[Cite as *State v. Robinette*, 2023-Ohio-5.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J..
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 2021 CA 00124
JAMES RANDY ROBINETTE	:	
	:	
Defendant-Appellant	:	OPINION

CHARACTER OF PROCEEDING:	Criminal appeal from the Stark County Court of Common Pleas, Case No. 2020 CR 2236
JUDGMENT:	Reversed and Remanded
DATE OF JUDGMENT ENTRY:	January 3, 2023

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
KYLE STONE Prosecuting Attorney By: VICKI L, DESANTIS Assistant Prosecutor 110 Central Plaza South, Ste. 510 Canton, OH 44702	KATHLEEN O. TATARSKY 236 Third Street S.W. Suite 100, Carnegie Bdg. Canton, OH 44702

Gwin, P.J.

{¶1} Defendant-appellant James Randy Robinette ["Robinette"] appeals his convictions and sentences after a jury trial in the Stark County Court of Common Pleas.

Facts and Procedural History

{¶2} The January 2021 term of the Stark County Grand Jury charged Robinette with three counts of felonious assault, a violation of R. C. 2903.11(A)(2), felonies of the second degree, and one count of discharge of firearm on or near prohibited premises, R. C. 2923.162(A)(3), a felony of the third degree. The indictment contained one three-year firearm specification in violation of R.C. 2941.145(A).

{¶3} The charges arose from an incident on November 28, 2020 when a vehicle containing three persons came to Robinette's duplex apartment located at 827 30th Street N.E., Canton, Ohio and Robinette shot his revolver. *Bill of Particulars*, filed Feb. 19, 2021. [Docket Entry No. 6].

{¶4} Prior to trial, Robinette filed a Notice of Self-defense. [Docket Entry No. 25]. Robinette also filed on September 20, 2021 a "Motion in Limine to Allow Evidence of Self-Defense to be Presented at Trial." [Docket Entry No. 46]. In addition, Robinette filed a "Motion in Limine to Allow Evidence of Other Bad Acts of the Alleged Victim." [Docket Entry No. 45].

{¶5} Robinette's jury trial began on September 21, 2021. Prior to voir dire of the jury, the trial judge remarked that he knew self-defense was an issue but would defer on granting a self-defense instruction until hearing the evidence. 1T. at 1; 9[1]. The trial court

[1] For clarity, the jury trial transcript will be referred to as, "__T.__," signifying the volume and the page number.

also ruled that Robinette could testify that he was afraid of the victim because he knew he was violent, but not suggest specific violent acts that he committed. 2T. at 95-97.

November 28, 2020

{¶6} On November 28, 2020, Robinette and his girlfriend, Natalie Guarnieri, were spending time together at his duplex apartment. The apartment had two floors.

{¶7} Robinette worked on the night shift and was scheduled to work that evening. 2T. at 90; 100. Guarnieri was home from college and she came over to spend the night with Robinette at his apartment. 2T. at 58-59.

{¶8} That morning, they woke up and cooked breakfast. 2T. at 60. Later that morning, Guarnieri looked out the upstairs window and saw a car in the driveway. She didn't recognize the car or the "big white man with a beard" who exited the vehicle. 2T. at 60-61. She later learned that his name was Tony Diaz-Sauceda [“Diaz”]. Id. Guarnieri testified that Diaz is “at least three times [Robinette’s] size.” 2T. at 66. Guarnieri observed Diaz with mail in his hands and told Robinette to go see who it was, as she thought it was the former tenant collecting his mail. 2T. at 61-62. Waiting inside the car was Noah Johnson and Kaitly Siakon[2]. 1T. at 168.

{¶9} Robinette went downstairs and called out, "who is it," and heard the reply "Noah's Tony." 2T. at 62-63; 95-97; 101. Robinette opened the door, shook Diaz's hand and said, 'what's going on." 2T. at 101-102. Robinette and Guarnieri both heard Tony say "we gotta work" meaning "we got to fight." 2T. at 64; 102. Robinette responded that no, he was not going to do that because his girlfriend was present

[2] The indictment in this case spells the name, “Siakon.” The transcript spells the name, “Sikon.” Kaitly Siakon did not testify at trial.

and he had to work that night. 2T. at 64; 102. Diaz then demanded money from Robinette. Id.

{¶10} Robinette noticed that Diaz had his hand on a handgun tucked into the front pocket of his hoodie. 2T. at 103-104. Robinette saw his friend, Johnson, get out of the car and walk to the front of the car telling Robinette that he, Johnson could not control Diaz and that Diaz might rush Robinette. 2T. at 110. Robinette closed the front door and locked it. 2T. at 66-67; 110-111. Robinette testified that he was "terrified." 2T. at 110. As he ran upstairs, Robinette heard the front door knob shaking and turning as if someone was trying to open the door and get into the home. 2T. at 111. Robinette grabbed a .44 Magnum Taurus revolver from the dresser. 2T. at 111-112.

{¶11} After making sure that his girlfriend was alright, Robinette heard a loud noise that sounded like a loud bang, frightening the two of them. 2T. at 68; 112. Not knowing whether the door had been kicked in, or if someone had entered the home through a different entrance, Robinette ran downstairs. 2T. at 112.

{¶12} Robinette observed that the front door had not been breached; however, he was concerned that the noise had come from someone attempting to enter the residence through the garage. 2T. at 113. Robinette opened his front door and saw that the trash cans had been knocked over and trash was strewn about. Id. at 114. Johnson and Siakon were inside the car which was backing up. Id. Diaz was standing next to the car. 2T. at 114-115. The rear passenger door to the car was open, but Diaz had not gotten into the car. Id. at 117. The pair made eye contact. 2T. at 118. Diaz had his hand on his weapon. 2T. at 115-116. Robinette fired his weapon at Diaz. 2T. at 116. Diaz got into the car as Robinette fired two more times. 2T. at 117. Diaz then returned fire from inside the car.

2T. at 117-118. Surveillance video from the hardware store next door, showed Diaz then exiting the vehicle and walking toward the house. State's Exhibit 4A; 1T. at 180; 184-185.

{¶13} Robinette took cover by closing his front door and crouching against the wall next to the door. 2T. at 118. Robinette testified that he had never been more scared. Id. at 119. Robinette told Guarnieri to call 9-1-1 and tell dispatch that "they're shooting at us." 2T. at 67; 76. Terrified and thinking she was going to die, Guarnieri called 9-1-1. 2T. at 69.

The police respond

{¶14} Canton Police Officer Joseph Bays was working traffic patrol on 30th Street when he heard shots fired. 1T. at 121. A passer-by pointed out the location of the shots and Bays turned his cruiser around and headed to the area. In the driveway of a duplex, he saw a 2011 black BMW and two males and a female. 1T. at 122; 165. He unholstered his service weapon and called CANCOM for additional units to respond. 1T. at 122.

{¶15} Officer Bays pointed his firearm at the front door of the duplex and waited for back up officers to respond. Robinette and Guarnieri were on the line with dispatch at the time and were told to come out of the house. Robinette and his girlfriend, Guarnieri, complied and came out of the house into the driveway. 1T. at 124.

{¶16} Officer Bays and other law enforcement officers entered the duplex apartment to make sure there were no other shooting casualties. Finding none, they went through the apartment and found two to three firearms all lawfully owned by Robinette. 1T. at 124. Officer Bays secured Tony Diaz-Sauceda in his cruiser to take him down to the detective bureau for questioning. 1T. at 125-126. Officer Bays found concealed on

Diaz a FN five-seven firearm, a small handgun that shoots rifle cartridges in very fast rounds. 1T. at 128-129; 159. The FN five-seven was released prior to trial and was not admitted into evidence. 2T. at 52.

The investigation

{¶17} Canton Police lead detective, Joseph Mongold, was called out to the above address around 1:00 p.m. 1T. at 143.

{¶18} Detective Mongold testified Robinette, Diaz, Johnson, Siakon and Guarnieri were transported to headquarters to be interviewed. 1T. at 147. After Robinette signed a *Miranda* waiver, he agreed to speak with Detective Mongold. 1T. at 149; 154; State's Exhibit 13. Robinette's recorded statement was played for the jury. 1T. at 152.

{¶19} Detective Mongold documented the damage to Robinette's apartment,

> The front door of the residence had bullet holes in it. The bullets had passed through the front door and into the residence causing damage to the interior of the apartment itself. Drywall damage, some wood damage, these types of things that occurred.

1T. at 158-159. The damage to the Robinette apartment was caused by the FN five-seven handgun in the possession of Diaz. 1T. at 159. The FN five-seven is a handgun that fires rifle bullets. 1T. at 159. In addition to the damage to the interior of Robinette's apartment, Detective Mongold found shell casings from the FN five-seven handgun in the interior of the BMW. Detective Mongold testified that the bullet holes in the windshield of the BMW went from the inside of the car firing outside. 1T at 167; State's Exhibit 1H.

Detective Mongold confirmed Diaz fired those rounds. Id. Mongold confirmed that Noah Johnson was driving the BMW, Kaitlin Siakon was in the front passenger seat and Diaz was in the rear passenger seat. 1T. at 168.

{¶20} Detective Mongold also determined that there was damage to the front of the BMW including the engine compartment from shots fired from Robinette's revolver. 1T. at 169; 201. There were also rounds that traveled across 30th Street and hit two vehicles parked in the businesses across the street. 1T. at 169.

{¶21} Detective Mongold identified the November 28, 2020 9-1-1 call from Guarnieri that was played for the jury. 1T. at 161; State's Exhibit 4B.

{¶22} Detective Mongold located video evidence from the True Value Hardware Store, directly west of Robinette's address. 1T. at 174. The video does not capture the area between Robinette's front door or the front of the apartment complex and the BMW.

{¶23} At 13:52:20 in the video an individual wearing a light-colored hoodie can be seen exiting from the rear passenger side door of the car. At 13:52:54 of the video the individual can be seen walking back to the car. At 13:53:06 the individual can again be seen walking toward the front of the apartment complex. At 13:53:21 a large white box truck pulls into the True Value Hardware's parking lot obstructing the view of the apartment complex and the car. At 13:55:03 the car is observed backing up as it clears the white truck obstructing the view. No one can be seen getting into or out of the car before this point. At 13:55:08 a shopper wearing a ball cap exits the True Value Hardware store looking in the direction of the apartment complex. At 13:55:10 it can be observed that shots are being fired from inside the vehicle through the front windshield. At 13:55:14,

the individual in the light-colored hoodie exits the rear passenger seat of the vehicle and walks toward the front of the apartment complex appearing to be holding a weapon.

{¶24} The video was played for the jury and admitted into evidence as part of State's Exhibit 4.

{¶25} On cross examination, Detective Mongold agreed that Johnson, Siakon, and Diaz went to Robinette's residence unannounced and that Diaz took mail from Robinette's mailbox. 1T. at 192. Diaz knocked on the door and Robinette opened the door. Diaz told Robinette they needed to fight. 1T. at 193. Robinette also told Detective Mongold that Diaz had a gun in his pocket with his left hand on the butt while at the door. Id. Detective Mongold confirmed that Diaz told Robinette we need to work [fight] or you need to give me some money. 1T. at 194. Detective Mongold further testified that Johnson also got out of the car and said we need to fight or pay. 1T. at 195. Further Robinette told Detective Mongold that Johnson told him Diaz would rush him if he did not fight or pay him. Detective Mongold agreed that Diaz was a bigger, stockier man than Robinette. 1T. at 196. Robinette told Detective Mongold that the request for money came out of nowhere as he did not owe Johnson or Diaz for drugs or anything else. State's Exhibit 4A. Robinette further told Detective Mongold that the discussion concerning the "wood roller" occurred as Diaz was walking away from the door. State's Exhibit 4A.

{¶26} Detective Mongold said Robinette conveyed he was afraid that they would get inside his home so he slammed and locked the door, and ran upstairs to get his gun. State's Exhibit 4A. Robinette claimed he could see the handle to the door twisting behind him and he heard a loud noise, as he was getting his gun. 1T. at 198; State's Exhibit

4A. Because he was afraid of them getting into his home, he opened the front door and fired while Diaz was outside the car. State's Exhibit 4A.

{¶27} Diaz, Johnson and Siakon did not testify at trial.

{¶28} Following the presentation of evidence, after the court's review of caselaw and evidence, the court denied Robinette's request to instruct the jury on self-defense. 2T. at 155-165. The trial judge found that Robinette did not demonstrate he had a bona-fide belief that he was in imminent danger of death or great bodily harm, and that his only means of escape was the use of deadly force. 2T. at 156-157.

{¶29} The trial court did instruct the jury on the lesser included offense of aggravated assault. 2T. at 163.

{¶30} The jury found Robinette guilty of felonious assault against Johnson and Siakon, aggravated assault against Diaz, guilty of discharge of a firearm at or near prohibited premises, and the firearm specification. The trial court sentenced Robinette to three years on the gun specification, and an aggregate prison term of two years up to a maximum of three years on the other charges.

Assignments of Error

{¶31} Robinette raises five Assignments of Error,

{¶32} "I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY REFUSING TO GIVE A SELF-DEFENSE INSTRUCTION.

{¶33} "II. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND ABUSED ITS DISCRETION IN ALLOWING THE STATE TO ADMIT 'OTHER ACTS EVIDENCE' THAT DEPRIVED ROBINETTE OF A FAIR TRIAL.

{¶34} "III. THE PROSECUTION COMMITTED MISCONDUCT THAT DEPRIVED ROBINETTE HIS RIGHTS TO A FAIR TRIAL.

{¶35} "IV. ROBINETTE WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND SECTIONS 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

{¶36} "V. ROBINETTE'S CONVICTION FOR DISCHARGE OF A FIREARM NEAR PROHIBITED PREMISES WITH A FIREARM SPECIFICATION WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

I.

{¶37} In his First Assignment of Error, Robinette argues the trial court abused its discretion in failing to give a self-defense instruction under the current version of R. C. 2901.05. [Appellant's brief at 7]. Specifically, Robinette contends the trial court's refusal to give any instruction on self-defense was incorrectly based upon the trial court's finding that Robinette had the affirmative burden of production, of producing evidence that tends to support that he used the force in self-defense. [Appellant's brief at 8].

Standard of Appellate Review

{¶38} In determining whether a self-defense jury instruction is warranted, we look to whether 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. R.C. 2901.05(B)(1).

{¶39} A review of the record to determine whether evidence tends to support that the accused person used force in self-defense is a question of law that we must review

de novo. *See, State v. Williams*, 11th Dist. Hamilton No. C-190280, 2020-Ohio-5245, ¶5; *State v. Sims,* 7th Dist. Columbiana No. 19 CO 0035, 2021-Ohio-2334, ¶12; *State v. Belanger,* 190 Ohio App.3d 377, 2010-Ohio-5407, 941 N.E.2d 1265(3rd Dist. 2010), ¶4; *State v. Harvey,* 4th Dist. Washington Nos. 21CA3, 21CA4, 2022-Ohio-2319, ¶39; *State v. Sullivan,* 11th Dist. Lake Nos. 2019-L-143, 2019-L-144, 2020-Ohio-1439, ¶33, *quoting State v. Imondi,* 11th Dist. Lake No. 2014-L-019, 2015-Ohio-2005, ¶18.

Self Defense under R.C. 2901.05

{¶40} In order to determine when an instruction of self-defense is warranted, we first look to R.C. 2901.05(A) which provides,

> (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 *other than self-defense, defense of another, or defense of the accused's residence presented as described in division (B)(1) of this section*, is upon the accused.

Emphasis added.

{¶41} In order to determine the respective duties with respect to a self-defense claim, we must turn to R.C. 2901.05(B)(1),

> (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.

Emphasis added. This section plainly and explicitly recognizes and permits a citizen the right to self-defense, defense of another and defense of his or her residence.

{¶42} Importantly, in a departure from previous law, R.C. 2901.05(B)(1) **does not state that the accused must present evidence** that tends to support that the accused person used the force in self-defense, defense of another, or defense of that person's residence. *See, State v. Melchior*, 56 Ohio St.2d 15, 20, 381 N.E.2d 195 (1978) (former law). Rather, the trial court must look to the record and consider evidence "from whatever source the evidence may come." Id.

{¶43} The trial court should view this evidence in the light most favorable to the defendant. *State v. Stephens*, 8th Dist. Cuyahoga, 2016-Ohio-384, 59 N.E.3d 612, ¶ 19, *citing State v. Robinson*, 47 Ohio St.2d 103, 112, 351 N.E.2d 88 (1976). The question of credibility is not to be considered. *State v. Belanger*, 190 Ohio App.3d 377, ¶6 (3d Dist. 2010); S*ee also Imondi, supra*, at ¶17 ("We evaluate the evidence in a light most favorable to the defense."); *State v. Sullivan, supra,* 2020-Ohio-1439, ¶45; *State v. Davidson-Dixon,* 8th Dist. Cuyahoga No. 109557, 2021-Ohio-1485, ¶20.

{¶44} If there is conflicting evidence, the instruction must be given. *State v. Davidson-Dixon, supra* ¶20; *State v. Johnson,* 8th Dist. Cuyahoga No. 110673, 2022-Ohio-2577, ¶10. The defendant's testimony alone can be evidence that tends to support

that he used force in self-defense. *See, State v. Sullivan, supra,* 2020-Ohio-1439, ¶45; State *v. Belanger*, *supra*, 190 Ohio App.3d 377 at ¶6.

{¶45} Thus, under the law as currently written, the trial judge assumes the role of a gate-keeper to determine whether evidence was presented from any source that tends to support that the accused person used the force in self-defense, defense of another, or defense of that person's residence. If it has, then the jury must decide whether the state has disproved beyond a reasonable doubt that the accused person used the force in self-defense, defense of another, or defense of that person's residence.

Issue for appellate review: *Whether evidence was presented that tends to support that Robinette used force in self-defense, defense of another, or defense of his residence*

{¶46} In the case at bar, Robinette consistently admitted that he fired a .44 magnum revolver 3 to 4 times at Diaz. The use of a gun constitutes deadly force. See, *State v. Barker,* 2nd Dist. Montgomery No. 29227, 2022-Ohio-3756, ¶8. Thus, if the evidence produced at trial tends to support that Robinette used deadly force in self-defense, the trial court must instruct the jury that the state must prove beyond a reasonable doubt that Robinette did not use that force in self-defense. In other words, the state must disprove at least one of the elements of the use of deadly force in self-defense beyond a reasonable doubt. The elements of self-defense that the state must now disprove at least one of are: (1) Robinette was not at fault in creating the situation giving rise to the affray, (2) Robinette had reasonable grounds to believe and an honest belief even if mistaken that he was in imminent danger of death or great bodily harm and that he did not use more force than necessary to defend against the attack and (3)

Robinette must not have violated any duty to retreat or avoid the danger. *State v. Robbins,* 58 Ohio St.2d 74, 79, 388 N.E.2d 755(1979) (citations omitted); *See also, State v. Barker,* 2nd Dist. Montgomery No. 29227, 2022-Ohio-3756, ¶27; *State v. Evans,* 8th Dist. Cuyahoga No. 79895, 2002-Ohio-2610, ¶ 53; *State v. Hamilton,* 12th Dist. Butler No CA2001-04-098, 2002-Ohio-3862, ¶17.

{¶47} However, when exercising its gate keeper function to determine whether the jury should be instructed on self-defense, the trial court should only concern itself with whether the evidence produced at trial "tends to support" that Robinette used deadly force in self-defense. Under the present version of the law, whether he ultimately used or did not use deadly force in self-defense is a question of fact for the jury to decide after hearing the evidence, judging the credibility of the witnesses and receiving proper instructions on the law from the trial court.

Evidence was presented that tends to support that Robinette was not at fault in creating the situation giving rise to the affray.

{¶48} The unrefuted evidence presented established that Diaz, Johnson and Siakon came uninvited to Robinette's apartment to engage in a physical confrontation with Robinette. Diaz brought a gun with him that was observed by Robinette.

{¶49} Thus, evidence was presented that tends to support that Robinette was not at fault in creating the situation giving rise to the affray.

Evidence was presented that tends to support that Robinette did not violate any duty to retreat or avoid the danger.

{¶50} Robinette told Diaz that he did not want to fight and that his girlfriend was present. Robinette never left the doorway of his apartment.

R.C. 2901.09 "Stand your ground."

{¶51} Ohio citizens are permitted to "stand his or her ground" and defend themselves. Most recently amended April 6, 2021, R.C. 2901.09, provides,

> (A) As used in this section, "residence" has the same meaning as in section 2901.05 of the Revised Code.
>
> (B) For purposes of any section of the Revised Code that sets forth a criminal offense, a person has no duty to retreat before using force in self-defense, defense of another, or defense of that person's residence if that person is in a place in which the person lawfully has a right to be.
>
> (C) A trier of fact shall not consider the possibility of retreat as a factor in determining whether or not a person who used force in self-defense, defense of another, or defense of that person's residence reasonably believed that the force was necessary to prevent injury, loss, or risk to life or safety.

{¶52} In *State v. Brooks*, —— Ohio St.3d ——, 2022-Ohio-2478, —— N.E.3d —— the Ohio Supreme Court held that amendments to the self-defense statute, which shifted the burden of proof on self-defense from defendant to prosecution, apply to all subsequent trials even when the alleged offenses occurred prior to the effective date of the amendments. The same rationale used by the Supreme Court in *Brooks* would apply to the amendment to R.C. 2901.09, making the amended version applicable to Robinette's case. As Robinette's jury trial did not commence until September 21, 2021, the amended statute would apply. *See, State v. Wagner,* 11th Dist. Lake No. 2021-L-101,

2022-Ohio-4051, ¶28. *Contra, State v. Parker,* 1st Dist. Hamilton No. C-210440, 2022-Ohio-3831, ¶14.

{¶53} However, we reach the same result under the prior version of R.C. 2901.09. The prior version of R.C. 2901.09 provided,

> (B) For purposes of any section of the Revised Code that sets forth a criminal offense, a person who lawfully is in that person's residence has no duty to retreat before using force in self-defense, defense of another, or defense of that person's residence, and a person who lawfully is an occupant of that person's vehicle or who lawfully is an occupant in a vehicle owned by an immediate family member of the person has no duty to retreat before using force in self-defense or defense of another.

{¶54} The evidence in the case at bar, establishes that Robinette never left his residence. At all times, he was in a place where he lawfully had a right to be. Accordingly, under either version of the law as currently written, evidence was presented that tends to support that Robinette did not violate any duty to retreat or avoid the danger.

Evidence was presented that tends to support that Robinette had reasonable grounds to believe and an honest belief even if mistaken that he was in imminent danger of death or great bodily harm.

{¶55} The second element of self-defense requires that the evidence tend to show that the accused had reasonable grounds to believe or an honest belief, even if mistaken, that he was in imminent or immediate danger of death or great bodily harm. In *State v. Thomas,* the Ohio Supreme Court explained,

[T]he second element of self-defense is a combined subjective and objective test. As this court established in *State v. Sheets* (1926), 115 Ohio St. 308, 310, 152 N.E. 664, self-defense "is placed on the grounds of the bona fides of defendant's belief, and reasonableness therefor, and whether, under the circumstances, he exercised a careful and proper use of his own faculties." (Emphasis sic.) *See, also, McGaw v. State* (1931), 123 Ohio St. 196, 174 N.E. 741, paragraph two of the syllabus. In *Koss,* we once again stated this test by approving similar jury instructions to those given in the case sub judice:

"In determining whether the Defendant had reasonable grounds for an *honest* belief that she was in imminent danger, you must put yourself in the position of the Defendant * * *. You must consider the conduct of [the assailant] and determine if such acts and words caused the Defendant to *reasonably* and *honestly* believe that she was about to be killed or to receive great bodily harm.'" (Emphasis added.) *Koss,* 49 Ohio St.3d at 216, 551 N.E.2d at 973. Thus, the jury first must consider the defendant's situation objectively, that is, whether, considering all of the defendant's particular characteristics, knowledge, or lack of knowledge, circumstances, history, and conditions at the time of the attack, she *reasonably* believed she was in imminent danger. See 1 LaFave & Scott, Substantive Criminal Law (1986, Supp.1996) 654, Supp. 71, Section 5.7. See, also, generally, *State v. Shane* (1992), 63 Ohio St.3d 630, 634, 590 N.E.2d 272, 276…Then, if the objective standard is met, the jury must determine if, subjectively, this

> particular defendant had an honest belief that she was in imminent danger. See 1 LaFave & Scott, Substantive Criminal Law (1986, Supp.1996) 654, Supp. 71, Section 5.7. See, also, generally, *Shane, supra*, 63 Ohio St.3d at 634, 590 N.E.2d at 276….

77 Ohio St.3d 323, 330-331, 673 N.E.2d 1339(1997).

{¶56} "[I]if the evidence generates only a mere speculation or possible doubt, the evidence is insufficient to raise the affirmative defense, and submission of the issue to the jury will be unwarranted." *State v. Melchior*, 56 Ohio St.2d 15, 20, 381 N.E.2d 195 (1978) (former law). It should be noted that the decision in *Melchior* reviewed the self-defense statute at a time when the statute required the accused to prove by a preponderance of the evidence that he acted in self-defense. In contrast according to the plain meaning of the statue as presently written, a person who is lawfully in his home or in a place that he or she has a right to be, has a right to defend themselves, another person and his or her property.

{¶57} In the case at bar, Diaz, Johnson and Siakon did not testify. Robinette's unrefuted testimony, corroborated by Detective Mongold's testimony, is that the trio arrive uninvited and unannounced at his apartment. Diaz goes through Robinette's mailbox. 1T. at 192. Diaz appears at his door, and demands that Robinette fight. 1T. at 193; 2T. at 64. Robinette declines telling Diaz in part that Guarnieri is present and he has to work. 1T. at 193; 2T. at 65. Robinette notices Diaz has his hand on a gun tucked into the pocket of his hoodie. 1T. at 193; 2T. at 103-104. Johnson exits the car and tells Robinette that he had better fight or pay Diaz and that Diaz may rush him if he does not. 1T. at 195; 2T. at 107; 110. Robinette knows that Diaz has a reputation as a violent person who

always carries a gun. 2T. at 97-98. Detective Mongold agreed that Diaz was a bigger, stockier man than Robinette. 1T. at 196. Robinette testified that he feared that Diaz was going to rob him. 2T. at 102. Robinette testified that he was "terrified." 2T. at 104; 110. Robinette closed and locked the door. 2T. at 111. Robinette heard and saw the door knob twisting as he was running up the stairs to retrieve his gun. 2T. at 111. After making sure that Guarnieri was all right, Robinette hears a loud bang which frightened both him and Guarnieri. 2T. at 68; 112. Robinette testified that he was afraid that they were attempting to get into his apartment by another means. 1T. at 197-198; 2T. at 112-113. Robinette saw his front door was not opened so he thought perhaps they had breached the garage. 2T. at 113. He was unable to see the garage door from his door so he opened his front door. Id. As he looks out the door, Robinette sees his trash cans and trash had been strewn about. 2T. at 114. He observes the car backing up, but Diaz remained outside next to the car. Id. Diaz was looking at Robinette, making eye contact. 2T. at 115. Robinette testified, "Because I felt as if, he, he saw my gun and that he still had his gun, he was going to shoot me." 2T. at 116.

{¶58} As previously noted, under the law as presently written R.C. 2901.05(B)(1), permits a person "to act in self-defense, defense of another, or defense of that person's residence." A person standing in the doorway of his home is lawfully where he or she has a right to be. When confronted with an individual or individuals threatening harm to that person, another person present, or his or her property that person is entitled to act in self-defense. Accordingly, some evidence was 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.*

{¶59} In the case at bar, the minimum standard of evidence required to present self-defense to the jury is present in the record. Whether that evidence is credible and whether the state can prove beyond a reasonable doubt that the accused did not act in self-defense are questions of facts for the jury to decide, the trial court's role in deciding whether to allow a jury instruction on self-defense is more limited—it is not the trial court's job to weight the evidence under the statutes as they are presently written.

{¶60} In this case, the trier of fact was the jury, not the trial judge. The trial court improperly assumed the jury's role by making its own evaluation of the weight of the evidence and the credibility of the witnesses in deciding not to give the self-defense instruction. Based on the record before this court, we find that when viewing the evidence in favor of Robinette, sufficient evidence was presented that tends to show that he acted in self-defense. The trial court should have granted Robinette's request to instruct the jury on deadly force self-defense. Accordingly, the trial court erred as a matter of law because the minimum standard of evidence required to present self-defense to the jury is present in the record.

{¶61} When an accused asserts the defense of self-defense he does not seek to negate any of the elements of the offense which the state is required to prove. Self-defense is not merely a denial or contradiction of evidence offered by the state to prove the essential elements of the charged crime. Rather, it is an admission of the prohibited conduct coupled with a claim that the surrounding facts or circumstances exempt the accused from liability therefor— "justification for admitted conduct." *State v. Poole*, 33 Ohio St.2d 18, 294 N.E.2d 888(1973).

{¶62} We are unconvinced that the absence of an instruction on the right to stand his ground and defend himself, another person or his property was harmless. The only real issue in the case was whether Robinette acted in self-defense, and we see an undeniable benefit to a defendant in having a jury told that he has a right to act in self-defense, defense of another, or defense of that person's residence. Further, there is a benefit to having a jury told that the state must disprove self-defense beyond a reasonable doubt, presumably that was one of the considerations in writing the law the way that it is presently codified.

{¶63} The state has argued that if the trial court's failure to instruct the jury on self-defense was erroneous, no prejudice resulted from the error. However, Robinette's sole theory at trial was that he acted in self-defense. Robinette testified in his own behalf to that effect. He obviously defended himself at trial by attempting to create in the minds of the jurors a reasonable doubt that his actions were in defending himself, his girlfriend and his home. In that light, the error to charge the jury with respect to the defense of self-defense was highly prejudicial. See, *State v. Poole*, 32 Ohio St.2d 18, 21, 294 N.E.2d 888(1973).

{¶64} Robinette's First Assignment of Error is sustained.

II, III, IV & V

{¶65} In light of our disposition of Robinette's First Assignment of Error, we find Robinette's Second, Third, Fourth and Fifth Assignments of Error to be premature.

{¶66} The judgment of the Stark County Court of Common Pleas is reversed and this matter is remanded for proceedings in accordance with our Opinion and the law.

By Gwin, P.J.,

Hoffman, J., and

Wise, John, J., concur

[Cite as *State v. Wagner*, 2022-Ohio-4051.]

IN THE COURT OF APPEALS OF OHIO
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY

STATE OF OHIO, Plaintiff-Appellee, - v - MARK R. WAGNER, JR., Defendant-Appellant.	**CASE NO. 2021-L-101** Criminal Appeal from the Court of Common Pleas Trial Court No. 2020 CR 001117

O P I N I O N

Decided: November 14, 2022
Judgment: Affirmed in part and reversed and remanded in part

Charles E. Coulson, Lake County Prosecutor, and *Kristi L. Winner*, Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Brandon J. Henderson, Justin M. Weatherly, and *Calvin Freas*, Henderson, Mokhtari & Weatherly Co., LPA, 1231 Superior Avenue, East, Cleveland, OH 44114 (For Defendant-Appellant).

MATT LYNCH, J.

{¶1} Defendant-appellant, Mark R. Wagner, Jr., appeals from his convictions for Felonious Assault, Discharge of a Firearm on or Near Prohibited Premises, Improperly Handling Firearms in a Motor Vehicle, and Falsification in the Lake County Court of Common Pleas. For the following reasons, we affirm in part and reverse in part the judgment of the lower court and remand for further proceedings consistent with this opinion.

{¶2} On January 29, 2021, the Lake County Grand Jury issued an Indictment, charging Wagner with Felonious Assault (Count One), a felony of the second degree, in violation of R.C. 2903.11(A)(2); Discharge of a Firearm on or Near Prohibited Premises (Count Two), a felony of the third degree, in violation of R.C. 2923.162(A)(3); Improperly Handling Firearms in a Motor Vehicle (Count Three), a felony of the fourth degree, in violation of R.C. 2923.16(A); and Falsification (Count Four), a misdemeanor of the first degree, in violation of R.C. 2921.13(A)(3). Counts One and Two also had firearm specifications pursuant to R.C. 2941.145 and .146.

{¶3} A jury trial was held on July 20-22, 2021. The following pertinent testimony and evidence were presented:

{¶4} On September 22, 2020, Solomon Ford was driving on I-271 North and encountered another vehicle in front of him, a Chevy Silverado, later determined to have been driven by Wagner. According to Ford's testimony, Wagner was driving aggressively and slamming on his brakes. Ford testified that after the two travelled onto I-90 West, Wagner moved into the right lane while Ford remained in the fast lane. When Ford looked to the right, he observed Wagner with a gun and then saw and heard two gun shots. Ford followed Wagner to obtain his license plate number and gave a statement at the Wickliffe Police Department. Ford allowed police to access his vehicle, which had two bullet holes in it, and officers subsequently swabbed the inside of his vehicle for gunshot residue. At this point in the testimony, defense counsel indicated to the court that he was unaware a swab had been taken of Ford's car. The State indicated a reference to the kit had been included on the index of discovery provided to the defense.

{¶5} Patrolman David Cook of the Wickliffe Police Department spoke with Wagner, who described the shooting, observed two bullet holes in his passenger side and found a bullet inside the vehicle on the rear passenger floorboard. Around the same time, Officer Salvatore Continenza of the Willoughby Hills Police Department spoke with Wagner, who came to the department after the shooting. According to Continenza, Wagner identified that Ford fired at him first but Wagner did "not remember if he [Wagner] fired or not." Continenza turned over the statement to the Wickliffe Police Department as it was determined the incident occurred within their jurisdiction.

{¶6} Lieutenant Manus McCaffery of the Wickliffe Police Department searched Wagner's vehicle, wherein two shell casings were recovered. He observed no signs of a shooting within Ford's vehicle, which he inspected the day after the incident. He swabbed the interior of Ford's vehicle for gunshot residue on July 28. He testified that this was not sent to a laboratory because "there is no laboratory in the State of Ohio that will test them for gunshot residue" and labs would only test gunshot residue found on a person.

{¶7} As to his supplemental report that discussed swabbing Ford's vehicle for gunshot residue, McCaffery testified that he personally gave a copy to the prosecutor for the first time on the day preceding his testimony, the first day of trial. He was unaware of when the prosecutor first received the report but provided a copy because it had been indicated to him they did not have his supplement.

{¶8} Detective Don Dondrea of the Wickliffe Police Department examined Wagner's vehicle and did not observe bullet holes. He swabbed the vehicle for gunshot residue but after speaking with Ohio BCI, he was informed that they would only test residue from hands. He did not discover any evidence that showed Ford shot at Wagner

other than Wagner's statement.

{¶9} Wagner testified that Ford tried to merge his vehicle into him while driving on I-271, which resulted in Wagner "brake checking" him. After Ford tailgated him and followed him in traffic, Wagner separated from him and drove in the right lane while Ford remained in the far left lane. Subsequently, Wagner observed Ford holding a gun. Wagner reached for a firearm in his vehicle while crouching down, heard a shot and saw a flash, and then fired his gun twice. He observed no damage to his vehicle and told Continenza that he "wasn't sure if I shot him. But I fired." He testified that he fired the shots in self-defense.

{¶10} The jury found Wagner guilty of all counts as charged in the indictment. Its verdict was memorialized in a July 28, 2021 Judgment Entry.

{¶11} A sentencing hearing was held on August 30, 2021. The court found that Counts Two and Three merged into Count One. It ordered Wagner to serve a minimum prison term of three years and a maximum term of four and a half years on Count One, with a term of three years for the first firearm specification and five years on the second, all to be served consecutively. Wagner was ordered to serve a concurrent term of 180 days for Count Four.

{¶12} Wagner timely appeals and raises the following assignments of error:

{¶13} "[1.] The trial court committed prejudicial error when it instructed the jury to consider whether Mr. Wagner had a duty to retreat as a factor of his self-defense claim because the plain language of the statute in effect at the time of trial and jury deliberations prohibited such an instruction: 'the trier of fact *shall not consider the possibility of retreat*' in determining whether the self-defender 'reasonably believed that the force was

necessary . . .' R.C. 2901.09(C).

{¶14} "[2.] The Defendant was reversibly prejudiced when crucial evidence that was directly related to the cross-examination of the State's primary witness—and whose cross-examination had already been completed—was not given to his defense until one day into the three-day trial even though the Defendant had triggered Crim.R. 16 by demanding discovery months previously."

{¶15} In his first assignment of error, Wagner argues that, after the offense occurred but prior to trial, a "Stand Your Ground" law came into effect, removing the duty to retreat for the purposes of self-defense and, thus, the trial court erred by denying his request not to give a duty to retreat instruction.

{¶16} Generally, "[a]n appellate court reviews a trial court's decision to give a particular set of jury instructions under an abuse of discretion standard." (Citation omitted.) *State v. Settle*, 2017-Ohio-703, 86 N.E.3d 35, ¶ 37 (11th Dist.). However, "[w]hether the jury instructions correctly state the law is a question that is reviewed de novo." *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, 54 N.E.3d 80, ¶ 135.

{¶17} R.C. 2901.09 was amended effective April 6, 2021, and provides the following:

> (B) For purposes of any section of the Revised Code that sets forth a criminal offense, a person has no duty to retreat before using force in self-defense, defense of another, or defense of that person's residence if that person is in a place in which the person lawfully has a right to be.

> (C) A trier of fact shall not consider the possibility of retreat as a factor in determining whether or not a person who used force in self-defense, defense of another, or defense of that person's residence reasonably believed that the force was necessary to prevent injury, loss, or risk to life or safety.

The version of the statute in effect prior to that date, known as the Castle Doctrine, provided that a person lawfully in that person's residence has no duty to retreat before using force in self-defense, defense of another, or defense of a residence and a person in their vehicle had no duty to retreat before using force in self-defense or defense of another. Section (C) was not part of the prior version.

{¶18} "The Supreme Court of Ohio has articulated a two-part test" for "determining whether a statute is impermissibly retroactive under Section 28, Article II." *State v. McEndree*, 2020-Ohio-4526, 159 N.E.3d 311, ¶ 43 (11th Dist.). "Because R.C. 1.48 establishes a presumption that statutes operate prospectively only, '[t]he issue of whether a statute may constitutionally be applied retrospectively does not arise unless there has been a prior determination that the General Assembly specified that the statute so apply.'" (Citation omitted.) *State v. Walls*, 96 Ohio St.3d 437, 2002-Ohio-5059, 775 N.E.2d 829, ¶ 10. "If there is no 'clear indication of retroactive application, then the statute may only apply to cases which arise subsequent to its enactment.' * * * If we can find, however, a 'clearly expressed legislative intent' that a statute apply retroactively, we proceed to the second step, which entails an analysis of whether the challenged statute is substantive or remedial." (Citations omitted.) *Id.* If the law is substantive, it cannot be applied retroactively. *Bielat v. Bielat*, 87 Ohio St.3d 28, 721 N.E.2d 28 (2000).

{¶19} It has been held, however, that "if a statute is amended and becomes effective while the defendant's case is pending in the trial court, then its applicability to the defendant's case is guided by R.C. 1.58." *State v. Stiltner*, 4th Dist. Scioto No. 19CA3882, 2021-Ohio-959, ¶ 54, *vacated*, *State v. Stiltner*, __ Ohio St.3d __, 2022-Ohio-3589, __ N.E.3d __, ¶ 1, citing *State v. Kaplowitz*, 100 Ohio St.3d 205, 2003-Ohio-5602, 797 N.E.2d 977, ¶ 8 ("R.C. 1.58(B) identifies which law to apply when a statute is amended after the commission of a crime but before sentence is imposed"). R.C. 1.58 provides that an amendment of a statute does not, inter alia, affect any right accrued under the statute or affect a violation thereof prior to the amendment but that "[i]f the penalty, forfeiture, or punishment for any offense is reduced by * * * amendment of a statute" such penalty or punishment "shall be imposed according to the statute as amended." R.C. 1.58(A) and (B).

{¶20} The State argues that this law cannot be applied retroactively because it is substantive in nature. Wagner argues that it is unnecessary to conduct a retroactivity analysis because the statute was in effect at the time his trial began and, thus, the application relating to the jury instruction was prospective.

{¶21} We initially observe that there is limited authority on the prospective or retroactive application of the specific statute at issue in the present case. Two courts have addressed this issue in relation to R.C. 2901.09. In *State v. Degahson*, 2d Dist. Clark No. 2021-CA-35, 2022-Ohio-2972, the court found that retroactive application of the statute would be unconstitutional since the change in law relating to the duty to retreat is substantive. In *State v. Hurt*, 8th Dist. Cuyahoga No. 110732, 2022-Ohio-2039, the Eighth District found that former R.C. 2901.09 applied during the trial since substantive

provisions of the former law apply to pending prosecutions under R.C. 1.58. In support of its conclusion, it cited *Stiltner*, 2021-Ohio-959. In *Stiltner*, the appellate court held that the trial court did not err in instructing the jury on a former version of the self-defense law, R.C. 2901.05, because the new version of the statute became effective while the defendant's case was pending and the legislature did not indicate it intended to apply the statute retroactively. It rejected the argument that inclusion of the words "at trial" in the statute was an express intent to apply the statute to pending cases. *Id.* at ¶ 56. *Degahson* also cites *Stiltner* for the proposition that substantive provisions of the former law should not apply to pending prosecutions. *Degahson* at ¶ 22.

{¶22} The issue addressed in *Stiltner*, whether the prior version of the self-defense statute applied at trial when the offense had been committed prior to the amendment of the statute, is instructive in this case. In both instances, relating to self-defense and the issue of duty to retreat, the courts are asked to consider how to instruct a jury at trial for an offense that was committed under the former version of this statute. Courts in this state have been split on the resolution of this matter as to the self-defense statute. In support of his position, Wagner cites to *State v. Gloff*, 2020-Ohio-3143, 155 N.E.3d 42 (12th Dist.), which addresses the foregoing. In *Gloff*, while the trial was taking place, the amended self-defense statute went into effect, which provides: "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, * * * the prosecution must prove * * * that the accused person did not use force in self-defense." *Id.* at ¶ 3, citing R.C. 2901.05(B)(1). The lower court's determination that this statute applied only to offenses committed after its effective date

was rejected. The appellate court determined that a retroactivity analysis was not required since the amended statute applied prospectively to trials and "focuses on when the trial is held, as opposed to when the offense was committed." *Id.* at ¶ 22. Some other appellate districts reached similar conclusions. *State v. Smith*, 6th Dist. Wood No. WD-19-070, 2020-Ohio-5119, ¶ 32 (where defendant's conduct occurred before amendment and trial occurred after, the amended statute applied at trial and the jury should have been instructed as to the new burden of proof); *State v. Pitts*, 2020-Ohio-5494, 163 N.E.3d 1169, ¶ 25 (1st Dist.). In contrast, other districts held that where the offense was committed before the effective date of the amendment, an instruction under the amended version should not be given at trial. *Stiltner*, 2021-Ohio-959, ¶ 55. *See also State v. Williams*, 3d Dist. Allen No. 1-19-39, 2019-Ohio-5381, ¶ 12, fn. 1 ("[w]e apply the version of R.C. 2901.05 in effect at the time the defendant committed the offense"); *State v. Irvin*, 2020-Ohio-4847, 160 N.E.3d 388, ¶ 26 (2d Dist.), *vacated*, *State v. Irvin*, __ Ohio St.3d __, 2022-Ohio-3587, __ N.E.3d __, ¶ 1. This court reached the same conclusion and determined that, "inasmuch as the amended self-defense statute creates a new burden of proof on the state, we find that it is *substantive* and cannot be applied retroactively." *McEndree*, 2020-Ohio-4526, at ¶ 44.

{¶23} The Ohio Supreme Court recently resolved the foregoing conflict in *State v. Brooks*, ___ Ohio St.3d ___, 2022-Ohio-2478, ___ N.E.3d ___. The court evaluated the issue of whether "legislation that shifts the burden of proof on self-defense to the prosecution * * * appl[ies] to all subsequent trials even when the alleged offenses occurred prior to the effective date of the act." *Id.* at ¶ 1. The Supreme Court held that amended R.C. 2901.05 applies "to all trials conducted on or after its effective date" regardless of

when the underlying criminal conduct occurred. *Id.* at ¶ 2. In its analysis, the court found this was not an ex post facto law since it did not create a new crime or increase the burden or punishment for a past crime. *Id.* at ¶ 13.

{¶24} The court also held that, as amended, the statute did not apply retroactively but prospectively to all trials occurring after its effective date, emphasizing the right to self-defense was stated in the present tense ("[a] person *is* allowed to act in self-defense" and "*at the trial* of a person * * * the prosecution must prove" self-defense). *Id.* at ¶ 14. It concluded that since "[t]he amendment here applies prospectively and, because it does not increase the burden on a criminal defendant, there is no danger of its violating Ohio's Retroactivity Clause or the United States Constitution's Ex Post Facto Clause." *Id.* at ¶ 19.

{¶25} Similar to the argument presented by Wagner, the Supreme Court in *Brooks* did not perform an analysis as to whether the statute was properly applied retroactively, including whether the change is substantive, because it found that, as written, it has a prospective application. *See McEndree* at ¶ 43 ("if we can find, however, a 'clearly expressed legislative intent' that a statute apply retroactively, we proceed to the second step, which entails an analysis of whether the challenged statute is substantive or remedial"). In relation to self-defense, R.C. 2901.05(B)(1) states "at the trial of a person * * * the prosecution must prove" self-defense. In other words, the amended statute should apply since the language related to the date of the trial rather than the date the offense was committed. Likewise, in the present matter, the duty to retreat statute, R.C. 2901.09(C) states, in part: "A trier of fact shall not consider the possibility of retreat as a factor in determining whether or not a person who used force in self-defense, defense of

another, or defense of that person's residence reasonably believed that the force was necessary to prevent injury, loss, or risk to life or safety." It also has a prospective application and sets forth how the jury should be instructed as of the date of the trial. Also similar to *Brooks*, there are no concerns about the application of the amended statute negatively impacting the defendant since it does not deprive him of any rights or subject him to a harsher penalty.

{¶26} This sentiment was echoed by the dissenting opinion in *Hurt*, 2022-Ohio-2039. The opinion addressed the similarities between R.C. 2109.05 and .09, citing *Gloff* in support, which the Supreme Court upheld as "correctly decided" in *Brooks*. *Hurt* at ¶ 99; *Brooks* at ¶ 19. As the dissenting opinion explained, "*Gloff* held that the 2019 amendment to R.C. 2109.05 applies prospectively to trials held after the effective date of the statute per the statutory language that prescribes the actions 'at the trial.' * * * Likewise, the plain language of R.C. 2105.09(C) provides that '*a trier of fact* [at trial] shall not consider the possibility of retreat as a factor.'" *Hurt* at ¶ 99 (Mays, P.J., concurring in part and dissenting in part). We agree with this conclusion and do not find the majority opinion in *Hurt* to be persuasive given its reliance on *Stiltner* which is no longer valid law following the holding in *Brooks*. As to *Degahson*, we observe that, while it recognized the *Brooks* opinion, it did not address its applicability in relation to this matter. It also utilized *Stiltner*'s interpretation that, under R.C. 1.58(B), the court could not apply the self-defense law as amended due to its substantive nature, which is inconsistent with *Brooks*. *Degahson* also fails to consider the fact that the provision requiring a jury instruction appears to have prospective application on its face, as discussed above. As such, we decline to apply its holding.

{¶27} We recognize the State's argument that this case differs slightly from the self-defense issue addressed in *Brooks* and addresses a more substantive matter as it relates to the right to defend oneself without retreating rather than a change in burden for a self-defense instruction. However, given the similarities in the prospective application and the fact that the duty to retreat statute proscribes the actions to be taken at trial, we find the *Brooks* analysis to be applicable in the present matter.

{¶28} Since we conclude the jury instruction should have been given under the amended version of the statute, we remand for a retrial on the counts relating to the shooting of the vehicle: Felonious Assault (Count One), Discharge of a Firearm on or Near Prohibited Premises (Count Two), and Improperly Handling Firearms in a Motor Vehicle (Count Three). The Falsification conviction, relating to statements Wagner made to police about the incident that were unrelated to the duty to retreat, was not impacted by the jury instruction issue and is affirmed.

{¶29} The first assignment of error is with merit.

{¶30} In his second assignment of error, Wagner argues that a violation of Crim.R. 16 occurred when the prosecution failed to disclose a report from a detective showing that he performed a gunshot residue swab of Ford's vehicle, which caused prejudice and warrants a new trial. Given the disposition of the first assignment of error, and since this error does not relate to or impact the Falsification conviction, we decline to address this issue as it is moot.

{¶31} The second assignment of error is moot.

{¶32} For the foregoing reasons, Wagner's conviction for Falsification is affirmed and his convictions for Felonious Assault, Discharge of a Firearm on or Near Prohibited

Premises, and Improperly Handling Firearms in a Motor Vehicle are reversed and this matter is remanded for a new trial on those charges. Costs to be taxed against appellee.

THOMAS R. WRIGHT, P.J.,

CYNTHIA WESTCOTT RICE, J.,

concur.