IN THE SUPREME COURT OF OHIO

SCT NO. 2018-1720

STATE OF OHIO	:	
Appellee	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of
vs.	:	Appeals CA: 105847
RICHARD R. AMEY	:	
Appellant		

MOTION FOR RECONSIDERATION OF DECISION DECLINING TO ACCEPT JURISDICTIONAL APPEAL OF APPELLANT RICHARD R. AMEY

MARK A. STANTON
Cuyahoga County Public Defender
BY: JOHN T. MARTIN (COUNSEL OF RECORD)
0020606
Assistant Public Defender
310 Lakeside Avenue, Suite 200
Cleveland, OH 44113
(216) 443-7583
(216) 443-3632 FAX
jmartin@cuyahogacounty.us
COUNSEL FOR APPELLANT RICHARD R. AMEY

MICHAEL C. O'MALLEY
Cuyahoga County Prosecutor
The Justice Center – 9th Floor
1200 Ontario Street
Cleveland, OH 44113
(216) 443-7800

COUNSEL FOR APPELLEE, THE STATE OF OHIO

IN THE SUPREME COURT OF OHIO

SCT NO. 2018-1720

STATE OF OHIO	:	
Appellee	:	On Appeal from the Cuyahoga County Court of Appeals, Eighth Appellate District Court of
vs.	:	Appeals CA: 105847
RICHARD R. AMEY	:	
Appellant		

MOTION FOR RECONSIDERATION OF DECISION DECLINING TO ACCEPT JURISDICTIONAL APPEAL OF APPELLANT RICHARD R. AMEY

Pursuant to S.Ct. Prac. R. 18.02, Appellant Richard Amey moves this Honorable Court to reconsider its decision of February 20, 2019 declining to accept jurisdiction over the instant case. Reasons for this motion are set forth in the accompanying memorandum.

Respectfully submitted,

/s/ John T. Martin

JOHN T. MARTIN
Assistant Public Defender

MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION OF DECISION DECLINING TO ACCEPT JURISDICTIONAL APPEAL

Introduction

This Court is asked to reconsider and, consistent with the three votes previously cast to accept Propositions of Law I and II, accept those propositions. The first proposition concerns issues regarding how self-defense claims can be asserted and reviewed on appeal in Ohio. At the time the appeal was noted in this case, it was unknown that Ohio would be radically changing the law of self-defense, effective March 27, 2019. This change in circumstances is significant. As for Proposition of Law II, the State of Ohio's attempt to cast this proposition as one regarding sufficiency of the evidence is simply incorrect – the second proposition invites this Court to apply its decision in *State v. Mcgee*, 79 Ohio St.3d 193, 680 N.E.2d 975, 1997-Ohio-156, to a verdict in a bench trial in order to ensure that the trial is conducted under a correct interpretation of the law.

The facts of this case are important because they depict a situation that oftentimes happens when people try to help friends in violent domestic situations. This is part of the reason why, aside from the legal issues, this is a case of great general and great public interest.

All Richard Amey wanted to do was help his friend, Janice Gresham, avoid being harmed by her ex-boyfriend, La'Dale Davis. Amey had already been beaten by Davis earlier that same evening at Gresham's apartment complex -- to the point where security had pepper sprayed Davis and, when that had not worked, physically removed Davis in order to save Richard from further injury.[1] This had occurred simply because Davis thought Amey was now romantically involved with Gresham.

[1] In his previously filed memorandum in support of jurisdiction, Mr. Amey confined his factual recitation to the facts enunciated in the Eighth District's second opinion in this case -- where it reconsidered its earlier opinion (that had reversed the conviction). Support for the facts recited below can be found in the Eighth District's earlier opinion. Both opinions were previously included when the appeal to this Court was noted.

Now, later that same evening, Amey, to whom Gresham had reached out again, escorted Gresham as she attempted to return to the apartment she shared with her mother. Amey, afraid he might be attacked again, carried a gun this time.

Once again, Davis came upon the scene, this time as Gresham was close to her apartment door at the top of a staircase. Davis began arguing with Gresham so loudly that Gresham's mother, who was inside the apartment, barricaded the door. Davis ordered Gresham to enter the apartment and retrieve items he had given her when they had dated. Gresham convinced her mother to remove the barricade. But, instead of waiting for Gresham to get the items, Davis barged inside and vandalized the apartment. When Gresham attempted to get away by leaving the apartment, Davis punched her in the head and she fell on the stairs. Gresham ran back in the apartment and closed the door.

For his part, Richard Amey remained at the bottom of the steps throughout this ordeal and had not intervened other than to tell Gresham to give Davis what he wanted. But, with the door to the apartment closed behind him after he had already assaulted Gresham, Davis' attention turned to Amey.

What happened next, which no one besides Richard and Davis witnessed, is the subject of dispute -- which is why there was a trial. Richard told police that, during the fatal confrontation, there was a point where Davis was below Richard on the staircase (thus blocking Richard’s escape) and that Richard fatally shot Davis during the confrontation. While the trajectory of the bullet was not consistent with this positioning, that discrepancy could be attributable to the angle of the firearm as opposed to the relative position of the two men. At the same time, Richard's account was consistent with evidence that Davis was out of control all evening (to the point that his sister was trying to find him), that Davis had, in the words of the original Eighth District opinion, "brutally beat Amey just hours before," and that Amey had bite marks that he claimed were caused by Davis.

In a bench trial, the trial court rendered, and tried to explain, an inexplicable set of verdicts. The trial court acquitted Richard of murder because Richard did not purposely kill Davis. The trial court acquitted Richard of felonious assault because Richard did not "knowingly" cause physical harm to Davis. But then the trial court found Richard guilty of voluntary manslaughter because he acted "knowingly" for purposes of that statute. But there was only one shot and the same mens rea applied to both counts -- it could not be fired "knowingly" for voluntary manslaughter and not be fired "knowingly" for felonious assault.

And Richard Amey is now serving a ten-year sentence where his earliest release on judicial release will be after serving eight years.

The Eighth District, after first reversing the conviction for voluntary manslaughter, reconsidered and affirmed the conviction. The Eighth District held that "knowingly" did not have to be proven, because Richard conceded he acted knowingly when he asserted self-defense. In Proposition of Law I, which three members of this Court voted to accept (Fischer, Donnelly and Stewart, JJ.), the defense maintains that one need not give up the right to have the State prove all the elements of a crime just because one asserts the affirmative defense of self-defense. As discussed below, this Proposition of Law is bigger than Richard Amey. There are others who find themselves victims of unwarranted attacks and who fight back. They should not have to choose between requiring the prosecution to prove every element of the alleged crime and asserting self-defense.

In Proposition of Law II, which the same three members of the Court voted to accept, the defense maintains that the Eighth District's view that an inconsistent verdict can never be questioned takes the notion of deference to the fact finder too far. When any party, particularly a criminal defendant, waives the right to trial by jury and places their fate in the hands of a judge, that party has

the right to assume the judge knows the law. When the judge demonstrates that this assumption was unfounded, the appellate process should be able to correct the mistake. This is discussed below.[2]

And while these issues are larger than Richard Amey, the fact that he sits in prison for ten years after a flawed trial and a hands-off appellate approach to an obvious misstatement of the law sends a message to others in the State of Ohio that the law will not always be there to help those who try to protect the victims of domestic abuse.

In support of reconsideration of Proposition of Law I:

> **A defendant who asserts a defense of self-defense against the charge of voluntary manslaughter does not, in so doing, concede that the defendant has knowingly caused the death of the alleged victim.**

One should not have to give up one's right to have the prosecution prove every element of the offense charged in order to assert the defense of self-defense. The criminal justice system wants fact finders to have all appropriate options for disposition available in every case. For this reason, civil parties are allowed to plead in the alternative. Similarly, in criminal cases, prosecutors can choose to bring lesser included offenses.

Yet, the Eighth District, and some other districts mentioned in the State's response to Mr. Amey's memorandum in support of jurisdiction, believe that a criminal defendant cannot argue that "I was provoked by a person who wanted to hurt me; I would have been justified in using force against him (or her), but, in the midst of the fray, I never knowingly tried to hurt him." In such a circumstance, the jury should have two options besides guilt: (1) The mens rea of "knowingly" (or purposely or recklessly when appropriate) has not been proven, or (2) The defendant did knowingly cause the injury (or death) but did so in self-defense. The jury's options should not be circumscribed by the Eighth District's view that defendant's need to read the jury and make the best tactical decision as to which fork in the road to pursue -- the system wants the truth, not a chess game.

---

[2] Two members of this Court (Donnelly and Stewart, JJ.) also vote to accept Proposition of Law III. Reconsideration is not being sought as to that proposition.

And the Eighth District's view is not universally held. In Ohio, the Tenth District has recognized that the elements of the offense must be proven by the prosecutor, regardless of whether self-defense is asserted. *State v. Oller,* 85 N.E.3d 1135, 2017-Ohio-814 ¶ 61 (10th Dist. 2017); in this regard, the State's reliance on a pre-*Oller* case from the Tenth District is inapposite. Similarly, in *State v. Kidd,* 1st Dist. No. C-820093, 1983 WL 5359, the First District analyzed the case for both sufficiency-of-evidence-of-intent and for manifest-weight-of-evidence-of-self-defense; the State's reliance upon the First District's earlier decision in *State v. Williams,* 1st Dist. No. C-810450, is inapposite. The State's reliance upon the Third District's decision in *State v. Barnd,* 85 Ohio App.3d 254, 260, 619 N.E.2d 518, 521 (3rd Dist. 1993) is qualified by *Barnd's* acknowledgment that "courts have occasionally made exceptions to this general rule and determined that jury instructions on both accident and self-defense are necessary and appropriate under certain facts." *Id.*

The Second District, in *State v. Armbrust,* 42 N.E.2d 214 (2nd Dist. 1941) examined the issue in an effort to place this Court's decision in *State v. Champion,* 109 Ohio St. 281, 142 N.E. 141 (1924) in proper context. *Champion* employed sweeping language that a claim that a weapon was accidentally discharged was inconsistent with self-defense. *Armbrust* distinguished *Champion* on its facts and noted that it was possible for a weapon to be drawn in self-defense but not fired knowingly. This is precisely the type of decision that the Eighth District's bright-line rule has eliminated.

In the end, common sense tells us that, when one is fighting to save oneself from serious injury or even death, niceties of "accident," "recklessly," "knowingly," and "purposely" do not fit into either-or arguments at trial. Moreover, as a result of the enactment of HB 228, effective March 27, 2019, self-defense in Ohio will be colorable anytime "there is evidence presented that *tends* to support the accused person used the force in self-defense." Accordingly, the need to clarify this area of law is even more acute than it was previously.[3]

[3] In his memorandum in support of jurisdiction, Mr. Amey noted that the then-current version of Ohio's self-defense law, which placed the burden of persuasion on the defendant, caused Proposition

In support of reconsideration of Proposition of Law II:

> **When a trial court's explanation of its verdict in a bench trial explicitly finds that the evidence of an element was lacking in one count and then finds that the evidence was sufficient with respect to that same element in another count, the conviction offends due process of law under the Fifth and Fourteenth cannot stand.**

This Court has previously recognized that a verdict that obviously evinces a fundamental misunderstanding of the law cannot stand. In *State v. McGee*, 79 Ohio St.3d 193, 680 N.E.2d 975, 1997-Ohio-156, the trial court in a bench trial made clear that it was employing a negligence mens rea to the offense of child endangering. This Court reversed, holding that the correct mens rea was recklessness. In the instant case, the trial court similarly made clear on the record that it was applying the wrong law when it stated that "knowingly" for purposes of felonious assault was different than "knowingly" for purposes of voluntary manslaughter. The only difference between the instant case and *McGee* is timing – the judge in *McGee* misstated the law when ruling on the motion for directed acquittal at the close of the prosecution's case-in-chief; the judge in the instant case misstated the law when rending its verdict. This is a distinction without a difference.

Had this been a jury trial and the judge had told the jury that "knowingly" had two different meanings, the conviction would have been reversed. Why? Because the record would reflect the legal error. Where, as here, the record also reflects the legal error, the outcome should be no different.

Courts of appeals should not speculate about the reasoning behind a general verdict. But when a rationale is provided, courts of appeals should not ignore the obvious misstatement of the law. That is what this Proposition stands for. And it is a proposition that will improve the quality of justice in Ohio.

---

of Law I to be salient. The recent enactment of HB 228 creates an even more pressing concern in this regard.

Conclusion

For these reasons, Mr. Amey prays for reconsideration and for acceptance of the first two propositions of law.

Respectfully submitted,

/s/ John T. Martin

JOHN T. MARTIN
Assistant Public Defender

CERTIFICATE OF SERVICE

A copy of the foregoing Memorandum in Support of Jurisdiction was hand delivered upon Michael O'Malley, Cuyahoga County Prosecutor, and or a member of his staff, The Justice Center 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this March 4, 2019.

s/ John T. Martin

JOHN T. MARTIN
Assistant Public Defender Counsel for Appellant