward Christopher Lee on April 4, 2010.

{¶ 3} On April 3, 2010, Lee celebrated his birthday at a barbecue with friends and family. After the barbecue, Lee and his wife, Vonetta, went to the Liberty Bar with Vonetta's brother, Sherlon McKenzie, and McKenzie's fiancée, Leticia Dorsey. Gott's daughter, Ashley, who had once dated McKenzie, was also at the bar that night with three of her cousins. There was conflicting testimony about whether Ashley spoke with McKenzie, Lee, or Vonetta at the Liberty Bar, but the witnesses seemed to agree that Ashley and Leticia did not interact at that time.

{¶ 4} At this point the witnesses' versions of events diverge. According to the state's witnesses, when the bar closed, Lee and Vonetta left separately in one car, and McKenzie and Leticia in another. They were headed to an after-hours club on Lagrange Street. Although not part of the group, Ashley and her cousins followed McKenzie and Leticia. While they were stopped at a stop sign or a stoplight at an intersection, Ashley's group pulled Leticia from the car and began hitting her with a high-heeled shoe. Leticia sustained cuts that were bleeding. Lee and Vonetta arrived and Ashley and her cousins took off. Ashley denies that she or her cousins instigated the fight at the intersection and claims that McKenzie, Leticia, Vonetta, and Lee were all together and that it was they who assaulted Ashley.

{¶ 5} After the incident at the stop sign, Leticia became intent on fighting Ashley "one-on-one." She went home to change her clothes and clean up, and she assembled a group that included McKenzie, Lee, Vonetta, Leticia's sisters, Kevia and Kiana Dorsey, among others. A caravan of several cars headed to the Moody Manor apartments, where Ashley's sister lived, to seek out Ashley. Ashley wasn't there, so the group left.

{¶ 6} Shortly after leaving, Leticia and her group learned that Ashley had arrived at Moody Manor. Leticia's group returned so the two women could fight. A crowd of approximately 30 people assembled in the parking lot. Like Leticia, Ashley was there with a group of people, including Gott. People began fighting in the parking lot. At some point during the fighting, Gott retrieved a gun and fired multiple shots. One hit McKenzie's leg and one hit Lee's leg. After being shot, Lee lay on the ground. The state claims that while Lee was on the ground, Gott stood over him, said "no one fucks with my family," and despite pleas by Lee that they were leaving and that Gott should stop shooting, Gott fired another shot into Lee's chest. Police and ambulance were called and transported Lee to St. Vincent Hospital where he later died. Gott fled before the police arrived and instructed his nephew to throw the gun in the river. Numerous witnesses identified Gott in a photo array and he ultimately turned himself in.

{¶ 7} On April 13, 2010, Gott was indicted for Lee's murder, a violation of R.C. 2903.02(B), and for the felonious assault of McKenzie, a violation of R.C. 2903.11, both carrying firearms specifications under R.C. 2941.145. The case went to trial before a jury from February 7 to February 18, 2011. Gott claimed that Lee was the aggressor and that

he shot Lee in self-defense but did not intend to kill him. Although Gott conceded during police questioning that he was the only one with a gun, he presented witnesses at trial who testified that Lee also had a gun. At the conclusion of the trial, the trial court instructed the jury on self-defense and, over the state's objection, on the reduced charge of voluntary manslaughter. The jury returned a guilty verdict on the voluntary manslaughter charge, with a firearms specification. It rendered a verdict of not guilty on the murder and felonious assault charges.

{¶ 8} Gott now appeals that verdict, assigning the following errors for our review:

I. THE TRIAL COURT COMMITTED ERROR BY EXCLUDING EXPERT TESTIMONY CENTRAL TO DEFENSE OF SELF-DEFENSE.

II. THE TRIAL COURT IMPROPERLY EXCLUDED AND/OR LIMITED EVIDENCE OF IMPEACHMENT.

III. THE DECISION OF THE TRIAL COURT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

II. Legal Standards and Analysis

{¶ 9} The trial court has broad discretion in the admission of evidence, and unless it has clearly abused its discretion to defendant's prejudice, an appellate court should not disturb the trial court's decision. *State v. Barnes*, 94 Ohio St. 3d 21, 23, 2002-Ohio-68, 759 N.E.2d 1240 (2002). Accordingly, with respect to Gott's first two assignments of error, our review is limited to determining whether the trial court acted unreasonably, arbitrarily, or unconscionably in its decisions to admit or exclude evidence. *Id.*

A. Appellant's First Assignment of Error.

{¶ 10} In his first assignment of error, Gott claims that the trial court erred in excluding expert testimony from Dr. David Connell, a clinical psychologist retained by Gott. Dr. Connell authored a report and was expected to testify that Gott reasonably and honestly believed that his life and his family's lives were in danger and that he acted in self-defense the night he shot Lee and McKenzie. Anticipating that Gott would seek to admit this testimony, the state filed a motion in limine to exclude it.

{¶ 11} The trial court held what it referred to as a "hybrid" *Daubert* hearing on November 3, 2010. Dr. Connell was examined by both parties and by the court concerning the opinions he would be offering and the foundation for those opinions. He described that he had been hired to determine if Gott had acted in self-defense in the shootings of Lee and McKenzie. As part of this process, he took a history from Gott during three interview sessions spanning 7.5 hours, and reviewed a number of records including evaluations, progress notes, assessments, summaries, and medication flow sheets from United Behavioral Health Group, Inc., the Toledo Police Department's supplemental crime report, and the forensic toxicology report for Lee. He also administered to Gott the Slosson Intelligence Test and the Minnesota Multiphasic Personality Inventory- 2-Restructured Form. Based on his evaluation of Gott, the records he reviewed, and Gott's test results, he concluded that Gott's IQ was in the low average range. He also concluded that Gott suffered from bipolar disorder, which was effectively managed by medication. Nevertheless, Dr. Connell opined to a reasonable degree of

psychological certainty that Gott had "an honest belief that he was in immediate danger of death or great bodily harm and that his only reasonable means of escape from such danger was by the use of deadly force."

{¶ 12} After hearing Dr. Connell's testimony, the trial court concluded that Dr. Connell had not described a specific theory or technique that he had used, that there was no "peer review methodology for this type of expert opinion," that there was no "strong scientific method" relied upon, that whether Gott acted in self-defense was a question for the jury, and that Dr. Connell did not have the "ability to testify as an expert and render an opinion with regard to the standards that are required under *Daubert*." The defense was precluded from offering his opinions.

{¶ 13} At trial, the court allowed additional argument on this issue. It entertained the possibility of allowing Dr. Connell to testify as to all aspects of his evaluation of Gott without providing his ultimate conclusion that Gott believed that he was in danger or that he acted in self-defense. Ultimately, Gott's treating psychiatrist, Tufal Khan, M.D., instead testified and provided information about Gott's mental health diagnoses and the trial court did not permit Dr. Connell to testify. Gott claims that this was error. He claims that Dr. Connell's testimony was central to his self-defense claim.

{¶ 14} Under Ohio law, self-defense is an affirmative defense which a defendant must establish by a preponderance of the evidence. R.C. 2901.05(A); *State v. Martin,* 21 Ohio St.3d 91, 94, 488 N.E.2d 166 (1986). To prove self-defense, a defendant must prove (1) that he was not at fault in creating the situation giving rise to the use of deadly

force, (2) that he had reasonable grounds to believe and an honest belief that he was in immediate danger of death or great bodily harm and that his only means of escape from such danger was by the use of deadly force, and (3) that he did not violate any duty to escape to avoid the danger. *State v. Cooper,* 170 Ohio App. 3d 418, 426, 2007-Ohio-1186, 867 N.E.2d 493, ¶ 18 (4th Dist.), citing *State v. Williford*, 49 Ohio St.3d 247, 249, 551 N.E.2d 1279 (1990). Gott intended for Dr. Connell to provide testimony establishing the second element.

{¶ 15} To determine whether the trial court properly excluded Dr. Connell's testimony, we must review whether his testimony satisfied the requirements of Evid.R. 702. That rule permits a witness to testify as an expert where:

> (A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;
>
> (B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;
>
> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;

(2) The design of the procedure, test, or experiment reliably implements the theory;

(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

{¶ 16} More succinctly stated, for expert testimony to be admissible, Evid.R. 702(A) requires that the subject of the testimony be beyond the knowledge possessed by lay persons, (B) requires that the witness be qualified because of experience, education, and training, and (C) requires that the witness' testimony be reliable. Gott argues that the trial court erred by failing to address the first and second prongs of Evid.R. 702 and that it applied an incorrect legal standard in considering the third prong because it required Dr. Connell to establish that his methodologies were "generally accepted."

{¶ 17} Expert testimony is inadmissible under Evid.R. 702(A) if it concerns matters "within the ken of the jury." *State v. Johnson*, 10th Dist. Franklin No. 02AP-373, 2002-Ohio-6957, ¶ 37, quoting *State v. Sallie*, 81 Ohio St.3d 673, 676, 693 N.E.2d 267 (1998). *See also State v. Coulter*, 75 Ohio App.3d 219, 228, 598 N.E.2d 1324 (12th Dist.1992) ("When an issue of fact is within the experience, knowledge, and

comprehension of the trier of fact, expert opinion testimony on that issue is unnecessary and inadmissible since it would not assist the trier of fact in understanding the evidence or determining a fact in issue.").

{¶ 18} The second element of a self-defense claim requires defendant to establish that he had a bona fide belief that he was in imminent danger of death or great bodily harm, and that the only means of escape from the danger was the use of force. *Coulter* at 227-28. This is a subjective test and the defendant's state of mind is crucial. *Id.* at 228. It is usually best established by the testimony of the defendant. *State v. Herdman*, 5th Dist. Delaware No. 99CAA12067, 2000 WL 1133244 (Aug. 8, 2000), citing *State vs. Seliskar*, 35 Ohio St.2d 95, 96, 298 N.E.2d 582 (1973).

{¶ 19} Expert testimony ordinarily may not be admitted to establish a self-defense claim. Courts typically follow the general rule that expert testimony from a psychologist or psychiatrist is inadmissible for purposes unrelated to the insanity defense. *See State v. Wilcox*, 70 Ohio St.2d 182, 199, 436 N.E.2d 523 (1982). Narrow exceptions exist in cases involving battered woman or battered child syndromes. *See State v. Nemeth*, 82 Ohio St.3d 202, 208-209, 694 N.E.2d 1332 (1998); *Coulter* at 229. In those types of cases, expert testimony often assists the jury by dispelling popular misconceptions they may have about battered women and children. *Coulter* at 229; *Nemeth* at 207. In the absence of one of those exceptions, however, expert psychological testimony is not admissible.

{¶ 20} Courts have articulated the reason for disallowing testimony from psychologists and psychiatrists in self-defense claims. For instance, in *Johnson*, 10th Dist. Franklin No. 02AP-373, 2002-Ohio-6957, ¶ 38, the Tenth District explained:

> In the context of a claim of justification based on self-defense, and whether a defendant acted reasonably under the circumstances, courts have held that "this issue is generally not a proper subject for expert testimony because 'the question of reasonableness is quintessentially a matter of applying the common sense and the community sense of the jury to a particular set of facts and, thus, it represents a community judgment.'" *State v. Salazar* (1995), 182 Ariz. 604, 898 P.2d 982, 988, quoting *Wells v. Smith* (D.Md.1991), 778 F.Supp. 7, 8. Accordingly, "[b]ecause jurors are capable of determining whether the use of force in self-defense is reasonable, expert testimony bearing on that issue is generally inadmissible." *Salazar,* supra, at 988.

{¶ 21} Other courts have reached the same conclusion. *See, e.g., State v. Taylor*, 8th Dist. Cuyahoga No. 65711, 1995 WL 663267 (Nov. 9, 1995) *aff'd,* 78 Ohio St. 3d 15, 676 N.E.2d 82 (1997) (finding that it was not ineffective assistance of counsel to fail to raise defendant's paranoid personality disorder because psychiatric testimony is inadmissible for purposes unrelated to the insanity defense); *State v. Taylor*, 2d Dist. Montgomery No. 15119, 1996 WL 417098 (July 26, 1996) (concluding that opinions about the effect of defendant's psychological makeup on her perception that she was in

fear of great harm or death would invade the province of jury and were properly excluded); *State v. Wright*, 8th Dist. Cuyahoga No. 43869, 1982 WL 9365 (May 20, 1982) (holding that doctor's testimony about defendant's mentality were inadmissible and that jury could draw its own conclusions as to whether defendant had culpable mental state).

{¶ 22} We, too, conclude that it was within the province of the jury to evaluate whether defendant had reasonable grounds to believe and an honest belief that he was in immediate danger of death or great bodily harm and that his only means of escape from such danger was by the use of deadly force. Evid.R. 702(A) was not satisfied, thus the trial court properly excluded Dr. Connell's testimony.

{¶ 23} Gott's first assignment of error is not well-taken.

B. Appellant's Second Assignment of Error.

{¶ 24} In his second assignment of error, Gott argues that the trial court improperly excluded evidence of Lee's character. He claims that to establish that he feared or had reason to fear Lee, it was essential that he be permitted to provide evidence of Lee's character and his propensity for violence. To do this, Gott sought to question Lee's widow, Vonetta, about domestic violence reports that she made in which she told police that Lee had assaulted her and threatened her with a gun.

{¶ 25} During Vonetta's cross-examination, defense counsel asked her about Lee's reputation in the community for violence. She first responded that "[t]hey don't let anybody get over on him or his family." Counsel asked the question again and Vonetta

maintained that she did not know whether her husband had a reputation in the community for violence. She acknowledged that he had been violent toward her "two or three times" and that she had filed domestic violence reports with the Toledo Police Department. At that point the state objected and the parties conferred with the court. They discussed that counsel intended to use the police reports to establish that Vonetta knew Lee to carry a gun. The court overruled the state's objection and allowed defense counsel to ask Vonetta if her husband was known to carry a weapon. Vonetta responded "not that I know of." Counsel began to impeach her with a domestic violence report where Vonetta alleged that Lee threatened her with a gun. The court released the jury and the parties engaged in argument about the extent to which Gott could use the various domestic violence reports in cross-examining Vonetta.

{¶ 26} The state argued that Gott was stuck with the answer given by Vonetta that she did not know Lee to carry a weapon, even though it conflicted with the information contained in the police report. The state maintained that Gott was not permitted to inquire about specific instances of Lee's conduct unless he could establish that he knew of them before he shot Lee. Gott argued that he could use the police report to impeach Vonetta and for the purpose of showing that Lee carried a weapon and had a history of violence, therefore, justifying Gott's purported fear of Lee.

{¶ 27} Ultimately the court ruled that Gott could impeach Vonetta with the police report under Evid.R. 607 because it conflicted with her testimony at trial that she did not know Lee to carry a weapon. The court also ruled that the evidence was admissible

under Evid.R. 405(B) because it went to the second element of Gott's self-defense claim–that he feared the victim and had an honest belief that he was in immediate danger of death or great bodily harm.

{¶ 28} When Vonetta's testimony continued, defense counsel asked her about a March 11, 2009 police report where she stated that Lee approached her brandishing a handgun. Vonetta claimed that the statement in the report concerning the gun was not true and that she made up the statement because she knew that the police would respond more quickly if they believed a gun was involved. She conceded that the remainder of the information in that report concerning the assault was true. Vonetta also acknowledged that there had been an incident in 2002 where Lee threatened her with a gun upon seeing her in a hotel parking lot with another man. She described the gun as black but did not know what kind it was or where on his person he was carrying it. At that time, the court did not permit further questioning about incidents forming the basis for other police reports she had filed.

{¶ 29} These arguments resurfaced when Gott called Vonetta in his case-in-chief. Counsel questioned Vonetta about other domestic disturbances between her and Lee, including a 2002 incident where she was admitted to the hospital after Lee hit her and caused several other injuries "all over" her body. He also questioned her about a December 26, 2004 police report she made after he pulled her down the stairs. He asked if Lee placed a gun to her head in a January 2004 incident and Vonetta claimed

that she did not recall. After Vonetta answered questions by the state during which she claimed that Lee had not been violent with her in a "long time," defense counsel asked if she believed February 22, 2010 to have been a long time ago, an indication that she had reported domestic violence by Lee just two months before Lee's shooting death.

{¶ 30} Gott now argues that the trial court erred because despite ruling that he could question Vonetta about the police reports, it limited the testimony and did not permit him to inquire about the specific information contained within the police reports.

{¶ 31} In general, "[e]vidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion." Evid.R. 404(A). Evid. R. 404(A) describes three exceptions to this rule. One of those exceptions is contained in (A)(2), which states:

> Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor is admissible * * *.

{¶ 32} Where character evidence is permitted, Evid.R. 405 describes the methods by which a party may prove character:

> (A) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be

made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(B) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct.

{¶ 33} Numerous courts have examined the relationship between Evid.R. 404(A)(2) and 405 in the context of a self-defense claim. They describe:

Under Evid.R. 404, evidence of a trait of an individual's character is not generally admissible for the purpose of proving that he acted in conformity with it. However, Evid.R. 404(A)(2) creates an exception for evidence concerning the character of a victim of the crime if offered by an accused, or by the prosecution to rebut evidence offered by the defense. While Evid.R. 404 provides that such evidence is admissible, Evid.R. 405 limits the permissible methods of proving character. Character may generally be proven by means of reputation and opinion testimony. However, only where character constitutes an element of a charge, claim or defense, may it be proven by means of specific acts of conduct. See Evid.R. 405(B). Thus, whether evidence concerning the victim is admissible to prove self-defense depends upon the type of evidence being offered.

State v. Busby, 10th Dist. Franklin No. 98AP-1050, 1999 WL 710353, * 5 (Sept. 14, 1999).

{¶ 34} Character evidence that defendants seek to offer to support a self-defense claim typically falls into two categories: (1) testimony concerning the victim offered to demonstrate the defendant's state of mind at the time of the incident, and (2) testimony about the victim's character offered to prove that the victim was more likely the aggressor. *Id.*

{¶ 35} The Ohio Supreme Court has held that "Evid.R. 405(B) precludes a defendant from introducing specific instances of the victim's conduct to prove that the victim was the initial aggressor." *Barnes*, 94 Ohio St.3d at 24, 759 N.E.2d 1240. But a defendant may testify about specific instances of the victim's prior conduct which were known to defendant in order to establish defendant's state of mind. *State v. Carlson*, 31 Ohio App.3d 72, 73, 508 N.E.2d 999 (8th Dist.1986), paragraph one of the syllabus. "These events are admissible in evidence, not because they establish something about the victim's character, but because they tend to show why the defendant believed the victim would kill or severely injure him." *Id.* The critical issue is what the defendant knew about the alleged victim at the time of the confrontation. *Busby* at *5.

{¶ 36} Here, Gott's primary purpose for offering evidence of specific acts of violence was to establish that he feared Lee. What's missing, however, is any evidence that Gott *knew* of these specific acts of violence. Gott never testified. He never introduced any evidence to establish that he knew of Lee's past violent acts. And despite

Gott's claims to the contrary, "[a]n alleged victim's purported violent nature is not an essential element of self-defense and therefore, witnesses other than the defendant have no admissible basis for testifying to specific instances of violent conduct." *State v. Williamson*, 4th Dist. Ross No. 95CA2155, 1996 WL 530008 *4 (Sept. 12, 1996). Accordingly, Gott could not properly offer the evidence.

{¶ 37} Having said this, despite the evidence of specific acts being improper, the trial court actually permitted Gott to question Vonetta about specific instances of violence perpetrated by Lee, despite the fact that Gott did not demonstrate that he had knowledge of those incidents before shooting Lee. Much information about Lee's character was made known to the jury.

{¶ 38} Finally, to the extent that Gott claims it was necessary to introduce evidence of specific acts to demonstrate that Vonetta was untruthful when she said that she did not know Lee to carry a weapon and did not know whether he had a reputation for violence, the trial court gave him considerable leeway to do just that. In fact, the trial court allowed Lee to go well beyond what was necessary to impeach Vonetta's trial testimony.

{¶ 39} The court in *State v. Powell*, 8th Dist. No. 79928, 2002-Ohio-2618, ¶ 12, 24, considered a very similar issue. There, the defendant's fiancé testified that she did not know him to carry a gun. The state questioned her about a domestic violence report she had filed in which she told police that defendant had assaulted her and pointed a gun at her. The witness testified that the gun was actually a spatula and denied other details

contained in the police report. The state called as a rebuttal witness the police officer who responded to the domestic violence report who testified that the report accurately reflected what the witness had told him at the time of the incident. Defendant claimed that this was error. The Eighth District held that "the state was permitted under Evid.R. 607 to question the credibility of [the witness] and her statement that she had never observed the appellant with a gun." The court noted, however, that the details contained in the report regarding the physical assault of the witness should not have been permitted. Here, as in *Powell*, the trial court permitted Gott to present evidence beyond what was permissible to impeach Vonetta.

{¶ 40} Gott's second assignment of error is not well-taken.

C. Appellant's Third Assignment of Error.

{¶ 41} In his final assignment of error, Gott argues that "the trial court's decision was against the manifest weight of the evidence." He claims that the state did not prove all the elements of voluntary manslaughter because there was no evidence that Gott acted in a fit of passion; that an independent witness who testified–Jessica Buckner–failed to identify Gott as the sole shooter; and that Buckner's description of the shooter did not match Gott's physical appearance. As the state properly points out, this assignment presents a challenge to both the weight of the evidence *and* the sufficiency of the evidence. Under either standard, Gott's argument fails.

{¶ 42} "Sufficiency of the evidence" is a legal standard which is applied to determine whether the evidence is legally sufficient to support a jury verdict as a matter

of law. *State v. Thompkins*, 78 Ohio St. 3d 380, 386, 678 N.E.2d 541 (1997), *superseded by constitutional amendment on other grounds, State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668 (1997). It requires the court to determine whether the state has presented enough evidence on each element of the crime to allow the case to go to the jury. *Id*. "Weight of the evidence," on the other hand, contests the believability of the evidence before the jury. *State v. Mick*, 6th Dist. Lucas No. L-11-1034, 2012-Ohio-3296. "The weight of the evidence concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other." *State v. Baatin*, 10th Dist. Franklin No. 11AP-286, 2011-Ohio-6294, ¶ 9, citing *Thompkins* at 387.

{¶ 43} We first address Gott's argument that the state failed to present evidence of each element of the crime of voluntary manslaughter. R.C. 2903.03(A) provides:

> 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 * * *.

Gott claims that the state failed to provide evidence of sudden passion or a fit of rage. But Gott's argument on appeal is directly contrary to what he argued to the trial court when he requested a jury instruction on voluntary manslaughter.

{¶ 44} At defense counsel's request, and over the state's objection, the court instructed the jury on voluntary manslaughter, giving jurors the option to convict Gott of a lesser offense than the murder charge for which he was indicted. The following

exchange took place between defense counsel and the court:

> Mr. McKinney: The court asked whether I want to have a voluntary manslaughter and self-defense per OJI and I indicated that I did. So it was requested some time ago[.]
>
> The court: Has the request changed at all over the last seven days?
>
> Mr. McKinney: It has not, Your Honor.
>
> * * *
>
> Mr. McKinney: Your Honor, there is ample evidence which if believed by a jury would support the voluntary manslaughter claim.
>
> The essential element is one of the sufficient provocation and secondly whether there is a sudden passion.
>
> I would argue that this whole event transpired within about three minutes, that there was clearly an armada, as I call it, of vehicles coming to this man's daughter's house. There was a fight involving some 30 people. He's testified that he was afraid of Edward Lee. There is ample evidence that Edward Lee was a scary guy. He testified or said on the tape Edward Lee knocked him down. [Gott's niece] testified he was slammed. There is certainly ample evidence both of self-defense and of provocation of the kind that would support, if believed by a jury, a voluntary manslaughter claim.

Gott now argues that the evidence at trial did not indicate that Gott reacted in a sudden fit or passion.

{¶ 45} The trial court articulated its reasons for allowing the jury to be instructed on the lesser charge of voluntary manslaughter: the argument between the families became very aggressive and very violent very quickly and Gott was not initially involved in the argument but was suddenly "thrown into it" after being called by a younger family member. Regardless of whether or not the court correctly concluded that Gott's conduct rose to the level of "sudden passion" or "a sudden fit of rage" brought on by "serious provocation," we agree with the state that Gott invited any purported error by requesting an instruction on this charge. *State ex rel. Beaver v. Konteh*, 83 Ohio St.3d 519, 520-21, 700 N.E.2d 1256 (1998) (holding that defendant charged with murder but convicted of felonious assault invited error by requesting felonious assault instruction). "Under the invited-error doctrine, a party will not be permitted to take advantage of an error that he himself invited or induced the trial court to make." *Id.*, citing *State ex rel. The V Cos. v. Marshall*, 81 Ohio St.3d 467, 471, 692 N.E.2d 198 (1998). *See also State v. Eldridge*, 12th Dist. Brown No. CA2002-10-021, 2003-Ohio-7002, ¶ 25, f.n.3 (explaining that under the invited-error doctrine, appellant may not claim trial court erred in granting his request for a jury instruction).

{¶ 46} Finally, turning to Gott's argument that the jury's verdict was against the manifest weight of evidence, we again disagree. He bases this contention on the testimony of two witnesses who testified that Lee had a gun, and on the varying

descriptions of the shooter's physical appearance. We find, however, that the jury's verdict was supported by competent, credible evidence.

{¶ 47} Cierra Richardson, Gott's then 13-year-old niece, testified that she saw Lee with a gun during the altercation at Moody Manor. However, she conceded on cross-examination that she did not report this to police when they interviewed her and that she saw Gott shoot Lee. Laqresha Hadden, Gott's niece, also testified that she saw Lee with a handgun at the Liberty Bar. Again, she did not report this to police and she did not contend that she saw Lee with a gun at Moody Manor. The jury could reasonably have rejected Richardson's and Hadden's testimony as not credible. *See State v. Fell*, 6th Dist. Lucas No. L-10-1162, 2012-Ohio-616, ¶ 14 ("The jury is free to accept or reject evidence, to note ambiguities and inconsistencies in testimony–whether between several witnesses or in the conflicting statements of a single witness–and to resolve or discount them accordingly.") In any event, in contrast to these witnesses' testimony, other witnesses who testified denied that Lee had a gun, no one interviewed by the police claimed that Lee had a gun, and the police did not find a gun at the scene. Numerous witnesses identified Gott as the shooter. And more importantly, Gott himself admitted during police questioning that he shot Lee.

{¶ 48} As for the shooter's physical description, Jessica Buckner, who witnessed the altercation from a bedroom window, testified that the shooter was a large man wearing a white hooded sweatshirt. The defense disputes that Gott was a "large" man and McKenzie testified at trial that the shooter's sweatshirt was blue. This presented a

mere conflict to be resolved by the jury. The jurors observed the witnesses' testimony and viewed the physical evidence. It was within the jury's province to make credibility determinations. And again, the numerous witnesses who testified identified Gott as the shooter and Gott himself admitted to police that he shot Lee. Having reviewed the testimony and evidence, regardless of how Buckner described the color of the sweatshirt or Gott's stature, there was substantial, credible evidence upon which the jury could find that Gott shot Lee. The jury's verdict was not against the manifest weight of the evidence.

{¶ 49} Gott's third assignment of error is not well-taken.

III. Conclusion

{¶ 50} We find Gott's three assignments of error not well-taken. The trial court properly excluded psychological testimony in support of Gott's self-defense claim; Gott was permitted much leeway in eliciting testimony from Lee's widow as to other bad acts Lee had committed; any error in instructing the jury on the charge of voluntary manslaughter was invited; and the jury's verdict was supported by competent, credible evidence. The judgment of the Lucas County Court of Common Pleas and Gott's February 23, 2011 conviction are affirmed. The costs of this appeal are assessed to appellant 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.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE