ORIGINAL

IN THE SUPREME COURT OF OHIO

State of Ohio	:	
Appellee	:	On Appeal from the Clermont County Court of Appeals,
	:	Twelfth Appellate District
v.	:	
	:	Court of Appeals Case No. 2016-064-022
Joshua Napier	:	(2017-Ohio-246)
Appellant	:	

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPEALLANT JOSHUA NAPIER

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EXPLANATION OF WHY THIS CASE IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

A. Post Traumatic Stress Disorder

This cause offers the Court the opportunity to further define the role of post traumatic stress disorder (PTSD) in criminal cases in two material aspects: (1) May evidence as to a defendant's PTSD be offered to either (a) establish a diminished capacity defense, (b) to wholly negate a mens rea or (c) to establish an involuntary act?; and (2) Is PTSD the basis for a 'stand-alone' defense?

Before PTSD became a diagnosis officially recognized by the psychiatric and psychological communities, it was commonly known as battle fatigue or traumatic neurosis of war. During the Vietnam conflict a poorly defined and often non-uniformed enemy (many times women and children) caused trauma, injury and death to servicemen and women. Surviving servicemen and women brought PTSD home and, in 1980, the Diagnostic and Statistical Manual of Mental Disorders, Third Edition (DSM III) recognized that PTSD was an appropriate diagnosis[1] not only for those suffering the physical and mental traumas of war but for those in society who suffer similarly as a result of physical, mental or sexual abuse. DSM V states that about 3.5% of U.S adults have PTSD in a given year and 9% will develop it at some point in their life.[2] The incident of PTSD is higher in regions of armed conflict[3] and more

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[1] Omri Berger, MD, Dale E. McNeil, PhD, Renee L. Binder, MD, *PTSD as a Criminal Defense: A Review of the Case Law*, J Am Acad Psychiatry Law 40:509-21, 2012

[2] DSM V, pp. 271-280

[3] The amici memorandum in support of jurisdiction of The Ohio Suicide Prevention Foundation, et al., as filed in Supreme Court Case No. 2013- 0711, *State v. Belew*, offers the following at p. 5: the lifetime prevalence for Vietnam-era veterans is 30.9% for men and 26.9% for women; the

common in women than in men. As a result of this Country's twenty year, more or less, involvement in various skirmishes in what we familiarly call the Middle East, greater numbers of our service people survive the traumas of war and often come home both physically and mentally disabled. This Court has based its PTSD precedent upon the recognized medical and/or scientific certainty of PTSD as a diagnosis and has clearly acknowledged that the disorder cuts a broad societal swath. This case is the opportunity to further define the role of PTSD in the criminal process and criminal cases.

1. PTSD as causing a diminished capacity or wholly negating criminal culpability.

There is no doubt that Appellant Napier (Napier) suffers from service related PTSD as the record is replete as to the same. In the trial court, after an evaluation by the Court Clinic that verified Napier's PTSD, the State of Ohio filed a motion in limine that sought to prohibit Napier from introducing any evidence of either his military service or service related PTSD as being irrelevant. The trial court granted the motion in limine which had the effect of totally suppressing[4] Napier's ability to introduce any evidence of either his military service or the diagnosis of PTSD. Though the trial court ostensibly left the door open to introduce evidence of Napier's military service and PTSD at trial, when the testimony was offered, the door was quickly slammed shut as the trial court sustained objections made by the State of Ohio. The fact that there was an attempt to introduce the evidence at trial is totally ignored by the appellate court.

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lifetime prevalence for Gulf War veterans is 10.1%; and veterans of the conflicts in Iraq and Afghanistan have a prevalence of 13.8% in a sampling of 1,938 people.

[4] Though denominated a motion in limine and order granting the same, in fact, the end result was suppression of evidence. Napier questions the appellate review of the motion in limine.

DSM V establishes that two known consequences of PTSD may be hyper-alertness and hyper-reactivity to a stimulus: "Individuals with PTSD may be very reactive to an unexpected stimuli, displaying a heightened startle response, or jumpiness, to loud noises or unexpected movements". DSM 5, p. 275-76. One writer has offered the view that Ohio's statutorily based PTSD defense (the battered woman syndrome) is, in fact, a diminished capacity defense. Nancy Fioritto, *Law Considers Post Traumatic Stress Disorder*, Ohio State Bar Association Journal, July 4, 2016. Offering PTSD evidence through an expert to avoid criminal culpability/liability is no different than offering evidence of an involuntary action or reaction as allowed by R.C. 2901.21(E)(2). Just as one may offer evidence of a lack of volition under the R.C. 2901.21(E)(2), Napier and those similarly situated should be allowed to offer evidence of his/her military service related PTSD as evidence of an involuntary action (or reaction) in order to avoid culpability. There seems to be a basic due process/equal protection issue where one can offer evidence of a lack of volition pursuant to the statute but is prevented from doing so when the evidence to be presented to support the same proposition takes the form of evidence of a diagnosis of PTSD and how PTSD manifests. Though diminished capacity may not be a legal defense it is evidence that tends to negate culpability.

2. PTSD as a standalone defense or diminished capacity that tends to negate intent.

This Court has, to some extent, addressed PTSD as a standalone defense in the context of the battered woman syndrome and determined that it is not a standalone defense. *State v. Koss*, 49 Ohio St.3d 213 (1990; 3rd syllabi). It has also opined (without syllabus law) as to the relevance of PTSD in a parricide case as a simple evidentiary issue relevant to the issue of self defense:

> "The defense in this case did not ask that the battered child syndrome be recognized as a new defense for the independent killing of an abusive parent. The proffer made at trial was limited to expert testimony that would explain the psychological effects of long-term child abuse, and was proffered in support of a self defense theory as well as a charge on voluntary manslaughter. As such, the issue before us is an evidentiary matter and is governed by the Rules of Evidence. Because there was no basis for excluding the testimony under the Rules of Evidence, and because we find that the trial court's exclusion of this testimony to be prejudicial to the defendant, we need not reach the constitutional issues addressed by the court of appeals."

State v. Nemeth, 82 Ohio St.3d 202, 206-7, 1998-Ohio-376. This case offers the opportunity for the Court to reconsider whether PTSD is a standalone defense. This case also offers the Court the opportunity to establish syllabus law that PTSD evidence is admissible when a defendant with service related PTSD raises self defense (as occurred in this case). See, *State v. Koss*, supra. The fact that Napier contracted the PTSD as a result of his military service causes his military service to be relevant evidence just as Nemeth's battered childhood and Koss' battered wife status were relevant.

B. When is a motion in limine a motion to suppress? What standard of review is applied upon appeal? What is the Supreme Court of Ohio's law on these issues?

Motions to suppress, in the criminal context, address whether evidence has been legally or properly obtained. The motion to suppress is generally used where constitutional violations are alleged to have occurred and it may also be used when there are alleged violations of statutes that allow evidence to be gathered. When a court grants a motion to suppress, evidence is excluded from use at trial. In general, an order in limine is a tentative, precautionary ruling that is intended to prevent the admission of highly prejudicial evidence at trial. *State v. French*, 72 Ohio St.3d 446 (1995). All motions in limine are not alike. *State v. Shalash*, 2015-Ohio-3836, ¶ 30-31 (12th App., Warren Co.). In this case, the trial court not only suppressed and

excluded relevant evidence through an order in response to a motion in limine filed by the State of Ohio but also forbade the exploration of issues related to the evidence in voir dire. As the issues could not be explored during voir dire, it was clear from the Order that there was no doubt that the evidence would be excluded at trial.

The trial court's order granting the State's motion in limine states, in essence, as follows:

> (1) The Defendant is **precluded from eliciting any evidence** regarding the Defendant's PTSD diagnosis for the purpose of presenting a diminished capacity defense.
> **(2) ...neither party shall address the PTSD diagnosis issue during voir dire or opening statements...** (and thereafter sets forth that a side bar should occur should the issue arise during trial)
> (3) Ordered...that the same restrictions and procedures will be followed regarding any references to or elicitation of any evidence relating to the Defendant's military service.

The appellate court found that the foregoing Order was liminal in nature and reviewed it under the abuse of discretion standard that is applicable to evidentiary rulings. Napier suggests that the foregoing is something more than an order in limine as a reasonable reading of the foregoing is "don't go there" and most lawyers that work in court rooms understand what happens when a party or his or her counsel get spanked in front of a jury. Factually, in context and in trial, Napier did try to "go there" when his Registered Nurse girlfriend that lived with him attempted to testify as to Napier's PTSD and Napier attempted to testify about his military service. Napier did testify that he feared for his safety and that he only did what he did to protect himself. The PTSD diagnosis is clearly relevant to self defense. Napier believes the foregoing ruling of the trial court was the functional equivalent of a motion to suppress as the trial court's rulings at trial sustained the State of Ohio's objections and enforced the trial court's

functional suppression Order. *State v. Shalash*, 2015-Ohio-3836 (12th App., Warren Co.). As to this issue below, the appellate court should have applied the standard of review for motions to suppress: accept as true the trial court's findings of fact if they are supported by competent, credible evidence, and then independently determine, without deference to the trial court's determination, whether the facts satisfy the applicable legal standard. *Shalash*, infra, ¶ 42.

C. Failure to charge the jury as to self defense

The trial court refused to charge the jury on self defense. As set forth above, self defense is available to those suffering from PTSD, that is, those that have been abused and battered. Regardless of the name attached (battered woman, battered child, sexually abused), battered people suffer from some form or another of PTSD. There was sufficient evidence, with a proper jury charge, to allow a jury to determine that Napier had established self defense. Those with service related PTSD are no different and no less battered or abused than those who have been battered spouses or children.

The issues of this cause are of great general interest to Ohioans suffering with PTSD and especially Ohio's veterans suffering with PTSD.[5] The Court is given the opportunity to clarify whether evidence of PTSD is relevant when a veteran is asserting PTSD as (1) a standalone defense, (2) to support self defense, (3) to support a diminished capacity defense or (4) in support of a defense based upon an involuntary act. This cause also offers the Court the opportunity to examine and establish when a motion in limine morphs into suppression and what standard of review should be used in such a situation.

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[5] Some counties in Ohio have Veteran Courts. The jurisdiction of these courts generally excludes offenses of violence. Napier's trial occurred in Clermont County. Clermont County does not have a Veteran Court. Given that Napier was charged with an offense of violence, Napier would not have been eligible for a referral to a Veteran Court.

STATEMENT OF THE CASE AND FACTS

Napier was indicted for assault on a police officer.

The following facts are gleaned from the report of the Court Clinic that was proffered into evidence in this case. T.d. 35. Napier is an honorably discharged U.S. Air Force veteran who spent significant time in Somalia. As a result of his service, it is undisputed that Napier suffers from PTSD. The State filed a motion in limine seeking to prevent Napier from introducing any evidence of (1) his military service and history and (2) the fact that he suffers from PTSD. T.d. 29. The trial court granted the motion in limine and ruled that Napier could not introduce any evidence of either his military service or the fact that he suffers from service related PTSD. The trial court also ruled that neither party could raise the issue of Napier's military service and PTSD in vior dire. T.d. 38.

The incident that gave rise to the indictment occurred in the Midtown Tavern which is located in Felicity, Ohio. This incident started because a married Felicity officer got a text from his beat wife that Napier had been thrown out of the Midtown. The officer responds to the text/dispatch of his girl friend and goes to the Midtown near closing time. The officer talks to his girlfriend who tells the officer that Napier has been kicked out of the Midtown because he broke a piece off of the bar. The officer leaves and finds Napier, who is on foot, some three blocks from the Midtown. At this point, the officer has no basis to arrest Napier. T. p. 52, 59, 95. Napier walks back to the Midtown to talk to a Midtown employee. While Napier is standing at the bar talking to a Midtown employee, the officer grabs Napier from behind and Napier reacts and strikes the officer causing a bloody nose.

At trial, one of the witnesses for Napier was his girlfriend and living mate, Falisha McCann, who is a registered nurse. McCann was with Napier the night of the incident. McCann began to testify as to Napier's PTSD condition and the State objected. The trial court sustained the objection made by the State. T. p. 180.

There is evidence in the record that after being stopped by the officer, Napier returned to the Midtown. Upon his return, Napier was standing at the bar when he was pulled hard from behind. Napier didn't know who had pulled on him and he believed that something serious was about to happen and that he was in danger. Napier testified that he struck the officer because he reacted in a manner consistent with his military training when he was grabbed from behind. The State objected and the objection was sustained. T. p. 202. Napier also testified that his actions were in defense of himself. T. p. 203. Unfortunately, the police officer who had attacked Napier from behind, sustained a bloody nose when Napier reacted to being grabbed. Napier suggests that his reaction is totally consistent with the hyper-reactivity response to a startling stimulus that occurs with those who are afflicted with PTSD. Though the instruction was requested and Napier believed that the evidence sustained the request, the trial court refused to instruct the jury on self defense and/or PTSD (in that he did not act in a knowing manner citing *Tennessee v. Phipps*, below).

ARGUMENT

FIRST PROPOSITION OF LAW

> Pursuant to, and consistent with, R.C.2901.21(E)(2), one who suffers from post traumatic stress disorder may offer evidence of their condition to establish that his or her conduct is involuntary.

In one case with regard to the relevance of PTSD evidence, this Court has stated: "Evidence that would support the defendant's explanation of the events at issue and would provide evidence as to his possible state of mind at the time of the incident is clearly relevant to his or her defense." The Court went on to state that such evidence would be relevant for at least four different reasons: (1) whether the person acted with prior calculation and design; (2) whether the person acted with purpose; (3) whether the person created the confrontation or initiated the aggression; and (4) whether the person had an honest belief that he was in imminent danger (self defense). *State v. Nemeth*, supra, at 207. Reasons (1) and (2) address criminal culpability and whether an act is voluntary. Reasons (3) and (4) address state of mind and/or culpability. In its essence, *Nemeth* acknowledges that the defendant may have been in a dissociative state and the conduct was reactionary. *Nemeth*, supra, at 208. The Court also noted that other states see PTSD for some part of what it may be: a diminished level of culpability. *Nemeth*, supra, at 214. The Court has stopped short of the Proposition offered above as syllabus law and Napier believes that this cause offers the Court the opportunity to create syllabus law on the subject.[5]

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[5] The legislature has addressed the battered woman syndrome in the context of self defense. R.C. 2901.06 (eff. 1990) and R.C. 2945.392 (eff. 1990, Am. 1997). In fact, R.C. 2945.372 specifically states "...expert testimony that the defendant suffered from that syndrome as evidence to establish the requisite impairment of the defendant's reason, at the time of the

SECOND PROPOSITION OF LAW

Expert ***and lay*** testimony may be offered for the purpose of presenting evidence of post traumatic stress disorder so as to lessen the offense or establish a lack of a mens rea.

and

THIRD PROPOSITION OF LAW

Evidence that the defendant suffers from post traumatic stress disorder may be introduced in defense of a charge of assaultive conduct.

The overlap of these Propositions with the First Proposition is obvious.

For the purpose of their article, Dr. Berger, et al., (hereinafter Berger),[7] did a comprehensive LexisNexis search of the case or common law through 2010. The research also included a search for law review articles and a search of PubMed. Berger cites the cases where PTSD has been used as a defense in conjunction with (1) an insanity plea, (2) where one is in a dissociative state, and (3) to support some form of diminished capacity evidence or defense.

In *Nemeth*, supra, a great deal of what is stated above comes close to establishing or allowing PTSD as a standalone defense as, if one is in a dissociative state, there would be either the inability to form intent or perhaps an insanity defense.

There is no doubt that PTSD evidence is admissible if self defense is raised by a defendant. See, n. 5 (page 9).

A case not cited in Berger is *State (of Tennessee) v. Phipps*, 883 S.W. 2d 138 (1994; *Phipps*). The Second Proposition of Law is found in *Phipps* at p. 148. Phipps was a Desert Shield

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commission of the offense...". Have similar statutes been enacted for battered people (or is it only "battered women")?

[7] See n. 1 above.

and Desert Storm veteran who suffered from PTSD and major depression. Phipps was charged with murder and, at the time that he went to trial, Tennessee was in flux with relation to recognizing diminished capacity as a defense. *Phipps,* at 145. The *Phipps* court found that Tennessee had abolished common law defenses and established statutory defenses[8] and diminished capacity was not an enumerated defense. In fact, Phipps' theory of defense at trial was that at the time of the killing he could not, and did not, form the specific intent to commit the murder. *Phipps*, at 142. Phipps presented **uncontradicted expert *and lay* testimony** that he suffered from PTSD and major depression at the time of the killing. The *Phipps* court undertakes an extremely detailed analysis of state and federal law ultimately concluding that, though diminished capacity is not a legal defense to a crime, it is admissible evidence that tends to establish that the defendant was unable to form a specific intent.

FOURTH PROPOSITION OF LAW

> When a court suppresses evidence when ruling on a motion in limine, the standard of review on appeal is that applicable to motions to suppress: the reviewing court must accept as true the facts if they are supported by competent, credible evidence, and then independently determine, without deference to the trial court's determination, whether the facts satisfy the applicable legal standard.

This Proposition is taken directly from ¶ 42 of *State v. Shalash*, supra. This case is one where it was very clear during the pretrial stages that presenting any evidence as to Napier's PTSD would be met with great resistance. Napier presented a not guilty by reason of insanity plea because he knew that he would then be referred to the Court Clinic for evaluation and that he would found to be suffering from service related PTSD. When the Appellee State filed the

[8] Citing T.C.A. § 39-11-203(e)(2).

motion in limine seeking to prevent the admission of any evidence of Napier's military service and diagnosis of PTSD, Napier believed that the only way that he would be able to preserve the issues now presented on appeal was to either call the preparer of the report as a witness at a hearing on the motion in limine or proffer the Court Clinic report into the record. Napier opted for the latter and proffered the report into the record. The trial court's liminal Orders were not a surprise to Napier.

If, in fact, the trial court's order was liminal, when Napier offered evidence at trial as to self defense, his affliction with PTSD and his military service, under the current state of the law in Ohio, all of that evidence should have been admitted. However, the Appellee State objected to the testimony and the trial court sustained the objections. The trial court, by its Order "in limine", effectively suppressed evidence and the standard on appeal should have been that related to review of orders suppressing evidence.

FIFTH PROPOSITION OF LAW

> A court must charge a jury as to self defense when a defendant who suffers service related post traumatic stress disorder produces evidence to support such a charge.

This incident starts because Napier walks away from a nonconsensual encounter with an officer. At the time of the initial confrontation, the officer testified that he had no warrant to arrest and no basis to arrest Napier. Napier walked away from the officer and returned to the Midtown Tavern. When standing in the Midtown and talking to an employee of the Midtown, Napier was grabbed from behind by the officer (the officer denied this). In any event, contrary to the appellate court Opinion, there was sufficient evidence, i.e., questions of fact, presented at trial for a jury to find that Napier acted in self defense.

Napier requested that the jury be charged on self defense and PTSD. App. Op. ¶ 27. The requested PTSD charge was made in writing and was based upon *Phipps,* supra. The request for a charge on self defense was made orally prior to the charge to the jury. T. p. 223. The request for a charge as to Napier's PTSD negating intent is sufficiently covered above.

The appellate court accurately states the law of self defense. App. Op., ¶ 28. It is an affirmative defense and a defendant must bring forth a preponderance of evidence that supports the following three elements: (1) the defendant was not at fault in creating the situation that gave rise to the affray; (2) that the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from the danger was in the use of force and (3) the defendant did not violate a duty to retreat or avoid danger.

A reasonable trier of fact could have found that Napier produced sufficient proof of each element: (1) the officer followed Napier, who was not under arrest, to the Midtown; (2) Napier had a bona fide belief that he was in danger and something bad was about to happen to him; and (3) because Napier was attacked from behind, he was unable to retreat (and in fact, based upon the layout of the Midtown, had no place to retreat). The appellate court mischaracterized the state of the evidence (App. Op. ¶ 29)[9] and the trial court invaded the

[9] Despite what the appellate court states in ¶ 29 of the Opinion, who was at fault in creating the situation remains an open question under the facts that were adduced at trial. The appellate court wrongly states that Napier was at fault in creating the situation because a piece of the bar top came off and he was asked to leave. It was time to go because it was just that, the bar would close shortly (at least if one of the officer's stated reason is true). The unrefuted testimony of Brandon Byus, the Midtown employee who was interacting with Napier, was that Napier was not thrown out of the bar. T. p. 125.

province of the jury by taking the issue from it. If the trial court had simply given the requested self defense charge and Napier is found guilty, Napier has no beef.

CONCLUSION

As set forth above, this case involves matters of public and great general interest or substantial constitutional question(s) are present. Napier requests that the Court accept jurisdiction of this case so that these important issues and matters of law will be reviewed upon merit.

Respectfully submitted,

Gary A. Rosenhoffer
Attorney for Appellant,
Joshua Napier

CERTIFICATE OF SERVICE

I certify that on February 23, 2017, a copy of this memorandum was delivered to the Clermont County Prosecutor's office.

Gary A. Rosenhoffer

2017-Ohio-246

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE OF OHIO, :

Plaintiff-Appellee, :

:

- vs - :

:

JOSHUA NAPIER, :

Defendant-Appellant. :

CASE NO. CA2016-04-022

OPINION
1/23/2017

APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2015 CR 374

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S. POWELL, P.J.

{¶ 1} Defendant-appellant, Joshua Napier, appeals his conviction and sentence in the Clermont County Court of Common Pleas. For the reasons that follow, we affirm the judgment of the trial court.

{¶ 2} On June 30, 2015, the Clermont County Grand Jury returned a one-count indictment charging Napier with assault against a peace officer in violation of R.C. 2903.13(A), a fourth-degree felony. The charge stemmed from an altercation that occurred

at Midtown Tavern in Felicity, Ohio. Napier entered pleas of not guilty and not guilty by reason of insanity based upon his affliction with post-traumatic stress disorder ("PTSD"). The trial court referred Napier to the Court Clinic, which verified Napier's diagnosis. However, the Court Clinic found that Napier did not meet the criteria to raise the defense of not guilty by reason of insanity.

{¶ 3} Prior to trial, appellee filed a motion in limine seeking to preclude Napier from introducing evidence of his PTSD or prior military service. Following a hearing on the matter, the trial court granted appellee's motion. Shortly thereafter, the case was tried before a jury, which rendered a verdict of guilty to the charge. During trial, the court sustained an objection by the state when Napier attempted to elicit testimony regarding his PTSD. Further, the trial court declined Napier's request to give jury instructions regarding certain affirmative defenses and lesser included or inferior offenses. The record revealed the following facts.

{¶ 4} The altercation between Napier and Officer Seng occurred in the morning hours of June 21, 2015; however, the two crossed paths earlier in the afternoon on June 20, 2015. The first interaction occurred when Officer Seng conducted a traffic stop on a vehicle in which Napier was a passenger. Napier's significant other, Falisha McCann, was the driver of the vehicle. After conducting routine traffic stop procedures, such as requesting identification from the occupants, Officer Seng released the occupants with a verbal warning.

{¶ 5} Later that night, McCann and Napier accompanied some friends to Midtown Tavern, a local bar in Felicity, Ohio. Napier had been consuming alcohol throughout the evening and McCann was the designated driver. During the course of the evening at Midtown Tavern, Napier expressed his discontent and frustration with the traffic stop from earlier in the day, and more specifically, with Officer Seng. Napier communicated these feelings to two tavern patrons, Sydney Grant and Alexandria Mefford. Grant testified that Napier threatened to punch Officer Seng in the face. Following this discussion, Grant, an

acquaintance of Officer Seng, sent him a text message informing him of the interaction with Napier. Officer Seng took this information under advisement.

{¶ 6} Approximately 30 minutes later, Napier was involved in an incident that caused physical damage to the trim of the bar top. In response, the bartender, Brandon Byus, informed Napier that he ought to finish his drink and head home. After finishing his drink, Napier, McCann, and Napier's friend, Michael Wehrum, exited the tavern and began to walk home. Shortly after the three exited, Officer Seng arrived at the Midtown Tavern to conduct a "bar check," a procedure typically executed to help handle any issues that may arise near closing time. At this time, Officer Seng was on duty, arrived in uniform, and parked his marked police cruiser outside of the tavern. Upon entering the tavern, Officer Seng was informed that Napier was asked to leave following the damage to the bar top trim.

{¶ 7} Officer Seng observed the damage and began to further investigate. In the course of his investigation, Officer Seng noticed Napier and Wehrum walking down the sidewalk approximately three blocks from the tavern. Next, Officer Seng entered his police cruiser, activated its lights, and pulled behind McCann's vehicle, which was following along with Napier and Wehrum. Officer Seng began to discuss the bar incident with Napier. In response, Napier expressed his discontent with Officer Seng and threatened to harm him, as well as denied any wrongdoing with regard to the damage to the bar top. Following this interaction, Napier began to walk back towards the tavern, disregarding Officer Seng's warnings that Napier may be charged with various citations if he did not stop. Napier entered the tavern and began to discuss the events with Byus.

{¶ 8} Next, Officer Seng entered the tavern and approached Napier, informing him that he was being removed from the tavern and placed him in the escort position. A struggle ensued, followed by a single punch thrown by Napier striking Officer Seng, resulting in a gash on Officer Seng's nose and loss of blood. The struggle continued after the punch until Officer

Seng was able to secure Napier with the assistance of a tavern patron.

{¶ 9} In rendering its guilty verdict, the jury made two individual findings regarding the victim, Officer Seng. The jury found that at the time of the assault Officer Seng was both: (1) a peace officer, and (2) that he was carrying out his official duties. The trial court sentenced Napier to twelve months in prison. Napier now appeals.

{¶ 10} Assignment of Error No. 1:

{¶ 11} THE TRIAL COURT ERRED TO THE SUBSTANTIAL PREJUDICE OF NAPIER WHEN IT GRANTED THE STATE'S MOTION IN LIMINE AND PREVENTED NAPIER FROM PRESENTING RELEVANT AND ADMISSIBLE EVIDENCE AS A DEFENSE.

{¶ 12} Assignment of Error No. 2:

{¶ 13} THE TRIAL COURT COMMITTED PREJUDICAL ERROR WHEN IT REFUSED TO CHARGE THE JURY ON INFERIOR AND/OR LESSER INCLUDED OFFENSES.

{¶ 14} Assignment of Error No. 3:

{¶ 15} THE TRIAL COURT COMMITTED PREJUDICAL ERROR WHEN IT FAILED TO CHARGE THE JURY AS TO SUBSTANTIVE LAW RELEVANT TO THIS CASE.

{¶ 16} Assignment of Error No. 4:

{¶ 17} THE TRIAL COURT COMMITTED PREJUDICAL ERROR WHEN IT EXCLUDED RELEVANT AND MATERIAL EVIDENCE.

{¶ 18} The purpose and effect of a motion in limine is distinct from that of a motion to suppress. "A 'motion to suppress' is defined as a '[d]evice used to eliminate from the trial of a criminal case evidence which has been secured illegally[;]'" thus, it "is the proper vehicle for raising constitutional challenges based on the exclusionary rule * * *." (Citations omitted.) *State v. French*, 72 Ohio St.3d 446, 449 (1995), quoting *Black's Law Dictionary* (6th Ed.1990) 1014. "A 'motion in limine' is defined as '[a] pretrial motion requesting [the] court to prohibit opposing counsel from referring to or offering evidence on matters so highly prejudicial to

[the] moving party that curative instructions cannot prevent [a] predispositional effect on [the] jury.'" *French* at 449, citing *Black's Law Dictionary*, *supra*, at 1013. The purpose of a motion in limine "is to avoid injection into [the] trial of matters which are irrelevant, inadmissible and prejudicial * * *." *Black's Law Dictionary*, *supra*, at 1013-14.

{¶ 19} "A motion in limine * * * is 'a tentative, interlocutory, precautionary ruling by the trial court reflecting its anticipatory treatment of [an] evidentiary issue.'" *State v. Harris*, 12th Dist. Butler No. CA2007-11-280, 2008-Ohio-4504, ¶ 27, quoting *State v. Grubb*, 28 Ohio St.3d 199, 201-02 (1986). "A motion in limine is directed to the inherent discretion of the trial judge, about an evidentiary issue that is anticipated, but has not yet been presented in full context." (Citation omitted.) *State v. Harris*, 12th Dist. Butler No. CA2007-11-280, 2008-Ohio-4504, ¶ 27. It is important to note that not all motions in limine are alike. *See State v. Shalash*, 12th Dist. Warren No. CA2014-12-146, 2015-Ohio-3836, ¶ 30-31.

{¶ 20} A definitive or exclusionary motion in limine is the functional equivalent of a motion to suppress, which determines the admissibility of evidence with finality. *State v. Johnston*, 2d Dist. Montgomery No. 26016, 2015-Ohio-450, at ¶ 16, citing *French* at 450. Specifically, granting a definitive or exclusionary motion in limine not only prevents evidence from being introduced, but also prevents any mentioning of the excluded evidence during trial. *Johnston* at ¶ 16, citing *State v. Echard*, 9th Dist. Summit No. 24643, 2009-Ohio-6616, ¶ 20. A motion in limine may be used in this regard "to suppress evidence that is either not competent or improper due to some unusual circumstance not rising to the level of a constitutional violation." *Johnston* at ¶ 16, citing *French* at 450. "'The essential difference between a [motion to suppress] and a motion in limine is that the former is capable of resolution without a full trial, while the latter requires consideration of the issue in the context of the other evidence.'" (Emphasis deleted.) *Johnston* at ¶ 17, quoting *State v. Hall*, 57 Ohio App.3d 144, 146 (8th Dist.1989).

{¶ 21} We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *State v. Boles*, 12th Dist. Brown No. CA2012-06-012, 2013-Ohio-5202, ¶ 14. "A reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that has created material prejudice." *Id.*, citing *State v. Smith*, 12th Dist. Fayette No. CA2007-10-035, 2008-Ohio-5931, ¶ 33. An abuse of discretion connotes more than an error of law or judgment; it implies that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Boles* at ¶ 14.

{¶ 22} In this case, the ruling was not the functional equivalent of a motion to suppress. It is clear from the trial court's decision and entry on the state's motion in limine that the trial court did not determine with finality the admission of evidence of Napier's PTSD or prior military service. Specifically, the trial court stated:

> [i]t is premature to rule that the PTSD evidence is to be precluded altogether. If it is used for some other recognized purpose, other than a diminished-capacity defense, it may be relevant. Presently, the Court has nothing before it at this point to rule on its admissibility for some other purpose.
>
> If the evidence regarding [Napier's] PTSD is determined to be relevant during the actual context of the trial in this matter, the Court will not exclude it * * *.

Here, the trial court determined that evidence of Napier's PTSD diagnosis was inadmissible in regards to presenting a diminished-capacity defense. However, the trial court reserved ruling on the admissibility of the evidence for a different purpose until it could give consideration of the issue in the context of the other evidence presented at trial. With respect to Napier's prior military service, the trial court questioned the relevancy of the evidence. Nonetheless, the trial court specifically stated "permanent preclusion of this evidence is not warranted at this point" and that any ruling, "is anticipatory in nature and may be changed when the issue of admissibility of any evidence is presented in the actual context of the trial." Therefore, the trial court intended to prevent the injection of irrelevant and

inadmissible evidence into the trial, which is the precise purpose of a motion in limine, but did not prevent any mention of it at trial with finality.

{¶ 23} The trial court found that Napier intended to present evidence of his PTSD diagnosis and prior military service as a defense to the intent element of his charge; therefore, Napier intended to present a diminished-capacity defense. The trial court did not abuse its discretion in preventing the admission of such evidence for this purpose because Ohio "jurisprudence definitively states that the partial defense of diminished capacity is not recognized in Ohio." *State v. Fulmer*, 117 Ohio St.3d 319, 2008-Ohio-936, ¶ 66. "Thus, when a defendant does not assert an insanity defense, it is well settled that he may not offer expert testimony in an effort to show that he lacked the mental capacity to form the specific mental state required for a particular crime." *Id.* at ¶ 67.

{¶ 24} Napier argues that the intent element of his assault charge could have been negated because his conduct was a "simple reaction" due to his PTSD. However, the trial court correctly found this argument unconvincing because it demonstrates the exact limitation in offering such evidence as explained in *Fulmer*. Napier did not qualify for a not guilty by reason of insanity defense; therefore, he may not offer expert testimony to negate his capacity to form the specific mental state required for assault.

{¶ 25} Napier further argues that Ohio recognizes PTSD as a standalone defense. In support of this argument, Napier relates PTSD to battered woman syndrome and asserts that the syndrome has been found to be a standalone defense. However, the Ohio Supreme Court case Napier cites to support this argument does not support this proposition. Rather, the case states that evidence of battered woman syndrome is relevant in the context of establishing the second element of self-defense, as discussed below. *See State v. Koss*, 49 Ohio St.3d 213, 217-18 (1990). Moreover, the court in *Koss* definitively stated the "admission of expert testimony regarding the battered woman syndrome does not establish a

new defense or justification." *Koss* at 217.

{¶ 26} Additionally, Napier asserts two instances where PTSD has been recognized as a standalone defense. *See State v. Haines*, 112 Ohio St.3d 393, 2006-Ohio-6711, ¶ 29; *State v. Rivera-Carrillo*, 12th Dist. Butler No. CA2001-03-054, 2002 WL 371950, *14 (Mar.11, 2002). However, neither case supports such proposition with respect to PTSD. Rather, *Haines* permitted presenting such evidence to prove a victim's state of mind upon a credibility challenge and *Rivera-Carrillo* found that it may be relevant as evidence demonstrating a defendant was "under the influence of sudden passion or sudden fit of rage," as it relates to voluntary manslaughter. *Haines* at ¶ 29; *Rivera-Carrillo* at *14.

{¶ 27} Next, Napier requested the trial court give jury instructions on PTSD, self-defense, a defendant's right to resist an unlawful arrest, and excessive force. However, "[a] trial court is not required to instruct the jury on [an affirmative defense] in every case where it is attempted to be presented. The defendant must first present sufficient evidence at trial to warrant such an instruction." *State v. Evegan*, 12th Dist. Warren No. CA97-08-091, 1999 WL 559694, *2 (Aug. 2, 1999), citing *City of Bucyrus v. Fawley*, 50 Ohio App.3d 25, 26-27 (3d Dist.1988). "In reviewing the record to ascertain the presence of sufficient evidence to support the giving of a proposed jury instruction, an appellate court should determine whether the record contains evidence from which reasonable minds might reach the conclusion sought by the instruction." *State v. Davis*, 12th Dist. Madison No. CA2015-05-015, 2016-Ohio-1166, ¶ 35, citing *State v. Risner*, 120 Ohio App.3d 571, 574 (3d Dist.1997). If the trial court finds that the evidence is legally insufficient to raise the issue, it will remove the issue from jury consideration. *Evegan* at *2. We review this decision for an abuse of discretion. *Id.*

{¶ 28} As discussed above, Ohio does not recognize PTSD as a standalone defense; therefore, the trial court did not abuse its discretion by not providing the jury with instructions

on it as a standalone defense. Next, to establish the affirmative defense of self-defense, a defendant must prove by a preponderance the following three elements: (1) that the defendant was not at fault in creating the situation giving rise to the affray, (2) that the defendant had 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) that the defendant did not violate any duty to retreat or avoid danger. *State v. Ray*, 12th Dist. Butler No. CA2012-10-213, 2013-Ohio-3671, ¶ 26, citing *State v. Barnes*, 94 Ohio St.3d 21, 24 (2002).

{¶ 29} Here, the trial court did not err by not instructing the jury on self-defense. Even assuming Napier had sufficiently proven the second element of self-defense by presenting evidence regarding his PTSD and prior military service, the trial court found that Napier would have failed to establish the first element of self-defense because Napier was clearly at fault in creating the situation giving rise to the affray in that he broke the bar top and was told to stay out of the tavern and not return. The record supports the trial court's finding as testimony revealed that Napier disregarded Officer Seng's instruction and returned to the tavern; thereby, creating the situation requiring Officer Seng to reenter the tavern.

{¶ 30} In addition to jury instructions regarding his PTSD and self-defense, Napier argues the trial court erred by failing to give his requested instructions regarding excessive force by a police officer and a defendant's right to resist an unlawful arrest. Jury instructions in a criminal case "must be given when they are correct, pertinent, and timely presented." *State v. Joy*, 74 Ohio St.3d 178, 181 (1995). "A trial court must fully and completely give jury instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact-finder." *Davis* at ¶ 27, citing *State v. Comen*, 50 Ohio St.3d 206, paragraph two of the syllabus (1990). A reviewing court may not reverse a criminal conviction based upon jury instructions unless "it is clear that the jury instructions constituted

prejudicial error." *Davis* at ¶ 28. "An appellate court's duty is to review the instructions as a whole, and, if taken in their entirety, the instructions fairly and correctly state the law applicable to the evidence presented at trial, reversible error will not be found merely on the possibility that the jury may have been misled." *Id.*

{¶ 31} Napier argues that since his arrest was unlawful, the jury should have been instructed that it may find Napier lawfully resisted arrest. However, as Napier was never charged with resisting arrest, the instruction was not relevant or necessary for the jury to discharge its duty as the fact-finder. (Emphasis sic.) *State v. Corbin*, 12th Dist. Fayette No. CA2010-01-001, 2010-Ohio-3819, ¶ 13, n.1 ("a lawful arrest is *not* an element of assault on a peace officer"), citing *State v. Peer*, 2d Dist. Montgomery No. 19104, 2002-Ohio-4198, ¶ 10. Even assuming arguendo Napier's arrest was unlawful, it would not justify assaulting Officer Seng. Thus, the trial court did not abuse its discretion by not giving an instruction on lawfully resisting arrest.

{¶ 32} Next, Napier argues the trial court erred by not giving an instruction on excessive force because the jury should have been given an opportunity to find that Officer Seng's use of force was wholly unnecessary. Excessive force is an affirmative defense to a resisting arrest charge, and as discussed above, Napier was not charged with resisting arrest; therefore, the trial court did not abuse its discretion by not instructing the jury on the defense. *See Village of Blanchester v. Newland*, 12th Dist. Clinton No. CA83-07-008, 1984 WL 3426, *3 (Sept. 17, 1984) (stating that excessive or unnecessary force is a judicially created defense to the crime of resisting arrest), citing *City of Columbus v. Fraley*, 41 Ohio St.2d 173, paragraph three of the syllabus (1975), *certiorari denied*, 423 U.S. 872, 96 S.Ct. 138. Moreover, even viewing this argument as providing factual support for the second element of self-defense, it does not negate that Napier was still at fault in creating the situation giving rise to the affray. Therefore, the trial court did not abuse its discretion with

respect to not instructing the jury on PTSD, self-defense, a defendant's right to resist an unlawful arrest, and excessive force.

{¶ 33} Finally, Napier argues that the trial court erred by not instructing the jury on the lesser included or inferior degree offenses of assault and disorderly conduct. "A jury instruction on a lesser included offense is required only where the evidence presented at trial would reasonably support both an acquittal of the crime charged and a conviction on the lesser included offense." *State v. Tolle*, 12th Dist. Clermont No. CA2014-06-042, 2015-Ohio-1414, ¶ 11, citing *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, ¶ 192. There must be "sufficient evidence" to "allow a jury to reasonably reject the greater offense and find the defendant guilty on a lesser included (or inferior degree) offense." (Emphasis deleted.) *Trimble* at 192. In making its decision, the trial court must view the evidence in a light most favorable to the defendant. *Id.* We review this decision for an abuse of discretion. *State v. Doby*, 12th Dist. Butler No. CA2013-05-084, 2014-Ohio-2471, ¶ 17.

{¶ 34} Napier requested a jury instruction on assault pursuant to R.C. 2903.13(A) and 2903.13(B). R.C. 2903.13(A) provides that: "[n]o person shall knowingly cause or attempt to cause physical harm to another * * *." R.C. 2903.13(B) provides that: "[n]o person shall recklessly cause serious physical harm to another * * *." If convicted under either section, a defendant is guilty of assault; therefore, neither section is a lesser included or inferior degree offense of the other. *See State v. Deem*, 40 Ohio St.3d 205, 209 (1988) (defining lesser included offense as an offense having a penalty of lesser degree than the indicted offense and which, as statutorily defined, also being committed, and some element of the greater offense is not required to prove the commission of the lesser offense); *see id.* (defining an inferior degree offense as one with identical elements, except for one or more additional mitigating elements).

{¶ 35} In this case, the jury verdict form required the jury to make separate findings as

to the charge of assault pursuant to R.C. 2903.13(A) and the enhancing factor that the victim was a peace officer pursuant to R.C. 2903.13(C)(5). The trial court also instructed the jury that "[i]f your verdict is guilty as to the charge of assault in this case you will also separately decide beyond a reasonable doubt the additional element of whether the victim in this matter was a peace officer at the time of the offense." The trial court further explained that the jury may find Napier guilty of assault pursuant to R.C. 2903.13(A), while finding that Officer Seng was not a peace officer in the performance of his official duties at the time of the offense. Therefore, contrary to Napier's claim otherwise, the trial court did instruct the jury on the inferior degree offense of assault pursuant to R.C. 2903.13(A) and did not abuse its discretion by not instructing the jury on assault pursuant to R.C. 2903.13(B).

{¶ 36} Napier further argues that the trial court erred by not instructing the jury on the lesser included offense of disorderly conduct. In order to warrant an instruction on the lesser included offense of disorderly conduct, the trial court would have had to find that "(1) the jury could have reasonably concluded that [Napier] did not knowingly cause or attempt to cause physical harm to Officer [Seng] but instead (2) recklessly caused inconvenience, annoyance or alarm by engaging in violent or turbulent behavior." *State v. Beard*, 12th Dist. Butler No. CA98-02-019, 1998 WL 857856, *2 (Dec. 14, 1998).

{¶ 37} Here, the evidence indicated that Napier punched Officer Seng in the nose followed by a struggle between the two until Napier was subdued with the assistance of a tavern patron. As a result of this punch, Officer Seng's nose sustained a large gash and loss of blood. Given these facts, the jury could not reasonably have found Napier not guilty of assault, but guilty of the lesser offense of disorderly conduct. *See State v. Keith*, 10th Dist. Franklin Nos. 08AP-28 and 08AP-29, 2008-Ohio-6122, ¶ 38 (finding lesser included jury instruction on disorderly conduct not warranted where defendant injured police officers by engaging and throwing them to the floor); *State v. Thacker*, 4th Dist. Lawrence No. 04CA18,

2005-Ohio-1227, ¶ 8-13 (finding lesser included jury instruction on disorderly conduct not warranted where defendant caused physical injuries to the victim). Therefore, the trial court did not abuse its discretion by not giving jury instructions on the aforementioned lesser included or inferior degree offenses.

{¶ 38} Accordingly, Napier's first, second, third, and fourth assignments of error are overruled.

{¶ 39} Assignment of Error No. 5:

{¶ 40} THE TRIAL COURT COMMITTED PREJUDICAL ERROR WHEN IT SENTENCED NAPIER TO THE OHIO PENAL SYSTEM.

{¶ 41} In his final assignment of error, Napier argues that his sentence is clearly and convincingly contrary to law because the trial court should have imposed community control and it did not consider Napier's prior military service and PTSD in determining his sentence.

{¶ 42} R.C. 2953.08(G)(2) sets forth the standard of review for all felony sentences. *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, ¶ 1; *accord State v. Crawford*, 12th Dist. Clermont No. CA2012-12-088, 2013-Ohio-3315, ¶ 6. Pursuant to R.C. 2953.08(G)(2), when hearing an appeal of a trial court's felony sentencing decision, "[t]he appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing."

{¶ 43} As explained in *Marcum*, "[t]he appellate court's standard for review is not whether the sentencing court abused its discretion." *Marcum* at ¶ 9. Rather, pursuant to R.C. 2953.08(G)(2), an appellate court may only "increase, reduce, or otherwise modify a sentence * * * or may vacate the sentence and remand the matter to the sentencing court for resentencing" if the court finds by clear and convincing evidence "(a) [t]hat the record does not support the sentencing court's findings[,]" or "(b) [t]hat the sentence is otherwise contrary to law." R.C. 2953.08(G)(2)(a)-(b). A sentence is not "clearly and convincingly contrary to

law where the trial court considers the principles and purposes of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, properly imposes postrelease control, and sentences the defendant within the permissible statutory range." *State v. Ahlers*, 12th Dist. Butler No. CA2015-06-100, 2016-Ohio-2890, ¶ 8, citing *State v. Moore*, 12th Dist. Clermont No. CA2014-02-016, 2014-Ohio-5191, ¶ 6. Furthermore, if a sentence imposed does not require any of the statutory findings identified in R.C. 2953.08(G)(2), an appellate court will nonetheless conduct a review of the sentence "under a standard that is equally deferential to the sentencing court." *Marcum* at ¶ 23.

{¶ 44} In the present case, a jury found Napier guilty of assault of a peace officer, a fourth-degree felony. For a fourth-degree felony, a sentencing court may impose a prison term from six to eighteen months. R.C. 2929.14(A)(4). "R.C. 2929.13(B)(1)(a) sets forth a presumption for community control if an offender is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence." *State v. Hughes*, 12th Dist. Butler No. CA2013-05-081, 2014-Ohio-1320, ¶ 11. R.C. 2929.13(B)(1)(A) provides:

> Except as provided in division (B)(1)(b) of this section, if an offender is convicted of or pleads guilty to a felony of the fourth or fifth degree that is not an offense of violence or that is a qualifying assault offense, the court shall sentence the offender to a community control sanction of at least one year's duration if all of the following apply:
>
> (i) The offender previously has not been convicted of or pleaded guilty to a felony offense.
>
> (ii) The most serious charge against the offender at the time of sentencing is a felony of the fourth or fifth degree.
>
> (iii) If the court made a request of the department of rehabilitation and correction pursuant to division (B)(1)(c) of this section, the department, within the forty-five-day period specified in that division, provided the court with the names of, contact information for, and program details of one or more community control sanctions of at least one year's duration that are available for persons sentenced by the court.

> (iv) The offender previously has not been convicted of or pleaded guilty to a misdemeanor offense of violence that the offender committed within two years prior to the offense for which sentence is being imposed.

{¶ 45} Here, the presumption of community control is inapplicable because Napier was convicted of an offense of violence as defined by the statute. R.C. 2901.01(A)(9)(a) (defining "offense of violence" as a violation of R.C. 2903.13). Furthermore, pursuant to R.C. 2929.13(K)(4), a "qualifying assault offense" means a violation of R.C. 2903.13 for which the penalty provision in division (C)(8)(b) or (C)(9)(b) of that section applies. Neither apply in this case because Napier's assault offense was not against hospital personnel or a judge, magistrate, prosecutor, or court official or employee. *See* R.C. 2903.13(C)(8)(b); R.C. 2903.13(C)(9)(b); R.C. 2903.13(D)(14). Therefore, contrary to Napier's assertion, R.C. 2929.13(B)(1)(a) does not apply. However, R.C. 2929.13(B)(2) provides that "[i]f division (B)(1) of this section does not apply * * *, in determining whether to impose a prison term as a sanction for a felony of the fourth or fifth degree, the sentencing court shall comply with * * * [R.C. 2919.11] and [R.C. 2929.12]."

{¶ 46} After a thorough review of the record, we find no error in the trial court's decision to sentence Napier to a prison term. The record reflects that Napier's sentence is not clearly and convincingly contrary to law because the trial court properly considered the principles and purposes of R.C. 2929.11 and the factors listed in 2929.12, imposed the required optional three-year postrelease control term, and sentenced Napier within the permissible statutory range for a fourth-degree felony. Napier further argues that the trial court failed to consider his prior military service and any mental, emotional, or physical condition derived therefrom, as required by R.C. 2929.12(F). However, the record does not support Napier's argument because the trial court stated at sentencing that not only had it reviewed R.C. 2929.11 and R.C. 2919.12, but also that it considered Napier's PTSD

condition, and concluded that community control was not warranted at that time. Moreover, the record clearly demonstrates the trial court considered Napier's prior military service by thanking him for his service, while also stating that such service did not excuse the offense of violence that occurred.

{¶ 47} Therefore, because we find Napier's sentence is not clearly and convincingly contrary to law, and because the record fully supports the trial court's sentencing decision, Napier's fifth assignment of error is overruled.

{¶ 48} Judgment affirmed.

RINGLAND and HENDRICKSON, JJ., concur.

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2016-04-022
	:	JUDGMENT ENTRY
- vs -	:	
JOSHUA NAPIER,	:	
Defendant-Appellant.	:	

The assignments of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, affirmed.

It is further ordered that a mandate be sent to the Clermont County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

Stephen W. Powell, Presiding Judge

Robert P. Ringland, Judge

Robert A. Hendrickson, Judge

COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

STATE OF OHIO,	:	**CASE NO. 2015-CR-0374**
Plaintiff,	:	**Judge Richard P. Ferenc**
VS.	:	
JOSHUA NAPIER,	:	**DECISION AND ENTRY**
Defendant.	:	

Katherine Terpstra, Assistant Prosecuting Attorney, 76 S. Riverside Drive, 2nd Fl., Batavia, OH 45103.

Gary A. Rosenhoffer, 313 E. Main Street, Batavia, OH 45103, Attorney for Defendant.

This matter was before the Court for consideration of the State's Motion In Limine ("Motion"). A hearing on the Motion was held on March 3, 2016. Counsel were present as was the Defendant.

The Motion seeks to preclude the Defendant from introducing evidence at trial regarding his military service and a diagnosis that he suffers from post-traumatic stress disorder ("PTSD"). As to the Defendant's prior military service, the State contends such evidence is not relevant under Evid.R. 401, but if relevant, it should nonetheless be excluded under Evid.R. 403. As to the PTSD evidence, the State contends it should be excluded for three reasons. First, the Defendant failed to comply with Crim.R. 16(K) by not providing the State with a written report regarding this issue. Second, PTSD is not a stand-alone defense to the charge in this case and thus not relevant. Third, even if relevant under Evid.R. 401 it should nonetheless be excluded under Evid.R. 403.

Factual Background

The Defendant stands charged with a single count of assault upon a peace officer while in the performance of his official duties. He entered pleas of not guilty and not guilty by reason of insanity. He was evaluated by Dr. Carla S. Dreyer of the Court Clinic regarding his NGRI plea. She opined that the Defendant did not meet the criteria

for such a defense to the pending charge.[1] She did, however, opine that the Defendant was suffering from PTSD at the time of the offense.

On October 5, 2015, the Defendant filed the following: "Defendant's Motion Re: PTSD." In this motion he contends that " . . . (PTSD) is ingrained in Ohio law," citing R.C. 2901.06(B), Ohio's statute regarding the affirmative defense of "battered woman syndrome." He also likens PTSD to that of "battered child syndrome." Importantly, the Defendant has indicated to the Court that he will not be putting forth an insanity defense.

After the State filed its Motion which is now pending, the Defendant filed a request for jury instructions which included the following, relating to his PTSD claim:

> Defendant Napier has submitted evidence that he was suffering from a mental condition known as post-traumatic stress disorder. This evidence should be considered by you specifically as to whether or not Defendant Napier knowingly caused or attempted to cause physical harm to Office Seng. In the event that you find that Defendant Napier suffers from post-traumatic stress disorder and did not act in a knowing manner, you must find him not guilty.

At the hearing on the Motion, counsel for the Defendant confirmed that he intended to present PTSD as a defense to the mens rea element of the pending assault charge, to wit: knowingly.[2]

Analysis

The Defendant seeks to present evidence of his diagnosis of PTSD as a defense to the mens rea element in this case of knowingly. This purpose is the functional equivalent of presenting a diminished-capacity defense. Such a defense is not recognized in Ohio. In *State v. Fulmer,* 117 Ohio St.3d 319, 2008-Ohio-936, 883 N.E.2d 1052, the court held:

> In cases in which a defendant asserts the functional equivalent of a diminished-capacity defense, the trial court should instruct the jury to disregard the evidence used to support that defense unless the defendant can demonstrate that the evidence is relevant and probative for purposes other than a diminished-capacity defense. (*State v. Wilcox* (1982), 70 Ohio St.2d 182, 24 O.O.3d 284, 436 N.E.2d 523 applied), syllabus. *See, State v. Mariana,* 12th Dist.No. CA98-09-202, 1999 WL 1271022, (Dec. 30, 1999) *3-5, relying on *Wilcox, supra.*

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[1] Dr. Dreyer's report was filed October 2, 2015, under seal with the Court.

[2] Defense counsel also suggested that PTSD could be part of a self-defense claim, depending upon how the evidence may unfold at trial.

It is settled law in Ohio that the defense of diminished-capacity in a criminal case is not recognized unless it is presented as part of an insanity defense.

Therefore, the Defendant is precluded from presenting any evidence or arguments that the Defendant did not act knowingly in this case as a result of his PTSD diagnosis.

It is premature to rule that the PTSD evidence is to be precluded altogether. If it is to be used for some other recognized purpose, other than a diminished-capacity defense, it may be relevant. Presently, the Court has nothing before it at this point to rule on its admissibility for some other purpose.

If the evidence regarding the Defendant's PTSD is determined to be relevant during the actual context of the trial in this matter, the Court will not exclude it based upon the State's claimed Crim.R. 16(K) violation. Dr. Dreyer's report of October, 2015, was provided to the State. She clearly referenced the Defendant's PTSD. Also, the Defendant's aforementioned Motion Re: PTSD put the State on notice that he was, in some fashion, going to present evidence regarding PTSD in his defense. Thus, the Court cannot find that the State has been prejudiced by the possible use of this evidence through Dr. Dreyer's expert testimony.

The State's Motion also seeks to preclude any evidence or references to the Defendant's military service. At first blush, the Court questions the relevancy of such evidence. What fact of consequence to the determination of this action does this evidence have any tendency to make more or less probable? However, at this point the Court has no information concerning the Defendant's purpose in presenting such evidence. Therefore, permanent preclusion of this evidence is not warranted at this point. The parties must keep in mind that a court's decision to grant or deny a motion in limine regarding anticipated evidence is tentative, interlocutory and precautionary. It is anticipatory in nature and may be changed when the issue of admissibility of any evidence is presented in the actual context of the trial. *State v. Setty*, 12th Dist.No. CA2013-06-049, 2014-Ohio-2340, ¶28.

In light of the above, the Court will issue the following orders:

IT IS HEREBY ORDERED, that the Defendant is precluded from eliciting any evidence regarding the Defendant's PTSD diagnosis for the purpose of presenting a diminished-capacity defense.

IT IS FURTHER ORDERED, that neither party shall address the PTSD diagnosis issue during voir dire or opening statements. If during the trial either party believes the PTSD evidence should be admitted, the proponent of its admission shall initially advise the Court that an evidentiary issue has arisen, without stating the nature of that issue; counsel shall then request a sidebar conference with the Court at which time the Court will determine if a hearing pursuant to Evid.R.104 will be held outside the presence of the jury.

IT IS FURTHER ORDERED, that the same restrictions and procedure will be followed regarding any references to or elicitation of any evidence relating to the Defendant's military service.

IT IS FURTHER ORDERED, that this Decision shall also serve as the entry regarding this matter.

Richard P. Ferenc, Judge

CERTIFICATE

I hereby certify that a copy of the foregoing was sent to counsel of record by regular U.S. Mail this 8th day of March, 2016.