No. 2022-1298

IN THE SUPREME COURT OF OHIO

APPEAL FROM THE COURT OF APPEALS
SECOND APPELLATE DISTRICT
GREENE COUNTY, OHIO
CASE NO. 2021 CA 0029

STATE OF OHIO
Plaintiff-Appellee

v.

TALICIA A. DIXON
Defendant-Appellant

PLAINTIFF-APPELLEE STATE OF OHIO'S MEMORANDUM IN RESPONSE TO JURISDICTION

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EXPLANATION OF WHY THIS CASE DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION, IS NOT ONE OF PUBLIC OR GREAT GENERAL INTEREST, AND WHY LEAVE TO APPEAL SHOULD NOT BE GRANTED

Defendant-Appellant Talicia A. Dixon (hereinafter "Appellant") challenges the Second District Court of Appeals' finding that the Greene County Court of Common Pleas did not abuse its discretion in refusing to instruct the jury on aggravated assault. She asks this Court to "establish what combination of circumstance" is sufficient to show serious provocation reasonably sufficient to bring on a sudden passion or fit of rage, to ignore the plain language of R.C. 2903.12(A) and consider the actions of any involved person – not just the victim of the violence – in determining whether there has been serious provocation, and to expand "serious provocation reasonably sufficient to bring on a sudden passion or fit of rage" to include serious provocation reasonably sufficient to bring on *fear*.

The State submits that Appellant's case does not involve a substantial constitutional question, is not one of public or great general interest, and leave to appeal should not be granted. While Appellant may not agree with the Second District's conclusion, dissatisfaction does not elevate an issue to one that this Honorable Court has jurisdiction to consider. The decision of the Second District need not be revisited. Accordingly, this Court should decline to accept jurisdiction.

STATEMENT OF THE CASE AND FACTS

In its opinion affirming the trial court's judgment, the Second District Court of Appeals set forth the relevant facts of this matter, which the State adopts as follows:

> {¶ 4} The present appeal stems from a shooting outside of a residence on the night of May 4, 2018. On that date, Dixon shot Andre Nooks in the neck, rendering him a quadriplegic. Nooks died at a long-term care facility in January 2019 following complications from the gunshot. Dixon does not dispute shooting Nooks. The only real issues at trial were whether she acted in self-defense and whether the treatment Nooks received at the long-term care facility was an intervening cause of his death. 1 The jury also found Dixon guilty of felonious assault with a firearm specification, which was subject to merger as an allied offense of similar import.

{¶ 5} The record reflects that Dixon and two friends, Kendra Lane and Dwight Jamison, went to the Round Table bar in Xenia on the night in question. While there, Dixon encountered another group of people that included Vanessa Hoyt, Andre Nooks, Christian Weems, and others. Dixon and Weems argued in the bar, and the dispute later became physical in the parking lot. Hoyt testified that Dixon and Weems "attacked each other." According to Hoyt, the two women pulled hair and scuffled for about a minute before being separated. For her part, Dixon testified that Hoyt and Weems jointly assaulted her in the parking lot. Dixon explained that she retreated to the safety of her car after being punched in the face by both women. Police arrived and spoke to members of both groups, but no arrests were made.

{¶ 6} Following the parking-lot incident, the two groups parted ways. Dixon's friend Natasha Erkins drove her to Kendra Lane's house at 467 Franklin Avenue in Xenia. While Dixon was there, Lane called and argued with members of Hoyt's group, including Hoyt, Weems, and Nooks. Following the call, Hoyt's group decided to go to Lane's house. Hoyt's group arrived at Lane's residence in two cars. Hoyt testified that upon arriving she saw Dixon "running towards the street." Hoyt instructed Nooks, who was driving her car, to park down the street in front of 314 Franklin Avenue so Dixon wouldn't harm her vehicle. The second car in Hoyt's group parked directly in front of Hoyt's vehicle.

{¶ 7} Hoyt testified that Nooks exited her car and began walking toward Lane's house. Hoyt then saw Lane throw a bottle at Nooks while walking toward him. Hoyt began following Nooks as he walked toward Lane's house. Hoyt retrieved the bottle and tossed it aside. As Hoyt was walking, she saw Dixon run to Natasha Erkins' car, which was parked in Lane's driveway, and retrieve something from the back seat. Shortly thereafter, Hoyt was standing near Nooks and speaking to Erkins when she heard Lane say, "Talicia, what the f**k?" Hoyt turned and saw Dixon pointing a handgun, pulling the slide back, and ejecting rounds onto the ground. Hoyt then heard a "boom," and Nooks fell to the ground with a gunshot wound in his neck. Hoyt testified that Nooks had not physically assaulted Dixon, "lunged" at her, or made any threatening comments prior to being shot. Hoyt stated that she and Nooks were at the end of a neighbor's driveway near Lane's house when the shooting occurred. Dixon fled the scene after the shooting. Police arrived and found Nooks in the street outside 481 Franklin Avenue. Shell casings from the firearm were found in Lane's yard at 467 Franklin Avenue.

{¶ 8} Neighbor Vicki Cromwell, who resided at 434 Franklin Avenue, testified that prior to the shooting she heard loud voices and went outside to see what was occurring. She saw a lady retrieve something from a car parked in Lane's driveway. Cromwell then watched this person walk up to a small group of people, raise her arm, and fire a gunshot. Cromwell did not see anyone physically assault the shooter prior to the gunshot.

{¶ 9} For her part, Dixon testified that she was outside with Lane when the cars carrying Hoyt's friends arrived. Dixon stated that they were honking and yelling at her, and she feared that she would be assaulted again. After the cars parked, Hoyt and Nooks began walking toward her and Lane. Dixon testified that she tried to hold Lane back and stop her from confronting Hoyt and Nooks.

According to Dixon, she retrieved the handgun from Erkins' car only after Hoyt threw a bottle at her and Lane. Dixon claimed she did not know the firearm was loaded. She "pulled it back" to scare Hoyt. She also asked the members of Hoyt's group to leave. Dixon testified that Nooks then "lunged" toward her. At that point, Dixon feared for her life and was afraid that she was going to be beaten. She raised her arm and fired the gun. Dixon reiterated that she was afraid and believed there was no way to avoid being beaten when she shot Nooks. On cross-examination, Dixon explained that she fired the gun "out of fear of [Nooks] coming towards [her]."

{¶ 10} Weems and Lane, who was Dixon's cousin, also testified as defense witnesses. Weems testified that she and Hoyt did hit Dixon in the bar parking lot. Weems stated that the plan was to go to Lane's house to fight Dixon after leaving the bar. Upon arriving at Lane's residence, Weems testified that she saw Hoyt and Nooks directly in front of Dixon screaming at her.

{¶ 11} On cross-examination, Weems admitting being good friends with Dixon. She also admitted telling police after the incident (1) that Dixon had been the aggressor outside the bar, (2) that Weems had defended herself outside the bar, (3) that only Weems and Dixon were involved in the altercation outside the bar, (4) that no one in Hoyt's group went to Lane's house with the intent to fight Dixon, (5) that Hoyt and Nooks went to Lane's house to talk to Dixon, (6) that Dixon ran after the car Weems occupied outside of Lane's house, and (7) that Weems did not see the shooting or what happened at the time of the shooting.

{¶ 12} Lane testified that she was outside her house with Dixon when Hoyt and Nooks drove down her street honking their horn, cursing, and making threats. According to Lane, Hoyt and Nooks parked and then began approaching on foot. As they did so, Hoyt threw a bottle toward Lane and Dixon. Lane testified that she responded by trying to push Dixon back toward her house as Dixon tried to restrain her from confronting Hoyt. She heard Dixon tell Hoyt and Nooks to leave. Lane also heard Nooks threaten to "knock out" her and Dixon. Lane testified that Nooks then rushed toward them and made a motion like he was going to throw a punch. At that point, Lane heard a "phoom" sound when Dixon shot Nooks.

{¶ 13} On cross-examination, Lane acknowledged telling police that she and Hoyt did not exchange words on the street prior to the shooting. Lane also did not mention anything to police about Hoyt's throwing a bottle. Contrary to her trial testimony, Lane told police that she had tried to restrain Dixon from confronting Hoyt and Nooks, not that Dixon had tried to restrain her. Lane also did not tell police that Hoyt and Nooks had been making threats to her. In fact, Lane told police that all Nooks said to her outside the house was "what's up?" Lane additionally told police that she then went back inside her house and stayed there and that she did not know who had been shot.

State v. Dixon, 2022-Ohio-3157.

On April 5, 2019, Appellant was indicted in Greene County Common Pleas Case Number 2019 CR 0242 for Murder in violation of R.C. 2903.02(B), an unclassified felony (Count One),

Involuntary Manslaughter in violation of R.C. 2903.04(A), a felony of the first degree (Count Two), and Felonious Assault in violation of R.C. 2903.11(A)(2), a felony of the second degree (Count Three). All three charges carried three-year Specifications pursuant to R.C. 2941.145. The State later dismissed Count Two, Involuntary Manslaughter, leaving Murder as Count One and Felonious Assault as Count Two. A jury trial began on July 14, 2021 and concluded on July 19, 2021. The jury found Appellant guilty on both Counts and the accompanying Specifications. At sentencing on July 22, 2021, the State conceded that Count Two and the accompanying Specification were allied offenses to Count One and its accompanying Specification and elected to proceed to sentencing on Count One. The trial court imposed a mandatory indefinite term of 15 years to life for Murder and a mandatory term of three years for the Specification – to be served consecutively to the sentence for Murder – for a total indefinite sentence of 18 years to life. Appellant was awarded 1,197 days of jail time credit.

On August 18, 2021, Appellant filed a timely notice of appeal in Second District Court of Appeals Case Number 2021 CA 0029. She raised five assignments of error: 1) the court erred in refusing to instruct the jury on inferior degree offenses, 2) the court erred in failing to provide a jury instruction with a correct and complete statement of law, 3) the court erred in prohibiting the retroactive application of Ohio's stand your ground law, 4) Appellant's conviction was based on insufficient evidence as a matter of law, and 5) Appellant's conviction was against the manifest weight of the evidence. The Second District affirmed the trial court's judgment on September 9, 2022.

The matter is now before this Honorable Court on Appellant's October 21, 2022 notice of appeal and memorandum in support of jurisdiction.

LAW AND ARGUMENT

<u>Appellant's Proposition of Law No. I:</u> "A defendant has a right to expect that the trial court will give complete jury instructions on all issues raised at the evidence. Even when arguing self-defense, a defendant is entitled to an instruction on inferior degree offenses when the evidence presented to the jury supports doing so. When injuries are brought on by extreme stress caused by provocation, a trial court must allow the jury to consider instructions on inferior degree offenses. The serious provocation standard provides little guidance on how it is to be applied and limits a trial court in giving the instruction unless there is sufficient evidence. The jury should be left to determine what amounts to sufficient provocation, in order to find a defendant not guilty of felonious assault but guilty of aggravated assault."

"In Ohio, the law regarding lesser included offenses is the product of statute, rule, and the common law." *State v. Wine*, 140 Ohio St.3d 409, 2014-Ohio-3948, 18 N.E.3d 1207, ¶ 18. R.C. 2945.74 provides that a jury may find a defendant guilty of a lesser included offense "[w]hen the indictment or information charges an offense, including different degrees, or if other offenses are included within the offense charged." Crim.R. 31(C) provides that "[w]hen the indictment, information, or complaint charges an offense including degrees, or if lesser offenses are included within the offense charged, the defendant may be found not guilty of the degree charged but guilty of an inferior degree thereof, or of a lesser included offense." Finally, at common law, juries are "permitted to find the defendant guilty of any lesser offense necessarily included in the offense charged." *Beck v. Alabama*, 447 U.S. 625, 633, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980).

This right, however, "is subject to the underlying principle that the trier of fact shall not be confronted with the option to reach an unreasonable conclusion." *State v. Kilby*, 50 Ohio St.2d 21, 24, 361 N.E.2d 1336 (1977). As a result, a jury instruction on a lesser-included offense "is required only where the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser included offense." *State v. Thomas*, 40 Ohio St.3d 213, 213, 533 N.E.2d 286 (1988).

The trial court is in the best position to gauge the evidence before the jury and is provided the discretion to determine whether the evidence adduced at trial was sufficient to require an instruction. *State v. Fulmer*, 117 Ohio St.3d 319, 2008-Ohio-936, 883 N.E.2d 1052, ¶ 72. When deciding whether to instruct the jury on a lesser included offense, a trial court must view the evidence in the light most favorable to the defendant. *State v. Trimble*, 122 Ohio St.3d 297, 2009-Ohio-2961, 911 N.E.2d 242, ¶ 192. "The lesser-included-offense instruction is not warranted every time 'some evidence' is presented to support the lesser offense." *Id.* Rather, "a court must find '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.'" *Id.*, quoting *State v. Shane*, 63 Ohio St.3d 630, 632, 590 N.E.2d 272 (1992).

"An appellate court reviews a trial court's refusal to give a requested jury instruction for abuse of discretion." *State v. Adams*, 144 Ohio St.3d 429, 2015-Ohio-3954, 45 N.E.3d 127, ¶ 240. A trial court abuses its discretion when its "attitude is unreasonable, arbitrary or unconscionable." *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 450 N.E.2d 1140 (1983).

R.C. 2903.12(A) provides that no person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause serious physical harm to another or to another's unborn or cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.

The offense of aggravated assault is an inferior degree of felonious assault because its elements are identical to those of felonious assault, except for the additional mitigating element of serious provocation. *State v. Deem*, 40 Ohio St.3d 205, 211, 533 N.E.2d 294 (1988). "Thus, in a trial for felonious assault, where the defendant presents sufficient evidence of serious provocation

[…] an instruction on aggravated assault […] must be given." *Id., see also State v. Koch*, 2d Dist. No. 28000, 2019-Ohio-4099, 146 N.E.3d 1238, ¶ 90.

"Provocation, to be serious, must be reasonably sufficient to bring on extreme stress and the provocation must be reasonably sufficient to incite or arouse the defendant into using deadly force." *Deem* at paragraph five of the syllabus. First, "an objective standard must be applied to determine whether the alleged provocation is reasonably sufficient to bring on a sudden passion or fit of rage." *State v. Mack*, 82 Ohio St.3d 198, 201, 1998-Ohio-375, 694 N.E.2d 1328. "Words alone will not constitute reasonably sufficient provocation to incite the use of deadly force in most situations." *Shane* at 637. Moreover, "[p]ast incidents or verbal threats do not satisfy the test for reasonably sufficient provocation when there is sufficient time for cooling off." *Mack* at 201. If the objective prong of the aggravated-assault analysis is not met, then "no subsequent inquiry into the subjective portion, when the defendant's own situation would be at issue, should be conducted." *Shane* at 634.

If the objective prong is met, however, "the inquiry shifts to a subjective standard, to determine whether the defendant in the particular case 'actually was under the influence of sudden passion or in a sudden fit of rage.'" *Id.* It is well-settled that "[f]ear alone is insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or fit of rage." *Mack* at 201; see also *State v. Harding*, 2d Dist. Montgomery No. 24062, 2011-Ohio-2823, ¶ 44 ("Harding testified at length that he was motivated by fear and that he acted in self-defense"); *State v. Miller*, 2d Dist. Montgomery No. 29099, 2022-Ohio-213, ¶ 18 ("He only stabbed Young because he was afraid"); *State v. McClendon*, 2d Dist. Montgomery No. 23558, 2010-Ohio-4757, ¶ 23 ("Rather, Defendant shot Driscoll out of fear because he was afraid Driscoll might be retrieving a weapon out of his coat"); *State v. Shakhmanov*, 2d Dist. Montgomery No. 28066, 2019-Ohio-4705,

¶ 33 ("Instead, Mustafa repeatedly stated that he was afraid that Aydin would harm someone and that he was merely attempting to scare and disarm Aydin").

Here, both the trial court and the Second District were unpersuaded that the victim engaged in any serious provocation. The victim was not involved in the altercation at the Round Table. Even if the victim had participated, what happened at the Round Table was a "past incident" that does not satisfy the test for reasonably sufficient provocation. *Mack* at 201. Nor was he the primary aggressor on Franklin Street. Vanessa was yelling and "being aggressive." *Id.* at 814-815. Vanessa threw a bottle of Hennessy at Appellant. *Id*. at 812, 815. And it was Vanessa who Appellant was trying to scare when she retrieved the gun. *Id*. at 816. The only possible evidence of aggression by the victim was Appellant's self-serving claim that he "lunged" at her, but that is belied by the location of the victim's body in relation to the location of the shell casings from the gun that Appellant fired. *Id.* at 379, 399, 840, 845-846.

Even if the trial court or the Second District had been persuaded that the victim engaged in any serious provocation, Appellant still was not entitled to an instruction on aggravated assault. The record is devoid of evidence that Appellant acted under the influence of sudden passion or fit of rage. Her own testimony establishes that the emotion she felt was fear: "it scared me," "I was worried that he was going to do anything," and "[the gun] went off out of fear of him coming towards me." *Id.* at 818, 840.

CONCLUSION

The State submits that Appellant's case does not involve a substantial constitutional question, is not one of public or great general interest, and leave to appeal should not be granted. For these reasons, the State respectfully asks that this Court decline to exercise jurisdiction over this appeal.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon L. Patrick Mulligan, Counsel for Appellant, via regular mail at 24 N. Wilkinson Street, Dayton, OH 45402, this 17th day of November, 2022.

/s/ Megan Hammond
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