THE STATE OF OHIO, APPELLEE, *v.* HURT, APPELLANT.

[Cite as *State v. Hurt*, 173 Ohio St.3d 345, 2023-Ohio-3013.]

Appeal dismissed as having been improvidently accepted.

(No. 2022-1037—Submitted June 27, 2023—Decided August 30, 2023.)

APPEAL from the Court of Appeals for Cuyahoga County, No. 110732, 2022-Ohio-2039.

{¶ 1} This cause is dismissed as having been improvidently accepted.

FISCHER, DONNELLY, STEWART, and BRUNNER, JJ., concur.

DEWINE, J., concurs in part and dissents in part, with an opinion joined by DETERS, J.

KENNEDY, C.J., dissents.

DEWINE, J., concurring in part and dissenting in part.

{¶ 2} This court has fallen into the habit of dismissing a lot of cases after oral argument as having been improvidently accepted. While in some situations it is necessary, we ought not do so without good reason. After all, in accepting a case, we have put the parties to the time and expense of briefing and oral argument, and we have occasioned considerable delay in the case's ultimate resolution.

{¶ 3} There is no good reason to not decide the double-jeopardy issue we accepted as the third proposition of law in this case. The matter is squarely in front of us; I would decide it. I dissent from the majority's decision to do otherwise.

The court of appeals reverses Hurt's convictions and orders a new trial

{¶ 4} Darnelle Hurt shot and killed Melvin Dobson. The killing happened after Melvin attempted to intervene in a dispute between Hurt and Melvin's

daughter, Tannika Dobson. Hurt claims that he acted in self-defense. (For a more detailed version of the facts, *see* 2022-Ohio-2039, ¶ 3-11.)

{¶ 5} Hurt was charged in six counts: (1) the purposeful murder of Melvin in violation of R.C. 2903.02(A), (2) felony murder of Melvin in violation of R.C. 2903.02(B), (3) voluntary manslaughter of Melvin in violation of R.C. 2903.03(A), (4) felonious assault of Melvin in violation of R.C. 2903.11(A)(1), (5) felonious assault of Tannika in violation of R.C. 2903.11(A)(2), and (6) domestic violence against Tannika in violation of R.C. 2919.25(A). The jury found Hurt not guilty of purposeful murder, but guilty of the remaining charges.

{¶ 6} The court of appeals reversed Hurt's convictions on Counts 2 through 5. 2022-Ohio-2039 at ¶ 53. It found that the trial court committed plain error in failing to instruct the jury that it could not find Hurt guilty of both felony murder and voluntary manslaughter.[1] *Id.* at ¶ 28-29. It also held that the trial court erred by declining to instruct the jury on (1) the inferior offense of aggravated assault as to the felonious-assault charges in Counts 4 and 5 and (2) involuntary manslaughter as a lesser included offense of felony murder as to Count 2. *Id.* at ¶ 31, 39, 43. The court of appeals, however, rejected Hurt's argument that a new trial would violate the constitutional protections against double jeopardy and the doctrine of collateral estoppel. *Id.* at ¶ 45, 52-53. Thus, it remanded for a new trial on Counts 2 through 5. *Id.* at ¶ 53.

{¶ 7} Hurt appealed to this court, and we accepted three propositions of law. *See* 168 Ohio St.3d 1457, 2022-Ohio-4201, 198 N.E.3d 869. In the first proposition, Hurt asserts that the trial court erred by not instructing the jury that he had no duty to retreat before exercising self-defense. This argument is premised on

1. The state did not appeal, so we have no occasion to consider whether the court of appeals was correct in reversing Hurt's convictions.

the legislature's amendment to R.C. 2901.09 eliminating the duty to retreat. *See* 2020 Am.S.B. No. 175, effective Apr. 6, 2021. Hurt killed Melvin before the effective date of the statute, but his trial occurred after the effective date. He contends that the new self-defense standard should have been applied to his trial because the trial took place after the effective date of the statute.

{¶ 8} In his second proposition of law, Hurt contends that the trial court erred by failing to provide a requested jury instruction on Count 5 that would have allowed the jury to consider his claim of self-defense against Melvin in determining whether he was guilty of feloniously assaulting Tannika.

{¶ 9} Hurt's third proposition of law asserts that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and the doctrine of collateral estoppel preclude his retrial on the felony-murder charge in Count 2 and the felonious-assault charge in Count 4.

There is no reason not to decide Hurt's third proposition of law

{¶ 10} I am not going to quibble with the majority's decision not to reach Hurt's first and second propositions of law. Hurt raised the arguments contained in these propositions in the court of appeals, asserting that his convictions on Counts 2 through 5 were improper because the trial judge failed to provide appropriate jury instructions. Hurt was successful in getting his convictions reversed on those counts, albeit on different grounds.

{¶ 11} Even though he was successful in getting his convictions reversed, Hurt would like us to reach his first two propositions of law to give guidance to the trial judge as to the proper jury instructions for the next trial. The problem is that we generally "refrain from giving opinions on abstract propositions" and "avoid the imposition by judgment of premature declarations or advice upon potential controversies." *Fortner v. Thomas*, 22 Ohio St.2d 13, 14, 257 N.E.2d 371 (1970).

{¶ 12} Jury instructions necessarily depend on the evidence presented. Here, there is no way to know for sure what evidence will be presented at Hurt's

retrial. The state and the defense may well pursue different strategies and put on different evidence. The parties may request different jury instructions. Hurt, who did not testify at his first trial, may elect to do so at the second. We just don't know. And because we don't know what the evidence will be, there is good reason to abstain from providing an advisory opinion about potential jury instructions under a hypothetical set of facts.

{¶ 13} But it's a different story when we come to Hurt's third proposition of law. That proposition asks us to hold that the court of appeals erred in ordering a new trial. If we rule in Hurt's favor, it will definitively resolve the matter. The state will not be able to put Hurt on trial again for these offenses.

{¶ 14} None of our traditional reasons for dismissing a case as having been improvidently accepted apply to Hurt's third proposition of law. This is not a situation "where a case presented on the merits is not the same case as presented" in the memorandum in support of jurisdiction, *Williamson v. Rubich*, 171 Ohio St. 253, 259, 168 N.E.2d 876 (1960). It is not a case where a deeper review has revealed that the issue presented in the proposition of law has been waived. *See State v. Mayfield*, 102 Ohio St.3d 1240, 2004-Ohio-3440, 811 N.E.2d 81, ¶ 5 (Lundberg Stratton, J., concurring). It is not a case where a review of the record reveals other grounds for the decision below not encompassed in the proposition of law we accepted. *See State v. Harrison*, 166 Ohio St.3d 479, 2021-Ohio-4465, 187 N.E.3d 510, ¶ 56-63 (DeWine, J., dissenting). Nor is it a case in which the facts prevent this court from reaching the issue. *See Ahmad v. AK Steel Corp.*, 119 Ohio St.3d 1210, 2008-Ohio-4082, 893 N.E.2d 1287, ¶ 2-9 (O'Connor, J., concurring). And as explained above, answering the third proposition of law would not require us to write an advisory opinion. *See In re N.M.P.*, 160 Ohio St.3d 472, 2020-Ohio-1458, 159 N.E.3d 241, ¶ 30-35 (DeWine, J., dissenting).

{¶ 15} Further, there is particularly good reason to resolve Hurt's claim now. " '[T]he protection against double jeopardy is not just protection against

being punished twice for the same offense, it is also the protection against being tried twice for the same offense.' " *State v. Anderson*, 138 Ohio St.3d 264, 2014-Ohio-542, 6 N.E.3d 23, ¶ 58, quoting *Wenzel v. Enright*, 68 Ohio St.3d 63, 68, 623 N.E.2d 69 (1993) (Wright, J., dissenting), *superseded by statute on other grounds as stated in Anderson*. Thus, if Hurt is correct about his double-jeopardy argument, this court's refusal to decide his case will cause an irremediable violation of his constitutional rights.

{¶ 16} One might argue that we shouldn't have accepted the third proposition of law in the first place. But we did. The matter has been fully briefed and argued—I see no reason not to decide it. Because the majority does not, I respectfully dissent from that portion of its judgment.

DETERS, J., concurs in the foregoing opinion.

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Daniel T. Van and Owen W. Knapp, Assistant Prosecuting Attorneys, for appellee.

The Law Office of Schlachet & Levy and Eric M. Levy, for appellant, Darnelle Hurt.

Steven L. Taylor, urging affirmance for amicus curiae Ohio Prosecuting Attorneys Association.

Cullen Sweeney, Cuyahoga County Public Defender, and John T. Martin and Jonathan Sidney, Assistant Public Defenders, urging reversal for amicus curiae Cuyahoga County Public Defender.

Russell Bensing, urging reversal for amicus curiae Ohio Association of Criminal Defense Lawyers.
