IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
		Case No. 2022-0987
Plaintiff-Appellee,	:	
		On Appeal from the
v.	:	Clermont County Court of Appeals, Twelfth Appellate District
PHILLIP A. PALMER,	:	
		COA Case No. CA2021-07-35
Defendant-Appellant.	:	

MERIT BRIEF OF AMICUS CURIAE OHIO PUBLIC DEFENDER IN SUPPORT OF APPELLANT PHILLIP A. PALMER

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TABLE OF CONTENTS

Page No.

TABLE OF AUTHORITIES

Page No.

CASES:

STATUTES:

RULES:

OTHER AUTHORITIES:

STATEMENT OF THE CASE AND FACTS

Amicus curiae adopts and incorporates the statement of the case and facts as set forth by Mr. Palmer in his merit brief.

STATEMENT OF INTEREST OF AMICUS CURIAE, OFFICE OF THE OHIO PUBLIC DEFENDER

The Office of the Ohio Public Defender ("OPD") is a state agency that represents indigent criminal defendants and coordinates criminal-defense efforts throughout Ohio. The OPD also plays a key role in the promulgation of Ohio law and procedural rules. A primary focus of the OPD is on the appellate phase of criminal cases, including direct appeals and collateral attacks on convictions. The mission of the OPD is to protect and defend the rights of indigent persons by providing and supporting superior representation in the criminal and juvenile justice systems.

As amicus curiae, the OPD offers this court the perspective of experienced practitioners who routinely handle criminal cases in Ohio courts. This work includes representation at both the trial and appellate levels. The OPD has an interest in the present case because, at its heart, it involves a constitutional issue that is of vital importance to individual liberty: the ability to defend oneself. The legislature recognized a shift in public opinion surrounding the ability to defend yourself and memorialized that belief in statute. Courts should give full effect to the statutory change and allow defendants to receive a self-defense instruction when they provide evidence which tends to support they acted in self-defense.

INTRODUCTION

This Court should utilize this case to provide needed clarity to lower courts as they struggle to interpret the new self-defense law and the burden of production it places on defendants in order to receive a self-defense jury instruction.

As of March 28, 2019, defendants no longer have to prove by a preponderance of evidence that they acted in self-defense. Instead, the burden has shifted to the prosecution to disprove self-defense. Now, once evidence tending to support self-defense has been introduced, the prosecution must prove beyond a reasonable doubt that the defendant did not act in self-defense. R.C. 2901.05(B)(1).

Since the amendment to R.C. 2901.05(B)(1) became effective, lower courts have struggled to interpret the law, resulting in inconsistent decisions. The availability of a self-defense instruction currently depends more upon geography than the facts of any given case.

This court recently issued its opinion in *State v. Messenger,* Slip Opinion No. 2022-Ohio-4562. *Messenger* was instructive in that it answered several questions including, 1) does a defendant still have a burden of production, and 2) how the appellate court reviews the burden of production and burden of persuasion. The remaining, unanswered question is exactly how much evidence a defendant must introduce to receive a self-defense jury instruction and trigger the state's burden of persuasion.

ARGUMENT

APPELLANT'S FIRST PROPOSITION OF LAW

R.C. 2901.05, as amended, requires that a defendant present evidence "tending to support" the use of self-defense to trigger the prosecution's burden to disprove the elements of self-defense beyond a reasonable doubt. Where a trial court first requires a defendant to present qualitative evidence proving each element of self-defense, they improperly shift the burden of production from the prosecution to the defendant.

APPELLANT'S SECOND PROPOSITION OF LAW

Where there is conflicting evidence on a self-defense factor, the jury should decide that factor. Where the trial court declines to instruct the jury on self-defense based on their own weighing of evidence's credibility, they usurp the province of the jury as finder of fact, in derogation of a defendant's right to a trial by jury.

Revised Code section 2901.05 was amended to include additional language that shifts the burden of persuasion regarding self-defense to the prosecution. Prior to the amendment, this court laid out a strict three-part test a defendant had to meet to necessitate a self-defense jury instruction:

> the defendant must show "* * * (1) * * * [he] was not at fault in creating the situation giving rise to the affray; (2) * * * [he] has [*sic*] 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 * * * force; and (3) * * * [he] must not have violated any duty to retreat or avoid the danger. * * *"

State v. Robbins, 58 Ohio St.2d 74, 388 N.E.2d 755 (1979), paragraph two of the syllabus. The amended statutory language, which creates a presumption of self-defense, now states:

> (B)(1) 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 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.

R.C. 2901.05(B)(1); Am.Sub.H.B. 228. This new language reduces the defendant's burden of production.

A. Courts have reached inconsistent decisions on whether to give the jury a self-defense instruction

Since the amended self-defense statute became effective, lower courts have struggled to interpret the law, resulting in inconsistent decisions on when self-defense instructions are warranted. Lower courts have inconsistently set standards for *how* much evidence a defendant must present that "tends to support" a self-defense instruction.

Some trial and appellate courts have granted self-defense jury instructions when minimal evidence was presented at trial that "tends to support" self-defense, even when there was conflicting evidence. Devon Williams, who was inside a market, fired fourteen rounds into a vehicle parked outside the market. *State v. Williams,* 9th Dist. Summit No. 29444, 2020-Ohio-3269, ¶ 2-3. Mr. Williams testified that he feared for his life because of prior interactions with the victim. *Id.* The jury was instructed on self-defense under the newly amended R.C. 2901.05. *Id* at ¶ 4.

Similarly, Tymaine Jackson testified that the victim was aggressive towards him in a convenience store parking lot. *State v. Jackson*, 8th Dist. Cuyahoga No. 108493, 2020-Ohio-1606, ¶ 6. Jackson also testified that the victim called him a derogatory name, the victim insinuated the individuals with him had guns, and the victim reached into his pocket for a gun. *Id.* at ¶ 8. The jury was instructed on self-defense. The Eighth District held in *Jackso*n that the prosecution has the burden to disprove self-defense, and, when there is conflicting testimony regarding self-defense, the jury is in the best position to determine whether the defendant acted in self-defense. *Id.* at ¶ 31.

Additionally, in *State v. White,* the trial court instructed the jury on self-defense. *State v. White*, 12th Dist. Butler No. CA2019-07-118, 2020-Ohio-3313, ¶ 41. Mr. White testified that he

believed the victim had a firearm and was getting ready to draw it on him, and that he fired to protect his friends. *Id.* at ¶ 50. This was contrary to other witness testimony that the victim was on the ground, with nothing in his hands, when Mr. White shot him. *Id.* at ¶ 46.

Other districts have denied a self-defense jury instruction unless the evidence presented reached an inflated sufficiency threshold. Matthew Tolle testified that he and the victim engaged in a knife fight in the front yard. *State v. Tolle*, 4th Dist. Adams No. 19CA1095, 2020-Ohio-935, ¶ 11. Mr. Tolle testified that the victim stood next to his truck with a knife. *Id.* After requesting the amended self-defense jury instruction, the trial court determined Mr. Tolle did not have a right to be at the residence because of a protection order and he did not comply with his duty to retreat. *Id.* at ¶ 20. The trial court denied Mr. Tolle's request for a a self-defense jury instruction, and the Fourth District affirmed that decision, holding that a request for a self-defense is not warranted when the defendant provides insufficient evidence of all elements of self-defense, such that there is not enough evidence to raise a question in the mind of a reasonable juror that self-defense occurred. *Tolle* at ¶ 22-24.

B. "Tends to support" should be defined and construed as a low threshold for defendants to trigger the burden shift and receive a self-defense jury instruction

Lower courts have struggled to interpret "tends to support" and have indicated that it is not defined. *State v. Petway,* 11th Dist. Lake No. 2019-L-124, 2020-Ohio-3848, ¶ 56. The language "tends to support"—used explicitly in R.C. 2901.05(B)(1)—is found elsewhere in the Ohio Criminal Rules and case law. This language is often construed liberally as setting a low threshold. In Crim.R. 16(H)(3), a burden is imposed on the defense to share with the prosecution, "[a]ny evidence that tends to negate the guilt of the defendant, or is material to punishment, or tends to support an alibi." Similarly, in cases of sexual imposition, this court held that "slight circumstances or evidence which tends to support victim's testimony is satisfactory." *See State v. Economo,* 76

Ohio St.3d 56, 60, 666 N.E.2d 225 (1996). Similarly, R.C. 2907.06(B) provides that no person may be convicted of sexual imposition unless the state produces evidence corroborating the victim testimony, and the corroborating evidence need not be independently sufficient to convict the accused, slight circumstances, or evidence which "tends to support" the victim testimony is satisfactory. *State v. White,* 4th Dist. Washington No. 04CA52, 2005-Ohio-4506, ¶ 12.

Both "tends" and "tends to support" are not defined by common legal dictionaries. *Black's Law Dictionary; Ballentine's Law Dictionary*. However, common usage and non-legal dictionaries are instructive. Merriam-Webster's Dictionary defines "tend" as "to exhibit an inclination or tendency." Merriam-Webster Dictionary, "tend", www.merriam.webster.com/dictionary/tend, accessed Jan. 13, 2023. Other states have utilized the phrase "tends to support" in court opinions interpreting rules of evidence and explaining the defense of entrapment. Pennsylvania determines evidence is relevant "if it logically tends to establish a material fact in the case, tends to make a fact at issue more or less probable, or tends to support a reasonable inference or proposition regarding a material fact." *Commonwealth v. Serge,* 2003 PA Super 470, ¶ 9, 837 A.2d 1255 (Pa. Super Ct. 2003); citing PA Evid. R. 401. Illinois allows the jury to decide the question of "whether there was illegal entrapment" where "the testimony of the accused on its face tends to support this defense or the evidence with respect to this defense is conflicting* * *." *People v. Kadlec,* 12 Ill. App.3d 289, 313 N.E.2d 522 (Ill. App.Ct. 3d Dist. 1974).

The reasonable conclusions that may be drawn from both Ohio and neighboring states, is that a defendant is only required to produce "slight" evidence which "tends to support" self-defense. And where the evidence is conflicting, the trier of fact, the jury, is in the best position to determine the credibility of the witnesses and evidence. This court should define "tends to support" as a low threshold to give full effect to the burden shift intended by the legislature.

CONCLUSION

This court should define the phrase "tends to support" as slight evidence, that raises the question of self-defense in the mind of the jurors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was electronically delivered to Assistant Clermont County Prosecutor Nicholas Horton, at nhorton@clermontcountyohio.gov; and John D. Hill, Jr., counsel for Phillip A. Palmer, at attorneyjohnhill@gmail.com, on this 17th day of January, 2023.

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