

**IN THE SUPREME COURT OF OHIO
2021**

STATE OF OHIO,

Case No. 2021-0451

Plaintiff-Appellee,

On Appeal from the
Franklin County Court of Appeals,
Tenth Appellate District

-vs-

JOSHUA S. FERRELL,

Court of Appeals
Case No. 19AP-816

Defendant-Appellant.

MEMORANDUM OF PLAINTIFF-APPELLEE OPPOSING JURISDICTION

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EXPLANATION OF WHY THIS COURT SHOULD DECLINE JURISDICTION

Defendant Joshua Ferrell started a fight with Mario DiPenti. The two fell to the ground, and soon DiPenti was on top of defendant and was punching him. Apparently recognizing that he started a fight that he could not finish, defendant pulled out a gun and pointed it at DiPenti's head. The two struggled some more, culminating in defendant shooting DiPenti in the chest, killing him. The entire affray was captured on video. Defendant was convicted of murder, with the jury finding that the State disproved self-defense beyond a reasonable doubt.

Defendant's single proposition of law claims that in any self-defense case - regardless of the particular facts of the case - a trial court must instruct the jury on all the "variations, contingencies, exceptions, and nuances" to the elements of self-defense. In particular, defendant argues that in all self-defense cases, a trial court must instruct the jury (1) that an initial aggressor may use self-defense if he withdraws from the conflict in good faith or conveys his intention to withdraw therefrom (also known as "revival"), see *State v. Melchior*, 56 Ohio St.2d 15, 21 (1978) and (2) a non-deadly aggressor may use deadly force when the other person responds with deadly force, see *State v. Hendrickson*, 4th Dist. No. 08CA12, 2009-Ohio-4416, ¶ 28. For several reasons, this Court should decline jurisdiction

To start, defendant's arguments are limited to plain-error review. The only objection to the self-defense instruction the defense raised at trial related to whether H.B. 228 required the State to disprove all elements of self-defense or only one (on this point, the trial court properly instructed the jury that the State could meet its burden by disproving any element of self-defense). The defense requested no instruction on revival under *Melchior*. Opinion at ¶ 23. Nor did the defense ever request any instruction regarding a non-deadly aggressor responding to deadly force under *Hendrickson*. Indeed, the *Hendrickson* argument is doubly forfeited because defendant did not raise it until his reply brief in the Tenth District. Memorandum Decision at ¶ 4 (denying

reconsideration). Even if this Court is inclined to address whether trial courts must give these instructions in all self-defense cases, it should do so in a case where the arguments are properly preserved.

In addition to being forfeited, defendant's argument that in every self-defense case a trial court must instruct on the "variations, contingencies, exceptions, and nuances" of the elements of self-defense is irreconcilable with the well-settled law that a trial court's instructions must be "appropriate to the facts." *State v. White*, 142 Ohio St.3d 277, 2015-Ohio-492, ¶ 46, citing *State v. Griffin*, 141 Ohio St.3d 392, 2014-Ohio-4767, ¶ 5. A trial court need not - and indeed should not - give instructions that are not supported by the evidence. This is true, even with self-defense after H.B. 228. The State's burden to disprove self-defense does not apply unless the evidence "tends to support" self-defense. ORC 2901.05(B)(1). Thus, whether and to what extent the State must disprove self-defense will necessarily depend on the evidence admitted at trial.

As the Tenth District found, the evidence did not justify an instruction on revival under *Melchior*. Opinion at ¶ 29. Defendant argues that he withdrew from the confrontation by putting the gun to DiPenti's head, but this act had the exact opposite effect - it escalated the confrontation. *Id.* at ¶ 30. "That Ferrell soon found himself outmatched did not restore his right to use deadly force in self-defense for a situation he created and from which he never sufficiently withdrew." *Id.* The Tenth District also correctly found that the evidence did not support an instruction on a non-deadly aggressor using deadly force under *Hendrickson*. Memorandum Decision at ¶ 7. Defendant "was responsible for both provoking the violent situation and for the degree of force with which the victim responded." *Id.*

The trial court instructed the jury that self-defense required that "the defendant was not at fault in creating the situation giving rise to the shooting." This general instruction was more than

enough to communicate to the jury the concepts of revival under *Melchior* and non-deadly aggressor responding to deadly force under *Hendrickson*. That is, the jury knew that either defendant's withdrawal from the initial fight or DiPenti's use of deadly force in response to defendant's non-deadly aggression would have created a brand new "situation" for which defendant would have not been at fault.

The video evidence, however, unambiguously showed that there was no "distinct middle point" in the affray and that "the encounter was one continuous, rather brief incident." Opinion at ¶ 29. Given the evidence, even if the trial court had instructed the jury on revival under *Melchior* and/or non-deadly aggressor responding to deadly force under *Hendrickson*, there is zero probability that the outcome of the trial would have been any different.

Defendant argues throughout his memorandum in support of jurisdiction that lower courts need this Court's guidance on the common-law elements of self-defense. Not so. While H.B. 228 reallocated the burden to disprove self-defense to the State (as opposed to requiring the defense to prove self-defense by a preponderance), the common-law elements of self-defense are well-settled and have been stated in numerous decisions from this Court. See e.g., *State v. Thomas*, 77 Ohio St.3d 323, 326 (1997); *State v. Jackson*, 22 Ohio St.3d 281, 238 (1986); *State v. Robbins*, 58 Ohio St.2d 74, 79-80 (1970); *Melchior* at 20-21. As an aside, the General Assembly has enacted variations to the common law duty to retreat, none of which is applicable to this case.

Thus, the problem is not any lack of clarity in the law regarding either the elements of self-defense or the "variations, contingencies, exceptions, and nuances" to these elements. Rather, the problem is that defendant forfeited his arguments that the trial court should have instructed on revival under *Melchior* and on non-deadly aggressor responding to deadly force under

Hendrickson. And even if the defense had not forfeited these arguments, the evidence simply did not support giving these instructions.

Defendant's reliance on the Second Amendment and Article I, Section 4 of the Ohio Constitution is a constitutional red herring. Whatever the scope of the right to bear arms for purposes of self-defense (including whether the right applies outside the home), these constitutional provisions do not supplant the law on the actual use of deadly force in self-defense. No conceivable view of the Second Amendment or Article I, Section 4 would protect shooting someone in the chest in order to end a fight that the shooter himself initiated.

In the end, the trial court's self-defense instruction was appropriate to the evidence and correctly instructed the jury on the State's burden to disprove self-defense under H.B. 228. The instructions accurately conveyed the law to allow "the jury to weigh the evidence and discharge its duty as the factfinder." *State v. Comen*, 50 Ohio St.3d 206 (1990), paragraph two of the syllabus. The trial court committed no error, let alone plain error, in its self-defense instruction. Because defendant's proposition of law presents no questions of such constitutional substance or of such great public interest as would warrant this Court's review, and because the Tenth District correctly affirmed defendant's murder conviction, jurisdiction should be declined.

STATEMENT OF CASE AND FACTS

On May 15, 2018, defendant was indicted for two counts of murder in Franklin County Common Pleas case no. 18CR-2277. The charges related to the shooting death of DiPenti on May 2, 2018. Count One was for purposefully causing the death of DiPenti, in violation of ORC 2903.02(A). Count Two was for causing DiPenti's death as a proximate result of committing felonious assault, in violation of ORC 2903.02(B). Each count carried a three-year firearm specification.

On October 21, 2019, after a four-day trial, the jury returned a verdict of guilty on Count Two, causing DiPenti's death as a proximate result of committing felonious assault, and the accompanying firearm specification. The jurors deadlocked as to Count One, purposefully causing the death of DiPenti. On November 26, 2019, a sentencing hearing was held. The court imposed the statutorily mandated sentence of fifteen years to life for Count Two plus an additional three years for the firearm specification.

On May 2, 2018, defendant shot and killed DiPenti in the street between their houses. At the time of his death, DiPenti was 51 years old, 5'11" tall, and weighed 208 pounds. At the time of the shooting, defendant was 30 years old, 5'11½," and 225-230 pounds.

Just before 8:40 p.m., on May 1, 2018, defendant and DiPenti met for the first time. Defendant testified that as he was driving into the neighborhood and DiPenti was driving out, DiPenti went around a corner "real fast." When he saw that, defendant stopped and honked his horn. They each got out of their cars and an argument ensued. Defendant then punched DiPenti in the jaw causing him to stagger and fall down. The argument continued in defendant's driveway. The next morning, defendant and DiPenti had another run-in. They argued and defendant then slapped DiPenti's hand. Eventually, DiPenti got in his car and defendant turned to walk back toward his own house. Throughout these interactions, DiPenti never struck defendant. At trial, defendant denied that he shot DiPenti due to anything that happened in these first two encounters.

The next altercation, in which DiPenti was killed, occurred in the afternoon of May 2, 2018. At 2:20 p.m., DiPenti walked down the sidewalk across the street from the neighbor's house toward the location of the encounter the night before. DiPenti was shirtless, wearing only shorts and flip flops. A few minutes later, DiPenti walked back in the direction of his own home.

As DiPenti walked back to his house, defendant exited his own home, walked down his driveway, and confronted DiPenti in the middle of the street. Immediately upon reaching DiPenti, defendant swung his fist at DiPenti, who was able to dodge the punch and turn around to run away. Defendant chased after DiPenti and grabbed at his left arm. DiPenti then turned around to face defendant and the two began to argue again.

Next, defendant made a move to punch DiPenti, but he blocked the blow. Defendant then lunged toward DiPenti and put his arms around DiPenti's neck. DiPenti fell backwards, while their arms were intertwined, causing defendant to fall to the ground as well. After they hit the ground, DiPenti climbed partially on top of defendant. DiPenti punched defendant with his right arm. This is the first time that DiPenti struck defendant.

Defendant testified that during this altercation he told DiPenti to "stop" multiple times and screamed that he had a gun "a lot" of times, but DiPenti did not back away. Defendant claims, which the State disputes, that after he told DiPenti he had a gun, DiPenti pressed his thumbs into defendant's eyes. According to defendant, as a result of the eye gouging, he pulled his gun out because DiPenti "wasn't listening to me telling him to stop. He wasn't listening to me tell him I had a gun." Roughly twenty-five seconds after he confronted DiPenti in the street, defendant pulled his gun from his shorts with his right hand.

First, defendant put the gun up to DiPenti's head. He held it there for almost ten seconds. Then, DiPenti said "you really got a gun?" To which defendant responded: "Yes, I got a fucking gun. Get the fuck off me."

In the video, DiPenti's arm came out from under defendant's body after he put the gun up to his head. After DiPenti's arm was no longer under defendant, DiPenti used his left hand to hold down defendant's right bicep - the arm which contained the gun. Defendant testified that at

this point DiPenti reached for the gun with his left hand. However, the gun was in clear view in the recording until defendant brought it to DiPenti's chest to shoot him, and DiPenti's hands were never near the gun.

Then, defendant lifted the gun to DiPenti's chest and fired one shot. The bullet fractured two of DiPenti's ribs, perforated the upper lobe of his left lung, lacerated his descending thoracic aorta, and entered his fourth thoracic vertebra, causing his death. "The entire encounter, from the time defendant came out of his house to the time he shot and killed DiPenti, lasted less than 1 minute. From the time defendant lunged at DiPenti to the time he shot him, less than 30 seconds elapsed." Opinion at ¶ 14.

Defendant then got out from under DiPenti and went to his house to get his cell phone to call 911. When the 911 dispatcher asked what was going on, defendant said: "I shot a man." When the dispatcher asked why, he said: "Self-defense. He was on top of me and I pulled a gun out, told him to get off of me and he didn't get off of me." During the 911 call, defendant did not say that DiPenti reached for the gun or that he was in fear for his life. Defendant testified over and over that he told DiPenti to "get off" him and that he took out his gun because DiPenti was not "complying."

Columbus Police Officer Perrigo arrived on the scene. Perrigo asked defendant if he was injured; defendant said his heart was racing and his knees were scraped up. Defendant did not mention any injury to his eyes. Later, defendant was transported to CPD headquarters. Sergeant Standley took photographs of defendant and collected DNA samples of blood from his clothing, belt, holster, and cell phone. Standley testified that in his experience eye gouging injuries usually include "a lot of dried blood and obvious amount of soft tissue injury, swelling, bruising, discoloration with the bruising and blood around the whole general area." The close-up

photograph of defendant's face does not show any of these tell-tale signs of eye gouging - there is no bruising, no swelling, and no dried blood around defendant's eyes. In addition, the parties stipulated that defendant's DNA was not under DiPenti's fingernails.

Defendant timely appealed his felony murder conviction to the Tenth District Court of Appeals. The Tenth District noted that “[i]n his first assignment of error, defendant argues the trial court erred in instructing the jury on self-defense. More specifically, Ferrell asserts the trial court erred in failing to instruct the jury on the revival of the right to use force in self-defense for an initial aggressor who withdraws from the conflict in good faith.” Opinion at ¶ 22. The Tenth District held that “[t]he trial court fully and appropriately instructed the jury on the state's burden of proof. Thus, the trial court did not err, let alone plainly err, in failing to give an instruction on the revival of the right to use force in self-defense to an initial aggressor.” Opinion at ¶ 31. On January 4, 2021, defendant filed a Motion to Reconsider. In denying the motion, the Tenth District stated: “Ferrell's argument that the victim responded with greater force than was necessary to repel Ferrell's initial attack, thereby rendering Ferrell not "at fault," lacks merit. Memorandum Decision at ¶ 7.

The facts show that defendant started a fist fight, then escalated that fight by holding a gun to DiPenti's head, then shot DiPenti when - he says - DiPenti reached for the gun. The jury was able to play the video of the shooting as many times as they needed to determine what really happened and come to a verdict. After hearing all the facts of the case, and being properly instructed on self-defense, the jury returned a guilty verdict. The defense claim of self-defense was so weak that it did not even create a reasonable doubt as to the applicability of that defense. The jury's determination should not be taken lightly.

ARGUMENT

Response to Proposition of Law: A failure to request a jury instruction at trial forfeits all but plain error. Crim.R. 30(A); Crim.R. 52(B). A defendant cannot show any error, let alone plain error, when a trial court omits an instruction that is not “appropriate to the facts.” *State v. White*, 142 Ohio St.3d 277, 2015-Ohio-492, ¶ 46.

As stated above, defendant’s arguments are limited to plain-error review. Defendant’s Proposition of Law was not argued before the trial court or the Court of Appeals. As stated above, the only objection to the self-defense instruction the defense raised at trial related to whether H.B. 228 required the State to disprove all elements of self-defense or only one. The defense requested no instruction on revival under *Melchior*. Opinion at ¶ 23. Nor did the defense ever request any instruction regarding a non-deadly aggressor responding to deadly force under *Hendrickson*. Indeed, the *Hendrickson* argument is doubly forfeited because defendant did not raise it until his reply brief in the Tenth District. Memorandum Decision at ¶ 4 (denying reconsideration). Even if this Court is inclined to address whether trial courts must give these instructions in all self-defense cases, it should do so only where the arguments are properly preserved.

In Ohio, a trial court “has broad discretion to decide how to fashion jury instructions,” such instructions must “present a correct, pertinent statement of the law that is appropriate to the facts” of the case. *State v. White*, 142 Ohio St. 3d 277, 2015-Ohio- 492, ¶ 46. Thus, 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 fact finder. *State v. Comen*, 50 Ohio St. 3d 206 (1990), paragraph two of the syllabus. But there is a limit, and “[t]he relevant principle for jury instructions is not one of abstract correctness, but is whether an instruction - even if a correct statement of law - is potentially misleading.” *White*, at ¶ 52, citing *State v. Guster*, 66 Ohio St.2d

266, 271 (1981) (“Abstract rules of law or general propositions, even though correct, ought not to be given unless specifically applicable to facts in issue”).

In this case, the evidence does not support jury instructions regarding revival under *Melchior*, nor non-deadly aggressor responding to deadly force under *Hendrickson*. In regard to the revival instruction, the Tenth District stated:

The evidence presented at trial, in particular the video evidence of the fatal encounter, did not support an instruction on the revival of Ferrell's right to use deadly force in self-defense. Instead, the evidence demonstrated that Ferrell was the aggressor, initially at fault for the encounter, and that he never withdrew. Despite Ferrell's attempts to describe the fatal encounter as having a distinct middle point in which he announced his intention to withdraw from the affray, the video recording shows the encounter was one continuous, rather brief incident. The video shows Ferrell walk directly and deliberately toward DiPenti and immediately swing his fist at DiPenti's face. A few seconds later, Ferrell charges toward DiPenti, and the two become entangled and fall to the ground. Although Ferrell testified he was trying to get away once DiPenti was on top of him, the video recording shows Ferrell never removed any just apprehension of fear in DiPenti from the affray that Ferrell initiated. Mere seconds passed before Ferrell brandished his gun the first time; mere seconds more passed before Ferrell shot and killed DiPenti.

Further, although Ferrell asserts that placing his gun against DiPenti served as his intention to retreat from the initial encounter, his argument ignores that by brandishing his gun, Ferrell only escalated the situation rather than removed any just apprehension of fear DiPenti possessed. See, e.g., *State v. Campbell*, 10th Dist. No. 07AP-1001, 2008-Ohio-4831, 2008 WL 4332044, ¶ 25-27 (defendant did not act in self-defense where, after becoming involved in a fight with people at a party, defendant ran to a van, retrieved his gun, and started firing shots, and “[t]he weight of the evidence indicates that [defendant] was the aggressor and escalated the confrontation by retrieving his shotgun and being the first to shoot”). The video recording of the incident demonstrates that Ferrell confronted DiPenti aggressively in the street with the intention of physically fighting with him. That Ferrell soon found himself outmatched did not restore his right to use deadly force in self-defense for a situation he created and from which he never sufficiently withdrew.

Opinion at ¶¶ 29-30. In regard to the non-deadly aggressor instruction, the Tenth District stated:

Ferrell relies on *State v. Hendrickson*, 4th Dist. No. 08CA12, 2009-Ohio-4416, for the proposition that an initial aggressor who initiates an encounter with non-deadly force can regain the right to act in self-defense where the victim responds to his non-deadly force with deadly force.

* * *

Hendrickson is inapposite to the instant case.

* * *

Though Ferrell attempts to characterize the victim's response as greater force than was required or justified in an attempt to avail himself of the reasoning employed in *Hendrickson*, the video evidence does not support that finding. As we explained in our decision, Ferrell initiated the physical altercation and never sufficiently withdrew before using deadly force. Thus, Ferrell's argument that the victim responded with greater force than was necessary to repel Ferrell's initial attack, thereby rendering Ferrell not "at fault," lacks merit.

Memorandum Decision at ¶¶ 5-7.

As found by the Tenth District, the evidence did not support jury instructions on revival and non-deadly aggressor. These instruction were simply not appropriate based on the facts. In this case, defendant did not properly preserve his arguments. "A defendant cannot show any error, let alone plain error, when a trial court omits an instruction that is not "appropriate to the facts." *State v. White*, 142 Ohio St.3d 277, 2015-Ohio-492, ¶ 46.

CONCLUSION

The Tenth District correctly affirmed the trial court's judgment. For the foregoing reasons, it is respectfully submitted that the within appeal does not present questions of such constitutional substance nor of such great public interest as would warrant further review by this Court. It is respectfully submitted that jurisdiction should be declined.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on May 11, 2021, a copy of the foregoing was delivered via electronic mail, james@tyacklaw.com, to JAMES P. TYACK, 536 South High Street, Columbus, OH 43215, Counsel for Defendant-Appellant.

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