[Cite as *State v. Brown*, 2010-Ohio-2460.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93007

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

VERNON BROWN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-447563

BEFORE: Dyke, J., Gallagher, A.J., and Boyle, J.

RELEASED: June 3, 2010

JOURNALIZED:

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ANN DYKE, J.:

{¶ 1} Defendant Vernon Brown appeals from his convictions[1] for two counts of murder with firearm specifications, robbery with firearm specifications, carrying a concealed weapon, and having a weapon while under disability. For the reasons set forth below, we affirm.

{¶ 2} On January 21, 2004, defendant was indicted pursuant to a five-count indictment in connection with the shooting deaths of Tearle Toeran and Duane Roan. In Count One, defendant was indicted for the aggravated murder of Toeran, with one-year and three-year firearm specifications, mass murder and felony murder specifications, a notice of prior conviction, and a repeat violent offender specification. Count Two set forth the same charges in connection with the shooting of Roan. Count Three charged defendant with aggravated robbery, with one-year and three-year firearm specifications, notice of prior conviction, and a repeat violent offender specification. Counts Four and Five charged defendant with carrying a concealed weapon. Count Five was later amended to charge defendant with having a weapon while under disability.

{¶ 3} As the matter proceeded to trial, defendant indicated that he shot Toeran and Roan but did so in self-defense. The state's case established that

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[1] This appeals arises from a retrial, following the reversal of his conviction and death sentenced for the aggravated murder with prior calculation and design of Duane Roan and conviction for the murder of Tearle Toeran, aggravated robbery with firearm specifications, and two weapons violations. See *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858.

Jillian Wright, who lived with defendant,[2] testified that, on January 1, 2004, she drove defendant in his black Escalade to the West 52nd Street home of James Donley, a.k.a. Jamill Williams, "Jay" or "Capone." About 20 minutes later, defendant called her and asked her to pick him up. When she arrived, a light colored vehicle pulled up. There were two individuals inside. Defendant told Wright to go home. She did not want to do so, and defendant insisted that she remain in the Escalade. Wright watched as defendant got into the back of the men's vehicle, which then drove slowly away. A short time later, she saw the two men get out of the car with their hands up, and defendant exit the vehicle with a gun. According to Wright, the men had nothing in their hands.

{¶ 4} Wright next testified that defendant had his gun to the back of the man who had been seated in the front passenger seat. This individual then reached for something, and defendant shot him in the head. The man who had been driving the car then ran and defendant chased after him, firing his weapon. The man then fell on the ground shaking, and defendant stood over him and shot him in the face.

{¶ 5} Wright fled in the Escalade and defendant fled in the vehicle that had been driven by the two men. Wright became lost and defendant directed her to his mother's home on Superior Avenue. At this time, Wright observed the men's car in the garage.

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[2] Wright testified that she and defendant obtained a marriage license but did not get married. Defendant indicated that his brother had married them.

{¶ 6} Defendant changed his clothes and he and Wright drove one of defendant's other vehicles to West 32nd Street later that night and observed numerous police cars. A few days later, police arrived at the Wright's apartment and she gave them consent to search. At this time, police found drugs and ammunition, and a gun case. Wright told police that defendant was home with her at the time of the shootings. Wright indicated that this statement was a lie and that later, after she had been charged with various offenses, she made a statement implicating defendant in the shootings. Several months later, however, she changed her story to exonerate defendant, but she claimed that she did so because she believed that defendant would harm her.

{¶ 7} Cleveland Police Officer Robert Beveridge, Det. Joseph Bovenzi, and Ret. Det. Harry Matlock testified that police quickly responded to the scene and observed Toeran's dead body partially on the sidewalk. A shell casing was recovered approximately one foot from Toeran's head. No weapons were in Toeran's hands and a Smith & Wesson 9 mm handgun containing twelve live rounds in the clip was in Toeran's coat pocket. He also had over $7,000.

{¶ 8} Another dead body, later identified as Roan, was discovered in an adjacent field. A gun handle was sticking out from the right waistband of his pants, and he had approximately $500. According to police, Roan had no weapon in his hands, and three shell casings were found near his body. Police later learned that Roan's weapon, a Starr 9mm revolver, was loaded with nine live

rounds and one in the chamber.

{¶ 9} Leon Jackson testified that he and defendant drove past a street memorial for Toeran and Roan. According to Jackson, defendant mocked the look on Roan's face when he was shot and stated that the men had shorted him and did not want to pay him so he "did what he had to do."

{¶ 10} Christine Porter testified that she learned of the shootings from Donley, then spoke with defendant. According to Porter, defendant reportedly said that they were not his boys and they got what they deserved.

{¶ 11} Deshon Garrison testified that he knew Donley, Roan, and Toeran from drug sales. Defendant carried a .45 that he called "Mike Tyson." Roan also carried a weapon but he was not certain whether Toeran did so. Garrison did not speak with defendant about the matter but did provide information to Det. Beveridge.

{¶ 12} Dr. Joseph Felo, deputy coroner for Cuyahoga County, performed autopsies on the two victims. Toeran died from a gunshot wound to the back of his head behind the right ear. There was fouling, or gun smoke, and stippling, or unburned gunpowder, around the entrance wound, indicating a muzzle-to-target distance of less than six inches.

{¶ 13} Roan sustained five gunshot wounds: one to the right jaw; one to his right collarbone; one to the mid portion of his right side; one to the right side of his chest, and one to his left buttock. The sequence of the shots could not be determined. There were stipple wounds to the cheek and upper right eye area,

indicating, with respect to the gunshot wound to the jaw area, a muzzle to body distance of 12" to 18".

{¶ 14} Curtiss Jones, a forensic scientist with the Cuyahoga County Coroner's Office, testified that there was no trace metal reaction from Roan or Toeran's hands. The possible explanations for this test result are that they did not handle metal; they handled metal but are not "metal reactors"; or they handled metal but the evidence was lost. Roan had gunshot primer residue on his left hand and Toeran had it on both hands. Possible explanations for this test result are that they fired a weapon, they were in close proximity to a weapon being fired, or their hands came into contact with a surface containing gunshot primer residue.

{¶ 15} Jones also examined Roan's clothing for trace evidence. According to Jones, the front shoulder area of Roan's shirt was an entrance wound, based upon the "wipe off rim" of the mark. A Griess test for nitrates indicated that the muzzle-to-target distance was one to two feet. A second entrance wound was at the flank or area below Roan's arm. The Griess test results indicate, based upon the nitrates, that Roan was shot from a distance of three to four feet. A third entrance wound was found on the rear, left of midline, and based upon the absence of nitrates, was inflicted from at least four feet away.

{¶ 16} After receiving a tip in this matter, police began surveillance of defendant. Independent of this, Cleveland Police Det. James Simone observed the Escalade with improper plates and decided to tow the car. Simone then

noticed the surveillance and the officers converged upon defendant and arrested him just after he got into the Escalade and prepared to drive away. At this time, defendant had a gun and keys to the vehicle driven from the scene of the shooting.

{¶ 17} Bullets recovered from the autopsies in this matter were linked to defendant's gun, and shell casings from the scene also matched this weapon. In addition, police examined a pair of defendant's boots. Material on the sole of one of the boots had a mixture of DNA profiles, from which Toeran could be excluded as a contributor but Roan could not be excluded as a contributor. The car driven from the shootings, a Mitsubishi Diamante, was also located and drugs were uncovered from an area beneath the dashboard. In addition, the state presented evidence that defendant wrote a number of letters to Wright and others regarding the shootings.

{¶ 18} Carmello Cruz testified that he heard voices arguing, and then heard two gunshots. A short time later, he heard several other gunshots. The next day, he observed defects in the back of his house that appeared to be bullet holes, which he then repaired. He acknowledged that he heard the shots in the front of his house, not the back, and that there appeared to be a greater number of holes to the house than shots fired the previous night. Retired Det. Harry Matlock testified that he viewed the defects on the Cruz home and did not observe bullets. He opined that the holes were unrelated to the incident under investigation and were older defects. Det. David Stokes testified that he

examined the defects, removed the putty that had been used to repair them, and did not observe any bullets.

{¶ 19} Defendant elected to present evidence. He presented the testimony of Grace Cardone, who stated that she heard what sounded like fireworks, which were followed by a short period of silence, then a second sound of fireworks. Her husband subsequently called police.

{¶ 20} Defendant testified that he and Donley sold drugs, and that they arranged to meet with Roan in order to buy approximately $2,850 in drugs. Donley subsequently left and defendant called Wright to pick him up. After Wright returned, Roan and another man arrived. Defendant had Wright remain in the Escalade and he got into the back seat of the car in which Roan and the other man were driving. According to defendant, Roan did not have a scale to measure the drugs and defendant stated that he wanted his money back. Defendant stated that he knew that Roan carried a weapon, so he ordered the men out of the car. Toeran had his hand in his pocket and Roan pulled out a gun. Defendant then pushed Toeran into Roan and fired his gun. Defendant then ran to the adjacent yard and heard gunshots. Defendant stated that he was being shot at and that Roan pursued him. As Roan got close, defendant shot him, doing so in self-defense.

{¶ 21} Defendant was subsequently convicted of two counts of the lesser included offense of murder, with the firearm specifications, robbery with firearm specifications, and carrying a concealed weapon. The trial court convicted him

of having a weapon while under disability. The trial court then imposed an aggregate sentence of 36 years to life imprisonment. Defendant now appeals and assigns six errors for our review.

{¶ 22} For his first assignment of error, defendant argues that the trial court violated defendant's constitutional right to confront witnesses when it permitted the state to introduce testimony from Deshon Garrison and Christine Porter. According to defendant, the testimony of these witnesses included hearsay statements from Jay Donley, a.k.a. Jamill Williams, who did not testify.

{¶ 23} The Confrontation Clause guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. Amend. VI.

{¶ 24} In *Crawford v. Washington* (2004), 541 U.S. 36, 53-54, 124 S.Ct. 1354, 158 L.Ed.2d 177, the Supreme Court of the United States held that the Confrontation Clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." [3]

{¶ 25} The *Crawford* Court declined to provide an exhaustive definition of "testimonial." It stated that the term encompasses, at a minimum, statements

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[3] Jamill Williams was also known as Jay Donley, and Jay Donley testified, subject to cross-examination, during the first trial as follows:

Defendant told Donley that he "got them. He * * * got Maggot. * * * [S]crew them. * * * [T]hey ain't going to do nothing." See *State v. Brown*, 115 Ohio St.3d 55, 2007-Ohio-4837, 873 N.E.2d 858.

During the second trial, the parties stipulated that Donley was a fugitive.

arising from preliminary hearings, grand jury investigations, previous trials, and police interrogations. Id. at 53, 124 S.Ct. 1354, 158 L.Ed.2d 177. The *Crawford* Court further recognized that statements "made under circumstances which would lead an objective witness to reasonably believe that the statements would be available for use at a later trial" are testimonial.

Deshon Garrison

{¶ 26} In this matter, defendant complains that the state introduced Donley's hearsay statements about the shootings through the testimony of Garrison and thus "treated Williams [Donley] as an accomplice to this murder." We have extensively reviewed this testimony, however, and we conclude that Garrison testified that he learned about the shootings through his father. Garrison then informed the police about the kind of gun that defendant carried. We therefore cannot accept the claim that the state elicited Donley's out-of-court statements implicating defendant through the testimony of Garrison.

{¶ 27} In any event, "[t]he [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford v. Washington,* supra, at fn. 9. Here, the essence of Garrison's testimony was simply that he received some hearsay information about the homicides that he then conveyed to the police. The testimony was offered, essentially, to demonstrate the manner in which defendant became the focus of the police investigation into the double shooting. Since it was offered to explain the actions of a witness to whom the statement was directed, i.e., police

officer's conduct while investigating a crime, rather than for the truth of the statement, is not hearsay. *State v. Thomas* (1980), 61 Ohio St.2d 223, 232, 400 N.E.2d 401.

{¶ 28} Finally, even if we were to accept the claim that Garrison was permitted to offer hearsay regarding the fact that defendant and Roan had a meeting wherein defendant was going to purchase drugs, and the deal went awry, we must conclude that defendant was not prejudiced by this evidence, as defendant admitted these matters but claimed that he shot the men in self-defense.

Christine Porter

{¶ 29} Christine Porter testified that, after learning of the shootings, she overheard Donley, whom she knew as Bishop, speaking with defendant about the shootings. She then spoke to defendant and defendant told her that the men "got what they deserved." She later made a statement to police about the matter.

{¶ 30} Porter's testimony contained admissions of a party-opponent that are not hearsay. See Evid.R. 801(D)(2). Moreover, "the Confrontation Clause is simply inapplicable when the 'witness' is the accused himself." *State v. Lloyd,* Montgomery App. No. 20220, 2004-Ohio-5813.

{¶ 31} In addition, even if we were to accept the claim that Porter's testimony elicited impermissible hearsay, the evidence is not prejudicial as defendant admitted that he planned a drug deal that did not go as he had

intended. Defendant admitted that he shot the men, but claimed that he did so in self-defense.

{¶ 32} This assignment of error is without merit.

{¶ 33} In his second assignment of error, defendant complains that the trial court violated his right to due process and a fair trial by permitting the state to elicit irrelevant and prejudicial testimony that defendant was a drug dealer, carried a gun that he named "Mike Tyson," associated with other drug dealers, and laughed and joked about the shootings.

{¶ 34} The admission of evidence rests within the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 510 N.E.2d 343, paragraph two of the syllabus. Accordingly, we review the trial court's decision for an abuse of discretion. *State v. Martin* (1985), 19 Ohio St.3d 122, 483 N.E.2d 1157.

{¶ 35} Evid.R. 404(B) provides that:

{¶ 36} "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."

{¶ 37} R.C. 2945.59 similarly provides that:

{¶ 38} "In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show

his motive or intent, the absence of mistake of accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by defendant."

{¶ 39} With regard to the evidence that defendant was a drug dealer, that he associated with drug dealers and carried a weapon, we remain mindful that defendant testified to these matters directly, so we cannot conclude that the trial court abused its discretion in permitting evidence as to these matters. As to defendant naming the weapon, and reportedly laughing and joking about the incident, we find this evidence relevant to defendant's intent, scheme or plan in meeting with Toeran and Roan. This evidence also refutes defendant's claim that the shootings occurred as the result of the two men attacking defendant and placing him in fear for his life. Cf. *State v. Perez,* 124 Ohio St.3d 122, 2009-Ohio-6179, 920 N.E.2d 104 (evidence of defendant's flippant attitude just after the murder was admissible).

{¶ 40} The second assignment of error is without merit.

{¶ 41} For his third assignment of error, defendant asserts that his convictions are against the manifest weight of the evidence. More specifically, defendant asserts that the evidence demonstrated that he shot Toeran and Roan in self-defense.

{¶ 42} In evaluating a challenge to the verdict based on the manifest weight

of the evidence, this court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in evidence, the trial court clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *State v. Thompkins,* 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541.

{¶ 43} To establish self-defense, the defendant must show the following elements: (1) the slayer was not at fault in creating the situation giving rise to the affray; (2) the slayer has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) the slayer must not have violated any duty to retreat or avoid the danger. *State v. Robbins* (1979), 58 Ohio St.2d 74, 388 N.E.2d 755, paragraph two of the syllabus; *State v. Dykas*, Cuyahoga App. No. 92683, 2010-Ohio-359. If any one of these elements is not proven by a preponderance of the evidence, the theory of self-defense does not apply. *State v. Williford* (1990), 49 Ohio St.3d 247, 551 N.E.2d 1279.

{¶ 44} In this matter, the evidence demonstrated that defendant got into the Mitsubishi, ordered the men out of the car, and shot Toeran in the head, just behind his right ear. The evidence further demonstrates that defendant shot Roan four times, including in his buttocks, side, shoulder, and face. Defendant then fled in Toeran's Mitsubishi, and hid it at his mother's home. Defendant does not dispute that he shot the men and fled in Toeran's car, and does not

dispute that he had a weapon despite a 1992 aggravated robbery conviction. We therefore cannot say that the convictions are against the manifest weight of the evidence.

{¶ 45} Turning to the issue of whether there is "justification for admitted conduct," *State v. Martin,* supra; *State v. Poole*, supra, the greater weight of the evidence indicated that defendant was at fault in creating the situation giving rise to the affray as he ordered the men out of the car at gunpoint. The greater weight of the evidence also indicated that defendant did not have a bona fide belief that he was in imminent danger of death or great bodily harm as Toeran's gun remained in his pocket and Roan's gun remained in his waistband, and Toeran was shot in the back of the head. The greater weight of the evidence indicated that defendant violated a duty to retreat or avoid the danger as he chased Roan down and shot him multiple times.

{¶ 46} Although defendant insisted that Toeran and Roan were the aggressors, there was no evidence that they grabbed their weapons. Despite defendant's claims that they shot at him, thus creating the defects in Cruz's house, the evidence demonstrated that neither man reacted to the trace metal test. Although this does not definitively establish that they did not aim their guns at defendant, additional evidence demonstrated that Toeran's loaded gun remained in his pocket, and Roan's loaded gun remained in his waistband. In addition, no bullets were found within Cruz's home and there were no shell casings linked to Toeran's and Roan's guns.

{¶ 47} Moreover, the nature of the shots to Toeran and Roan undermines the claim of self-defense as Toeran was shot in the back of his head, behind his ear, and Roan was shot in numerous parts of his body, including his buttock, and a close range shot to the face, both of which are contrary to the claim that Roan placed defendant in imminent fear for his life. Further, the evidence regarding the wounds to Toeran and Roan is consistent with the testimony of Wright who stated that defendant exited the Mitsubishi with a gun drawn, the two passengers had their hands up, and defendant shot one man in the head as he reached for something, and shot the other man after chasing him down.

{¶ 48} In accordance with the foregoing, we are unable to conclude that defendant established the justification of self-defense by a preponderance of the evidence. His convictions are not against the manifest weight of the evidence, and the third assignment of error is without merit.

{¶ 49} In his fourth assignment of error, defendant asserts that the trial court erred in refusing to instruct the jury on the offense of voluntary manslaughter. In reviewing a trial court's refusal to give a jury instruction, the appellate court must determine whether, under the facts and circumstances of the case, the trial court abused its discretion. *State v. Wolons* (1989), 44 Ohio St.3d 64, 541 N.E.2d 443.

{¶ 50} In *State v. Loyed,* Cuyahoga App. No. 83075, 2004-Ohio-3961, this court held that the trial court properly refused to give an instruction on voluntary manslaughter, where the defendant claimed that he acted in self-defense. This

court stated:

{¶ 51} "[T]he court did not err by refusing to instruct on the lesser included offense of voluntary manslaughter because the requested instruction was incompatible with Loyed's theory of self-defense. In *State v. Harris* (1998), 129 Ohio App.3d 527, 534-535, 718 N.E.2d 488, the court of appeals stated:

{¶ 52} "'Appellant incorrectly contends that the same evidence that supported his claim of self-defense and defense of others also supported his request for an instruction on voluntary manslaughter. As noted above, voluntary manslaughter requires that the defendant be under the influence of sudden passion or a fit of rage. Thus, this court has held that evidence supporting the privilege of self-defense, i.e., that the defendant feared for his own and other's personal safety, does not constitute sudden passion or fit of rage as contemplated by the voluntary manslaughter statute. See *State v. Tantarelli,* 1995 Ohio App. LEXIS 2186 (May 23, 1995), Franklin App. No. 94APA11-1618, unreported (1995 Opinions 2144, 2151) (testimony that defendant was dazed, confused, and scared was insufficient to show sudden passion or fit of rage); *State v. Thompson,* 1993 Ohio App. LEXIS 1198 (Feb. 23, 1993), Franklin App. No. 92AP-1124, unreported (1993 Opinions 485, 489) ('Self defense on the one hand requires a showing of fear, whereas voluntary manslaughter requires rage.').

{¶ 53} "* * *.'

{¶ 54} "A jury instruction on a lesser included offense '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.' *State v. Thomas* (1988), 40 Ohio St.3d 213, 533 N.E.2d 286, paragraph two of syllabus. As Harris makes clear, self-defense requires that the defendant show evidence of fear, while voluntary manslaughter requires that the defendant show evidence of sudden passion or fit of rage. It must be one or the other. The court did not err by finding that Loyed could not assert both."

{¶ 55} In accordance with the foregoing, the trial court properly declined to instruct the jury on the offense of voluntary manslaughter as there was no evidence that defendant acted with a sudden passion or fit of rage, and this offense is not compatible with defendant's claim of self-defense.

{¶ 56} The fourth assignment of error is without merit.

{¶ 57} Defendant's fifth assignment of error challenges the trial court's instructions on self-defense. Defendant maintains that the trial court improperly shifted the burden of proof to him to establish this defense. He additionally maintains that his attorneys were ineffective for failing to propose an instruction that required the state to establish the "absence of self-defense" as an element of the crime.

{¶ 58} Pursuant to R.C. 2901.05, the burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense, is upon the accused.

{¶ 59} In *State v. Martin* (1986), 21 Ohio St.3d 91, 488 N.E.2d 166, the

Supreme Court described the nature of a claim of self-defense as follows:

{¶ 60} "This court, in *State v. Poole* (1973), 33 Ohio St.2d 18, 19, 294 N.E.2d 888 [62 O.O.2d 340], characterized the defense of self-defense as a 'justification for admitted conduct.' Self-defense represents more than a 'denial or contradiction of evidence which the prosecution has offered as proof of an essential element of the crime charged * * *.' Id. Rather, we stated in *Poole*, this defense admits the facts claimed by the prosecution and then relies on independent facts or circumstances which the defendant claims exempt him from liability. Id."

{¶ 61} The *Martin* court therefore held that the burden of proving self-defense by a preponderance of the evidence does not require the defendant to prove his innocence by disproving an element of the offense with which he is charged, as the elements of the crime and the existence of self-defense are separate issues and self-defense seeks to relieve the defendant from culpability rather than to negate an element of the offense charged.

{¶ 62} R.C. 2901.05 in turn was analyzed by the Supreme Court of the United States in *Martin v. Ohio* (1987), 480 U.S. 228, 107 S.Ct. 1098, 94 L.Ed.2d 267. That Court held that R.C. 2901.05(A) did not shift to the defendant the state's burden of proving each and every element of an offense beyond a reasonable doubt, which would have violated the Due Process Clause, and stated:

{¶ 63} "[E]vidence offered to support the defense may negate a purposeful

killing by prior calculation and design, but Ohio does not shift to the defendant the burden of disproving any element of the state's case. When the prosecution has made out a prima facie case and survives a motion to acquit, the jury may nevertheless not convict if the evidence offered by the defendant raises any reasonable doubt about the existence of any fact necessary for the finding of guilt. Evidence creating a reasonable doubt could easily fall far short of proving self-defense by a preponderance of the evidence. Of course, if such doubt is not raised in the jury's mind and each juror is convinced that the defendant purposely and with prior calculation and design took life, the killing will still be excused if the elements of the defense are satisfactorily established. We note here, but need not rely on, the observation of the Supreme Court of Ohio that '[a]ppellant did not dispute the existence of [the elements of aggravated murder], but rather sought to justify her actions on grounds she acted in self-defense.'"

{¶ 64} Accord *State v. McGee,* Mahoning App. No. 07 MA 137, 2009-Ohio-6397; *State v. Middleton* (July 6, 1993), Montgomery App. No. 07 MA 137.

{¶ 65} Further, because there is no basis for including the absence of self-defense as an element of the offense, defendant's trial counsel did not commit an error in failing to request such an instruction, and claim of ineffective assistance of counsel, which is based upon this contention, must likewise fail. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674.

{¶ 66} In accordance with all of the foregoing, this assignment of error is

without merit.

{¶ 67} For his final assignment of error, defendant challenges the trial court's "reasonable doubt" instruction, and argues that the instruction given actually sets forth the lesser standard of "clear and convincing evidence."

{¶ 68} R.C. 2901.05(E) defines "reasonable doubt" as follows:

{¶ 69} "(E) 'Reasonable doubt' is present when the jurors, after they have carefully considered and compared all the evidence, cannot say they are firmly convinced of the truth of the charge. It is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. 'Proof beyond a reasonable doubt' is proof of such character that an ordinary person would be willing to rely and act upon it in the most important of the person's own affairs."

{¶ 70} In this matter, the instruction given to the jury tracked this statute and provided as follows:

{¶ 71} "Reasonable doubt is present when, after you have carefully considered and compared all the evidence, you cannot say you are firmly convinced of the truth of the charge. Reasonable doubt is a doubt based on reason and common sense. Reasonable doubt is not mere possible doubt, because everything relating to human affairs depending on moral evidence is open to some possibility or imaginary doubt. Proof beyond a reasonable doubt is a proof of such character that an ordinary person would be willing to rely and

act upon it in the most important of his own affairs."

{¶ 72} Defendant insists that the "firmly convinced" language represents only the clear and convincing evidence standard, and not the beyond a reasonable doubt standard. We note, however, that the Ohio Supreme Court has approved the use of the statutory definition of reasonable doubt in jury instructions. See *State v. Awkal* (1996), 76 Ohio St.3d 324, 667 N.E.2d 960. Accord *State v. Gross* (May 24, 1999), Muskingum App. No. CT 96-055.

{¶ 73} This assignment of error is therefore without merit.

Affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

ANN DYKE, JUDGE

SEAN C. GALLAGHER, A.J., CONCURS;
MARY J. BOYLE, J., CONCURS IN JUDGMENT ONLY