[Cite as *State v. White*, 2013-Ohio-51.]

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

State of Ohio	Court of Appeals No. L-10-1194
Appellee	Trial Court No. CR0200902300
v.	
Thomas Caine White	**DECISION AND JUDGMENT**
Appellant	Decided: January 11, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Evy M. Jarrett, Assistant Prosecuting Attorney, for appellee.

Deborah Kovac Rump, for appellant.

* * * * *

YARBROUGH, J.

{¶ 1} Defendant-appellant, Thomas C. White, formerly a police officer for the village of Ottawa Hills, appeals his convictions for felonious assault with a firearm specification. For the following reasons, we reverse his convictions and remand this case for a new trial.

I. Background

{¶ 2} On July 2, 2009, White was indicted by a Lucas County Grand Jury for the on-duty shooting of a motorcyclist after a brief vehicle pursuit through the streets of Ottawa Hills. The shooting left the motorcyclist, Michael McCloskey, permanently paralyzed from the waist down. On May 14, 2010, following a four-day jury trial, White was convicted of both felonious assault and the firearm specification. On June 21, 2010, the Lucas County Court of Common Pleas sentenced him to a ten-year prison term. This appeal followed.

A. Essential Trial Testimony

{¶ 3} This case is unique. Although the propriety of Officer White's decision to shoot was, and remains, disputed, the events preceding it are not. We have thoroughly examined the testimony and other evidence in the trial record. Because an understanding of the material facts is critical to addressing the legal issues White raises, they will be rendered in considerable detail.

1) Officer Thomas White

{¶ 4} At approximately 2:15 a.m. on May 23, 2009, Officer White was on routine patrol in his Ottawa Hills police cruiser. He had been a part-time police officer and full-time dispatcher for the village since September 2005. He was driving on Indian Road which traverses the village of Ottawa Hills in a northwesterly direction from Secor Road to Central Avenue. The posted speed limit is 25 m.p.h. At or near Hempstead Road, he

came up behind two motorcyclists traveling on Indian in the same direction. The motorcyclists were McCloskey and his friend, Aaron Snyder.

{¶ 5} As White drove behind them, he observed them "weaving from side to side." Believing them to be impaired, he continued to follow. White testified that "McCloskey crossed the south center yellow lines multiple times, [made] incomplete stops at stop signs, weav[ed] within the lane, [with] excessive speed above the speed limit." He saw Snyder "weaving, [making] incomplete stops." At Evergreen Road, after stopping for the stop sign, both motorcyclists started away quickly. White believed they were exceeding 25 m.p.h. and again observed them weaving. To the right of his rearview mirror, mounted on the dash-board of his cruiser, was a video camera. At this point White activated it "to document their driving."[1] He then requested assistance from another officer, Christopher Sargent, in preparation for stopping the two men. He told Sargent that based on the observed behavior, "they could possibly run." Sargent responded that he was on Central Avenue approaching Westchester Road. White delayed pulling them over until Sargent could arrive at his location.

[1] This device also has an audio component that captured contemporaneous statements made during the event, though not all are equally audible. During White's cross-examination, the prosecutor played the video and White reviewed what he had observed for the jury. He specifically identified Snyder's maneuvering on Indian near Pembroke Road as: "an erratic movement in his lane, very quickly weaving from the white curb line to the centerline and cross[ing] the centerline and mov[ing] radically back to the curb [line]." McCloskey, at that point, had "cross[ed] the center yellow line a total of four times throughout that distance."

{¶ 6} At the stop sign at Westchester Road the motorcyclists halted. They sat on their bikes talking for about 10 seconds. White, behind them in his cruiser, watched McCloskey "point at the ground" and then at Snyder's boot. White testified: "Mr. Snyder turned over his shoulder and looked at my vehicle. Mr. McCloskey turned as he was speaking with Mr. Snyder. They both pointed at the ground at various times during that stop."

{¶ 7} After this movement, the two men sped away suddenly, accelerating their bikes rapidly down Indian. White believed they were fleeing him. In response he activated his overhead emergency lights and siren and gave chase, notifying the Ottawa Hills dispatcher of his pursuit. As the motorcyclists approached the intersection of Central Avenue, where Indian ends in the form of a sharp curve, White testified that Snyder "split off from" McCloskey and increased speed just before losing control at the curve. His motorcycle bounced up and over the elevated mound of a grassy traffic island and spilled out onto Central just as Sargent's cruiser arrived. McCloskey stopped his bike at the intersection, then turned around to his right and watched White pull up behind him.

{¶ 8} White exited his cruiser and drew his .40-caliber Glock pistol. He stepped away from the open door to his left. From where he stood, White could not fully see McCloskey's right arm, nor his hands at all. McCloskey had turned forward, but then turned back to his right again. With his pistol aimed at McCloskey, White yelled "get your hands up." White described what he saw next: "He turned and looked at me, and

with the right arm made a reaching movement." Believing that McCloskey "was pulling a weapon," and fearing that his life and Sargent's life were in danger, White fired once. McCloskey fell to the ground and the motorcycle toppled on him. Still pointing his Glock, White approached McCloskey and patted over his pockets and waist for a weapon. Only then did he find that McCloskey was not armed.[2]

{¶ 9} On cross-examination, White stated that he believed McCloskey could clearly see his cruiser's oscillating lights during the pursuit, but was uncertain whether he could also hear the siren because the motorcycles were so loud. He was unsure when McCloskey would have first recognized that he was being pursued. White stated that when he was stopped behind McCloskey at Central, before exiting the cruiser, he did not feel in immediate danger and even hurriedly radioed the dispatcher. He then got out to continue what he considered "a high-risk vehicle stop." He acknowledged the cruiser's three lighting systems created a blinding "wall of light" behind McCloskey, and agreed the sirens were very loud. He did not see a weapon before shooting. White stressed that

[2] Another officer who arrived minutes after the shooting found a knife in a sheath inside McCloskey's boot. White had not searched there. The officer confiscated it just before EMT medics took McCloskey to the hospital. The knife measured about five and a half inches in length, with a blade of about two and a half inches. At trial, the parties debated whether McCloskey's "boot knife" was a formal "weapon" with which he had armed himself or, as the state argued and McCloskey himself claimed, merely a "gentleman's knife." Also disputed was whether the confiscating officer had found it concealed or in plain view. Regardless of how the knife is characterized or whether it was concealed, there is no dispute that White was unaware of its presence *before* he fired. It is therefore an after-acquired fact which is of no consequence to our disposition here.

the view of McCloskey seen on the videotape in the seconds before he fired was not his view.[3]

2) Officer Christopher Sargent

{¶ 10} Officer Sargent testified that in the early morning hours of May 23, 2009, he was on routine patrol in another section of Ottawa Hills. White contacted him by radio asking about his location because he wanted assistance in stopping "a couple of motorcyclists." White told Sargent "the motorcyclists were messing with him," so Sargent proceeded toward the intersection of Talmadge Road and Central Avenue. He then received a second transmission that White was now pursuing the motorcyclists westbound on Indian towards Central.

{¶ 11} Activating his siren and overhead lights, Sargent drove west on Central toward Indian but in the eastbound lane. On his left, approximately 200 feet away, Sargent could see the lights of the motorcycles and hear their engines throttling as they accelerated up Indian. He described them as "extremely loud" and traveling at an "extremely high rate of speed." As Sargent approached to intercept them, McCloskey's motorcycle came to a stop just as Snyder failed to negotiate the sharp curve on Indian. Sargent watched him go up over the grassy traffic island and make "a sweeping turn," finally stopping out on Central.

[3] Before his indictment, White had submitted a written statement to the Lucas County Grand Jury summarizing his version of the incident. The statement is a typed, two-page document, made shortly after the shooting. It was admitted at trial as state's exhibit No. 23. In its material respects, the statement does not differ from White's trial testimony.

{¶ 12} Sargent immediately exited his cruiser, drew his pistol, and ordered Snyder to show his hands and get on the ground. He complied. Sargent searched him but found no weapon. Snyder exhibited an odor of alcohol, "glassy, bloodshot eyes and slurred speech." He was handcuffed and put into Sargent's cruiser. Snyder was later charged with driving under the influence, driving under suspension, and failure to comply with a police order. Sargent described Snyder's demeanor as "confused," stating "[he] didn't know that the police were behind him."

{¶ 13} Sargent, while dealing with Snyder, could not see what was happening between McCloskey and White because of the flashing lights of the police cruisers. Although he heard a shot, he did not immediately recognize it as gunfire because of the "very loud" noise from the sirens and the motorcycles. After Snyder was secured, Sargent went to check on White. He testified that McCloskey was already on the ground with the motorcycle lying next to him. Sargent asked what happened, but at first White did not respond. A few minutes later, White told Sargent "he hoped he hadn't fucked up and he didn't want to end up in jail - something to that effect." Sargent had worked with White since 2004 and described him as "a very good officer." He had never seen White use excessive force against any suspect.

3) Michael McCloskey

{¶ 14} McCloskey testified that early in the evening of May 22, 2009, he spent about six hours riding his Harley-Davidson motorcycle around Toledo, stopping at various bars and clubs. He was distributing flyers for a "bike night" event to be held at

The Omni, a nightclub where he was in charge of "security duties" and sometimes acted as a security guard himself. In 2009, McCloskey stood six feet two inches and weighed 260 pounds. His security work sometimes required McCloskey to physically restrain or remove unruly bar customers.[4] On this night he was accompanied by his friend Aaron Snyder. While McCloskey promoted The Omni, Snyder, riding his bike, handed out business cards "to drum up business" for his motorcycle-related service shop, "T & A Cycles and Seats." Over the course of their stops, McCloskey and Snyder consumed beer—about one an hour over six hours—but McCloskey denied being under the influence of alcohol at any point.

{¶ 15} About 1:00 a.m., the two men returned to The Omni and went to a kitchen in the back of the building. There they were joined by a third friend, Klint Sharpe. They ate chicken wings and talked for a while. Afterward McCloskey invited Snyder and Sharpe to go to his home in Ottawa Hills. According to Sharpe, who testified at trial, this was to "watch movies and drink a few beers." McCloskey and Snyder left on their

[4] Considerable argument was expended below and in the appellate briefs about the relevance of McCloskey's "imposing" physical appearance, his weight-training habits, including body-building and power-lifting, and his success in local boxing events called "Tough-Man Competitions." He won that event in 2007. Yet, except for what White perceived, or reasonably could have perceived, about McCloskey's physical appearance during the pursuit and immediately before the shooting, the other facts about his physicality, even if true, could not have been known to the officer. They thus have no bearing on White's pre-shooting perceptions or state of mind under the relevant legal standard that applies here. Arguably, however, they may be relevant for others purposes, such as establishing background or context, *see State v. Swiergosz*, 197 Ohio App.3d 40, 2012-Ohio-830, 965 N.E.2d 1070, ¶ 25 (6th Dist.), or as they might bear on a witness's credibility.

motorcycles and traveled down Bancroft Street to Secor Road, where they stopped at the light. They then proceeded into Ottawa Hills on Indian Road. Sharpe followed briefly in his car, a black two-door Chevy Monte Carlo, but turned north on Secor.[5]

{¶ 16} McCloskey testified that as he and Snyder rode down Indian they obeyed the 25 m.p.h. limit. He noticed the headlights of a car behind them, but denied recognizing it was a police cruiser. He assumed it was Sharpe's car.[6] At the intersection of Westchester and Indian, McCloskey agreed they stopped for about ten seconds. He explained that the "pointing" and hand motions seen on the video occurred as the two men were talking about the "brightness of my LED taillights" and "the bad [electrical] wiring we had found," and him wanting Snyder "to stay at my house" that night. "We took our time saying those words."

{¶ 17} After stopping at Westchester, both men accelerated quickly down Indian toward Central. McCloskey conceded, "we got on it a little too much," noting that during this acceleration Snyder's motorcycle was "just as loud as mine, if not louder." As they approached the curve at Central, McCloskey was ahead of Snyder. McCloskey stopped quickly, however, when he saw Sargent's police cruiser crossing in front of him. He then

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[5] At trial Sharpe explained he avoided driving through Ottawa Hills on Indian because "that road is a hotspot for cops" at night. After McCloskey and Snyder started up Indian, Sharpe took Secor to Central Avenue where he turned left and drove west to Indian. There he came upon the flashing lights of Sargent's police cruiser. Although he reached the scene just ahead of other police units, he neither witnessed White's pursuit of his friends nor the shooting.

[6] Ottawa Hills police cruisers are white four-door Ford Crown Victorias marked with blue striping.

turned and saw the flashing lights of White's cruiser behind him. His riding glasses and the bright lights partially blocked his peripheral vision, and the police sirens seemed louder than the engines of the motorcycles. McCloskey shifted from first gear into neutral and remained seated on his motorcycle. He did not engage the kickstand. His left hand was on the left handlebar. He testified that "my right hand [was] on my right leg in plain sight to Officer Sargent," but conceded not knowing where White was.

{¶ 18} On cross-examination, McCloskey agreed that he had turned his body twice to look back at White, "turn[ing] my upper shoulder blades and head." He added that "I turned my head to identify the officer as law enforcement." He acknowledged telling an investigator from the Ohio Bureau of Criminal Identification that White had yelled to "put [my] hands in the air, because that's the only thing that I didn't do to comply." McCloskey then heard a loud gunshot, instantly felt "excruciating pain," and fell to his right, with the motorcycle landing on him. White searched him for a weapon after he went down. McCloskey complained he was not given time to show his hands before he was shot.[7]

4) Aaron Snyder

{¶ 19} Snyder testified that as the pair started down Indian, he too thought Sharpe was following them. For the most part, he rode in the right curb lane until a manhole

[7] The bullet struck McCloskey in the back, causing instant paralysis and damaging most of his major organs. He underwent six surgeries and was hospitalized for about 27 days. His paralysis is permanent. At the time of trial he weighed 130 pounds.

cover forced him to swerve sharply left. When they paused at the Westchester stop sign, Snyder commented to McCloskey about the recent repairs to his motorcycle. He turned and pointed down at McCloskey's seat and taillights as they conversed. He saw the headlights of the car behind them, but assumed it was Sharpe. From Westchester, Snyder conceded they took off at a "high rate of speed," admitting that it well exceeded 25 m.p.h. He testified: "[W]e were playing around. * * * He took off. I took off." Seconds later, as Snyder came around the sharp corner, he saw the headlights of a car on Central "going westbound in the eastbound lane," but heard no siren. Feeling "in danger of being hit," he steered his motorcycle up over a grassy island and pulled it to a hard stop. Only when he noticed the flashing lights did he realize the car was a police cruiser. Snyder claimed he never attempted to evade either officer, but admitted his driver's license was then under suspension. Although he heard the gunshot, he did not see the shooting and could not recall what happened with McCloskey.

B. Video and Audio Recordings

{¶ 20} State's exhibits Nos. 1 and 2 comprise, respectively, the video and audio recordings of White's pursuit and stop of McCloskey, and the shooting. The recordings were introduced into evidence, played repeatedly, and used by both parties during the questioning and testimony of the various witnesses. On the videotape a clock can be seen at the bottom right of the screen. From the point White activated the video, the clock recorded the timeline of the incident. In summarizing the video here, we will cite to the precise times shown in relation to the sequence of the material events.

1) Videotape

{¶ 21} Initially McCloskey and Snyder, seen from behind, are riding their motorcycles on Indian Road. Along the way they make quick stops at two stop signs. Some erratic maneuvering can be seen before they reach the third stop sign at Westchester, although the infractions, if any, would appear minor. Arguably, some of the manipulation exhibited by Snyder on his bike would suggest impairment.

{¶ 22} At Westchester, Snyder and McCloskey pause for approximately 10 seconds and plainly converse. (2:16:19-2:16:29). There is pointing and turning by both men. Snyder appears to look back at White's cruiser. Both then accelerate away at a high rate of speed. White commences pursuit at 2:16:30, turning on his lights and siren four seconds later. (2:16:34). Snyder and McCloskey rapidly gain distance on White. The audio on the video captures the loud throttling of the motorcycles under hard acceleration up Indian. McCloskey is in front as they approach the sharp curve at Central. Then Snyder, cutting left, bounces over the grassy traffic island. His bike "fishtails" slightly as he brakes and tries to regain control. (2:16:45). At that point, White's pursuit has lasted fifteen seconds (2:16:30-2:16:45). At 2:16:47, Sargent's cruiser first comes into view, its lights and siren operating, although the siren is slightly audible before then.

{¶ 23} McCloskey has stopped his bike by 2:16:47 (if not sooner). He is turned to his right watching White's cruiser come up behind him. At 2:16:51, he turns forward. His right arm is visible at his side and it moves forward with this turn. His right hand is

low, near his waist, and slightly in front. Between 2:16:50 and 2:16:53, White is heard transmitting: "I've got one. One is trying to take off on [Officer Sargent]."[8]

{¶ 24} White exits his cruiser at about 2:16:54. At 2:16:55-56, McCloskey turns to his right again, looking back toward White's cruiser. In this turning motion, his shoulder, elbow, and arm all move rearward. His right hand, discernible on the screen, comes back at waist level. Simultaneously with this motion, White shouts an inaudible command, then McCloskey is shot. White himself is not visible on the video before the shot is fired. The report can be heard at 2:16:56; McCloskey reacts and falls at 2:16:57-58. The clock indicates that about ten seconds elapsed between McCloskey halting his motorcycle at Central and the gunshot (2:16:47-2:16:57). Three seconds elapsed between White getting out, yelling a command, and firing (2:16:54-2:16:57). One second encompassed McCloskey's turning, White's command, and the shot.

{¶ 25} At the shot, McCloskey drops to his right and the motorcycle falls on him. White first comes into view from the left at 2:17:09. With his Glock pointed, he shouts at McCloskey to "get [or keep] your hands up." White then goes briefly out of view to shut off his siren. He reapproaches the fallen McCloskey, gun still pointed, and again orders him to get (or keep) his hands up. At 2:17:24-25, McCloskey says, "I don't have a weapon," to which White replies, "Why were you reaching?" White holsters his weapon

[8] The context for this transmission is that Snyder, from 2:16:47 to 2:16:56, can be seen still maneuvering his motorcycle on Central. He has not yet stopped. Sargent is turning his cruiser to follow him.

at 2:17:52 and approaches McCloskey, still under the motorcycle. He bends downs and searches the outer clothing of McCloskey's waist area. (2:17:56-2:18:00). McCloskey repeatedly says "I feel paralyzed."

{¶ 26} Klint Sharpe soon appears and White tells him to get the motorcycle up. McCloskey is heard screaming as Sharpe lifts the bike off him. (2:18:27). Some of their conversation at this point is inaudible. After the motorcycle is uprighted, White removes the external microphone from his belt and places it in his cruiser. The video then continues without sound. Shortly afterward a third police cruiser pulls into view, stopping near McCloskey. In the final minutes the paramedics arrive.

2) Audiotape

{¶ 27} The audiotape contains various transmissions between White, Sargent and the Ottawa Hills dispatcher during the events described above. It first reveals White asking for assistance from Sargent. He tells him that he is following two motorcyclists on Indian, saying he is "not sure what they are going to do on me." He tells Sargent to head to Central and Talmadge. White then informs the dispatcher that he is in pursuit and that both motorcycles are registered to someone at an address on Holland-Sylvania Road. White's siren can be heard. Some minutes later, he states that "I've got one; one is trying to take off on" Sargent. Afterward, a shot can be heard. Sargent notifies the dispatcher that he has Snyder in custody. White returns to the radio and requests an emergency squad.

C. Expert Testimony

{¶ 28} Three experts testified at trial. Two were called by White; one was called by the state in rebuttal. Neither party disputed their qualifications or their extensive backgrounds in law enforcement. Before testifying, each expert had reviewed the pertinent investigative reports, the witness statements, and the video and the audio recordings. Their respective opinions were fully expressed without objection.

1) Urey W. Patrick

{¶ 29} The first defense expert was Urey Patrick, an FBI agent for 25 years, now retired. He is self-employed as an expert consultant in police use-of-force cases. He has instructed on the law and policy issues relating to the use of deadly force by police. His expertise also extends to police training and practices, firearms and ammunition, and wound ballistics. He is widely published on these subjects as well.

{¶ 30} Patrick began by explaining the legal standard for deadly force and certain principles of its use that police are taught during their training. Officers are instructed that deadly force may be employed to prevent an imminent risk of serious injury or death, either to themselves, another officer or innocent civilians. The perceived risk must be assessed from the totality of the circumstances in which it arises. In determining the reasonableness of an officer's perception that serious injury or death was imminent, Patrick identified several factors: "what the officer knew, what he could see and perceive, what the individual he was interacting with did, what the circumstances were, [and the] behavior of the individual in conjunction with those circumstances[.] * * *

Police officers don't have to be certain that the risk is there. * * * Their perception has to be reasonable."

{¶ 31} Patrick next explained that in use-of-force training, officers are taught the principle that "action always beats reaction." He noted that "an officer is always reacting to what the individual he is confronting does." In police work, the officer must place himself in close proximity to people—whether making an arrest, writing a traffic citation or merely conversing. As a suspect takes some particular hostile action, "an officer is always reacting to that and trying to catch up." Such acts include being punched, kicked, stabbed with an edged weapon, or shot with a firearm. Using the latter as an example, Patrick explained that "a person holding a gun can invariably turn and/or get off a shot before you can react to stop or prevent it." Because of this, officers often have "less than a second" to decide whether to use deadly force.[9]

{¶ 32} Officers do not have to be absolutely certain of the risk of attack, he testified, nor must they actually see a weapon before using deadly force. Rather, when such force is used preemptively, they must be able to show that their *perception* that the risk existed was reasonable. Patrick testified:

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[9] Patrick further explained that police training includes the study of actual officer-involved shootings. Among these are cases in which officers were dispatched to scenes where people were threatening suicide with a firearm. They are used to illustrate the brevity of the action-reaction cycle. He stated: "A [suicidal] person holding a gun to their head in the fraction of a second can move it and fire before even a trained police officer could react."

> If the circumstances are such that what is happening is consistent with an imminent attack or an imminent risk of injury, then that's enough. And they may use deadly force if necessary to prevent that imminent attack from becoming an actual attack. * * * The most successful use of justified deadly force is preemptive in nature. It prevents an imminent risk of serious injury from the coming impact or attack or actual attempt.

{¶ 33} No ideal model exists for officers to use in determining beforehand when an imminent threat will occur. All that can be done, Patrick indicated, is to instruct officers on "risk assessment, the realities of action versus reaction, the realities of deadly force, the relatively limited effectiveness of handguns, [and] the realities of risk and how quickly it can turn."

{¶ 34} In light of the training principles and the legal standard for deadly force, Patrick then gave his impressions of the videotape. He first noted that White was an officer patrolling alone late at night who had encountered two motorcyclists who were not operating their bikes in a safe or consistent manner. In fact, to Patrick, they seemed to be impaired. As White followed, the motorcyclists appeared to look back at him. "It got to the point where the two riders were conferring with each other, looking back at the cruiser and then taking off at high speed." Patrick testified that "it looks like collusion between [them]" and "like an incipient pursuit." When White activated his lights and sirens, the fact that the motorcyclists "pull[ed] away and then separated" indicated to Patrick "something more than just a routine traffic stop." Referring to Snyder's and

McCloskey's actions seen earlier on the video, Patrick stated: "there is some forethought, there's something unusual going on. The two had conferred. They had talked before this began."

{¶ 35} After Snyder lost control of his motorcycle and McCloskey finally stopped, Patrick found it significant that his engine was still running and the kickstand was not down. "He's already indicated a willingness to flee." Next, McCloskey did not raise his hands when instructed. White was outside his cruiser by then, off to the left, when McCloskey made "a motion with his hand that is consistent with reaching for a weapon, rather than raising his hands or putting them in plain sight." At that point, White fired.

{¶ 36} Patrick opined: "Under those circumstances I think Officer White's perception that this was an imminent risk was reasonable." The fact that McCloskey had no weapon changed nothing. "Officer White could not have known that at that time." Patrick agreed that White "could have waited to see what McCloskey was doing with his hand"; however, "if Mr. McCloskey had in fact drawn a weapon to use against Officer White, [he] would have been conceding the first shot to McCloskey." So, "it would not be unreasonable for [White] to choose not to wait to see if McCloskey was in fact drawing a weapon."

{¶ 37} Referring to McCloskey's turning motions seen on the video, Patrick explained the term "targeting." It means locating the person you plan to assault or attack. McCloskey's repeated turning to look back—to see where White was—were instances of targeting the officer, Patrick contended. He noted that the video's view of McCloskey

sitting on his bike was not White's view from the left of his cruiser. McCloskey's second turning motion, from White's position and perspective, "in conjunction with the movement of [McCloskey's] hand down to his waist area [is] consistent with reaching for a weapon. It's where an officer would expect a weapon to be held." Patrick identified this as the critical point where White could reasonably perceive an imminent threat of injury or death—"[McCloskey's] hand is moving back and to the right again as if bringing a weapon out."

{¶ 38} In rendering his opinion, Patrick emphasized that the benefit of "20/20 hindsight" is not permitted. It is irrelevant, even if true, that the motorcyclists were unarmed, that they did not realize a police cruiser was following them, or that they had no plan to flee or engage in any other illegal activity. White could act based only on what he perceived as it was happening, along with the inferences he could reasonably draw, not on what he did not know or could not have known.

2) James J. Scanlon

{¶ 39} White's second defense expert was James Scanlon, a police officer in Columbus, Ohio for 32 years. When not on-duty, he self-employs as an expert witness on issues involving police tactics and the use of deadly force. A company he co-owns, called North American SWAT Training Association, trains officers in responding to hostage/barricade scenarios, active-shooter calls, special tactical missions, and advanced patrol assignments.

{¶ 40} In his opinion, it was reasonable for White to believe that he was facing an imminent risk of physical harm when he shot McCloskey. He believed that White's perception of imminent harm was the cumulative result of several suspicious behaviors by the motorcyclists, particularly McCloskey, and that these behaviors made White's fear for his safety reasonable. In reviewing the videotape, Scanlon first pointed to the motorcyclists' erratic maneuvering as they rode stop sign to stop sign along Indian. He believed this would naturally cause an officer following them to become suspicious. Then Scanlon noted White's comment early on the audiotape that, "I think they might be messing with me." To Scanlon, this indicated that White not only knew something was wrong, but he could also reasonably assume "[the motorcyclists] know there's a cruiser behind them." This would merely increase an officer's suspicion.

{¶ 41} Third, Scanlon found their extended pause at Westchester, where they conversed and pointed, to be a cause for concern. He stated that an officer would normally wonder, after having followed them in a marked cruiser, if the two men "were sizing [him] up" in deciding whether to "flee or fight." Fourth, from Westchester, Snyder and McCloskey illegally fled away at speed, prompting White to engage his lights and siren. When McCloskey finally stopped, he did not turn off his engine, drop the kickstand, or raise his arms when ordered. Instead, Scanlon noted, McCloskey's "right hand [was] suspiciously down at the right on his lap." Scanlon agreed with Patrick that White could reasonably perceive the turning motions as "targeting." He specifically noted that White, standing off to the left rear, could see even less of McCloskey's right

arm than is seen from the "straight-on view" of the video. The less he saw of McCloskey's right arm, Scanlon testified, the more dangerous the situation became in White's mind. He concluded that White's decision to shoot was "reasonable and justified." In assessing an officer's use of deadly force, "the facts known to the officer at the time that the shot is fired [are] all that matters."

{¶ 42} Scanlon too cited the pressure of the action-reaction principle as a factor affecting how White perceived the situation. At best, an officer has "three-quarters of a second" to respond. Summarizing his view of the shooting, Scanlon testified:

> So it's not the turning necessarily that does it or the second turn or the weaving or the traffic violation. [It's] the culmination of all those things incorporated with the officer's knowledge of reaction time, believing the person has a gun and knowing that if the person actually turns full circle [to face] him, that if he does have a gun, he loses the gunfight. * * * [T]hat's what we have to instruct civilians about because they don't understand the whole idea of reaction time and * * * if you wait to see the gun and the person who has their back to you, as they turn, * * * they're going to get at least one or two shots off."

3) W. Ken Katsaris

{¶ 43} The state's expert witness was Ken Katsaris, a police officer for various departments in Florida for over 48 years and formerly the elected sheriff of Leon County, Florida. As a patrol officer he worked street duty for eight years. Katsaris is presently

self-employed as a law enforcement trainer and expert consultant on use-of-force issues. A certified firearms instructor, he also trains officers in emergency vehicle driving, suspect pursuit and street tactics. In both local and national seminars, he lectures on police lethal-force encounters and "street survival," and has reviewed many officer-involved shootings. He is also an experienced motorcyclist.

{¶ 44} Katsaris began his testimony by responding to certain issues the defense experts discussed. He explained that in police training the term "target glance" depends on correctly assessing "whether the person is actually targeting you, or is it an inquiry glance?" Targeting is "getting ready to implement a use of force of some kind." Genuine "targeting" involves "multiple glances" and "it's going to be in exactly the same way that they're going to carry out whatever they're targeting you for."

{¶ 45} In reviewing the video for the jury, Katsaris disputed Patrick's conclusion that McCloskey was "targeting" White. Just before being shot, McCloskey's "turn to his right to look behind" was "an inquiry method, in other words, what's going on?" Because he was balancing the motorcycle between his legs, he could not move very far. His ability to turn—to draw a gun and fire it—was restricted. Katsaris noted that McCloskey turned forward to see the other police car in front of him, "then [he] hears something and looks to his right." That was not "targeting" because "he wasn't looking at the target"—Officer White—who was well back and left of McCloskey. Also, he was turning in the opposite direction from White. McCloskey was merely engaging in

"inquiry looks," trying to understand what was going on. There was action in front of him, "and then [he] hears something and attempts to turn to see what is being said."

{¶ 46} Essentially, Katsaris maintained, White misread the physical cues: McCloskey's turning was not "targeting." This misreading, Katsaris asserted, was only aggravated by White's earlier mistake when McCloskey halted his bike at Central. White violated "one of the tenets of traffic stops" by not turning off his cruiser's siren before getting out and shouting orders. This is necessary so people in the vicinity of the officer's vehicle can hear him. The added blare from Sargent's siren only worsened McCloskey's ability to hear White.

{¶ 47} Another problem was created by the "wall of light" from White's cruiser. Katsaris explained that this effect is a legitimate safety tactic police use in nighttime traffic stops. The wall of light involves the simultaneous use of the cruiser's strobe lights, overhead takedown lights and high-beam headlights. It is extremely difficult for the person stopped to see the officer, but the officer's view is unaffected. White had testified that all three lights were on when he pulled up behind McCloskey. Katsaris pointed out that the combined effect of the wall of light *and* the high-decibel sirens likely so disoriented McCloskey that he could not see White and would barely hear his commands.

{¶ 48} Katsaris next disagreed with the defense experts' evaluation of the presence or significance of certain "threat-assessment indicators." Although the terminology

varies, these indicators pertained to the suspicious driving and other behavior White said he observed before the motorcyclists stopped at Central.

{¶ 49} First, on the portion of the video showing Snyder and McCloskey riding along Indian up to Westchester, Katsaris saw no traffic violations, no impaired driving and no threat-indicators. In his view, "McCloskey especially [was] extremely straight arrow in his driving, extremely straight." As an experienced rider himself, Katsaris testified that motorcyclists often ride close to the left lane. They "accelerate a little bit" to gain speed, steadying their forward momentum, and then throttle back to maintain lawful speed. Motorcyclists, he explained, face different factors in traveling the road than do those riding in a car. They tend to avoid the center of the road because passing cars drop oil there, making it slippery for a two-wheeled bike. Second, the fact that the men stopped and talked at Westchester would not be a threat-indicator. Katsaris noted that when two motorcyclists ride together, the only time they can talk is when they stop. The hand motions seen on the video were innocuous movements, not threatening ones. However, their rapid, "full acceleration" after Westchester, in excess of the speed limit, was a traffic violation and Katsaris agreed that White was justified in pursuing them to a stop; yet, even that chase was too brief to be considered a "high-risk pursuit."

{¶ 50} Finally, at the point where McCloskey is stopped and sitting on his bike, Katsaris had to replay the video several times before he understood White to be yelling "get down." This was a command McCloskey could not obey initially, assuming he heard it, because he was trying to keep an 800-pound motorcycle balanced. Even after

lowering the kickstand to prevent the bike from falling, McCloskey would still have to do too many separate physical motions in dismounting the bike to be able to comply immediately. In his opinion of the video, Katsaris saw nothing about McCloskey's behavior, in the seconds before White fired, that was threatening. When White yelled his command, McCloskey's "obvious reaction" was to turn and look, notwithstanding the sensory distortion from the blinding lights and ambient noise.

{¶ 51} Katsaris did not dispute the deadly force standard to which police are trained, nor the validity of the action-reaction principle nor its significance in police firearms training. He agreed that officers, in making deadly force decisions, must do so "in split-seconds." He acknowledged that the video's view of McCloskey turning and then being shot was not White's view. Still, Katsaris saw nothing there to indicate "those objectively reasonable [circumstances] that would justify a shooting in this situation." In his opinion, to do so was "excessive force."

II. Analysis

A. Prefatory Issues

{¶ 52} White has assigned six errors for our review. Before considering them, certain prefatory issues must be addressed as they provide the larger context for correctly resolving the substantive issues raised by White's assignments. This case is important not just to the parties, but to the public, to law enforcement, and to the judicial system which can be expected to encounter similar cases over time. It warrants an analysis of

some depth, and because we are reversing and ordering a new trial, the import of these matters should not be left to implication on remand.

1) Applicable Law

{¶ 53} This appeal arises from the criminal prosecution of an Ohio peace officer for an on-duty use of deadly force. In recent decades, when a police officer engaging in enforcement activity shoots and wounds (or kills) a civilian, such conduct has typically resulted in a civil suit, in state or federal court, for monetary damages pursuant to 42 U.S.C. 1983. The common gravamen of the Section 1983 claim is that the officer's use of deadly force was an "unreasonable seizure" and therefore a violation of the Fourth Amendment. The merits of such claims are determined under the doctrines for evaluating police uses of force that have evolved principally from *Tennessee v. Garner*, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985) (deadly force) and *Graham v. Connor*, 490 U.S. 386, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (non-deadly "excessive force").

{¶ 54} It would seem logical, then, that in a criminal prosecution for what amounts to the same conduct the same doctrines and standards would apply. Yet neither party has cited any precedent directly on point, and the question is not one that answers itself. The parties have also characterized this case as "novel," with issues of first impression. While not new, reported instances of Ohio law enforcement officers prosecuted for their on-duty conduct are at least infrequent. *See, e.g.*, *McGaw v. State*, 123 Ohio St. 196, 174 N.E. 741 (1931) ("malicious wounding"); *State v. Sells*, 30 Ohio Law Abs. 355 (2d Dist.1939) (assault); *State v. Yingling*, 36 Ohio Law Abs. 436, 44 N.E.2d 361 (9th

Dist.1942) (manslaughter); *State v. Elder*, 67 Ohio Law Abs. 385, 120 N.E.2d 508 (Muni.1953) (unlawful discharge of weapon); *State v. Herrman*, 115 Ohio App. 271, 184 N.E.2d 921 (2d Dist.1961) ("willful oppression"); *State v. Foster*, 60 Ohio Misc. 46, 396 N.E.2d 246 (C.P.1979) (voluntary manslaughter). The cases where force was used, however, offer no consistent standard and were decided well before *Garner* and *Graham*.[10]

{¶ 55} In state courts, choice of law varies. Maryland, for example, follows federal law when prosecuting police officers for the unlawful use of deadly force. *See State v. Pagotto*, 361 Md. 528, 549-550, 762 A.2d 97 (2000) (Involuntary manslaughter—"[W]here the accused is a police officer, * * * the reasonableness of the conduct must be evaluated not from the perspective of a reasonable civilian but rather from the perspective of a reasonable police officer similarly situated.") California, in contrast, has not adopted the federal standard; instead, it uses the state tort-law standard of the "reasonable person" to assess police conduct under the criminal microscope. *See People v. Mehserle*, 206 Cal.App.4th 1125, 1145-46, 142 Cal.Rptr.3d 423 (Manslaughter

[10] In a more recent criminal case, *State v. Pecora*, 87 Ohio App.3d 687, 622 N.E.2d 1142 (9th Dist.1993), the court quoted and relied on *Garner's* deadly-force standard, but the defendant there was not a police officer. He was a private citizen who had attempted a "citizen's arrest" by .38-caliber gunfire. Citing *Garner*, the Ninth District stated that "the rights of a private citizen to use deadly force are no greater than those of a police officer." *Id*. at 690. That at least suggests that had the defendant been an officer his conduct would have been gauged under *Garner* and its progeny.

prosecution—calling "[t]he reasonable person standard" the "measuring stick in California" for evaluating "public officers' conduct involving use of force.")

{¶ 56} Not surprisingly, in the prosecution of law enforcement officers for civil-rights crimes based on excessive force, the federal courts have shown no reluctance to import use-of-force law from *Garner* and *Graham*. In *United States v. Reese*, 2 F.3d 870 (9th Cir.1993), a non-deadly force case, the police-defendants claimed error in the use of jury instructions based on *Graham's* "reasonableness" standard for evaluating an officer's use of such force. The Ninth Circuit rejected that challenge, stating:

> Appellants [argue that] because *Graham* was a civil case arising under 42 U.S.C. § 1983, it is somehow an inappropriate model in the context of a criminal prosecution under section 242. * * * There is nothing wrong with looking to a civil case brought under 42 U.S.C. § 1983 for guidance as to the nature of the constitutional right whose alleged violation has been made the basis of a [criminal] charge. The protections of the Constitution do not change according to the procedural context in which they are enforced - whether the allegation that constitutional rights have been transgressed is raised in a civil action or in a criminal prosecution, they are the same constitutional rights. *Id.* at 883-884.[11]

[11] Similarly, in *United States v. Bigham*, 812 F.2d 943 (5th Cir.1987), the appeals court rejected using different legal standards in criminal cases for instructing the jury on use-of-force, noting that "whether a case is brought on the civil or criminal side of the docket, the actionable conduct is deprivation of rights secured by the Constitution or laws of the

{¶ 57} We agree. Given that a police officer is authorized and, indeed, frequently obligated to use force—and sometimes deadly force—the benchmark of the "objectively reasonable officer" is not just appropriate for criminal prosecutions, but necessary. Unlike the prosaic "reasonable person" or "reasonable civilian" standard, the standard of the reasonable officer takes into account not only the specialized training and experience of police officers, but also the public-safety role for which they are uniquely employed. In that sense it is a more tailored standard than what suffices for tort law—because in circumstances relevant to the law enforcement function, the reasonable officer can do more than the reasonable civilian. But if federal use-of-force law applies to the prosecution of a police officer for an alleged misuse of force on duty, then *all* of its doctrines, standards and derivative rules apply to the extent their use is supported by the evidence and is consistent with the nature of the crime charged.

2) Use of Force Doctrines

a) General Requirement

{¶ 58} In *Garner*, the United States Supreme Court held that "apprehension [of a suspect] by use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment." *Garner*, 471 U.S. at 7. In *Graham*, decided after *Garner*, the court reiterated that principle unequivocally: "*[A]ll claims* that law enforcement officers

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United States." *Id.* at 948. *See also United States v. Schatzle*, 901 F.2d 252, 254-55 (2d Cir.1990) (applying *Graham* jury instruction in the federal prosecution of a secret service agent for non-deadly "excessive force").

have used excessive force - *deadly or not* - in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard[.]" (Emphasis added.) *Graham*, 490 U.S. at 395.[12] For both levels of force, "reasonableness" is generally to be gauged from "a totality of the circumstances" then confronting the officer. *Garner* at 8-9; *Graham* at 396.

{¶ 59} *Graham*, however, was a non-deadly "excessive force" case, and although "excessive force" is used loosely when referring to both levels of force, they are not the same. Different standards apply. *Jarrett v. Town of Yarmouth*, 331 F.3d 140, 149 (1st Cir.2003) ("The deadly/non-deadly distinction is significant in the Fourth Amendment context"); *Gutierrez v. City of San Antonio*, 139 F.3d 441, 446 (5th Cir.1998) (deadly force cases are "a subset of excessive force claims").

b) Non-Deadly Force Standard

{¶ 60} Under *Graham*, an officer's use of *non-deadly* force is reasonable if the jury is merely persuaded that a reasonable officer in the same situation could have believed the same force was necessary. *Graham*, 490 U.S. at 396-397; *Lee v. Ferraro*, 284 F.3d 1188, 1197 (11th Cir.2002) (slamming arrestee's head against car trunk after handcuffing her held unreasonable); *Spencer v. Rau*, 542 F.Supp.2d 583, 592-594 (W.D.Texas 2007) (use of "arm bar technique" to handcuff resisting suspect not

[12] We read *Graham's* "*all* claims" to include not just the allegations of a civil complaint brought under Section 1983, but those which appear in a criminal charging document, such as an indictment, asserting that the force the officer used constituted a crime.

unreasonable even if injury resulted). Instructionally, courts articulate this standard as using force that was "reasonable under the circumstances," or as using no more force than was "reasonable and necessary," or in similar terms. For deadly force, however, the standard is more stringent.

c) Deadly Force Standard: "Threat" Circumstance

{¶ 61} For this standard, *Garner* imposes two special circumstances or conditions that limit an officer's authority to use gunfire to affect a seizure. But if kept within those limits, the use of deadly force will be deemed reasonable. The first circumstance, and the one claimed here, is suspect conduct that threatens the officer at a level of serious physical harm or death. It requires asking whether the officer could reasonably have had "probable cause to believe that *the suspect pose[d] a threat of serious physical harm*, either to the officer or to others." (Emphasis added.) *Garner,* 471 U.S. at 11; *Williams v. City of Grosse Pointe Park,* 496 F.3d 482, 487-488 (6th Cir.2007).[13]

[13] *Garner's* second circumstance for deadly force exists where "there is probable cause to believe that [the suspect] has committed a crime involving the infliction or threatened infliction of serious physical harm[.]" *Garner,* 471 U.S. at 11-12. Often denoted as the "escape" circumstance, this is broader than it first appears. It refers to a suspect whose immediate past criminal acts or threats have demonstrated a disregard for human life. This person, in committing a violent felony, has seriously injured or killed others, or has threatened to do so, and will continue unless stopped *or* he is attempting to flee the scene of that crime. *See Scott v. Harris*, 550 U.S. 372, 382, 127 S.Ct. 1769, 167 L.Ed.2d 632 (2007), fn. 9 ("[S]o that his mere being at large poses an inherent danger to society.") In that circumstance, deadly force may also be used, even if there is no imminent, proximal threat to the officer taking action (e.g., a police sniper some distance away). In both the threat and escape situations, *Garner* requires some warning before firing "where feasible." That requirement is not ironclad, however, but is entirely circumstance and time dependent. *McLenagan v. Karnes,* 27 F.3d 1002, 1007 (4th Cir.1994).

d) Threat Perception

{¶ 62} A serious and imminent threat to the officer's safety will permit him to respond with gunfire. *Garner*, 471 U.S. at 11-12 (compare: "where the suspect *poses no immediate threat* to the officer and *no threat* to others," with: "the suspect *poses a threat* of serious physical harm [to] the officer"). Thus, *reasonable* threat perception is the "minimum requirement" before deadly force may be used. *Untalan v. City of Lorain*, 430 F.3d 312, 314 (6th Cir.2008). Whether the officer reasonably perceived a threat must be assessed objectively. The focus is specifically on the moment he used his weapon and in the moments directly preceding it. *Livermore ex rel. Rohm v. Lubelan*, 476 F.3d 397, 406-407 (6th Cir.2007) ("focus on the 'split-second judgments' made immediately before the officer [fired]"). Earlier errors in the officer's judgment do not make a shooting unreasonable if he was acting reasonably then. *Bouggess v. Mattingly*, 482 F.3d 886, 889 (6th Cir.2007).

{¶ 63} In deadly-force cases involving both armed *and* unarmed suspects, courts have accepted the action-reaction principle on facts justifying the officer's anticipatory use of his weapon to protect himself. In other words, a nascent threat can be sufficient; it need not materialize to the point of harm. *See Ontiveros v. City of Rosenberg*, 564 F.3d 379, 382-385 and fn. 2 (5th Cir.2009) ("[U]se of deadly force is presumptively reasonable" when the officer could reasonably have interpreted the suspect's movement as "reaching for a weapon"); *Anderson v. Russell*, 247 F.3d 125, 132 (4th Cir.2001) (officer "does not have to wait until a gun is pointed" before acting); *Montoute v. Carr*,

114 F.3d 181, 185 (11th Cir.1997) (same); *McLenagan, supra,* 27 F.3d 1002, 1007 (4th Cir.1994) (officer need not "actually detect the presence of an object in a suspect's hands before firing on him").

{¶ 64} As the court observed in *Elliot v. Leavitt*, 99 F.3d 640 (4th Cir.1996):

> The critical point [is] precisely that [the suspect] was "threatening" - threatening the lives of [the officers]. The Fourth Amendment does not require police officers to wait until a suspect shoots to confirm that a serious threat of harm exists. * * * Officers need not be absolutely sure [of] the suspect's intent to cause them harm - the Constitution does not require that certitude precede the act of self-protection. *Id*. at 643-644.

{¶ 65} Rather, it is the *perceived* threat of attack by a suspect, apart from the actual attack, to which the officer may respond preemptively. If his perceptions were objectively reasonable, he incurs no liability even if no weapon was seen, or the suspect was later found to be unarmed, or if what the officer mistook for a weapon was something innocuous. *Ontiveros*, 564 F.3d at 385 (officer reasonably believed suspect was reaching into his boot for a weapon. No weapon found); *Reese v. Anderson*, 926 F.2d 494 (5th Cir.1991) (unarmed suspect shot after furtive movement in vehicle); *Bell v. City of East Cleveland*, 125 F.3d 855 (6th Cir.1997) (juvenile shot after pointing toy gun); *McLenagan*, at 1007-1008 (no weapon seen, but declining to "second-guess the split-second judgment of a trained police officer merely because that judgment turns out

to be mistaken, particularly where inaction could have resulted in [his] death or serious injury").

{¶ 66} In evaluating reasonableness in the threat-perception cases, courts have also accepted that officers are trained to recognize certain behaviors and "body language" as danger cues. These include obvious attempts to evade the officer, furtive gestures and glances, sudden turns, and the ignoring of commands, such as an order to show one's hands. Because such encounters often occur at night, this limits vision significantly and enhances risk to both the officer and the suspect. *See Thompson v. Hubbard*, 257 F.3d 896, 899 (8th Cir.2001) (unarmed suspect shot while "look[ing] over shoulder" at officer and "mov[ing] his arms as though reaching for a weapon at waist level." No weapon found); *Reese, supra,* at 500-501 (officer could reasonably believe that suspect in car was reaching for a gun on floorboard. No weapon found); *Slattery v. Rizzo*, 939 F.2d 213, 215 (4th Cir.1991) (officer reasonably felt threatened by suspect turning toward him without left hand in view. No weapon found); *Davis v. Freels*, 583 F.2d 337 (7th Cir.1978) (suspect, ordered to raise hands, shot in back after officer saw "sudden motion with his right elbow in a backward direction." No weapon found).

{¶ 67} The motion most commonly identified by courts that prompted the officer to believe preemptive gunfire was needed is the reach toward the waistband or into a pocket.[14] In *Anderson v. Russell*, *supra*, the officer shot an unarmed suspect who,

[14] That officers commonly infer threats from the way a suspect moves, based on their immediate perceptions and street experience, has been highlighted as well by state courts:

ignoring the officer's orders, "was lowering his hands in the direction of a bulge" near "[his] waistband." *Id*. 247 F.3d at 130. The bulge was afterward discovered to be a Walkman radio. The Fourth Circuit found "[Officer] Russell's split-second decision to use deadly force * * * reasonable in light of Russell's well-founded, though mistaken, belief that [the suspect] was reaching for a handgun." *Id.* at 132. *See also Sherrod v. Berry*, 856 F.2d 802, 804-05 (7th Cir.1988) (unarmed suspect shot while making a "quick movement with his hand into his coat [as if reaching] for a weapon"); *Lamont v. New Jersey*, 637 F.3d 177, 179 (3d Cir.2011) ("suspect [shot after] suddenly pull[ing] his right hand out of his waistband [as] though he were drawing a gun." Crack pipe found).[15]

> It is quite apparent to an experienced police officer, and indeed it may almost be considered common knowledge, that *a handgun is often carried in the waistband*. It is equally apparent that law-abiding persons do not normally step back while reaching to the rear of the waistband, with both hands, to where such a weapon might be carried. Although such action may be consistent with innocuous or innocent behavior, *it would be unrealistic to require [the officer] * * * to assume the risk that the [suspect's] conduct was in fact innocuous or innocent.* * * * It would, indeed, be absurd to suggest that a police officer has to await the glint of steel before he can act to preserve his safety. (Emphasis added.) *People v. Benjamin*, 51 N.Y.2d 267, 271, 414 N.E.2d 645 (1980).

[15] Nothing in *Garner* contradicts the cases in which unarmed suspects have been shot but the officer's threat-perception was found objectively reasonable. *Garner* held that it was constitutionally unreasonable to shoot an unarmed felony suspect where (1) the officer *could see* that the suspect's hands held no weapon, (2) he was "reasonably sure" the suspect was unarmed, and (3) the suspect was fleeing over a fence, not reaching for an unknown object or repeatedly defying an order to raise his hands in close proximity to the officer. *Garner,* 471 U.S. at 1. On those facts the *Garner* suspect posed "no immediate threat to the officer." *Id.* at 11. In the reasonable threat-perception cases, all the signs were to the contrary. That the suspect was found to be unarmed afterward was irrelevant.

e) *Graham* Factors

{¶ 68} In *Graham*, the Supreme Court identified several contextual considerations, some drawn from *Garner*, for evaluating whether a particular use of deadly or non-deadly force was objectively reasonable under the applicable standard. These include "the severity of the crime at issue, whether the suspect pose[d] an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396, citing *Garner*, 471 U.S. at 8-9. The so-called *Graham* factors, however, are not some judicially-imposed checklist the officer must run down before employing force. Rather, they are simply *examples* to assist the trier of fact in assessing the reasonableness of force under particular circumstances. They present a "non-exhaustive list" in the calculus of what is reasonable. *Bouggess*, 482 F.3d at 889.

{¶ 69} Other relevant considerations may, and often do, exist. These include whether the incident occurred at night, "the suspect's demeanor," the "size and stature of the parties involved," and whether the suspect was "intoxicated and noncompliant." *Davenport v. Causey*, 521 F.3d 544, 551 (6th Cir.2008). Also relevant is whether the suspect is, or appears to be, violent or dangerous, the duration of the confrontation, whether it occurs during a chase or an arrest, the possibility that the suspect may be armed, and the number of suspects with whom the officer must contend. *See, e.g.*, *Kopec v. Tate*, 361 F.3d 772, 777 (3d Cir.2004).

f) Constraints on Evaluating Reasonableness

{¶ 70} *Graham* explicitly cautions deference to the law enforcement perspective:

> "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers," violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - in circumstances that are tense, uncertain, and rapidly evolving - about the amount of force that is necessary in a particular situation. (Citations omitted.) *Graham*, 490 U.S. at 396-397.

{¶ 71} The Sixth Circuit Court of Appeals has described *Graham's* deference this way:

> [W]e must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure. *Smith v. Freland*, 954 F.2d 343, 347 (6th Cir.1992).

{¶ 72} In evaluating reasonableness, some leeway must be given the officer for on-scene judgments made during the uncertainty of a confrontational encounter. Unlike judges and juries, "officers on the beat are not often afforded the luxury of armchair

reflection." *Elliott, supra,* 99 F.3d at 642. For that reason, certain constraints are imposed.

i) Trier of Fact

{¶ 73} In assessing the officer's decision to use force, including deadly force, juries (and judges when they are fact-finders) are strictly forbidden from using "the 20/20 vision of hindsight." *Graham,* 490 U.S. at 396. Instead, *Graham* mandates a tightly constrained frame of reference within which to calculate reasonableness. The required perspective is that of the "reasonable officer on the scene," standing in the *defendant-officer's* shoes, perceiving what *he* then perceived and acting within the limits of *his* knowledge or information as it then existed. *Id*. When the jury reviews the officer's action against the standard applicable to the force used, it must do so from *that* viewpoint. This constraint is unique to police-defendant cases, in contrast to the jury's normal freedom to envision the dynamics of a confrontation through the eyes of other parties or witnesses. *Schultz v. Braga,* 455 F.3d 470, 477 (4th Cir.2006) (facts must "be filtered through the lens of the officer's perceptions at the time of the incident").

{¶ 74} Facts learned or discovered later, and actions taken afterward, are irrelevant in this review, even if they would be relevant for some other purpose. *Davenport,* 521 F.3d at 553 ("Even though [in retrospect] it may seem that serious physical injury or death was not imminent, we cannot say that a reasonable officer [facing] such a suspect and having to decide very quickly could not have reasonably believed it was"); *compare Ryburn v. Huff,* 132 S.Ct. 987, 991-992, 181 L.Ed.2d 966 (2012) ("Judged from the

proper perspective of a reasonable officer forced to make a split-second decision in response to [the suspect's mother] turning and running into the house after refusing to answer a question about guns, [the officers'] belief that entry was necessary to avoid injury to themselves or others was imminently reasonable").

ii) Experts

{¶ 75} *Graham's* prohibition similarly extends to the testimony of even the most erudite police-procedure consultant when it crosses into the prohibited territory of second-guessing and "armchair reflection." This includes comparative speculation, couched in backward-looking terms, about what the officer "could have" or "might have" done differently, and whether he "should have" employed alternate or lesser means of force, or different tactics. *Davenport*, 521 F.3d at 552; *Plakas v. Drinski*, 19 F.3d 1143, 1148 (7th Cir.1994); *Medina v. Cram*, 252 F.3d 1124, 1133 (10th Cir.2001) ("[I]f we [considered] the expert's assertions regarding the failure to use pepper spray and other tactical measures, we would be evaluating the officers' conduct from the 20/20 perspective of hindsight rather than from the perspective of an officer making split-second judgments on the scene"). This is because the relevant legal consideration is not what *this* defendant-officer "should have" known or done, but rather what the *reasonable officer*, placed in his shoes, "*could have believed*" about the situational need for deadly force in reacting to an imminent threat. *Hunter v. Bryant*, 502 U.S. 224, 227-228, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991) ("could have believed" standard adopted in applying the perspective of the "reasonable officer" to the facts).

{¶ 76} More generally, conclusional testimony guised as "expert opinion" on the issue of whether the force used was reasonable is inadmissible. *See, e.g., Thompson v. City of Chicago*, 472 F.3d 444, 457-458 (7th Cir.2006) ("experts' insight" on objective reasonableness of force used held inadmissible); *Hygh v. Jacobs*, 961 F.2d 359, 364 (2d Cir.1992) (expert testimony that force used was "not justified" held inadmissible); *Pena v. Leombruni*, 200 F.3d 1031, 1034 (7th Cir.1999) ("[T]he jury needed no help in deciding whether [the officer acted] reasonably" in shooting the suspect); *Berry v. City of Detroit*, 25 F.3d 1342, 1348-50 (6th Cir.1994) (citing "junk science" concerns regarding plaintiff's force expert).[16]

g) Reasonable but Mistaken Belief

{¶ 77} The objectively reasonable officer can be mistaken. What is a "reasonable" belief in light of the officer's perceptions could also be a *mistaken* belief, and the fact that it turned out to be mistaken does not detract from its reasonableness when considered within the factual context and compressed time-frame of his decision to act. *Saucier v.*

[16] We do not discount the many subjects on which a police expert may admissibly testify, provided they are within his area of knowledge and expertise. These include: the practices and procedures used in modern police work, the details of police training, including use-of-force training, techniques and tactics, the standards and legal principles on which that training is based, the use of firearms and other instruments of force (e.g., restraint devices, batons, Tasers, etc.), and areas of specialized training, such as vehicle pursuit or forensic investigations. However, opining on the ultimate issue of force in police cases is generally inadmissible. *Hubbard v. Gross*, 199 Fed.Appx. 433, 442-443 (6th Cir.2006); *compare State v. Johnson*, 10th Dist. No. 02AP373, 2002-Ohio-6957, ¶ 37-39 (expert testimony on reasonableness of deadly force in self-defense held inadmissible). Although neither party objected to the opposing expert's conclusion on the reasonableness of White's decision to shoot, we identify the error here because it is capable of repetition on remand.

Katz, 533 U.S. 194, 205-206, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001); *Davenport*, 521 F.3d at 551.

{¶ 78} In *Saucier*, where an officer's entitlement to qualified immunity turned on the reasonableness of his perceptions at the moment he used force, the United States Supreme Court specifically extended the mistaken-belief defense to police use-of-force cases:[17]

> Because "police officers are often forced to make split-second judgments [about the amount of force necessary]," the reasonableness of the officer's belief as to the appropriate level of force should be judged from that on-scene perspective [.] * * * *If an officer reasonably, but mistakenly, believed that a suspect was likely to fight back, for instance, the officer would be justified in using more force than in fact was needed.* * * * *[R]easonable mistakes can be made* as to the legal constraints on particular police conduct. It is sometimes difficult for an officer to determine how the

[17] Noting that officers "can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause or exigent circumstances, for example," and still be deemed immune for such mistakes, the *Saucier* court applied "[t]he same analysis [to] excessive force cases, where in addition to the deference officers receive on the underlying constitutional claim, qualified immunity can apply *in the event the mistaken belief was reasonable*." (Emphasis added.) *Id*. at 206. *Saucier*'s two-step procedure for addressing an officer's assertion of qualified immunity was recently modified in *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed.565 (2009), but that case left undisturbed the availability of *Saucier's* defense for police-defendants. If the officer's mistake is reasonable, immunity attaches "regardless of whether the [officer's] error is 'a mistake of fact, a mistake of law, or a mistake based on mixed questions of law and fact.'" (Internal citation omitted.) *Pearson* at 231.

> relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts. *An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense.* (Emphasis added; internal citations omitted.) *Id.* at 205.

B) White's Assigned Errors

{¶ 79} Given the foregoing law applicable to White's use of deadly force, we turn to his six assigned errors, some of which will be treated out of order.

{¶ 80} The first assigned error states:

> I. The convictions are legally insufficient in violation of his right to due process. The state failed to prove [the] essential elements, and because White was acting under a good-faith mistake, he should have immunity from criminal prosecution. Further he did not act "knowingly" to harm McCloskey, as defined by case law.

1) Immunity

{¶ 81} White first asserts that if federal qualified immunity might shield him from civil liability for shooting McCloskey, then it should also shield him from criminal liability. Because his entitlement to immunity would follow from a conclusion that his act was objectively reasonable under *Garner*, he argues, we should decide that question

as a matter of law. Less cogently, White then seeks to tie his claim for immunity to an argument that the evidence was insufficient to convict. He asks us to "acquit" him on insufficiency grounds if we determine that his deadly-force decision was objectively reasonable. The state replies, first, that the immunity issue was never raised below and so cannot be considered now. Second, and somewhat dismissively, the state asserts that qualified immunity, "as a defense," simply "offers no protection from criminal liability."

{¶ 82} While a claim of immunity (qualified or otherwise) generally is a question of law, there are at least two predicates for a de novo review. *Hubbell v. City of Xenia* 115 Ohio St.3d 77, 2007-Ohio-4839, 873 N.E.2d 878, ¶ 20-21. It must have been raised initially in the trial court where it could be properly briefed and argued. Secondly, immunity is rendered a question of law only when there are no disputes over material facts relevant to its entitlement that would be outcome determinative. *Id.* at ¶ 21.

{¶ 83} We agree with the state that immunity and insufficiency, as legal doctrines, are effectively "apples and oranges," but to label immunity an affirmative defense, such as self-defense, is incorrect. Immunity generally, and qualified immunity in particular, is an "entitlement not to stand trial," rather than "a mere defense to liability." *Summerville v. Forest Park*, 128 Ohio St.3d 221, 2010-Ohio-6280, 943 N.E.2d 522, ¶ 40, quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). The state is also a little quick in dismissing certain substantive features of White's immunity claim. It first notes that White cites no precedent where civil qualified-immunity barred an officer's criminal liability. The state then contends that the issue of objective

reasonableness, on which his claim would turn, is always a jury question. This latter contention, however, is no longer tenable.

{¶ 84} Recently, the United States Supreme Court rejected the argument that objective reasonableness in excessive force cases is "a question of fact best reserved for a jury." *Scott v. Harris*, 550 U.S. 372, 381, 127 S.Ct. 1769, 167 L.Ed.2d 632 (2007), fn. 8. In *Scott*, although the motorist and the officer who pursued him gave sharply conflicting accounts of the chase, the Supreme Court found that those disputes did not necessitate a trial because the record included a *videotape* capturing the police chase. The videotape clearly contradicted the motorist's claims that he drove carefully and committed no infractions. Instead, on summary judgment, the *Scott* court held that "once we have determined the relevant set of facts * * * *the reasonableness of [the officer's] actions* * * * *is a pure question of law*." (Emphasis added.) *Id.* at 378-379. Here, the videotape in White's cruiser, along with his testimony, would arguably suggest that whether White's decision to shoot was objectively reasonable under *Garner* could be resolved as "a pure question of law" at some pretrial stage.[18]

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[18] In fact, appellate courts are applying *Scott* in just that way, at least in civil suits. *See Dunn v. Matatall*, 549 F.3d 348, 350 (6th Cir.2008) (officer's use of force objectively reasonable based on court's review of police video); *Williams v. City of Grosse Pointe Park*, 496 F.3d 482, 486 (6th Cir.2007) (officer's use of force objectively reasonable based almost exclusively on the police video); *Marvin v. City of Taylor*, 509 F.3d 234, 239 (6th Cir.2007) ("[T]his Court will view the events as they unfolded in the light most favorable to [plaintiff], but never in such a manner that is wholly unsupportable * * * by the video recording"); *see also Griffin v. Hardrick*, 604 F.3d 949, 954 (6th Cir.2010) (videotape evidence properly considered at the summary-judgment stage); *Coble v. City of White House, Tenn.*, 634 F.3d 865, 868-869 (6th Cir.2011) (audio recording properly considered).

{¶ 85} But such determinations, the state further claims, are restricted to civil cases. That too is not an absolute proposition. Under certain circumstances, immunities of the kind resembling qualified immunity might also protect police officers from criminal prosecution for using deadly force. *See Idaho v. Horiuchi*, 253 F.3d 359, 366-367 (9th Cir.2001) *(*state prosecution of a federal agent for involuntary manslaughter stemming from the controversial "Ruby Ridge incident").[19] We cite *Horiuchi* simply to make the point that the question of an officer's possible entitlement to immunity in criminal cases, while complex, is not as farfetched as the state suggests. *Horiuchi*

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[19] From some 200 yards away, Horiuchi, an FBI sniper, shot and killed an unarmed female holding an infant as she stood behind the open door of a cabin into which her fugitive husband was fleeing. Following his indictment for manslaughter by Idaho, Horiuchi removed the criminal case to federal court and promptly sought dismissal of the charge based on Supremacy Clause immunity under Article VI of the United States Constitution. Without holding an evidentiary hearing, the district court granted his motion. Idaho appealed and the Ninth Circuit reversed, finding too many "material questions of fact in dispute which, if resolved against Horiuchi, would strip him of Supremacy Clause immunity." *Id*. at 374. In reaching that finding, the court first cited *Garner's* deadly-force standard as the substantive controlling law for Horiuchi's alleged criminal misuse of long-distance rifle fire. *Id*. at 367. Although Supremacy Clause immunity stems from a textually explicit, constitutional source, the Ninth Circuit directly analogized to the procedure in Section 1983 cases for identifying when a police officer is entitled to *qualified immunity*, citing *Harlow v. Fitzgerald*, 457 U. S. 800, 102 S. Ct. 2727, 73 L.Ed.2d 396 (1982). ("*Harlow*'s reasoning [for qualified immunity] would seem to apply equally to Supremacy Clause immunity." *Id*. at 366-367, fn. 11.) The court, however, found too many material facts in question that made it impossible, at that stage, to resolve Horiuchi's immunity as a matter of law. *See id*. at 368-374. It remanded the case for "an evidentiary hearing to determine whether the evidence supports Agent Horiuchi's entitlement to immunity *under the legal principles applicable to the use of deadly force*." (Emphasis added.) *Id*. at 377. Presumably this suggests the converse: had there been *no* disputed material facts relevant to Horiuchi's immunity claim under *Garner*, then resolving it as a matter of law through a pretrial proceeding was the proper course.

identified substantial considerations favoring a pretrial immunity procedure for federal agents charged with state crimes. *See id.* at 375-376. Several of those considerations would appear to carry no less weight in the state prosecution of a local police officer for his on-duty use of deadly force during official enforcement activity—at least in close cases.

{¶ 86} Certainly this is not a case where the officer left his patrol route to engage in some sort of "spontaneous lark" of criminality apart from his assigned enforcement duties. *See Rogers v. Youngstown,* 61 Ohio St.3d 205, 574 N.E.2d 451 (1991). Nor is it one involving the use of physically abusive and sadistic force during otherwise normal enforcement activity. *See United States v Koon,* 34 F.3d 1416 (9th Cir.1994), *rev'd on other grounds,* 518 U.S. 81 (1996) (federal prosecution of state command officer in the so-call "Rodney King incident"). Nor is this a case involving collateral crimes perpetrated over long periods, as in the so-called "cop corruption" cases, where the officer employs the attributes of his position, including his weapon, to engage in long term criminal activity, like drug trafficking. *See, e.g., United States v. Haynes*, 582 F.3d 686 (7th Cir.2009).

{¶ 87} Ultimately, however, the procedure for resolving an officer's assertion of immunity from criminal liability for his good-faith use of force, deadly or non-deadly, in the line of duty is a matter best left to the General Assembly. This might be accomplished through a special statutory proceeding under R.C. Chapter 2744. So, while wise policy counsels the state never to say "never," White's attempt to merge his plea for

immunity with an insufficiency review is, at day's end, unconvincing. And even accepting that no material facts have been left in doubt, *Scott, supra*, the sheer complexity of an issue never raised below precludes our review now.

2) Insufficiency

{¶ 88} White was convicted of one count of felonious assault under R.C. 2903.11(A)(2), a second degree felony. The conduct thereby criminalized is that "[no] person shall knowingly * * * cause or attempt to cause physical harm to another * * * by means of a deadly weapon[.]"[20] White asserts insufficiency on due process grounds, by which he means that one or more of these elements were not proven beyond a reasonable doubt. His specific attack is on the "knowingly" element, but he points to facts implicating defenses like "justification" and self-defense.

{¶ 89} On four evidentiary points in the trial record there can be no dispute: (1) White was armed with his departmentally-issued pistol; (2) he intentionally shot McCloskey with it; (3) the injury resulting to McCloskey from this act was catastrophic and permanent; and (4) (to White's point) *no* evidence indicated that he shot McCloskey for any reason *other than* from an immediate fear for his safety and that of Officer Sargent.

{¶ 90} Yet appellate review for sufficiency does not encompass the strength or merits of defenses, whether characterized as "affirmative" or not. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 37. In terms of the core sufficiency

[20] In Part 4 hereof, we separately address White's challenge to his conviction on the firearms specification under R.C. 2941.145.

of the state's case against White, without regard to his status as a peace officer, the impact of federal use-of-force law or the assertion of any defenses, the evidentiary test is simply one of *adequacy*. *State v. Morris*, 10th Dist. No.05AP-1139, 2009-Ohio-2396, ¶ 25 (insufficiency analysis is inapplicable to jury's rejection of self-defense claim).

{¶ 91} "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 (1981), paragraph two of the syllabus, superseded by constitutional amendment on other grounds in *State v. Smith*, 80 Ohio St.3d 89, 684 N.E.2d 668 (1997).

{¶ 92} Viewed in that light, and without reference to any other consideration, we find that sufficient evidence was submitted which, if believed, would prove the elements of felonious assault beyond a reasonable doubt. Separately under the first assignment, White argues that he made a "good-faith mistake" and that the state failed to prove the "knowingly" element of felonious assault *in relation to that mistake*. We will take up that argument in addressing his challenges to the trial court's jury instructions. But to the extent indicated, the remainder of White's first assigned error is not well-taken.

3) Jury Instructions and Evidentiary Issue

{¶ 93} White's fourth assigned error states:

> IV. The trial court erred by instructing the jury on the issue of reasonableness and excessive force, but would not permit White to offer evidence needed to establish he acted in a reasonable manner.

{¶ 94} Under this assignment, White is actually asserting two distinct points of error. One challenges the jury instructions on several grounds, while the other contends that the trial court improperly restricted testimony relevant to his defense. We will address the instruction issues first, since that is the principal basis necessitating the reversal of White's conviction and a remand for a new trial.

a) Arguments

{¶ 95} White first maintains that the court's "excessive-force" instruction was erroneous because it mingled non-deadly force language into what should have been a pure deadly force instruction. Second, he complains that the jury was not instructed on "mistake," nor on "the impact of a good-faith mistake" in using deadly force. For this, he refers to "United States Supreme Court pronouncements after *Garner* and [*Graham*]" on the mistaken-belief defense. Third, White finds fault with the court's instructions on the *Graham* factors and "reasonableness."[21]

{¶ 96} The state replies that instructing on the *Graham* factors was appropriate to the facts, and if White expected to benefit from *Graham's* prohibition on 20/20 hindsight, then in fairness to the prosecution, all of its components were properly included. Oddly, the state has not addressed White's argument regarding the failure to instruct on mistake. Finally, the state maintains that the "excessive force" instruction was complete and accurate, noting that because "there were no standard Ohio Jury Instructions" for several

[21] Counsel for White and the state agreed on a separate instruction on the affirmative defense of "justification," which incorporated some language from the standard Ohio instruction on self-defense. Defense counsel had initially intended to request an instruction on self-defense, but later withdrew it in favor of the justification instruction.

of these issues, both parties tendered proposals drawn from *Garner* and *Graham.* White's counsel objected to the state's proposed force instruction, stating: "[I]t really is not an issue of excessive force. It's the reasonableness or the actions of a reasonable police officer under the facts and circumstances of the event [a police shooting], and excessive force is not an issue in this particular case." He also objected to the state's request to include the *Graham* factors. His objections were overruled and the court adopted the state's instructions.

b) Standard of Review

{¶ 97} Abuse of discretion is the standard of review for disputed instructions. *State v. Lillo*, 6th Dist. No. H-10-001, 2010-Ohio-6221, ¶ 15. Generally, a trial court has broad discretion in deciding how to fashion jury instructions. The court must not, however, fail to "give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder." *State v. Comen*, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990), paragraph two of the syllabus. Further, the defendant is entitled to "complete and accurate jury instructions on all the issues raised by the evidence." *State v. Sneed*, 63 Ohio St.3d 3, 9, 584 N.E.2d 1160 (1992).

c) Instructions Given

{¶ 98} We have thoroughly examined the record containing all of the instructions, including that portion reflecting the court and counsels' discussion and arguments as to the order, form and substance of those instructions. White's complaints are not quite the

quibbles the state urges. The following summary fairly reflects the substance of the court's instructions relevant to White's claims of error under the fourth assignment.

{¶ 99} Before giving the "excessive force" instruction, the court instructed the jury on the affirmative defense of "justification." The portion relevant here stated:

> The defendant has asserted the affirmative defense that he was justified in his use of force in the exercise of his official duties as a police officer. * * * In order to establish this defense, the defendant must prove by a preponderance of the evidence that he was acting in pursuit of his official duties and that his *use of deadly force was objectively reasonable under the circumstances*. (Emphasis added.)

{¶ 100} From that instruction, the court segued into:

{¶ 101} "Now, *excessive force*. If the defendant used *more force than reasonably necessary* in pursuing his official duties, the *defense of justification* is not available." (Emphasis added.) The "excessive force" instruction stopped there. The court next gave the jury the "test for [the] reasonableness of force," stating:

> In deciding whether [White] had reasonable grounds to believe Officer Sargent or himself was in imminent danger of death or great bodily harm you must put yourself in the position of [White], with his characteristics and his knowledge, and under the circumstances and conditions that surrounded him at that time. You must consider the conduct of Michael McCloskey and decide whether his acts caused [White]

reasonably and honestly to believe that Officer Sargent or himself was about to be killed or receive great bodily harm.

{¶ 102} The court then instructed the jury to determine "reasonableness" from "the perspective of a reasonable officer in light of all the facts and circumstances then confronting the officer at the time and in the moments before the use of *deadly force*[.]" This portion of the court's "reasonableness" instruction included *Graham's* language prohibiting 20/20 hindsight and giving deference to an officer's split-second judgments.

{¶ 103} The court next stated:

> In determining whether [White] acted reasonably in his use of force in the pursuit of his official duties, you must consider factors such as the severity of the crime Mr. McCloskey was believed to have committed, whether Mr. McCloskey posed an immediate threat to the safety of [White] or another person, and whether Mr. McCloskey was actively resisting arrest or attempting to evade arrest by flight.

{¶ 104} After this instruction, the court told the jury not to consider certain facts "not known to [White] before the use of force," citing the medical evidence of McCloskey's use of alcohol and marijuana and his possession of a knife. The jury, however, could consider, "in deciding whether [White] acted reasonably," "[what] he observed before the use of force as well [as] his conclusions based on those observations that Mr. McCloskey was intoxicated or armed with a weapon."

d) "Excessive Force" Instruction

{¶ 105} White's use of his .40-caliber Glock to shoot McCloskey was unquestionably the paradigm use of *deadly force* under both federal and Ohio law.[22] In a police deadly-force case, it is reversible error to give the jury a non-deadly force instruction. *Rahn v. Hawkins*, 464 F.3d 813, 818 (8th Cir.2006). Here, the trial court's "excessive force" instruction, phrasing the standard to be, "*if [White] used more force than reasonably necessary*," was error. That is the standard for non-deadly force. The court should have instructed on the deadly-force standard just as *Garner* states it or in substantially equivalent language. *See, e.g.*, *Harris v. Roderick*, 126 F.3d 1189, 1201 (9th Cir.1997) ("[O]fficers may not shoot to kill unless, at a minimum, [1] *the suspect presents an immediate threat to the officer or others* or [2] *is fleeing and his escape will result in a serious threat of injury to persons*." Emphasis added.)

{¶ 106} This error was compounded by the earlier *justification* instruction in which the terms "use of force," "deadly force" and "objectively reasonable" were scattered about. Instead of one concise and accurate instruction, the upshot of both was a hodgepodge of confusing language that misstated the applicable standard. While "reasonableness" applies generally to both types of force, *Garner* established explicit restraints when police confront suspects with their firearms. Deadly force by police gunfire is constitutionally reasonable *only* in the "threat" or "escape" circumstances. *Id.*, 471 U.S. at 11-12. This does not necessarily benefit White, since lethal force under

[22] R.C.2901.01(A)(2) defines "deadly force" as "any force that creates a substantial risk of causing death or serious bodily harm."

Garner is significantly more circumscribed than what the elasticity of the non-deadly force standard would allow if such force is merely "reasonable under the circumstances." The need to instruct correctly on the level of force corresponding to the facts should be readily apparent.

{¶ 107} For a court to give a deadly force instruction in a non-deadly "excessive force" case obviously makes no sense, not just because that level of force would be factually unsupported, but also because it would improperly hold the officer to *Garner's* more stringent standard. *See Dunfee v. Greenwood*, S.D.Ohio No. 02-XC-00315, 2005 WL 2085953 (Aug. 24. 2005) (rejecting as "confusing and prejudicial" a deadly-force instruction on "excessive force" facts.)

{¶ 108} Conversely, to give a non-deadly force instruction in a *deadly force* case is worse, for it could mislead the jury as to what *Garner* permits. They might conclude, for example, that it was "objectively reasonable" for the officer to shoot a suspect who posed no threat or who, in the "escape" category, was fleeing the scene of a nonviolent misdemeanor or traffic offense rather than a violent felony. That is not just an academic error. Human life has inherent constitutional value and either outcome would *judicially sanction* deadly force beyond the limits *Garner* has set. Hence, we cannot let it pass uncorrected. *Compare Sample v. Bailey*, 409 F.3d 689, 697-698 (6th Cir.2005) ("[Suspect's] hands were *visible and empty* [when shot] * * * [His] mere action of moving his arm to grab the top of the cabinet would not cause a *reasonable officer to perceive a serious threat* of physical harm to himself or others." Emphasis added.)

{¶ 109} In a police shooting case, where there is no dispute that deadly force was used, the trial court abuses its discretion by not instructing on *Garner's* deadly force standard. *Rahn*, 464 F.3d 813. Because the jury was improperly instructed on this issue, reversal is required. *Compare State v. Sims*, 8th Dist. No. 85608, 2005-Ohio-5846, ¶ 13-17 (prejudicial error in felonious assault prosecution to give non-deadly force/self-defense instruction on deadly force facts.)[23]

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[23] Our dissenting colleague confuses the general *Graham*-factors jury instruction, which can apply to both levels of force, with *Garner's* more specific deadly-force standard that would inform the jury precisely when police may shoot to kill fleeing or threatening suspects, an instruction that was never given here. Second, and without citing any authority, the dissent would apparently find no error in instructing on both deadly *and* non-deadly ("excessive") force, despite undisputed facts indicating that *only* deadly force was used. Finally, the dissent incorrectly contends that in *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686, the United States Supreme Court "revisited" *Garner*, quoting the statement that "*Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute 'deadly force.'" *Id.* at 382. Taking that sentence out of context, the dissent appears to suggest that *Scott* overruled *Garner*. This belies a serious misreading of *Scott*, for nowhere in that opinion did the Supreme Court explicitly or even implicitly remove *Garner's* restrictions on when police may justifiably shoot suspects. *Scott* involved a *police vehicle pursuit* in which the officer rammed the suspect's fleeing vehicle from behind, causing it to crash. The issue was whether that particular use of force (the vehicle-to-vehicle contact) was susceptible to *Garner's* deadly force standard. *Id.* at 381-382. After quoting *Garner's* holding "that it was unreasonable to kill a 'young, slight, and unarmed burglary suspect,' by shooting him 'in the back of the head' while he was running away on foot [and] when the officer 'could not reasonably have believed that [the suspect] ... posed any threat,'" the *Scott* court *distinguished Garner*, stating:

> Whatever *Garner* said about the factors that *might have* justified shooting the suspect in that case, such "preconditions" *have scant applicability to this case, which has vastly different facts*. "*Garner* had nothing to do with one car striking another or even with car chases in general * * * A police car's bumping a fleeing car is, in fact, not much like a policeman's shooting a gun so as to hit a person." (Citations omitted; emphasis sic and added.) *Id*. at 382-383.

e) Justification Instruction

{¶ 110} The justification instruction created a different problem. It was both unnecessary and, as worded, contributed to the error previously discussed. This instruction muddled the specificity of the decisional issue in relation to the critical evidence by imprecisely reducing *Garner's* deadly force test to "[whether it] was objectively reasonable under the circumstances." No—that is *a conclusion* which the jury might draw only *after* it was properly instructed to apply *Garner's* "threat" standard to (1) the segment of the videotape in the moments preceding the gunfire (2:16:47 through 2:16:57) *and* (2) White's testimony detailing *his* pre-shooting perceptions of McCloskey's movements from his angle. On this issue, only *his* perceptions matter in forming the baseline for the jury to employ the reasonable officer to decide the

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Scott left open the question of whether the pursuing officer's vehicle-ramming technique was even "deadly force," stating, "*whether or not* [Deputy] *Scott's* actions constituted the application of 'deadly force,' all that matters is whether [his] actions were reasonable." (Emphasis added.) *Id*. at 383. In light of the factual distinction the Supreme Court drew between police vehicle-contact techniques during chases and shooting suspects dead with their firearms, it is simply untenable to construe one sentence of dicta as overturning *Garner's* limiting circumstances on the latter. Indeed, notwithstanding the dissent's reading of *Scott*, courts have continued to apply *Garner* to disputed police shootings. *See, e.g*., *Hulstedt v. City of Scottsdale*, D.Ariz. No. CV-09-1258, 2012 WL 3234286 (Aug. 6, 2012) ("The use of a firearm as deadly force is governed specifically by *Garner* and its progeny"); *Rush v. City of Mansfield*, 771 F.Supp.2d 827, 853 (N.D.Ohio 2011) (Citing *Garner* for "clearly established [law] 'that if a suspect threatens an officer with a weapon or threatens another person with serious physical harm or death, deadly force is authorized in self-defense or defense of another person'"); *Henry v. Purcell*, 652 F.3d 524, 531-32 (4th Cir.2011) (Applying *Garner* to the police shooting of an unarmed, fleeing misdemeanant.)

fundamental predicate question on which guilt or innocence turns: Could White, in the moments before he fired, have *reasonably perceived* an *imminent threat* to his or Sargent's safety from McCloskey's turning/reaching motions, i.e., as if "he was pulling a weapon"?

{¶ 111} From an affirmative answer to that question, the jury could *conclude* that it was objectively reasonable for White to shoot. A negative answer would entail the *conclusion* that it was objectively unreasonable. *See Chappell v. City of Cleveland*, 584 F.Supp.2d 974, 994 (N.D.Ohio 2008) ("a reasonable juror could find that [the suspect] did not pose 'a serious and immediate threat to the safety of others' when he was shot by the detectives"). That is also why the justification instruction was superfluous. If the jury, correctly instructed under *Garner*, had found that White reasonably perceived an imminent threat from McCloskey, then his deadly-force response was *justified*. An opposite finding, by definition, would mean that it was *not justified*. *Jiron v. City of Lakewood*, 392 F.3d 410, 415 (10th Cir.2004) ("deadly force is justified" if a reasonable officer would have believed a threat of serious physical harm existed).

f) Failure to Instruct on Mistaken Belief

{¶ 112} In describing McCloskey's turning and arm motion, White testified: "I believed he was pulling a weapon." That this misperception was understood by the parties and the court to raise the issue of "mistake" or mistaken belief is clear from the record. During the pre-instruction conference, defense counsel requested an instruction on negligent assault under R.C. 2903.14. He stated: "there is a question of justification

[in the] reasonable officer's *interpretation* of facts and circumstances occurring prior to the use of force [and] there's an issue as to whether or not Officer White was *negligent in assessing those facts and circumstances* prior to making the decision to fire his weapon[.]" (Emphasis added.)

{¶ 113} The prosecutor opposed this instruction, arguing that White's decision to fire was an intentional act, supported by his own testimony. Noting that the court was going to instruct on the affirmative defense of justification, he replied: "[T]he issue as to whether [White] *improperly saw [the] facts* or *misinterpreted* them, I mean, may go to an issue of self-defense * * * *where you talk about mistake of fact* [and] would still allow the person to claim self-defense[.] * * * *Maybe that would be more appropriate at this point* as opposed to a negligent assault instruction." (Emphasis added.)

{¶ 114} In refusing to give the negligent assault instruction, the court stated: "[T]he justification defense is allowable *because [White] miscalculated on the facts* and *negligently applied that which he saw and interpreted*. It does not go to the actual elements of the offense [of] felonious assault, [but] is more of a sub-defense in the justification [defense] itself, in that your articulated reason as to why [White] was justified in the shooting is *because there was a negligent misunderstanding* of it, or the pressure of it, whatever you're going to argue, [and] I don't see it applying directly to the court [instructing on] the lesser offense." (Emphasis added.)

{¶ 115} Despite this circuitous discussion of "negligent assessment," "misinterpreted" perception, "mistake of fact," "miscalculation" and "negligent

misunderstanding," as all these descriptions pertained to White's factual belief at the moment he fired, no instruction was given on mistake—either in terms of *Saucier's* mistaken belief defense or what is effectively its criminal analog under Ohio law, the mistake-of-fact defense. The instruction on "excessive force," though erroneous for the reasons stated above, instructed *only* on force. It did not instruct the jury on the legal significance of a reasonable mistake an officer might make in believing that such force was needed. Nor did the instructions on justification, "reasonableness" or the *Graham* factors even passingly touch on mistake.

{¶ 116} White claims this was error. We agree. A separate instruction on mistaken belief should have followed a proper *Garner* instruction.[24]

[24] In the "test for reasonableness" instruction, the court used the phrase, "caused the defendant reasonably and honestly to believe," which also appeared in White's proposed instruction on self-defense. Although not cited by either party, there is some authority holding that a self-defense instruction which employs those or similar words, like "honest belief," incorporates "the concept of mistake," even if "mistake" is never explicitly mentioned. *See State v. Dunivant*, 5th Dist. No. 2003-CA-00175, 2005-Ohio-1497, ¶ 23-27. In *Dunivant*, a murder case with a self-defense instruction, the Fifth District relied for its holding on *State v. Evans*, 8th Dist. No.79895, 2002-Ohio-2610, also a murder/self-defense case. *Evans*, citing no authority whatsoever, stated that "an 'honest belief' naturally includes the possibility that the defendant may have been mistaken in his belief." *Id*. at ¶ 53.

At least in the case of a police officer to whose on-duty use of deadly force federal law applies, we disagree with this sub silentio approach. The mistaken-belief defense was specifically extended in *Saucier* to mistakes that *police* make in using force. The substance of that defense needs to be communicated to the jury in explicit terms by separate instruction. The decisional relevance to the officer's *criminal* liability of whether his mistake was reasonable or unreasonable is too important to be palmed off as an inferential matter, based on some presumed intellectual ability of the jury to divine the mitigating effect of a reasonable mistake from the words "honest belief."

{¶ 117} We have discretion under Crim.R. 52(B) to conduct a plain-error review of jury instructions—both of those that were improperly or incompletely given and those that were not given but which were clearly applicable. *State v. Williford*, 49 Ohio St.3d 247, 551 N.E.2d 1279 (1990). A finding of plain error is appropriate in "exceptional circumstances," where the omission of such an instruction "affected the outcome of the trial." *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). Even apart from a plain-error review, the discussions between counsel and the court on the issue of mistake (or "miscalculation," as the court phrased it) were sufficient to preserve the issue. *See State v. Wolons*, 44 Ohio St.3d 64, 67, 541 N.E.2d 443 (1989).

{¶ 118} The culpable mental state for felonious assault is "knowingly," which is defined in R.C. 2901.22(B). That section states:

{¶ 119} "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶ 120} That the "knowingly" element of felonious assault can be negated by a *factually-mistaken* belief is clearly established in Ohio's mistake-of-fact defense. This defense, if accepted by the jury, renders the state's case insufficient on that element, entitling the defendant to an acquittal. *State v. Snowden*, 7 Ohio App.3d 358, 363, 455 N.E.2d 1058 (10th Dist.1982) ("Mistake of fact can, in an appropriate circumstance, negate either *'knowingly'* or 'purposely'"); *see also State v. Pecora*, 87 Ohio App.3d 687,

690, 622 N.E.2d 1142 (9th Dist.1993); *State v. Rawson,* 7th Dist. No. 05-JE-2, 2006-Ohio-496, ¶ 7.

{¶ 121} While *Saucier's* mistaken belief defense cloaks the officer's act with immunity in Section 1983 suits, in the criminal context it would operate to negate the "knowingly" element in the same way as the mistake-of-fact defense (being modified instructionally for a finding of guilt or innocence.) In other words, if the jury finds that the officer held a reasonable but mistaken belief as to the facts that prompted him to act, it is effectively finding that he acted without the culpable mental state (mens rea) necessary to satisfy that element of the offense. *Compare Rawson*, *supra*, at ¶ 15 ("[I]f [the defendant] was mistaken about a fact that would nullify the 'knowingly' element, [then] the jury should acquit him"); *Culosi v. Bullock,* 596 F.3d 195, 201 (4th Cir.2010) ("A mistaken use of deadly force [is] not necessarily a constitutional violation under the Fourth Amendment [if based on] a mistaken understanding of facts that is reasonable in the circumstances[.]")

{¶ 122} In the civil context the law does not punish police officers for making honest and reasonable mistakes in using force under ambiguous, split-second conditions, even when those mistakes cause injury. *Saucier*. Neither, in our view, should the criminal law of this state, if under similar conditions the officer's evidence could conceivably support the same finding. Here, the state presented *no* evidence—*none*—that White shot McCloskey for any reason other than from an instantaneous inference that the "reaching movement" of McCloskey's right arm signaled the drawing of a

weapon. Nor has the state ever suggested, here or during trial, that his belief was not honestly held. *Sargent v. City of Toledo*, 150 Fed.Appx. 470, 475 (6th Cir.2006) ("No evidence suggest[s] that [Officer] Taylor shot Sargent for reasons other than self-defense"). In hindsight, of course, White's on-scene belief was tragically mistaken, but the jury might plausibly have found it reasonable if they had been instructed on the defense. The state is free to argue (and we assume it would) that his belief was not a reasonable one. It is an issue over which reasonable minds could differ, but White was entitled to the instruction. If the jury found his mistaken belief unreasonable, he could be convicted.

{¶ 123} In *Williford*, 49 Ohio St.3d 247, 551 N.E.2d 1279, where a manslaughter defendant had claimed self-defense, the Ohio Supreme Court found plain error in the trial court's failure to instruct the jury on "defense of family" and to give a correct "no retreat" instruction, where the *defendant's* evidence, "*if believed by a properly instructed jury, would support an acquittal* [.]" (Emphasis added.) *Id*. at 252. The same reasoning applies here. Mistaken belief was an issue plainly raised by White's own testimony and, "if believed by a properly instructed jury," it would support an acquittal. The failure to instruct on this defense was plain error.

g) The *Graham* and "Reasonableness" Instructions

{¶ 124} The trial court's "reasonableness" instruction, to the degree that its language did not reinforce the erroneous "excessive force" instruction, was substantially consistent with the federal decisions canvassed earlier. As far as the *Graham* instruction

went, with one exception, it substantially comported with that case. It properly instructed the jury not to engage in 20/20 hindsight or consider later-learned facts, such as the knife and the medical documentation of McCloskey's blood-alcohol content and drug use, since those were things White could not have known beforehand. The instruction also correctly indicated that the medical findings could be considered *against McCloskey* to the extent they bore on his credibility. At least as important, however, was that White did not know McCloskey was unarmed. The court should have balanced its recitation of the *Graham* factors with a corresponding admonishment to the jury that the fact no weapon was found could not be considered in assessing the reasonableness of White's threat perception. *See Reese*, *supra*, 926 F.2d at 501 ("Also irrelevant is the fact that [the suspect] was actually unarmed. [The officer] did not and could not have known this.")

h) Evidentiary Issue

{¶ 125} White's counsel objected to the jury being instructed that, per *Graham*, they could consider "the severity of the crime [McCloskey] *was believed* to have committed," even though he was never charged with anything. His real objection, however, and the one argued here, is less about that instruction and more about the trial court's related evidentiary ruling during trial. In sustaining an objection by the prosecutor, the court would not permit White to tell the jury what crime or crimes he would have charged McCloskey with.

{¶ 126} Given how the court later worded the *Graham* instruction, White points out, the question is, "believed by whom?" This instruction, which focused on

"determining whether the defendant acted reasonably," referred to *White's* belief. White argues that it made no sense, and was patently unfair, to tell the jury to consider the crimes McCloskey "*was believed* to have committed" without having heard from the *believer*—him—about just what those crimes were. In contrast, White complains, McCloskey and Snyder were allowed to give the jury "unimpeded testimony" explaining away their behavior as innocent, and hence to disallow his testimony was prejudicial. The state counters that White's testimony about possible charges would have been "speculation."

{¶ 127} We disagree. His testimony should have been allowed.

{¶ 128} *Graham*, as noted earlier, does not state a definitive checklist of factors. The parties may argue, and the jury may consider, any fact in evidence that bears on the reasonableness of White's pre-shooting perceptions, so long as it is not a later-learned fact that the hindsight prohibition would bar. White's understanding of what violations McCloskey may have committed *leading up to* the shooting was relevant and admissible for that purpose. It would be yet another factor for the jury to consider in gauging how *White* perceived the circumstances in which he found himself, including any illegalities (large or small) he observed the suspects commit. How probative it is of reasonableness is for the jury to determine. Whether the prosecutor's office, well after the fact, would have felt McCloskey's conduct warranted a felony charge, a misdemeanor charge, or no charge at all, is irrelevant. As well, McCloskey and Snyder's explanations of their behavior, while admissible, can have no role for the jury in determining whether *White*

reasonably perceived a threat justifying deadly force. For that purpose they are irrelevant. Apart from the video, only *his* perceptions matter as the threshold for gauging what the objectively reasonable officer could have believed.[25]

{¶ 129} Accordingly, to the extent indicated above, the fourth assigned error is well-taken.

i) Failure to Instruct on Negligent Assault

{¶ 130} White's third assigned error states:

> III. The trial court erred by not providing the jury with the requested instruction for negligent assault as a lesser include offense.

{¶ 131} The gist of negligent assault under R.C. 2903.14(A) is that "[n]o person shall negligently, by means of a deadly weapon * * * cause physical harm to another[.]" R.C. 2901.22(D) defines the culpable mental state required for criminal negligence:

> A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature. A person is negligent with respect to circumstances when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that such circumstances may exist.

{¶ 132} Thus, "a substantial lapse from due care" is the attribute of conduct or perception which R.C. 2903.14 (A) criminalizes for the "negligent" use of a deadly

[25] On this point, a cautionary instruction would not be inappropriate in order to contain the jury's assessment of the ultimate issue solely to *Graham's* constrained perspective of the reasonable officer placed in White's shoes in the moments before he fired.

weapon that harms another person. Counsel for White argues that he "acted in good faith, but was erroneous in [concluding] that McCloskey was armed," and thus this misperception furnished the evidentiary predicate for a negligent assault instruction. The jury, he argues, could have found a "substantial lapse from due care" in his pre-shooting judgment. The state replies that the instruction was correctly refused because White himself maintained that he *intentionally* shot McCloskey. Never once did he suggest that his weapon discharged from accident or inadvertence.

{¶ 133} As is evident, the parties are using "negligence" in two different senses. For the state, negligence under R.C. 2901.22(D) applies *only* to inadvertent conduct. For White, criminal negligence can be found in an intentional act done carelessly from a "substantial lapse" in one's evaluative judgment. That view of negligent assault, however, finds no support in the decisional law on the lesser-included issue.

{¶ 134} While several cases involving deadly weapons have held that negligent assault is a lesser included offense of felonious assault, *see, e.g*., *State v. McCornell* , 91 Ohio App.3d 141, 147-148, 631 N.E .2d 1110 (8th Dist.1993), they also hold that instructing on that offense is not automatic. "[It] is required only where the evidence presented at trial would reasonably support *both* an acquittal on the crime charged *and* a conviction upon the lesser included offense." (Emphasis added.) *Id.* at 147. *See also State v. Anderson*, 10th Dist. No. 06AP-174, 2006-Ohio-6152, ¶ 38-39. The latter condition is the problem here.

{¶ 135} In reviewing felonious assault convictions specifically involving firearms, appellate courts have consistently upheld the refusal to instruct on negligent assault where the evidence, even when viewed most favorably to the defendant, unambiguously demonstrated an intentional, rather than a careless or inadvertent, shooting. *See, e.g., State v. Stephens*, 8th Dist. No.93252, 2010-Ohio-3997, ¶ 17 (Evidence "showed that appellant put on rubber gloves before picking up the firearm; pointed the gun at [victim] and said, 'You think I won't?' [and] pulled the trigger [.] * * *Although he argues that the shooting was purely accidental, appellant's actions on the day in question indicate otherwise."); *State v. McCormick*, 2d Dist. No. 19505, 2003-Ohio-5330, ¶ 56 ("[Shooting] was not the result of negligence."); *compare State v. Ollison*, 8th Dist. No. 91637, 2009-Ohio-1691, ¶ 23 (aggravated assault conviction; "[appellant] testified that he shot at [victim] 'intending to sprinkle him.' This was not a situation where he accidently fired the gun; [appellant] intended to shoot [victim], and he did.")

{¶ 136} In resolving this assignment, the question is simply what the evidence demonstrated as to White's pre-shooting state of mind. His own testimony supplies the answer. Having drawn his gun as he exited his cruiser, White claimed he saw an imminent threat in McCloskey's turns and arm motion, from which he inferred that a weapon was being drawn. He responded by firing to stop the threat. That reflexive act, though in hindsight spurred by an erroneous inference, was deliberate. Indeed, it would be hard to imagine any act of *self-preservation* that was not. His mindset was one of survival—believing immediate action was needed against an apparently armed suspect.

This reveals the flawed premise underlying White's argument: "act[ing] in good faith but erroneously," as he puts it, did not *lessen* the intentionality of his act. On these facts, the appropriate instruction was not negligent assault; it was mistaken belief.

{¶ 137} But the secondary problem for White is the instruction on the affirmative defense of justification (notwithstanding the defect it contributed to what should have been a pure deadly-force instruction). "Justification" itself is merely a genus label for any affirmative defense which functions to excuse admitted conduct that is otherwise unlawful. *See State v. Poole*, 33 Ohio St.2d 18, 19, 294 N.E.2d 888 (1973). Here, that instruction read like a self-defense instruction, despite language that White "was acting in pursuit of official police duties." In substance, it expressed that White used deadly force *intentionally*, but was justified in doing so. The justification defense is therefore plainly inconsistent with the claim that White is, at best, guilty of negligent assault. *Compare State v. McDowell*, 10th Dist. No. 10AP-509, 2011-Ohio-6815, ¶ 45 ("[T]here was overwhelming evidence that appellant intentionally and purposely fired two shots at [victim] in rapid fire [.] * * * [T]o instruct on the lesser offense of assault would be incongruous, particularly given appellant's self-defense claim, which asserts a *purposeful act* that was purportedly justified." (Emphasis added.)

{¶ 138} Had the jury accepted White's justification defense, his acquittal on felonious assault would necessarily have followed. That acquittal, in turn, would operate as an acquittal on all lesser included offenses. *State v. Nolton*, 19 Ohio St.2d 133, 249 N.E.2d 797 (1969). Instructing on an affirmative defense, where it would be a complete

defense to the elements of the crime charged, precludes a defendant from obtaining an instruction on lesser included offenses. That has been the rule in this district, as it is in others. *See State v. Grace*, 50 Ohio App.2d 259, 260-261, 362 N.E.2d 1237 (6th Dist.1976); *see also State v. Densmore*, 3d Dist. No. 7-08-04, 2009-Ohio-6870, ¶ 18, citing *Nolton*, *supra* (defendant's choice is either-or, not both).

{¶ 139} Accordingly, the trial court correctly refused to instruct on negligent assault, and the third assigned error is not well-taken.

4) Firearm Specification Conviction

{¶ 140} White's sixth assigned error states:

> VI. It was unconstitutional to convict White for a firearms specification given he was required to carry a firearm in the course of his employment, and utilize the firearm within the course of his employment as a police officer.

a) Forfeiture of the Issue?

{¶ 141} This assignment raises the issue of the constitutionality of White's conviction under Ohio's firearm specification statute, R.C. 2941.145. We first note, and the state points out, that White did not raise the issue of constitutionality below. When such challenges are not raised and argued in the lower court, they are generally deemed forfeited on appeal. *State v. 1981 Dodge Ram Van*, 36 Ohio St.3d 168, 170, 522 N.E.2d 524 (1988). That is not, however, an invariable rule for several reasons.

{¶ 142} First, in *Dodge Ram*, not only was constitutionality not raised in the trial court, but the issue was also neither assigned as error nor briefed on appeal by either party. The appeals court there simply acted sua sponte, declaring the criminal statute to be unconstitutional. Although the Supreme Court reversed that ruling as an abuse of appellate discretion, it stated: "[N]othing prevents a court of appeals from passing upon an error which was neither briefed nor pointed out by a party." *Id.* at 170, citing *Hungler v. Cincinnati*, 25 Ohio St.3d 338, 496 N.E.2d 912 (1986). Here, the constitutional issue was raised and argued in the briefs, which distinguishes it from the posture of the issue in *Dodge Ram*.

{¶ 143} Second, in decisions since *Dodge Ram*, the Supreme Court has made it clear that the so-called "waiver doctrine" is discretionary: "Even where waiver is clear, this court reserves the right to consider constitutional challenges to the application of statutes in specific cases of plain error or *where the rights and interests involved may warrant it.*" (Emphasis sic.) *Hill v. Urbana*, 79 Ohio St.3d 130, 133-134, 679 N.E.2d 1109 (1997).

{¶ 144} Even apart from *Hill's* less restrictive view of waiver, we have discretion under App.R. 12(A)(2) to reach legal issues which, though not originally raised below, appear in the evidentiary record and have had the benefit of briefing. *See State v. Peagler*, 76 Ohio St.3d 496, 499, 668 N.E.2d 489 (1996). Here, there exists a patently clear "evidentiary basis in the record" involving White's use of his duty pistol in relation to having incurred the firearm specification penalty, and the constitutional issue has been

briefed. *Id.* Finally, there are wider dimensions to the constitutional issue which simply cannot be ignored. White's conviction on these facts establishes a precedent involving "the rights and interests" of a class of persons whose daily activity potentially subjects them to the imposition of this penalty: Ohio peace officers.[26] *Compare Hill* at 134. And it is these facts—*unique to peace officers*—that provide several contextual imperatives for addressing whether the specification may be constitutionally so applied.

{¶ 145} First, there is the driving premise underscoring all police-citizen encounters that rise to the level of a "seizure" under the Fourth Amendment: during legitimate acts of enforcement, a police officer's "right to make an arrest or investigatory stop *necessarily carries with it the right to use some degree of physical coercion or threat thereof* to effect [it]." (Emphasis added.) *Graham,* 490 U.S. at 396. If faced with life-threatening behavior by a suspect during a particular stop, arrest or capture, that right under *Garner* allows the officer to use, or threaten to use, his firearm to accomplish the seizure and to defend himself or others. Second, under R.C. 2935.03, and generally under R.C. 737.11, state law places an affirmative duty on peace officers to *enforce* the criminal and traffic laws of Ohio, to arrest violators, and to "preserve the peace, [and] *protect* persons and property." (Emphasis added.) R.C. 737.11. The discharge of these

[26] White is a certified Ohio "peace officer" as defined by R.C. 109.71(A) and 2935.01(B). In his testimony he explained that the Ottawa Hills police department traditionally employs full-time dispatchers who are also certified peace officers and, as needed, these "part-time officers * * * fill in for full-time officers on the road." This is what he was doing on May 23, 2009.

duties of enforcement and protection necessarily places the officers in situations where deadly or non-deadly force might have to be used. Further, in enforcing the laws of Ohio and their local jurisdictions, peace officers are *compelled* by their departments and agencies to train with and carry departmentally-issued (or approved) firearms for that purpose. This includes not just handguns, but shotguns and rifles as well. Third, their employers fully expect that the officers, at least on occasion, will deploy and use these firearms, or threaten to use them, if required to defend themselves or to apprehend and arrest lawbreakers. Finally, under R.C. 109.71 et seq., and the rules promulgated by the Ohio Peace Officer Training Commission (OPOTC), all officers are required annually to meet minimum OPOTC firearms training and qualification standards, in order to retain their state certifications (essentially, their right to be employed as peace officers.) *See* R.C. 109.801(A)(1) and (A)(2). Beyond what OPOTC mandates, the officers' departments may require that they meet higher proficiency standards and undergo specialized training in using firearms.

{¶ 146} In sum, in order even to be employed as a peace officer in Ohio, and to remain so employed over the course of a career, it is an undisputed *mandatory* "job requirement" for the officer to possess, carry and use a firearm while discharging his official enforcement duties.

{¶ 147} While the issue before us concerns the firearms-specification conviction of a particular officer, ultimately it touches the rights and interests of any Ohio peace officer who, under similarly hurried conditions during an on-duty encounter, may have to

draw, point and fire his gun at a criminal suspect, and thereby subject himself to a felony charge *and* the imposition of the specification. "Accordingly, we not only have the authority to consider this issue, but we believe we also have the duty to do so." *Hill*, 79 Ohio St.3d at 134, 679 N.E.2d 1109.

b) Arguments

{¶ 148} White challenges the constitutionality of his firearm specification conviction on as-applied grounds, and secondarily suggests that the statute is void-for-vagueness. His as-applied attack cites his rights under the due process and equal protection clauses of the Ohio and United States Constitutions. The state counters in two ways. First, the firearm specification statute is presumptively constitutional and White's as-applied challenge fails to demonstrate how peace officers are exempted from its reach. Second, any vagueness attack must fail, the state insists, because the statute is unambiguous as to what conduct is penalized, "even when the crime is committed by a police officer [who is] required to carry a gun."[27] For both points, the state cites several federal cases and one Michigan case where law enforcement officers, having been convicted of an underlying felony offense, were given upward increases in prison time due to a firearm specification or similar penalty enhancement.

[27] Since White makes no coherent vagueness argument, we will not make it for him, and we agree with the state that R.C. 2941.145 is facially unambiguous. Its meaning is not in question, only its scope. Further, because it is sufficient to address the statute's application to White on due process grounds, we need not address his equal-protection claim, which too is only asserted and not argued.

c) Standard of Review

{¶ 149} The constitutionality of a lawfully enacted statute is strongly presumed. *State v. Carswell,* 114 Ohio St.3d 210, 2007-Ohio-3723, 871 N.E.2d 547, ¶ 6. The party questioning its constitutionality bears the burden of proving beyond a reasonable doubt that the statute conflicts with some provision of the Ohio or United States Constitutions. *State v. Williams,*126 Ohio St.3d 65, 2010-Ohio-2453, 930 N.E.2d 770, ¶ 20.

i) As-Applied.

{¶ 150} The parties agree that R.C. 2941.145 is not facially unconstitutional, one of two ways it might be attacked. *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 231, 520 N.E.2d 188 (1988). Instead, White maintains that R.C. 2941.145 is unconstitutional on due process grounds as applied to him and to any on-duty Ohio peace officer engaged in legitimate law enforcement functions in which having to brandish, use, or threaten to use their firearm might occur.

{¶ 151} While a facial challenge permits a statute to be attacked for its effect on conduct other than the conduct for which the defendant is charged, *see Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 503, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985), an as-applied challenge requires clear and convincing evidence of a presently existing set of facts that makes the statute unconstitutional *when applied to the defendant on those facts*. *State v. Beckley*, 5 Ohio St.3d 4, 6, 448 N.E.2d 1147 (1983), citing *Belden v. Union Cent. Life Ins. Co.*, 143 Ohio St. 329, 55 N.E.2d 629 (1944). A statute may be unconstitutional as applied to a class of persons or to an individual person. *Oliver v. Feldner*, 149 Ohio

App.3d 114, 121, 2002-Ohio-3209, 776 N.E.2d 499, ¶ 40 (7th Dist.), citing *Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997). In challenging the statute "as applied," the party is contending that the "application of the statute *in the particular context in which he has acted* * * * would be unconstitutional. The practical effect of holding a statute unconstitutional 'as applied' is to prevent its future application in a similar context, *but not to render it utterly inoperative*." (Emphasis added; citations omitted.) *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 109, 2004-Ohio-357, 802 N.E.2d 632 (2004)*; see also Women's Med. Professional Corp. v. Voinovich*, 130 F.3d 187, 193 (6th Cir.1997) ("If a statute is unconstitutional as applied, the state may continue to enforce the statute in different circumstances where it is not unconstitutional, but if a statute is unconstitutional on its face, the state may not enforce the statute under any circumstances").

{¶ 152} Thus, if we find R.C. 2941.145 unconstitutional on as-applied grounds, White's firearm specification conviction must be reversed and the specification ordered dismissed. While R.C. 2941.145 could not be applied to him or to any other similarly-situated peace officer, the state could continue to apply and enforce the specification beyond that factual context. *Yajnik*; *Voinovich*.

ii) Due Process

{¶ 153} For purposes of White's substantive due process claim, "[t]he 'due course of law' clause of Section 16, Article I of the Ohio Constitution, has been considered the equivalent of the 'due process of law' clause in the Fourteenth Amendment." *Direct*

Plumbing Supply Co. v. City of Dayton, 138 Ohio St. 540, 544, 38 N.E.2d 70 (1941). In a due-process analysis of a statute's constitutionality, courts employ a rational-basis review unless a fundamental right is involved, which draws the more severe review of strict scrutiny. *Reno v. Flores*, 507 U.S. 292, 301-302, 309, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993); *Arbino v. Johnson & Johnson*, 116 Ohio St.3d 468, 478, 2007-Ohio-6948, 880 N.E.2d 420, ¶ 49.

{¶ 154} Employment as a peace officer is not a "fundamental right," as traditionally construed, nor is White claiming it is, and thus strict scrutiny is not warranted. Under a rational basis review, the statute will be upheld if it bears a real and substantial relation to the public health, safety, morals or general welfare *and* if it is not unreasonable, arbitrary or discriminatory. *Arbino* at ¶ 49; *State v. Thompkins* (1996), 75 Ohio St.3d 558, 561, 664 N.E.2d 926 (1996). The federal version of rational basis is simply whether there exists a rational relationship between the application of the challenged statute and its purpose. *Id.* Here, there is no question that R.C. 2941.145 has a "real and substantial relation" to public safety. The critical question is whether applying the firearm specification to White on these facts, and to Ohio peace officers in similar circumstances, is unreasonable, arbitrary or discriminatory in light of the purpose for which the statute was enacted. If it is, then its application in this context cannot be upheld.

d) Distinguishable Authority

{¶ 155} In arguing that R.C. 2941.145 is not unconstitutional as applied to White, the state first cites five federal cases in which the courts imposed a penalty enhancement on police officers for using their gun or related equipment (e.g., body armor, restraint devices) during the commission of a felony offense. None of those cases, however, bears even the remotest similarity to the facts here. All were egregious "cop corruption" cases involving the commission of collateral felonies over extended time periods. The flagitious conduct for which those officers were properly prosecuted was completely unrelated to their official duties and was not triggered by any act of on-duty enforcement.

{¶ 156} Among them is *United States v. Haynes*, 582 F.3d 686 (7th Cir.2009). *Haynes* involved a Chicago officer convicted of racketeering, drug conspiracy, robbery, and extortion. From 1999 to 2005, the officer was principally involved in "ripping off" drug dealers and drug couriers, and generally acting like the armed career criminals he was supposed to be arresting. *Id.* at 692-697. The *Haynes* court articulated the theme which distinguishes all these cases from White's situation, stating: "[a]s you read this, it may be difficult to tell the cops from the crooks. That's because many of the actors in these events are both. You may be reminded of a popular movie [Training Day]. In our case, life imitates art." *Id.* at 692, fn. 1.

{¶ 157} In *United States v. Shamah*, 624 F.3d 449 (7th Cir.2010), two Chicago street officers spent two years "supplement[ing] their income by shaking down drug dealers." *Id.* at 451-452. Hardly an isolated instance of "cops behaving badly," they

were properly convicted of RICO conspiracies, civil-rights crimes, theft of government funds, and gun possession during violent crimes—all involving the liberal use of their duty weapons, handcuffs and body armor to facilitate these offenses.

{¶ 158} In *United States v. Partida,* 385 F.3d 546 (5th Cir.2004) two police officers were convicted of extortion, drug trafficking and conspiracy. The gist of their misdeeds involved escorting and protecting known drug dealers as they transported large quantities of marijuana through their jurisdiction. Even then, the *Partida* court noted that under the federal sentencing statute, any penalty enhancement must still be based on evidence that the officer possessed "a weapon at the time he *uses his official position* to facilitate a drug offense." (Emphasis added.) *Id.* at 562. The enhancement provision, in other words, is not automatic. Some evidentiary connection must be shown between the possession or use of the weapon and the collateral offense, beyond its happenstance possession in the officer's official capacity. *Id*. at 563. The federal cases thus provide no authority whatsoever for upholding the application of R.C. 2941.145 to White's circumstances.[28]

[28] The remaining two federal cases on which the state relies are just as easily differentiated. In *United States v. Sivils,* 960 F.2d 587, 596 (6th Cir.1992), two officers were convicted of conspiring to possess and distribute cocaine and firearms possession while drug trafficking over a period of several months. In *United States v. Ruiz,* 905 F.2d 499, 508 (1st Cir.1990), a Massachusetts cop was convicted of drug-trafficking conspiracies and racketeering activity occurring over a six-year period. This stellar officer, among other nefarious conduct, assisted drug traffickers in return for "personal use" cocaine by protecting them from detection and arrest. *Id.* at 502-505. Ruiz's duty weapon was not "incidental to his vocation as a police officer," but was employed "as a means of facilitating his avocation as a criminal." *Id.* at 507. In noting the connection between his position and his felonious behavior, the court stated:

{¶ 159} The state also cites *People v. Khoury*, 181 Mich.App. 320, 448 N.W.2d 836 (1989), which, though non-binding, is arguably more analogous to this case. There, an on-duty officer, dispatched to an apartment complex to break up a fight, shot and killed a knife-wielding combatant. That resulted in Khoury's trial and convictions for manslaughter and the gun specification penalty under Michigan's felony-firearm statute. *Id.* at 837. The appeals court first rejected his void-for-vagueness challenge to the specification conviction, summarily holding that the statute "provides fair notice of proscribed conduct." The court next dismissed his "public policy" argument, which attempted an analogy with police immunity in civil cases. On this point, the court held:

> We know of no public policy consideration that would justify granting police officers immunity from criminal prosecution for their criminal acts. The fact that the Legislature has determined that there are such policy considerations to support the grant of immunity from civil liability to police officers for their actions under some circumstances is not persuasive. At such time as the Legislature deems it advisable, the Legislature will doubtless enact similar measures with regard to the

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> [Ruiz's] ability to intimidate [drug] dealers with the power of arrest, his access to [computer] data and inside information and warrants, his assistance in transporting cocaine, and his ability to supply ammunition were all made possible through, or facilitated by, his employment. [His] illegal activities were clearly helped along by the authority vested in him as a police officer[.] *Id.* at 504.

criminal prosecution of police officers for actions arising in the course of their duties. *Id.* at 839.[29]

{¶ 160} The state asks us to follow *Khoury's* reasoning here and simply pitch the issue to the General Assembly to resolve. Yet, in deferring to the legislature in a conclusory way, the *Khoury* court did not indicate whether its deference was due to some discernible legislative purpose behind Michigan's felony-firearm specification. That is, the court did not identify or rely on legislative purpose as it might bear on whether the specification was appropriately applied to police officers who use their guns while plainly performing official investigative or enforcement functions.

e) Legislative Purpose of R.C. 2941.145

{¶ 161} R.C. 2941.145 creates a penalty enhancement, not a separate criminal offense, and consequently it does not merge with the underlying felony at sentencing. *State v. Ford*, 128 Ohio St.3d 398, 2011-Ohio-765, 945 N.E.2d 498, ¶ 19. The specification carries a three-year mandatory prison term where the jury finds "that the offender had a firearm on or about the offender's person or under the offender's control

[29] The majority opinion affirmed the officer's specification conviction. The dissenting judge thought the evidence was insufficient to convict on the manslaughter charge, feeling also that it strongly indicated an act of reasonable self-defense, and would have reversed both convictions. *Id*. at 840. Thereafter, the Michigan legislature amended the felony-firearm statute to create an exemption for on-duty officers. The penalty enhancement "does not apply to a law enforcement officer who is authorized to carry a firearm while in the official performance of his or her duties, and who is in the performance of those duties" when use of the firearm occurs. *See People v. Khoury*, 437 Mich. 954, 954, 467 N.W.2d 810, 810 (1991). Khoury then moved for, and the court granted, reconsideration of its earlier ruling in light of this amendment, and reversed his specification conviction. *Id.*

while committing the offense *and* displayed the firearm, brandished the firearm, indicated that the offender possessed the firearm, or used it to facilitate the offense." (Emphasis added.) *Id.*[30]

{¶ 162} On several occasions the Ohio Supreme Court has identified the legislative purpose behind the mandatory incarceration penalty for using a firearm while committing a felony. *See State v. Thompkins*, 78 Ohio St.3d 380, 385, 678 N.E.2d 541 (1997); *State v. Powell*, 59 Ohio St.3d 62, 63, 571 N.E.2d 125 (1991); *State v. Murphy*, 49 Ohio St.3d 206, 208, 551 N.E.2d 932 (1990).

{¶ 163} Among these, in *Murphy*, the court bluntly stated:

> In enacting this statute [former R.C. 2929.71(A)] *the legislature wanted to send a message to the criminal world*: "If you use a firearm you will get an extra three years of incarceration." That is why it chose the

[30] R.C. 2929.71 formerly contained the firearm enhancement provisions, but was repealed effective July 1 1996. Applicable here, R.C. 2929.14(B)(1)(a) now provides, in relevant part:

> Except as provided in division (D)(1)(e) of this section, if an offender who is convicted of * * * a felony also is convicted or pleads guilty to a specification of the type described in section * * * 2941.145 of the Revised Code, the court shall impose on the offender * * *:
>
> (ii) A prison term of three years if the specification is of the type described in section R.C. 2941.145 of the Revised Code that charges the offender with having a firearm on or about the offender's person or under the offender's control while committing the offense and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense[.]

word "firearm," instead of simply "deadly weapon," which can include all types of lethal instruments. The foregoing definition includes loaded as well as unloaded guns. It also includes operable guns, as well as inoperable guns that can readily be rendered operable. *Id.* at 208. (Emphasis added.)

{¶ 164} In *Powell,* the court observed:

> By enacting [former] R.C. 2929.71, the General Assembly sought to deter and punish both the use and possession of firearms by people who commit crimes. The public policy behind this enactment is apparent: a criminal with a gun is both more dangerous and harder to apprehend than one without a gun. Further, it is obvious that a gun stolen during a burglary can be as dangerous as one which the burglar has at the start of the crime. Accordingly, we hold that a three-year additional term of actual incarceration may be imposed pursuant to R.C. 2929.71 if the defendant has a firearm in his or her possession at any time during the commission of a felony, even if, as in the instant case, the firearm is acquired by theft during the course of the felony. (Emphasis added.) Id. at 63.

{¶ 165} There is also Justice Resnick's perspicacious observation in *State v. Gaines*, 46 Ohio St.3d 65, 545 N.E.2d 68 (1989) (Resnick, J. dissenting):

> [A]t the time [former R.C.2929.71] was enacted *there was a drastic rise in violent crimes involving the use of firearms,* and therefore state legislatures throughout the country enacted statutes *designed to curb violent*

crime. One of the major avenues utilized by state lawmakers was the adoption of enhancement statutes. The basic premise of this type of law was to "enhance" the sentence of a defendant convicted of an enumerated felony who used or possessed a firearm in the perpetration of said crime. By enacting R.C. 2929.71 in 1983, *Ohio joined the growing number of states seeking to deter the use of guns in the commission of violent crimes.* (Emphasis added.) *Id.* at 71.

f) Analysis

{¶ 166} Today, the legislative purpose behind R.C. 2941.145 remains unchanged from its predecessor and is just as unequivocal. The underlying theory may be embedded in deterrence, but where that fails, the express purpose is to punish the offender who *voluntarily* introduces a firearm into a felony he was otherwise intending to commit. Indeed, to harshly punish the criminal *for making that choice* was the legislature's clear intent, since committing the felony unarmed draws only the penalty for the substantive crime.

{¶ 167} It is one thing for an on-duty officer to engage in a "personal frolic" of criminality, having no relation to a legitimate law enforcement task, that injures another person. *See Rogers*, 61 Ohio St.3d at 212, 574 N.E.2d 451 (on-duty officer, in uniform and armed, left patrol assignment, drove to his mother's house and allegedly assaulted sister). By definition, once an officer commits some collateral crime, as in the "cop corruption" cases, he is no longer performing his official duties and is properly subject to

prosecution and, where warranted, to the firearm specification. An officer has a statutory duty to enforce the law, but he is under *no duty* to break the law through a separate act of illegal conduct. Thus, for example, an Ohio highway patrolman who left the state patrol's training facility, went home and shot his wife, is properly convicted of both felonious assault *and* the firearm specification under R.C. 2941.145. *See State v. McCormick*, 2d Dist. No. 19505, 2003-Ohio-5330.

{¶ 168} The line of demarcation is straightforward: was the officer acting within the scope of what he was employed to do when he used a firearm? Was he performing an official enforcement function that involved, e.g., the investigation, detention, apprehension, pursuit or arrest of a person suspected of some offense? Regardless of whether the core act is afterward thought by the state to warrant a felony prosecution, the specification should not attach in that circumstance merely because it is artfully possibly to allege in the indictment that the officer possessed his duty firearm "while committing the offense *and* [the officer] displayed the firearm, brandished the firearm, * * * or used it to facilitate the offense." R.C. 2941.145.

{¶ 169} Consistent with this analysis is the relevance of R.C. 2901.04(A), which states: "[S]ections of the Revised Code defining offenses or *penalties* shall be *strictly construed* against the state, and *liberally construed* in favor of the accused." (Emphasis added.) As it would relate to R.C. 2941.145 and the significance of the legislative purpose behind it, the Ohio Supreme Court has stated: "[A]lthough criminal statutes are strictly construed against the state, R.C. 2901.04(A), they should not be given an

artificially narrow interpretation that would defeat *the apparent legislative intent*." (Emphasis added.) *State v. White*, 132 Ohio St.3d 344, 2012-Ohio-2583, 972 N.E.2d 534, ¶ 20.

{¶ 170} In our view, it was never the General Assembly's intent to apply the firearm specification to a peace officer who is required by his employer and, indirectly, by the duties and requirements of state law, to possess and carry a firearm and who, consequently, might have to discharge it during a legitimate act of enforcing the law. The purpose of the statute, in other words, was not to ensnare an officer with this type of penalty *when he had no choice* but to bring the firearm into an on-duty confrontation with a suspected lawbreaker, where he might be expected to brandish it and, possibly, have to use it. To maintain otherwise is to ignore the plain rationale for the specification, as recognized in *Murphy*, *Powell* and *Gaines*. We are therefore unpersuaded that the approach of the *Khoury* court should be ours.

g) R.C. 2941.145 is Unconstitutional as Applied

{¶ 171} We hold that R.C. 2941.145 may not be constitutionally applied to White on these facts and to persons in his class—Ohio peace officers—acting in similar circumstances. To convict the officer of the firearm specification for an act he unambiguously took in the good-faith performance of a law enforcement function, using a firearm he was compelled to carry, violates his due process rights. It bears no reasonable relation to the purpose for which the statute was enacted and to impose the specification penalty on White or other peace officers in this fashion is unreasonable and

arbitrary. As a predicate requirement for that holding, the trial record easily offers clear and convincing evidence of a presently existing set of facts that renders R.C. 2941.145 unconstitutional, under the appropriate level of scrutiny, when applied to a peace officer's use of his firearm in the line of duty. *Eppley v. Tri-Valley Local School Dist. Bd.*, 122 Ohio St.3d 56, 2009-Ohio-1970, 908 N.E.2d 401 (2009), ¶ 13, citing *Belden*,143 Ohio St. 329, 55 N.E.2d 629.

{¶ 172} Accordingly, White's sixth assigned error is well-taken.

{¶ 173} White's second and fifth assigned errors state:

> II. As evidenced by the trial court record, the jury lost its way and White's convictions were against the manifest weight of the evidence.
>
> V. The trial court erred in imposing a sentence of seven years for the [felonious] assault, with the mandatory three years consecutive for the firearms specification.

{¶ 174} Given the previous disposition of White's other assigned errors, these assignments are moot and need not be addressed. *See* App.R. 12(A)(1)(c)

III. Conclusion

{¶ 175} White's fourth and sixth assigned errors, to the extent previously indicated, are well-taken. The first and third assigned errors are not well-taken. The second and fifth assigned errors are deemed moot.

{¶ 176} On consideration whereof, the judgment of the Lucas County Court of Common Pleas is hereby reversed, the convictions and sentence are vacated, the firearm specification is ordered dismissed with prejudice, and the case is remanded for a new trial consistent with this decision. It is ordered that appellee pay the court costs of this appeal pursuant to App.R. 24.

Judgment reversed.

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

Stephen A. Yarbrough, J.
CONCUR. _____
JUDGE

Arlene Singer, J.,
CONCURS IN PART AND
DISSENTS IN PART AND
WRITES SEPARATELY.

SINGER, P.J., concurring in part and dissenting in part.

{¶ 177} I write separately to concur in judgment only with the majority's decision as to appellant's first, second, and third assignments of error. I respectfully dissent from the majority's conclusions with regard to appellant's fourth, fifth and sixth assignments

of error. Specifically, I respectfully dissent from the majority's decision to reverse appellant's conviction on the basis of the trial court's jury instructions regarding deadly force. Furthermore, I respectfully dissent from the majority's conclusion that appellant is immune from being convicted on a gun specification.

{¶ 178} In his first assignment of error, appellant contends that the state failed to sufficiently prove the elements of felonious assault.

{¶ 179} "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.

{¶ 180} Appellant was convicted of felonious assault in violation of R.C. 2903.11(A)(2). The elements are as follows: "(A) No person shall knowingly do either of the following: * * * (2) Cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance."

{¶ 181} Appellant claims that the state failed to prove the element of "knowingly." Appellant argues that because he was mistaken as to the factual circumstances of the present case, he lacked the criminal mens rea to commit the crime of felonious assault. I disagree.

{¶ 182} "Knowingly" is defined in R.C. 2901.22(B), which states that: "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶ 183} Some Ohio courts have found that "'[M]otive, purpose or mistake of fact is no significance' when determining whether a defendant acted knowingly." *State v. Chambers*, 4th Dist. No. 10CA902, 2011-Ohio-4352, ¶ 35, quoting *State v. Wenger*, 58 Ohio St.2d 336, 339, 390 N.E.2d 801 (1979). The *Chambers* court further explained:

> [T]o act "knowingly" is not to act "purposely," or with a specific intent to do the prohibited act. Katz & Gianelli, Ohio Criminal Law (2010 Ed.), Section 85.7. See *State v. Huff* (2001), 145 Ohio App.3d 555, 563, 763 N.E.2d 695 (stating that "[k]nowingly" does not require the offender to have the specific intent to cause a certain result. That is the definition of "purposely"); see, also, *State v. Dixon*, Cuyahoga App. No. 82951, at ¶ 16, 2004-Ohio-2406.

{¶ 184} Because knowing precisely what existed in a defendant's mind at the time of the wrongful act may be impossible, the trier of fact may consider circumstantial evidence, i.e., the facts and circumstances surrounding the defendant's wrongful act, when determining if the defendant was subjectively "aware that his conduct will probably cause a certain result or will probably be of a certain nature." *See, Huff, supra.* ("Whether a person acts knowingly can only be determined, absent a defendant's

admission, from all the surrounding facts and circumstances, including the doing of the act itself.")

{¶ 185} Other courts have held that that a mistake of fact can, in certain circumstances, negate the knowingly element of a specific intent crime. *State v. Cooper*, 10th Dist. No. 09AP-511, 2009-Ohio-6275, *State v. Feltner*, 2d Dist. No. 06-CA-20, 2007-Ohio-866, *State v. Snowden*, 7 Ohio App.3d 358, 363, 455 N.E.2d 1058 (10th Dist.1982).

{¶ 186} In *State v. Rawson*, 7th Dist. No. 05 JE 2, 2006-Ohio-496, an appellant attempted to get his felonious assault conviction overturned on the basis of a mistake of fact defense. The appellant had punched a man in the face causing severe injury. He claimed he mistook the man for someone he knew and jokingly began fighting with him before he realized his mistake. His "joke" ultimately led to a fight and to the appellant's indictment for felonious assault. The appellant argued that because he never would have gotten in a fight with the man had he not been mistaken about his identity, he could not be found to have knowingly caused him physical harm. The court disagreed:

> [T]he crime for which [the appellant] was convicted required him to knowingly cause serious physical harm to another. The only fact which [the appellant] was mistaken about was the identity of the man he spoke with * * * but this fact is unrelated to any of the elements of the crime he committed. Thus, a mistake of fact defense is simply inapplicable in this situation. *Id*. at ¶17.

{¶ 187} In this case, appellant was mistaken when he believed that McCloskey was armed and preparing to shoot him. As in the *Rawson* case, appellant's mistaken belief is unrelated to the elements of felonious assault. His mistaken belief does not change or "negate" the fact that he knowingly (aware that if he pointed and shot a gun at someone they would be injured) caused serious physical harm to McCloskey.

{¶ 188} Having thoroughly considered the entire record of proceedings in the trial court and the testimony, I find that the state presented sufficient evidence from which, when viewed in a light most favorable to the state, a rational trier of fact could have found appellant guilty of knowingly causing physical harm to McCloskey by means of a deadly weapon. The jury could infer from the testimony at trial that appellant was aware that shooting someone could result in serious injury to that person. *See State v. Mobley-Melbar*, 8th Dist. No. 92314, 2010-Ohio-3177.

{¶ 189} In his second assignment of error, appellant contends that his conviction is against the manifest weight of the evidence.

{¶ 190} A challenge to the weight of the evidence questions whether the greater amount of credible evidence was admitted to support the conviction than not. *Thompkins,* 78 Ohio St.3d at 387, 678 N.E.2d 541. The standard for determining whether a conviction is contrary to the manifest weight of the evidence is whether the appellate court finds that the trier of fact clearly "lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Id.*, citing *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983*). See*

also State v. Smith, 80 Ohio St.3d 89, 114, 684 N.E.2d 668 (1997). In making this determination, the court reviews the entire record, weighs the evidence and all reasonable inferences therefrom, and considers the credibility of witnesses. *Martin*, *supra*.

{¶ 191} "Weight is not a question of mathematics, but depends on its effect in inducing belief." (Emphasis deleted.) *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. We must keep in mind, however, that "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact may believe all, some, or none of what a witness says. *State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964). In this case, the jury chose to believe the state's witnesses. Based on the testimony and the law, I cannot say that the jury clearly lost its way or created a manifest miscarriage of justice by finding appellant guilty of the charge against him. *Thompkins,* 78 Ohio St.3d at 386, 678 N.E.2d 541. Accordingly, I do not believe that the jury's verdict was against the manifest weight of the evidence.

{¶ 192} In his third assignment of error, appellant contends that the court erred in not instructing the jury on the lesser included offense of negligent assault. Once again, appellant disputes the jury's finding that he acted knowingly and argues he acted negligently.

{¶ 193} The court must view the evidence in the light most favorable to the defendant when deciding whether to instruct the jury on a lesser included offense. *State v. Campbell*, 69 Ohio St.3d 38, 630 N.E.2d 339 (1994). An instruction is not warranted,

however, every time "some evidence" is presented on a lesser included offense. *State v. Smith*, 8th Dist. No. 90478, 2009-Ohio2244, ¶ 12, citing *State v. Shane*, 63 Ohio St.3d 630, 590 N.E.2d 272 (1992).

{¶ 194} A trial court has discretion in determining whether the record contains sufficient evidentiary support to warrant a jury instruction on a lesser included offense; an appellate court should not reverse that determination absent an abuse of discretion. *State v. Henderson*, 8th Dist. No. 89377, 2008-Ohio-1631, ¶ 10, citing *State v. Wright*, 4th Dist. No. 01 CA2781, 2002-Ohio-1462.

{¶ 195} R.C. 2903.14(A), negligent assault, provides that: "[n]o person shall negligently, by means of a deadly weapon or dangerous ordnance * * * cause physical harm to another or to another's unborn." "A person acts negligently when, because of a substantial lapse from due care, he fails to perceive or avoid a risk that his conduct may cause a certain result or may be of a certain nature." (Emphasis added.) R.C. 2901.22(D).

{¶ 196} As stated above, a person acts knowingly when he is aware that his conduct will probably cause a certain result. R.C. 2901.22(B).

{¶ 197} Courts have consistently held that shooting a gun in a place where there is risk of injury to one or more persons supports the inference that the offender acted knowingly. *See, e.g., State v. Brooks*, 44 Ohio St.3d 185, 192, 542 N.E.2d 636 (1989); *State v. Ivory*, 8th Dist. No. 83170, 2004-Ohio-2968, ¶ 6; *State v. Roberts*, 1st Dist. No. C-000756, 2001 WL 1386149 (Nov. 9, 2001), citing *State v. Gregory*, 90 Ohio App.3d

124, 628 N.E.2d 86 (1993); and *State v. Phillips*, 75 Ohio App.3d 785, 792, 600 N.E.2d 825 (12th Dist.1991).

{¶ 198} The Ohio Supreme Court has held that a charge on a lesser included offense is only required where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense. *State v. Thomas*, 40 Ohio St.3d 213, 533 N.E.2d 286 (1988), paragraph two of the syllabus.

{¶ 199} In *State v. McDowell*, 10th Dist. No. 10AP-509, 2011-Ohio-6815, the court found that an appellant was not entitled to a jury instruction on negligent assault as a lesser included offense of felonious assault when it was undisputed he shot at the victim even though he claimed he did it in self-defense. The court noted that "to instruct on the lesser offense of assault would be incongruous, particularly given appellant's self-defense claim, which asserts a purposeful act that was purportedly justified." *See also Mobley-Melbar*, *supra*, 8th Dist. No. 92314, 2010-Ohio-3177. In *State v. Ollison*, 8th Dist. No. 91637, 2009-Ohio-1691, the court, facing a similar question, stated "that [the appellant] acted 'knowingly' rather than 'negligently.' He testified that he shot at [victim] 'intending to sprinkle him.' This was not a situation where he accidently fired the gun. [The appellant] intended to shoot [the victim], and he did." *Id*. at ¶ 23. In *State v. Person*, 1st Dist. No. C-060656, 2007-Ohio-6869, the court found that the appellant was not entitled to an instruction on negligent assault as a lesser included offense of felonious assault because there was no evidence that the appellant accidentally shot the victim in

the face as a result of a weapon malfunction. In *State v. Bucci*, 11th Dist. No. 2001-L-091, 2002-Ohio-7134, the appellant was likewise denied a jury instruction for negligent assault when the evidence showed that appellant admitted to the police he hit the victim with a beer bottle.

{¶ 200} Consistent with these analyses, the court in *State v. Hawkins*, 2d Dist. No. 21691, 2007-Ohio-2979, found that there was evidence presented at trial to support an acquittal of felonious assault and a conviction of negligent assault. The facts showed that the victim, who was unsteady on his feet because of drinking all day, approached the appellant who was holding a knife. The court found that there was an issue for the trier of fact as to whether the appellant negligently failed to use due care when the victim approached her. Moreover, the victim told the police he was to blame for his injuries. (*See also In re Justin Tiber*, 154 Ohio App.3d 360, 2003-Ohio-5155, 797 N.E.2d 161, (7th Dist.), upholding a juvenile's negligent assault delinquency adjudication where a friend was visiting the juvenile's house, and the juvenile was showing the friend his father's new gun, when it accidentally discharged and hit the friend).

{¶ 201} A court of appeals is bound by and must follow decisions of the Ohio Supreme Court, which are regarded as law unless and until reversed or overruled. S*chlachet v. Cleveland Clinic*, 104 Ohio App.3d 160, 168, 661 N.E.2d 259 (8th Dist.1995).

{¶ 202} It is undisputed in this case that appellant, aware that shooting someone with a gun would cause physical harm, aimed and fired his gun at McCluskey. Having

already determined that the evidence at trial would not reasonably support an acquittal on the charge of felonious assault, I cannot, pursuant to *State v. Thomas*, *supra*, say that the trial court abused its discretion in failing to instruct the jury on the lesser included offense of negligent assault. A finding that the jury was entitled to an instruction on negligent assault would be inconsistent with my conclusion in appellant's first assignment of error and in direct opposition to *State v. Thomas, supra*. Finding no abuse of discretion, I also believe appellant's third assignment of error to be without merit.

{¶ 203} The majority recites the testimony of the witnesses in agonizing detail and I see no reason to reiterate. However, before addressing my concerns with the majority's conclusion regarding appellant's fourth assignment of error, it may be helpful to note that the recordings were played for the jury several times during the trial. The video recording closely reflects appellant's testimony of his pursuit. It initially shows McCloskey and Snyder, riding their motorcycles while appellant is driving behind them. McCloskey and Snyder make quick stops at two stop signs. At the third stop sign, they pause for a few seconds and appear to have a conversation. They then both take off at a high rate of speed. Appellant activates his sirens. He pursues them for eight seconds before Snyder drives up onto the grassy island and McCloskey stops his motorcycle. McCloskey turns around and looks at the police car. His right arm is clearly visible at his side. He then turns around and looks ahead. Again, he turns around to look at the police car. At the same time, appellant can be heard to yell something inaudible and he shoots McCloskey. Between the time McCloskey and appellant stop and McCloskey gets shot,

eight seconds elapse. Between the time appellant opened the car door and shoots McCloskey, *a mere three seconds elapse*.

{¶ 204} The majority contends that the court erred in instructing the jury on non-deadly force. Citing *Rahn v. Hawkins*, 464 F.3d 813 (8th Cir.2006), *overruled on other grounds*, *Rivera v. Illinois*, 556 U.S. 148, 129 S.Ct. 1446, 173 L.Ed.2d 220 (2009), the majority states that "[i]n a police deadly-force case, it is reversible error to give the jury a non-deadly force instruction." However, the *Rahn* case is easily distinguishable from the instant case in that the *Rahn* jury was only given a non-deadly force instruction despite clear evidence that the officers used deadly force. In this case, unlike *Rahn*, the jury received an instruction regarding deadly force in addition to an instruction regarding excessive force. I see no reversible error in giving the jury both instructions.

{¶ 205} Second, the majority states that the jury should have received a jury instruction "just as *Garner* states the standard or in a substantially equivalent language." The so called *Garner* standard provides that police use of deadly force is reasonable:

> If the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where, feasible, some warning has been given.

The court in this case instructed the jury as follows:

> In determining whether the defendant acted reasonable in his use of force in the pursuit of his official duties, you must consider factors such as the severity of the crime Mr. McCloskey was believed to have committed, whether Mr. McCloskey posed an immediate threat to the safety of defendant or another person, and whether Mr. McCloskey was actively resisting arrest or attempting to evade arrest by flight.

In my view, the language used by the court in this case instructed the jury in language, as the majority terms it, "substantially equivalent" to *Garner*. Even so, it should be noted that the United States Supreme Court has revisited *Garner*.

{¶ 206} Commenting on *Garner* some 22 years later, the United States Supreme Court in *Scott v. Harris*, 550 U.S. 372, 127 S.Ct. 1769, 167 L.Ed.2d 686 (2007), Justice Scalia writing for the court, stated:

> *Garner* did not establish a magical on/off switch that triggers rigid preconditions whenever an officer's actions constitute "deadly force." *Garner* was simply an application of the Fourth Amendment's "reasonableness" test, *Graham, supra*, at 388, 109 S.Ct. 1865, to the use of a particular type of force in a particular situation. *Garner* held that it was unreasonable to kill a "young, slight, and unarmed" burglary suspect, 471 U.S., at 21, 105 S.Ct. 1694, by shooting him "in the back of the head" while he was running away on foot, id., at 4, 105 S.Ct. 1694, and when the officer

> "could not reasonably have believed that [the suspect] ... posed any threat," and "never attempted to justify his actions on any basis other than the need to prevent an escape," *id.*, at 21, 105 S.Ct. 1694. * * * Although respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of "reasonableness." Whether or not Scott's actions constituted application of "deadly force," all that matters is whether [the defendant's] actions were reasonable. *Scott*, at 382-383.

{¶ 207} In *Scott*, an individual was injured when he was forced off the road by a police officer after he had engaged another police officer in a high speed chase. The driver was rendered a quadriplegic. The court held that because the car chase that respondent initiated posed a substantial and immediate risk of serious physical injury to others, the officer's attempt to terminate the chase by forcing respondent off the road was reasonable, even though that action posed high likelihood of serious injury or death for respondent. Interestingly, the *Scott* case also involved a videotape which the court heavily relied on in determining the reasonableness of the officer's use of force.

> [In the videotape], we see respondent's vehicle racing down narrow, two-lane roads in the dead of night at speeds that are shockingly fast. We see it swerve around more than a dozen other cars, cross the double-yellow line, and force cars traveling in both directions to their respective shoulders to avoid being hit. We see it run multiple red lights and travel for

considerable periods of time in the occasional center left-turn-only lane, chased by numerous police cars forced to engage in the same hazardous maneuvers just to keep up. Far from being the cautious and controlled driver the lower court depicts, what we see on the video more closely resembles a Hollywood-style car chase of the most frightening sort, placing police officers and innocent bystanders alike at great risk of serious injury. *Id*. at 379-380.

{¶ 208} Mindful of the *Scott* court's emphasis on reasonableness, we turn to *Graham v. Conner, supra*.

Because "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application," Bell v. Wolfish, 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447 (1979), however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight. * * * The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. * * * The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are

tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. *Graham*, 490 U.S. at 395-397, 109 S.Ct. 1865, 104 L.Ed.2d 443.

In this case, the trial court instructed as follows:

> Reasonableness must be judged from the perspective of a reasonable police officer in light of all the facts and circumstances confronting the officer at the time and in the moments before the use of deadly force rather than with 20/20 vision of hindsight.
>
> What constitutes reasonable action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure. Allowance must be made for the fact that that officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving.
>
> In determining whether the defendant acted reasonable in his use of force in the pursuit of his official duties, you must consider factors such as the severity of the crime Mr. McCloskey was believed to have committed, whether Mr. McCloskey posed an immediate threat to the safety of defendant or another person, and whether Mr. McCloskey was actively resisting arrest or attempting to evade arrest by flight.

{¶ 209} It is my opinion that the above jury instructions closely mirrored the standard of reasonableness set forth in *Graham.* Perhaps more importantly, as I am

disagreeing with the majority's decision to reverse in favor of appellant on the issue of jury instructions, the court's instructions closely followed the proposed instructions submitted by appellant's counsel, instructions which cited *Graham*. Those proposed instructions read as follows:

> Reasonableness must be judged from the perspective of a reasonable police officer in light of all the facts and circumstances confronting the officer at the time in the moments before the use of deadly force rather than with the 20/20 vision of hindsight. *Graham v. Connor*, (1989), 490 U.S. 386, 396.
>
> What constitutes "reasonable" action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure. *Smith v. Freland* (6th Cir.1992), 954 F.2d 343, 347. Allowance must be made for the fact that officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving. *Graham*, at 396-397.

{¶ 210} Once again, quoting Justice Scalia, "[A]lthough respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of "reasonableness." *Scott*, 550 U.S. at 383, 127 S.Ct. 1769, 167 L.Ed.2d 686. The *Scott* case involved a civil § 1983 action. In the instant case, a criminal jury trial, "* * * it was up to the jury to do the

sloshing." *Estate of Grigsby ex rel. Grigsby v. Falat,* N.D.Ill. No. 09 C 1956, 2011 WL 2297680 (June 6, 2011).

{¶ 211} One purpose of jury instructions is to inform the jury of various permissible ways of resolving the issues in the case, and a party is entitled to an instruction on its theory of the case so long as it is legally correct and there is factual evidence to support it. *Rahn, supra*, 474 F.3d 813. Courts "frequently trust juries to answer questions regarding reasonableness; that is the jury's proper role." *Falat, supra*.

{¶ 212} In this case, the jury, after viewing the videotape multiple times, was asked to determine whether or not appellant's actions in shooting McCloskey were reasonable under the circumstances. The jury determined that his actions were not reasonable under the circumstances. Upon a review of the jury instructions, it is my conclusion that the instructions were legally correct and were based on the evidence presented at trial. Further, I find no basis to conclude that the instructions as given in this case misled or confused the jury.

{¶ 213} A determination as to which jury instructions are proper is a matter left to the sound discretion of the trial court. *State v. Guster*, 66 Ohio St.2d 266, 271, 421 N.E.2d 157 (1981). Abuse of discretion requires more than simply an error in judgment; it implies unreasonable, arbitrary, or unconscionable conduct by the court. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). I disagree with the majority that the jury instructions, as given, meet the *Blakemore* standard for abuse of discretion.

{¶ 214} Because the majority has determined that appellant's conviction is reversible, they have found appellant's fifth assignment of error regarding his sentencing moot. For purposes of consistency with my conclusion, I will briefly address appellant's fifth assignment of error.

{¶ 215} First, he argues that the trial judge erroneously informed him that he could have been sentenced on the day the verdict was returned. Appellant argues that the trial judge is wrong as a defendant has a right to request a presentence report. Given that the trial court did not immediately proceed to sentencing upon the verdict's return and that a presentence report was prepared before appellant was sentenced, I fail to see how appellant was prejudiced.

{¶ 216} Appellant also contends that the trial judge erred in commenting on the testimony of the motorcyclists. I see no error in the trial judge discussing evidence, at sentencing, that has already been admitted.

{¶ 217} Next, appellant contends that the trial judge erred in sentencing appellant when he used the terms "taking time to reflect," "split-second decision" and "Monday morning quarterbacking." Appellant also contends that the trial judge erred in explaining that he once attended a short training session regarding police decision making at the Toledo Police Academy. Once again, I fail to see how appellant was prejudiced by these comments. What is important at sentencing is that, as established by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, ¶ 100, the trial court is vested with full

discretion to impose any sentence within the statutory range without any corollary requirement to issue specific reasons or findings prior to imposition of such a sentence.

{¶ 218} Appellant was convicted of a second degree felony with a gun specification. Pursuant to R.C. 2929.14(A)(2), the maximum term that appellant could be sentenced for a second degree felony is eight years. Appellant was also found guilty of a gun specification. Pursuant to R.C. 2929.14(B)(1)(a)(ii), the sentencing court is mandated to impose a three-year period of incarceration in addition to any other penalty. Here, appellant was sentenced to seven years in prison for felonious assault and an additional three years in prison for the gun specification. As appellant's sentence is within the sentencing parameters of R.C. 2929.14, I find no abuse of discretion.

{¶ 219} Finally, the majority concludes, in appellant's sixth assignment of error that the court erred in convicting him of a gun specification when appellant was required to carry a gun as a condition of his employment. R.C.2929.14(B)(1)(a)(ii) states:

> Except as provided in division (B)(1)(e) of this section, if an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification of the type described in section 2941.141, 2941.144, or 2941.145 of the Revised Code, the court shall impose on the offender one of the following prison terms:
>
> (ii) A prison term of three years if the specification is of the type described in section 2941.145 of the Revised Code that charges the offender with having a firearm on or about the offender's person or under

> the offender's control while committing the offense and displaying the firearm, brandishing the firearm, indicating that the offender possessed the firearm, or using it to facilitate the offense[.]

{¶ 220} When construing a statute and its legislative interest, a court has a duty to give effect to that statute's express wording and plain meaning. *See State v. Teamer*, 82 Ohio St.3d 490, 491, 696 N.E.2d 1049 (1998).

{¶ 221} The above penalty enhancement statute provides neither an exception nor an exemption for offenders who are required to carry a firearm in the course of their employment. Nor can I find any Ohio case law supporting appellant's contention that he should be exempt from a penalty enhancement by virtue of his employment at the time of the offense.

{¶ 222} As pointed out in the state's brief, other jurisdictions have declined to exempt on-duty police officers from being charged with a firearm enhancement simply because the officers are required to carry a firearm as part of their employment. *U.S. v. Shamah*, 624 F.3d 449 (7th Cir.2010), *United States v. Partida*, 385 F.3d 546, 562 (5th Cir.2004); *United States v. Sivils*, 960 F.2d 587, 596 (6th Cir.1992); *United States v. Ruiz*, 905 F.2d 499, 508 (1st Cir.1990).

{¶ 223} The state of Michigan has taken a different approach. In 1991, the Michigan legislature specifically amended its gun specification statute to read:

> This section does not apply to a law enforcement officer who is authorized to carry a firearm while in the official performance of his or her

> duties, and who is in the performance of those duties. As used in this subsection, "law enforcement officer" means a person who is regularly employed as a member of a duly authorized police agency or other organization of the United States, this state, or a city, county, township, or village of this state, and who is responsible for the prevention and detection of crime and the enforcement of the general criminal laws of this state.

Shortly after this amendment, the Supreme Court of Michigan, citing the amendment, reversed a police officer's conviction for using a firearm while committing involuntary manslaughter. He remained convicted of involuntary manslaughter, a crime which he was found to have committed while in the official performance of his duties. *People v. Khoury*, 437 Mich. 954, 467 N.W.2d 810 (1991).

{¶ 224} The legislature in this state is free to enact such a provision similar to Michigan's, but it has not done so. The majority finds, in appellant's first assignment of error, that there was sufficient evidence to convict appellant of felonious assault. If we are to accept the fact that a police officer, believing that he is acting in his capacity as a police officer, can be convicted of assaulting someone using a firearm, it would be inconsistent to find that the same officer could not be convicted of a gun specification under R.C. 2929.14.

{¶ 225} The elements for both of appellant's convictions were conclusively proven at trial. Absent any language in R.C. 2929.14 exempting on-duty police officers

from being charged with gun specifications, I believe we must affirm appellant's conviction on the gun specification.