IN THE SUPREME COURT OF OHIO
2022

STATE OF OHIO, Plaintiff-Appellee, -vs- MALCOLM WALKER, Defendant-Appellant.	Case No. 21-1421 On Appeal from the Lucas County Court of Appeals, Sixth Appellate District Court of Appeals No. L-20-1047

BRIEF OF AMICUS CURIAE OHIO PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF APPELLEE STATE OF OHIO

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STATEMENT OF AMICUS INTEREST

Founded in 1937, the Ohio Prosecuting Attorneys Association (OPAA) is a private, non-profit trade organization that supports the state's 88 elected county prosecutors. Its mission is to assist county prosecuting attorneys to pursue truth and justice as well as promote public safety. OPAA advocates for public policies that strengthen prosecuting attorneys' ability to secure justice for crime victims and serve as legal counsel to county and township authorities. Further, OPAA sponsors continuing legal education programs and facilitates access to best practices in law enforcement and community safety.

In light of these considerations, OPAA respectfully urges this Court to dismiss this case as improvidently accepted. The question of sufficiency review for self-defense is already before this Court in *State v. Messenger*, Sup.Ct. No. 21-944, which has been fully briefed and was orally argued on May 25, 2022. It is likely that the ruling in *Messenger* (expected by the end of the year) will settle the issue before the present case would be orally argued. This case would be merely duplicative of *Messenger*.

The case is improvident for the additional reason that, even if *Messenger* would conclude that sufficiency review applies to self-defense, the error of the appellate court in failing to engage in sufficiency review would be harmless. The appellate court addressed and rejected the defendant's manifest-weight claim regarding self-defense, and the defendant cannot possibly receive a better outcome under the less-favorable standard of sufficiency review.

If this Court reaches the merits of the present appeal, this Court should follow the logic of *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, which held that

sufficiency-of-the-evidence review does not apply to affirmative defenses. Despite the statutory change in the burden of persuasion, self-defense remains an affirmative defense to which sufficiency review would be inapplicable. The issue of self-defense is not an "element" or "essential element" to which sufficiency review would apply, and it is an issue on which the State would *never* have the burden of going forward with evidence.

STATEMENT OF FACTS

Amicus OPAA adopts by reference the procedural and factual history set forth in the State's brief and in paragraphs two through forty-five of the Sixth District's decision.

ARGUMENT

> **Amicus Proposition of Law**: Sufficiency-of-the-evidence review does not inquire into the adequacy of the evidence related to an affirmative defense like self-defense, even when the prosecution bears the burden of persuasion on the affirmative defense beyond a reasonable doubt.

Even if this Court does not dismiss the defendant's appeal has having been improvidently accepted, amicus OPAA respectfully submits that this Court should affirm the Sixth District's judgment.

A. An Improvident Case

With this Court now having heard the oral arguments in *Messenger*, it would be improvident to consider the present case. Both *Messenger* and *Walker* involve a defendant whose challenge to the adequacy of the evidence was unanimously rejected under the manifest-weight standard of review. While this Court is proceeding to hear the *Messenger* appeal to address whether sufficiency review applies, it takes only one of

these cases to provide a vehicle to address the issue, and, even in *Messenger*, the failure of the Tenth District to provide sufficiency review would be found to be harmless given that court's rejection of the manifest-weight challenge.

The present case provides another example of the harmlessness of the issue when the appellate court has unanimously rejected the defendant's arguments under manifest-weight review. Manifest-weight review is more favorable to the defense than sufficiency review, since manifest-weight review allows a limited weighing of the evidence by the appellate court acting as a "thirteenth juror." Even so, the Sixth District unanimously rejected defendant's arguments related to self-defense. A ruling rejecting a manifest-weight challenge is "dispositive of the issue of sufficiency." *State v. McCrary*, 10th Dist. No. 10AP-881, 2011-Ohio-3161, ¶ 11 (quoting another case); see, also, *State v. York*, 12th Dist. No. CA2021-11-147, 2022-Ohio-2457, ¶ 25.

The Sixth District's discussion of the manifest-weight challenge covers the same territory that would lead to the rejection of a sufficiency challenge. As emphasized by the Sixth District, defendant Walker was the sole witness allegedly supporting "self-defense", and he had been in possession of both firearms involved even before the use of deadly force. Defendant Walker then proceeded to demonstrate his consciousness of guilt by disposing of the weapons afterwards and hiding out from police. As stated by the Sixth District:

> {¶ 70} At trial, Ra.H. testified that she saw appellant shoot and kill S.B. while he was on his hands and knees after having already been shot twice by appellant. Ra.H. testified that she saw appellant in possession of two firearms – one in his hand and one in his waistband – at the time he shot S.B. She also testified that after appellant shot S.B. and exited the apartment she heard an additional shot being

fired in the hallway. The state elicited testimony from various forensic experts that established the five shell casings discovered inside the apartment, and the shell casing found in the hallway just outside the apartment, were fired from two firearms discovered in a yard a block away from the incident approximately one month later. Detective Holland testified that appellant was seen in possession of both of those firearms in a video created shortly before the shooting. Detective Holland testified that appellant did not have any injuries consistent with an altercation with S.B. He also testified that appellant never reported the alleged robbery which ultimately led to the alleged altercation with S.B.

{¶ 71} Appellant, in turn, testified that he acted in self-defense when he shot S.B. following an altercation between them in the kitchen of the apartment. His testimony relies solely on his own account of events since no one else witnessed the altercation. He also testified that he only shot S.B. twice during the altercation and that he dropped the only firearm he possessed at the time he exited the apartment.

{¶ 72} Having reviewed the record, we find that the state introduced compelling witness testimony and physical evidence which shows appellant intended to cause S.B. physical harm when he shot him. Appellant's own conduct – welcoming S.B. into the studio, filming a video about not being afraid of threats made against him, sitting in the living room entertaining Ra.H.'s children while he was supposedly afraid of being assaulted by S.B.'s associate – is not consistent with an individual acting in self-defense.

{¶ 73} Essentially, appellant believes the jury should have found his testimony more credible than the testimony and evidence introduced by the state, and found that he acted in self-defense when he shot and killed S.B. The credibility of appellant's testimony is an issue for the jury to determine and we may only disturb the jury's assessment of his credibility "in the exceptional case in which the evidence weighs heavily against the conviction." *Thompkins* at 386. In light of the testimony and evidence introduced by the state, and our own review of the evidence, we find that this is not an "exceptional case" which warrants reversal. The jury's verdict as to appellant's murder conviction was not

against the manifest weight of the evidence.

By every measure of possible "insufficiency", defendant Walker's challenge would fail. The jury was not required to believe a single word of his self-serving claim of self-defense. Strike One. His account conflicted with the physical evidence. Strike Two. His acts in disposing of the guns and hiding out from police afterward reflected consciousness of guilt and were not acts reflective of someone who acted in proper self-defense. Strike Three. As the Sixth District put it, defendant Walker's actions were "not consistent with an individual acting in self-defense."

It would have taken two of the three appellate judges to sustain a sufficiency challenge, and here all three would have rejected such a challenge given this posture of the evidentiary record. If anything, the present case confirms the OPAA's argument in *Messenger* and here that "sufficiency" review simply does not "fit" in assessing affirmative defenses.

With defendant Walker having received a more-favorable review than sufficiency review, and with his challenge *still* having failed under manifest-weight review, the Sixth District's refusal to engage in sufficiency review is necessarily harmless. At best, the Sixth District's judgment would be affirmed, since this Court "will not reverse a correct judgment simply because it was based in whole or in part on an incorrect rationale." *In re G.T.B.*, 128 Ohio St.3d 502, 2011-Ohio-1789, ¶ 7. "[T]his court is not authorized to reverse a correct judgment merely because erroneous reasons were assigned as the basis thereof." *State ex rel. Sands v. Culotta*, 157 Ohio St.3d 387, 2019-Ohio-4129, ¶ 14 (quoting other cases); *Joyce v. General Motors Corp.*, 49 Ohio St.3d 93, 96 (1990). It would be improvident to consider this case any further.

B. *Hancock* Continues to Lead the Way

The defense proposition of law nevertheless fails on the merits. In *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, this Court already held that sufficiency-of-the-evidence review does not apply to an affirmative defense, and there is no doubt that self-defense *remains* an affirmative defense. Although the defense argues that the 2019 change in the burden of persuasion renders *Hancock* inapplicable, the logic of *Hancock* continues to apply. Indeed, that logic is consistent with the reasoning of the United States Supreme Court in *Engle v. Isaac*, 456 U.S. 107 (1982), which addressed Ohio law as applicable to self-defense at a time when the prosecution (as now) bore the burden of persuasion on self-defense.

C. Self-Defense is Still an Affirmative Defense

The statutory language plainly continues to treat self-defense as an affirmative defense, and the prosecution's beyond-reasonable-doubt burden as to self-defense does not convert that affirmative defense into an "element" of the offense.

When the General Assembly amended R.C. 2901.05 to place the burden of persuasion on the prosecution effective in 2019, it did *not* amend the definition of "affirmative defense" in R.C. 2901.05(D)(1). Self-defense qualifies as an "affirmative defense" under this definition because it amounts to an excuse or justification peculiarly within the knowledge of the accused and on which the accused can be fairly required to adduce supporting evidence. R.C. 2901.05(D)(1)(b). "This court has long determined that self-defense is an affirmative defense." *State v. Martin*, 21 Ohio St.3d 91, 93, 94 (1986); *State v. Robinson*, 47 Ohio St.2d 103, 108 (1976) (listing self-defense as affirmative defense).

The General Assembly would have been aware of this legal background as it was setting out to change the statute as to the burden of persuasion while *not* changing the definition of "affirmative defense" and while *not* changing the burden of going forward on affirmative defenses. "When the legislature amends an existing statute, the presumption is that it is aware of our decisions interpreting it." *State v. Hassler*, 115 Ohio St.3d 322, 2007-Ohio-4947, ¶ 16; *Clark v. Scarpelli*, 91 Ohio St.3d 271, 278 (2001); *Spitzer v. Stillings*, 109 Ohio St. 297, 305-306 (1924). The General Assembly is presumed to have legislated against the background of existing law. *Stiner v. Amazon.com, Inc.*, 162 Ohio St.3d 128, 2020-Ohio-4632, ¶ 27; *In re Bruce S.*, 134 Ohio St. 3d 477, 2012-Ohio-5696, ¶ 11. It is also presumed that, to the extent the statute was unchanged, its operation was meant to continue as it had before. R.C. 1.54.

The amendment shifting the burden of persuasion on self-defense actually confirmed that self-defense remains an affirmative defense. As amended effective March 28, 2019, R.C. 2901.05(A) and (B)(1) provided:

> (A) Every person accused of an offense is presumed innocent until proven guilty beyond a reasonable doubt, and the burden of proof for all elements of the offense is upon the prosecution. The burden of going forward with the evidence of an affirmative defense, and the burden of proof, by a preponderance of the evidence, for an affirmative defense <u>other than self-defense, defense of another, or defense of the accused's residence as described in division (B)(1) of this section</u>, is upon the accused.
>
> (B)(1) <u>A person is allowed to act in self-defense, defense of another, or defense of that person's residence. If, at the trial of a person who is accused of an offense that involved the person's use of force against another, there is evidence presented that tends to support that the accused person used the force in self-defense, defense of another, or defense of that person's residence, the prosecution must prove beyond</u>

> a reasonable doubt that the accused person did not use the force in self-defense, defense of another, or defense of that person's residence, as the case may be.

Paragraph (A) was further amended effective in 2021 to add the word "presented", so that it now reads "for an affirmative defense other than self-defense, defense of another, or defense of the accused's residence presented as described in division (B)(1) of this section".

As can be seen, the second sentence in paragraph (A) was only partially amended in 2019. As to the first subject in the sentence, i.e., "[t]he burden of going forward with the evidence of an affirmative defense," the General Assembly *made no change*, and such burden "is upon the accused." Then, as to the second subject of the sentence, i.e., "the burden of proof, by a preponderance of the evidence, for an affirmative defense", the General Assembly mostly left in place the principle that the preponderance burden remains "upon the accused" for affirmative defenses. But, in this latter regard, the General Assembly narrowly carved out three exceptions in regard to the preponderance burden of persuasion, specifying pursuant to paragraph (B)(1) that, when the charged offense involves use of force against another, the prosecution will have the burden of persuasion beyond a reasonable doubt as to self-defense, defense of another, and defense of a residence. As to these latter three affirmative defenses, the General Assembly is willing to place the burden of persuasion on the prosecution, but not otherwise.

The amendment's language treats self-defense as an affirmative defense upon which the defense still has the burden of going forward with evidence that "tends to support" that defense. Only then does the prosecution have any burden of persuasion, thereby constituting a narrow exception to the usual rule that the defense would bear the

burden of persuasion by a preponderance. Creating this narrow exception necessarily meant that the General Assembly was treating self-defense as an affirmative defense to which the preponderance burden for affirmative defenses would otherwise apply. See, e.g., *Wilson v. Durrani*, 164 Ohio St.3d 419, 2020-Ohio-6827, ¶ 31 (if not otherwise included, "there would have been no need for the General Assembly to have expressly included the saving statute as an exception"); *Gitlitz v. C.I.R.*, 531 U.S. 206, 214 (2001) ("no need to provide an exception" if not already otherwise included). The phrase created by the General Assembly – "for an affirmative defense *other than* self-defense" – confirms that self-defense is an "affirmative defense" to begin with, and for which the legislature was creating a narrow exception as to the burden of persuasion.

One interesting feature of the amendment is that, even as to self-defense, it is not universally true that the prosecution would bear the burden of persuasion. The burden-shifting language only operates when the charged offense involves the use of force against another. R.C. 2901.05(B)(1). But self-defense could apply to offenses beyond just use-of-force-against-another situations.

In weapon-under-disability (WUD) cases, the offender can claim self-defense justifying his possession of the firearm even though he was otherwise prohibited by law from having such possession. *State v. Hardy*, 60 Ohio App.2d 325 (8th Dist.1978). In situations in which the defendant did not actually use force against another in possessing or carrying the firearm, the defense still would have the burden of going forward *and* the burden of persuasion because the WUD charge would not involve the use of force against another.

Self-defense might also come into play when the defendant made threats against

another that would qualify as aggravated menacing. *State v. Chopak*, 8th Dist. No. 96947, 2012-Ohio-1537, ¶ 29. The making of threats of serious physical harm could be justified as self-defense if meant to deter an attack by another. But aggravated menacing does not involve the use of force against another, only a *threat* to use force, and therefore the burden-shifting amendment would have no application to the defendant's claim of self-defense in that situation.

As to these instances of the defense claiming self-defense, the defense would have the burden of going forward with evidence of self-defense as well as the burden of persuasion by a preponderance as to self-defense. In all respects, self-defense remains an affirmative defense. The narrow burden-shifting amendment does not change the status of self-defense as an affirmative defense.

D. Burden of Going Forward Remains on Defense

The defense errs in contending that defendants no longer bear the burden of going forward with evidence on self-defense. According to the defense, the post-amendment version of the statute is "neutral" on that burden. But, on its face, the statutory amendment did *not* change the burden of going forward, which remains on the defense as to all affirmative defenses. "Placing upon the defendant the burden of going forward with evidence on an affirmative defense is normally permissible." *Simopoulos v. Virginia*, 462 U.S. 506, 510 (1983). It was only on the burden of persuasion that the General Assembly made the narrow carve-out for self-defense, defense of another, and defense of a residence. And, even in that regard, the burden of persuasion does not shift until evidence is presented that "tends to support" the defense. The burden of going forward remains on the defense, which must ensure there is evidence that "tends to

support" these affirmative defenses.

It is true enough that some of the evidence underlying a self-defense claim could arise during the prosecution's case-in-chief. But that is nothing new, as it is well-settled that, even when a preponderance standard applied, the jury must consider all of the evidence without regard to whether the witness providing the information was testifying in the prosecution's or defense's case-in-chief. *Martin v. Ohio*, 480 U.S. 228, 233-34 (1987). Even so, the burden of going forward never shifts, and the defense is the party which needs to ensure that there is enough evidence "tend[ing] to support" self-defense in order to warrant an instruction on that affirmative defense. By definition, the prosecution would not have a burden of going forward to "support" self-defense.

The defense's burden of going forward can be seen at work in the present case in which the defense still saw the need to introduce evidence in its case-in-chief in support of self-defense. No one else was present to see exactly what happened in the kitchen, which is when the defendant was claiming the need to use self-defense arose. Even though the prosecution had introduced his statements claiming self-defense to police, the defense still saw the necessity of providing the testimony of the defendant to support the defense.

Under the then-extant three-part test for self-defense in the use of deadly force, "the following elements must be shown: (1) the slayer was not at fault in creating the situation giving rise to the affray; (2) the slayer has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) the slayer must not have violated any duty to retreat or avoid the danger." *State v. Robbins*, 58 Ohio St.2d 74 (1979),

paragraph two of the syllabus. The second prong included a reasonableness component, requiring that the actor not only have a belief that deadly force was necessary, but also that the belief was a reasonable one. *Marts v. State,* 26 Ohio St. 162 (1875) ("bona fide believes, and has reasonable ground to believe"). "[T]he second element of self-defense is a combined subjective and objective test". *State v. Thomas*, 77 Ohio St.3d 323, 330 (1997).

To support self-defense, the defense here had the burden of going forward with defendant's own testimony, not only because of the need to try to establish the exact details of the events supposedly occurring the kitchen, but also because the defense needed to provide evidence tending to support the objective *and subjective* components of the second prong of self-defense that his self-serving and limited account to police apparently had not provided.

The defense had the burden of going forward on self-defense, and that burden never shifted to the prosecution. The statute is not "neutral" on this point.

It bears emphasis that, even when the defense has produced evidence that "tends to support" all necessary prongs of self-defense, the State still has no burden to produce evidence at that point. By that point in the trial, the State will have satisfactorily proven the material elements of the offense. In doing so, the accounts of the State's witnesses would likely already demonstrate that the events did not happen as the defendant is claiming and/or that the defendant's credibility may be in significant doubt, thereby allowing the jury to disregard the self-serving "self-defense" features of that testimony. The State need not re-prove what these witnesses already testified. The State would have no burden to reopen its case-in-chief to put on more evidence, and it would have no

burden to use its rebuttal case to knock down the self-defense theory.

Indeed, the mere introduction of evidence that "tends to support" self-defense does not perforce create any imperative that the prosecution offer contrary evidence. The self-defense evidence could be so weak and internally contradictory, and the demeanor of the witnesses could be so unconvincing, that the prosecution can simply assert that the "self-defense" theory is unworthy of credit and fails to create any reasonable doubt in relation to that defense. Imposing a burden of persuasion on the prosecution as to an affirmative defense does not perforce impose a burden of production on the prosecution as well. *Saxton v. State*, 804 S.W.2d 910, 913 (Tex.Crim.App. 1991) (statute imposing burden of persuasion on prosecution on affirmative defense does not impose a burden of production). As the Ohio statute makes clear, the General Assembly left the burden of going forward on the defendant alone on affirmative defenses.

E. Sufficiency Review Focuses on Elements, not Affirmative Defenses

The issue of sufficiency of the evidence presents a purely legal question for the Court regarding the adequacy of the evidence. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). This Court has provided the following test for judging the sufficiency of the evidence:

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed)

State v. Jenks, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. In setting forth the sufficiency standard for Ohio courts to follow, this Court in *Jenks* specifically *followed* the elements-based standard set forth in *Jackson*.

Under this standard, the evidence must be construed in the light most favorable to the prosecution, and it is focused on the essential elements.

> {¶164} "A motion for acquittal under Crim.R. 29(A) is governed by the same standard as the one for determining whether a verdict is supported by sufficient evidence." *State v. Tenace*, 109 Ohio St. 3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37. "The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

State v. Spaulding, 151 Ohio St.3d 378, 2016-Ohio-8126, ¶ 164.

"[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." Id.

"A jury, as a finder of fact, may believe all, part, or none of a witness's testimony." *State v. Antill*, 176 Ohio St. 61, 67 (1964). When there is conflicting evidence, "it [is] the function of the jury to weigh the evidence and assess the credibility of the witnesses in arriving at its verdict." *Jenks*, 61 Ohio St.3d at 279. It is not the function of a trial or appellate court "to substitute its judgment for that of the factfinder."

Id.

A court reviewing the sufficiency of the evidence must consider the totality of all of the evidence, construing all of the evidence in the light most favorable to the prosecution. *Jackson*, 443 U.S. at 319; *Jenks*, 61 Ohio St.3d at 272 (jury weighs "all of the evidence"). "[U]pon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution." *Jackson*, 443 U.S. at 319 (emphasis sic). Sufficiency review "leaves juries broad discretion in deciding what inferences to draw from the evidence presented at trial, requiring only that jurors 'draw reasonable inferences from basic facts to ultimate facts.'" *Coleman v. Johnson*, 566 U.S. 650, 655 (2012), quoting *Jackson*, 443 U.S. at 319. Courts reviewing for sufficiency are not permitted to engage in "fine-grained factual parsing". *Coleman*, 566 U.S. at 655. Such review merely inquires into whether the guilty verdict "was so insupportable as to fall below the threshold of bare rationality." Id. at 656.

As can be seen, "sufficiency" review looks to "the substantive elements of the criminal offense". Id. at 655, quoting *Jackson*, 443 U.S. at 324. This elements-based review has been repeatedly recognized by this Court, including, specifically, by this Court in *Hancock* in rejecting the application of sufficiency review to affirmative defenses. *State v. Worley*, 164 Ohio St.3d 589, 2021-Ohio-2207, ¶ 57 ("essential elements of the crime"); *State v. Groce*, 163 Ohio St.3d 387, 2020-Ohio-6671, ¶ 7 (same); *State v. Hundley*, 162 Ohio St.3d 509, 2020-Ohio-3775, ¶ 59 (same). As recently emphasized, "the proper question is whether the evidence presented, *when viewed in a light most favorable to the prosecution*, would allow any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt." *State v. Dent*, 163 Ohio

St.3d 390, 2020-Ohio-6670, ¶ 16 (emphasis sic). This focus on the essential elements of the offense represents the "[t]he *key* question in a sufficiency-of-the-evidence case * * *." *State v. Smith*, ___ Ohio St.3d ___, 2022-Ohio-269, ¶ 5 (emphasis added).

F. No Sufficiency Review on Affirmative Defenses

Consistent with this long-standing elements-based standard, this Court has held that sufficiency review does not apply to affirmative defenses. The defendant in *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, argued that the evidence was insufficient because the evidence supporting his insanity defense had been overwhelming. This Court held that the sufficiency standard asks "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id. ¶ 34 (citing *Jackson*). After noting that sanity is not an element and that insanity is an affirmative defense, see id. ¶ 35, this Court focused on the nature of insanity as an affirmative defense and emphasized that sufficiency review does not apply to affirmative defenses *at all*.

> {¶36} Courts have divided over whether and how sufficiency-of-the-evidence review under *Jackson v. Virginia* applies to affirmative defenses. Some courts hold that evidence is legally insufficient to convict if no rational trier of fact, viewing the evidence in the light most favorable to the prosecution, could have *failed* to find that the defendant established his affirmative defense by the required degree of proof. See *United States v. Barton* (C.A.5, 1993), 992 F.2d 66, 68-69; *United States v. Martin* (C.A.A.F., 2001), 56 M.J. 97, 107; *State v. Roy* (La.1981), 395 So. 2d 664, 669; *State v. Flake* (Tenn.2002), 88 S.W.3d 540, 554.
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> {¶37} However, the United States Court of Appeals for the Sixth Circuit has held that *Jackson* does not apply to affirmative defenses at all. "[A] defendant may be convicted of a crime in accordance with due

> processstrictures 'upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.' *Jackson v. Virginia*, 443 U.S. 307, 315, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Thus, the due process 'sufficient evidence' guarantee does not implicate affirmative defenses, because proof supportive of an affirmative defense cannot detract from proof beyond a reasonable doubt that the accused had committed the requisite elements of the crime." *Caldwell v. Russell* (C.A.6, 1999), 181 F.3d 731, 740, abrogated on other grounds by the Antiterrorism and Effective Death Penalty Act, Section 2261 et seq., Title 28, U.S.Code (see *Mackey v. Dutton* (C.A.6, 2000), 217 F.3d 399, 406). See, also, *Allen v. Redman* (C.A.6, 1988), 858 F.2d 1194, 1196-1198.
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> {¶36} We find this analysis persuasive. *Jackson* addresses the sufficiency of the state's evidence, not the strength of defense evidence. The *Jackson* standard of review "must be applied with explicit reference to the *substantive elements of the criminal offense as defined by state law*." (Emphasis added.) *Jackson*, 443 U.S. at 324, 99 S.Ct. 2781, 61 L.Ed.2d 560, fn. 16. The insanity defense does not involve "the substantive elements of the criminal offense." Accordingly, we reject Hancock's claim of insufficient evidence.

Hancock, ¶¶ 36-38.

The change in the burden of persuasion on self-defense does not alter this analysis. While the prosecution now has the burden persuasion as to self-defense, defense of another, and defense of a residence when evidence is presented that tends to support those defense(s), those defenses remain affirmative defenses and are not elements of the offense. Given the logic in *Hancock* that sufficiency of the evidence does not apply to affirmative defenses, sufficiency review would not apply to those defenses.

It is significant that *Hancock* relied on a Sixth Circuit case which had held that the affirmative defense of insanity was not subject to sufficiency review, even though the

prosecution had the burden of proving sanity under Michigan law once the defense was raised. *Allen v. Redman*, 858 F.2d 1194, 1196-1200 (6th Cir.1988). The Sixth Circuit held that sufficiency review is limited to elements of the crime, and the State's statutory choice to undertake the burden as to an affirmative defense beyond a reasonable doubt does not convert the affirmative defense into an "element" to which sufficiency review applies. Id.

In reaching this conclusion, the Sixth Circuit also relied on the United States Supreme Court's decision in *Engle v. Isaac*, 456 U.S. 107 (1982), which addressed self-defense under Ohio law at a time when the prosecution bore the burden of persuasion on self-defense beyond a reasonable doubt. This bears repeating: the *Engle* Court was addressing a self-defense claim under Ohio law that arose at a time when Ohio law placed the burden of persuasion on the State as to that issue. Yet, even with the State having the burden of persuasion as to self-defense, the Court in *Engle* concluded that putting the burden of persuasion on the State did not convert self-defense into an "element". Id. at 120-21. "A State may want to assume the burden of disproving an affirmative defense without also designating absence of the defense an element of the crime. The Due Process Clause does not mandate that when a State treats absence of an affirmative defense as an 'element' of the crime for one purpose, it must do so for all purposes." *Redman*, 858 F.2d at 1197, quoting *Engle*, 456 U.S. at 120. "[T]he due process 'sufficient evidence' guarantee does not implicate affirmative defenses, because proof supportive of an affirmative defense cannot detract from proof beyond a reasonable doubt that the accused had committed the requisite elements of the crime." *Caldwell v. Russell*, 181 F.3d 731, 740 (6th Cir.1999).

As indicated earlier, the sufficiency review that occurs under appellate review in Ohio is the very same as the *Jackson-Jenks* standard, and, per *Hancock*, affirmative defenses are not considered under such review. The Sixth District correctly reached this conclusion below, and other appellate decisions have agreed that sufficiency review is *still* inapplicable to self-defense as an affirmative defense. *State v. Inabnitt*, 12th Dist. No. CA2021-02-013, 2022-Ohio-53, ¶ 45; *In re N.K.*, 2021-Ohio-3858, 180 N.E.3d 78, ¶ 8 (6th Dist.); *State v. Messenger*, 2021-Ohio-2044, 174 N.E.3d 425 (10th Dist.); *City of Fairview Park v. Peah*, 8th Dist. No. 110128, 2021-Ohio-2685, ¶ 46.

G. String of Cites Unpersuasive

The defense acknowledges *Redman* and *Hancock* and attempts to distinguish them as involving the affirmative defense of insanity. But *Hancock* was based in part on *Redman*, and *Redman* relied heavily on *Engle*, a case addressing self-defense under Ohio law at a time when the prosecution bore the burden of persuasion on self-defense. Efforts to distinguish *Redman* and *Hancock* are unavailing in light of this reliance on *Engle*, a case which the defense cannot distinguish.

The defense cites other cases as being persuasive because they applied "sufficiency" review to self-defense claims in situations in which the prosecution had the burden of persuasion on self-defense beyond a reasonable doubt. The defense also cites Ohio cases that have applied sufficiency review to self-defense claims. However, this Court must view the string-cited cases with a wary eye.

A decision that merely assumes that sufficiency review applies to self-defense is not persuasive, since courts often "decide particular legal issues while assuming without deciding the validity of antecedent propositions, and such assumptions – even on

jurisdictional issues – are not binding in future cases that directly raise the questions." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (citations omitted); see, also, *In re Nowak*, 104 Ohio St.3d 466, 2004-Ohio-6777, ¶¶ 25-27 (validity of statute was assumed in earlier decision). An appellate decision does not necessarily address every possible issue, since issues often lurk in the record and are not necessarily decided by the court. *Webster v. Fall*, 266 U.S. 507, 511 (1925). Mere implicit assumptions are not precedential. *Toledo City School Dist. Bd. of Edn. v. State Bd. of Edn. of Ohio*, 146 Ohio St.3d 356, 2016-Ohio-2806, ¶ 39.

A decision does not constitute firm precedent on a particular issue unless it "squarely addresses" that issue. See *Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993); *Hauser v. Dayton Police Dept.*, 140 Ohio St.3d 268, 2014-Ohio-3636, ¶ 17 (plurality – "because *Genaro* did not squarely address the immunity question at issue here, it is not binding authority"). "[U]nexplained silences of our decisions lack precedential weight." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232 n.6 (1995). "When an issue is not argued or is ignored in a decision, such decision is not precedent to be followed in a subsequent case in which the issue arises." *O'Keeffe v. McClain*, 166 Ohio St.3d 25, 2021-Ohio-2186, ¶ 14 n. 2 (quoting another case). When "certain claims were not actually litigated and determined by this court in earlier decisions, those decisions [are] not binding precedent as to those claims". Id.

In light of the foregoing, a court merely assuming the applicability of sufficiency review as to self-defense is not precedential or persuasive for the threshold issue of whether sufficiency review extends to affirmative defenses. The decisions in *Hancock*, *Redman*, and *Engle* are far more significant in supporting the conclusion that sufficiency

review does not extend to affirmative defenses, even when the prosecution would bear the burden of persuasion beyond a reasonable doubt on the affirmative defense. And, to the extent some of defendant's cited cases refer to the elements-based standard of *Jackson v. Virginia* in the process of applying sufficiency review to self-defense, they are missing the forest for the trees. The absence of an affirmative defense is not an "essential element" of the offense, as this Court has already determined in *Hancock*.

H. Sufficiency Review on Venue is Inapposite

Defendant points to the post-*Hancock* decision in *State v. Hampton*, 134 Ohio St.3d 447, 2012-Ohio-5688, as indicating that sufficiency review can extend to matters that are not essential or material elements of the crime. But, as defendant appears to concede, the *Hampton* decision was characterizing venue as an "immaterial element", and, therefore, as nonetheless an "element" of the State's case-in-chief. "The plain language of the rule itself does not distinguish between 'material' elements and 'immaterial' elements." *Hampton*, ¶ 22.

In fact, there are basic differences between venue and self-defense. On the issue of venue, the State *always* bears the burden of going forward *and* the burden of persuasion. These burdens apply from the very beginning of the trial and never shift. Venue is never defensive, and it is not defined as an affirmative defense.

In contrast, the State never bears the burden of going forward on self-defense, and it would have no burden of persuasion on self-defense at the start of the trial. The State's burden of persuasion arises only upon the presentation of evidence that "tends to support" self-defense, and such evidence would need to support all of the prongs of that defense. "The defendant must put forth evidence that 'tends to support' each element of

a self-defense claim." *State v. Woodson*, 6th Dist. No. L-21-1068, 2022-Ohio-2528, ¶ 79.

Defendant's reliance on venue and *Hampton* also fails within the context of any sufficiency-of-evidence claim that would be raised in a Crim.R. 29 motion for judgment of acquittal. Again, *Hampton* treats the issue of venue as an "element" subject to review under Crim.R. 29. But this Court has already held in *Hancock* that affirmative defenses are not subject to sufficiency review, and nothing in *Hampton* negates that holding. An affirmative defense is not an "element", and, per *Engle v. Isaac*, putting the burden of persuasion on the State as to an affirmative defense does not make it an "element." Self-defense would not be an "immaterial element" either. A "claim of self-defense is not an aspect of a sufficiency of the evidence or Crim.R. 29 analysis". *State v. Ballein*, 12th Dist. No. CA2021-10-022, 2022-Ohio-2331, ¶ 36. And because the defense presents evidence in its case-in-chief in these cases, the defense would be waiving the ability to challenge the sufficiency of the evidence presented in the State's case-in-chief anyway. *State v. Pope*, 1st Dist. No. C-180587, 2019-Ohio-3599, ¶ 3 ("Pope presented evidence and testified in his defense. Thus, he waived his right to challenge the sufficiency of the evidence at the close of the state's case."), citing *State v. Guidugli*, 157 Ohio App.3d 383, 2004-Ohio-2871, ¶ 14 (1st Dist.).

I. "Sufficiency" Review does not "Fit" Affirmative Defenses

Sufficiency review by its terms would not "fit" in this context. As a matter of law, sufficiency review construes *all* of the evidence in the prosecution's favor, and sufficiency review forswears any assessment of credibility. In addition, the burden-shifting amendment did not change the substantive elements of self-defense, which include the requirement that the defendant harbor a subjective and reasonable belief in

the need to use deadly force. It always remains open to the jury to disbelieve any or all of a witness' testimony, to disbelieve any out-of-court declaration when it is self-serving, and to question the credibility of a criminal defendant having various potential motive(s) for his actions and testimony.

Accordingly, when the jury rejects self-defense, "sufficiency" review leads to various dead-ends. Sufficiency review would *require* that the appellate court accept the view that the jury was exercising its prerogative to reject the credibility of the various witnesses supporting the defense. Sufficiency review would *require* that the appellate court construe all of the evidence in the State's favor. A trial court applying sufficiency review under Crim.R. 29 would be required to follow the same approach, eschewing any credibility determination that would favor self-defense, and construing *all* of the evidence against self-defense. And, regardless of any credibility determination, evidence that merely "tends to support" self-defense could fall short in multiple ways by failing to provide sufficient detail to allow the trier of fact to believe defensive force was really necessary.

"[I]t is the responsibility of the jury – not the court – to decide what conclusions should be drawn from evidence admitted at trial. A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury." *Cavazos v. Smith*, 565 U.S. 1, 2 (2011). A court undertaking sufficiency review and "faced with a record of historical facts that supports conflicting inferences must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution." *Jackson*, 443 U.S. at 326. This would include accepting all reasonable

inferences undercutting any and all prongs of self-defense, especially the subjective prong of whether the defendant actually harbored a belief in the need to use defensive force.

Indeed, when the defendant testifies in support of a self-defense claim, and the jury rejects that testimony, the jury could even conclude that the testimony was false and therefore actually supportive of guilt. "The jury was under no obligation to accept [the defendant's] testimony as truthful." *State v. Carter*, 72 Ohio St.3d 545, 554 (1995). Moreover, the creation of a false exculpatory account can be considered to reflect consciousness of guilt. *State v. Issa*, 93 Ohio St.3d 49, 67 (2001); *State v. Hill*, 2018-Ohio-4800, 125 N.E.3d 158, ¶ 53-54 (11th Dist.); see, also, *State v. Williams*, 79 Ohio St.3d 1, 11 (1997). In addition, the evidence of the defendant's demeanor on the witness stand "may satisfy the tribunal, not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance, or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies." *Dyer v. MacDougall*, 201 F.2d 265, 269 (2nd Cir. 1952); see, also, *NLRB v. Walton Mfr. Co.*, 369 U.S. 404, 408 (1962) (quoting *Dyer*); *Wright v. West*, 505 U.S. 277, 296 (1992) (plurality – citing *Dyer*).

Given these various considerations when the jury has rejected a claim of self-defense, it is inapposite for an appellate court to review for "sufficiency". At best, the appellate court can review under a manifest-weight standard, which allows the reviewing court to weigh the evidence to a very limited degree and thereby possibly credit the defendant's testimony.

J. Self-Defense does not Negate Purpose to Kill

In *Messenger*, the defense contended at oral argument in this Court that sufficiency review must look at self-defense because self-defense negates purpose to kill in a murder case. But it is difficult to understand this logic. Purpose to kill is an element of purposeful murder, and sufficiency review applies to the evidence of purpose to kill as a result. Even if the evidence related to self-defense would somehow tend to undercut proof on purpose to kill, that kind of overlap still would not convert self-defense into an "element" to which sufficiency review would apply. Such an "overlap" would merely indicate that a single piece of evidence might have relevance to two different issues, and the fact remains that one of the issues is an element while the other issue is an affirmative defense. "We are thus not moved by [such overlap] assertions * * *." *Martin*, 480 U.S. at 234.

In any event, the notion of self-defense negating purpose to kill ignores Ohio law on these issues. While instances of self-defense tend to arise suddenly and might tend to undercut prior calculation and design, see *Martin*, 480 U.S. at 234, there would be no such tendency to undercut purpose to kill, since purpose to kill can arise instantaneously. Purpose to kill does *not* require premeditation. *State v. Campbell*, 69 Ohio St.3d 38, 48 (1994) ("issue is not what Campbell intended when he broke in, but what he intended when he stabbed Turner. The state did not allege, and did not have to prove, prior calculation and design."). A purpose to kill *can* be formulated after instantaneous deliberation. See *State v. Mulkey*, 98 Ohio App. 3d 773, 780 (1994) ("purposeful killing after instantaneous deliberation"); see, also, *State v. Reed*, 65 Ohio St.2d 117 (1981) (same).

Indeed, under Ohio law, if the defendant is claiming the killing was accidental or not purposeful, he cannot claim self-defense too. Accident and self-defense are mutually-exclusive concepts, and a claim of accident precludes the giving of a self-defense instruction. *State v. Hodge*, 2nd Dist. No. 29147, 2022-Ohio-1780, ¶ 26 ("inherent inconsistency between the theories of self-defense and accident"); *State v. Champion*, 109 Ohio St. 281, 286-87 & paragraph three of the syllabus (1924); *State v. Barnd*, 85 Ohio App.3d 254, 260 (3rd Dist. 1993) ("defenses of accident and self-defense are inconsistent by definition"); *State v. Washington*, 10th Dist. No. 98AP-1489, 1999 Ohio App. LEXIS 5254, at *11-12 (1999).

As can be seen, the contended interaction between purpose to kill and self-defense makes no difference on the question of whether sufficiency review applies to the affirmative defense of self-defense. If anything, the interaction would mean that a defendant claiming accident would be unable to claim self-defense too, thereby negating "sufficiency" review on self-defense anyway.

Defendant's proposition of law should be rejected.

CONCLUSION

For the foregoing reasons, amicus curiae OPAA urges that this Court affirm the judgment of the Sixth District Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was e-mailed on August 15, 2022, to the following counsel of record: Evy Jarrett, ejarrett@co.lucas.oh.us, Assistant Prosecuting Attorney, Lucas County Courthouse, Toledo, Ohio 43604, Counsel for State of Ohio; Peter Galyardt, peter.galyardt@opd.ohio.gov, Assistant Ohio Public Defender, 250 East Broad Street, Suite 1400, Columbus, Ohio 43215, Counsel for Appellant.

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