

[Cite as *State v. Amey*, 2018-Ohio-2061.]

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT  
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION  
No. 105847

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**STATE OF OHIO**

PLAINTIFF-APPELLEE

vs.

**RICHARD R. AMEY**

DEFENDANT-APPELLANT

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**JUDGMENT:**  
VACATED AND REMANDED

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Criminal Appeal from the  
Cuyahoga County Court of Common Pleas  
Case No. CR-16-604041-A

**BEFORE:** Laster Mays, J., Kilbane, P.J., and S. Gallagher, J.

**RELEASED AND JOURNALIZED:** May 24, 2018

## **ATTORNEY FOR APPELLANT**

John T. Castele  
Rockefeller Building, Suite 1310  
614 W. Superior Avenue  
Cleveland, Ohio 44113

## **ATTORNEYS FOR APPELLEE**

Michael C. O'Malley  
Cuyahoga County Prosecutor

By: Maxwell Martin  
Assistant County Prosecutor  
Justice Center, 9th Floor  
1200 Ontario Street  
Cleveland, Ohio 44113

ANITA LASTER MAYS, J.:

{¶1} Defendant-appellant Richard R. Amey (“Amey”) appeals his conviction for voluntary manslaughter and asks this court to reverse his conviction and remand to the trial court for a new trial. We vacate and remand.

{¶2} Amey was indicted on two counts of murder, a first-degree felony, in violation of R.C. 2903.02(A) and (B); two counts of felonious assault, first-degree felonies, in violation of R.C. 2903.11(A)(1) and (2); voluntary manslaughter, a first-degree felony, in violation of R.C. 2903.03(A); tampering with evidence, a third-degree felony, in violation of R.C. 2921.12(A)(1); and having weapons while under disability, a third-degree felony, in violation of R.C. 2913.13(A)(2) and 2913.13(A)(3). All of the counts, with the exception of having weapons while under disability, carried one- and three-year firearm specifications.

{¶3} At the end of a bench trial, the trial court found Amey guilty of voluntary

manslaughter and both counts of having weapons while under disability, and not guilty of the other charges. Amey was sentenced to seven years imprisonment for voluntary manslaughter, three years imprisonment for the firearm specification, and three years for having weapons while under disability, which was to be served concurrently to the seven years for voluntary manslaughter. The trial court ordered a total of ten years imprisonment.

## **I. Facts**

{¶4} On February 25, 2016, at the Garden Valley apartment complex, Amey and the victim, La'Dale Davis ("Davis") got into a physical altercation. Davis attacked Amey while Amey was walking with Davis's ex-girlfriend, Janice Gresham ("Gresham"). One of the apartment security officers testified that he saw Davis pounding on Amey, and despite him and the other officer telling Davis to stop, Davis would not stop. The officers tried using pepper spray on Davis, but that did not stop Davis from beating Amey. The officers eventually had to pull Davis off of Amey. After the altercation, Amey left the scene.

{¶5} Around 12:30 a.m., Gresham called Amey over to Shatwoyne Range's ("Range") apartment. After being at the apartment for a while, Amey decided to walk Gresham to her apartment. While inside the building complex, they were confronted by Davis again. Davis was waiting in Graham's stairwell. Davis and Gresham began arguing, and Davis instructed Gresham to enter her apartment and retrieve items that he gave her while they were dating. Gresham's mother, whom she shared her apartment with, barricaded the door after hearing the altercation. Gresham convinced her mother to remove the barricade and allow her to enter.

{¶6} At this time, Davis forced his way into the apartment and began throwing things around. Amey remained outside of the apartment. Gresham left the apartment and started down the steps when Davis grabbed and punched her in the side of the head causing her to fall on

the stairs. Gresham screamed and ran back into the apartment and closed the door. Shortly thereafter, Gresham heard two gunshots and went back outside of the apartment. She saw Davis lying on the steps, and Amey was no longer there.

{¶7} After the police interviewed Gresham and her mother, they arrested Amey and brought him in for an interview. During the interview, Amey told police that Davis tried to attack him again on the stairs. Amey also stated that Davis told him that he was going to kill him. At that point, Amey pulled his gun and fired twice. One bullet hit Davis and killed him.

{¶8} Amey was charged with seven counts including murder, felonious assault, voluntary manslaughter, tampering with evidence, and having weapons while under disability. The trial court found him guilty of voluntary manslaughter and having weapons while under disability. While rendering the verdict, the trial court reasoned that Amey was not guilty of murder because he did not purposefully kill Davis. The trial court also found Amey not guilty of felonious assault because it reasoned that Amey did not knowingly cause physical harm to Davis. Amey was sentenced to ten years imprisonment.

{¶9} Amey filed this appeal, assigning two errors for our review:

- I. The state failed to prove sufficient evidence as to each and every necessary element to prove the offense of voluntary manslaughter; and
- II. The defendant's conviction for voluntary manslaughter was against the manifest weight of the evidence.

## **II. Sufficient and Manifest Weight of the Evidence**

{¶10} In Amey's assignment of errors, he argues that there was not sufficient evidence to prove he committed voluntary manslaughter. He also contends that his conviction for voluntary manslaughter was against the manifest weight the evidence.

When an appellate court reviews a record upon a sufficiency challenge, “the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.” *State v. Leonard*, 104 Ohio St.3d 54, 2004 Ohio 6235, 818 N.E.2d 229, ¶ 77, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

In reviewing a claim challenging the manifest weight of the evidence, [t]he question to be answered \* \* \* is whether there is substantial evidence upon which a jury could reasonably conclude that all the elements have been proved beyond a reasonable doubt. In conducting this review, we must examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. (Internal quotes and citations omitted.) *Leonard* at ¶ 81.

*State v. Walker*, 8th Dist. Cuyahoga No. 97648, 2012-Ohio-4274, ¶ 33-34.

{¶11} Amey’s specifically argues that there was no proof he acted knowingly in the killing of Davis. R.C. 2903.03(A), voluntary manslaughter, states,

[n]o 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 the death of another \* \* \*.

{¶12} The trial court clearly explained, on the record, why it found Amey not guilty of murder stating,

Count 1, murder, there were no eyewitnesses to the shooting. There was no testimony as to whether that shooting was, in fact, purposeful. The fact that the defendant shooting at close range fired only two shots, one of which struck the victim, tends to support the conclusion that the evidence fails to prove that he had the purpose to kill La’Dale Davis. So I will find the defendant not guilty on Count 1.

(Tr. 410.)

{¶13} The trial court reasoned that Amey did not act purposefully or with the purpose to kill the victim. The trial court further explained why it acquitted Amey of felonious assault, stating,

Count 4, felonious assault. Inasmuch as there was no testimony as to whether the defendant's acts were committed knowingly, and that he fired only twice, one of which did not strike the victim, the [c]ourt finds the evidence fails to show beyond a reasonable doubt that he is guilty of felonious assault. Accordingly, the defendant will be found not guilty of felonious assault in Count 4.

(Tr. 411.)

{¶14} An individual is guilty of felonious assault when they “knowingly cause serious physical harm to another \* \* \* or cause or attempt to cause physical harm to another \* \* \* by means of a deadly weapon.” R.C. 2903.11(A)(1) and 2903.11(A)(2). Therefore, by finding Amey guilty of voluntary manslaughter, but not guilty of felonious assault, the trial court reasoned that Amey knowingly caused death to the victim, but did not knowingly cause serious physical harm. Moreover, the trial court stated that there was no testimony as to whether the defendant's acts were committed knowingly. This reasoning is not logical especially since knowingly is an element of voluntary manslaughter. In order to *knowingly* cause the death of someone, an individual would also have to *knowingly* cause physical harm. (Emphasis added.)

{¶15} When the trial court found Amey guilty of voluntary manslaughter, it stated, “There is no doubt that the defendant caused the death of La’Dale Davis. The fact that he used a firearm, which by definition is a deadly weapon, and that he did so at close range is sufficient to establish that he did so knowingly.” (Tr. 411-412.) The Ohio Supreme Court defines knowingly in *State v. Barry*, 145 Ohio St.3d 354, 2015-Ohio-5449, 49 N.E.3d 1248, ¶ 23, as,

[a] person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

{¶16} According to the Ohio Supreme Court,

[t]he test for voluntary manslaughter includes both an objective and a subjective component. First — the objective factor — a fact-finder must determine whether a serious provocation occurred and whether that provocation was “sufficient to arouse the passions of an ordinary person beyond the power of his or her control.” *State v. Shane*, 63 Ohio St.3d 630, 635, 590 N.E.2d 272 (1992). Second — the subjective factor — the fact-finder must evaluate whether “this actor, in this particular case, actually was under the influence of sudden passion or in a sudden fit of rage.” *Id.* at 634.

*State v. Thompson*, 141 Ohio St.3d 254, 2014-Ohio-4751, 23 N.E.3d 1096, ¶ 153.

The fact that the victim was shot at close range does not satisfy the element of knowingly as the trial court had reasoned.

{¶17} This court is, however, aware of our decisions regarding inconsistent verdicts.

“An appellate court is not permitted to speculate about the reason for the inconsistency when it determines the validity of a verdict.” *State v. Wingfield*, 2014-Ohio-2053, 11 N.E.3d 732, ¶ 31 (8th Dist.). The court further reasoned that,

“[c]onsistency between verdicts on several counts of a criminal indictment is unnecessary[.]” *State v. Eason*, 8th Dist. Cuyahoga No. 103575, 2016-Ohio-5516, ¶ 68, 69 N.E.3d 1202. “[A]n inconsistency in a verdict does not arise out of inconsistent responses to different counts, but only arises out of inconsistent responses to the same count.” *State v. Lovejoy*, 79 Ohio St.3d 440, 683 N.E.2d 1112 (1997), citing *State v. Hicks*, 43 Ohio St.3d 72, 538 N.E.2d 1030 (1989). “This is so because the several counts of an indictment are independent, and a verdict responding to a designated count will be construed in the light of the count designated, and no other.” *State v. Brown*, 8th Dist. Cuyahoga No. 89754, 2008-Ohio-1722, ¶ 29. “Inconsistent verdicts often reflect a factfinder’s attempt to avoid redundancy or to grant leniency” and “may work against the government as well as the defendant[.]” *Id.*, citing *United States v. Powell*, 469 U.S. 57, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984); *Lovejoy* at 444. “A defendant who benefits from a compassionate acquittal on one charge cannot fairly complain that it is inconsistent with his proper conviction on another.” *Wingfield* at ¶ 31, citing *Powell*. Accordingly, a defendant’s conviction will stand “irrespective of its rational incompatibility with the acquittal.” *Eason* at ¶ 68, citing *State v. Woodson*, 24 Ohio App.3d 143, 493 N.E.2d 1018 (10th Dist.1985).

*State v. Frierson*, 8th Dist. Cuyahoga No. 105618, 2018-Ohio-391, ¶ 45.

{¶18} However, this verdict’s inconsistency was not a result of a compassionate acquittal or an attempt to avoid redundancy. We are, also, not attempting to speculate about the reason for the inconsistency. The trial court clearly stated its reason when it said that the appellant did not knowingly cause serious physical harm to the victim. As well as stating “[i]nasmuch as there was no testimony as to whether the defendant’s acts were committed knowingly.” It simply reasoned that the evidence was insufficient to convict the appellant of felonious assault specifically because of the absence of the mens rea of “knowingly.” (Tr. 411.) Therefore, we find that Amey could not have knowingly cause the death of the victim.

{¶19} Amey also argues that the trial court’s decision to convict him of voluntary manslaughter was against the manifest weight of the evidence, and the trial court’s rejection of his claim for self-defense was in error.

Self-defense is an affirmative defense, and thus, the accused has the burden to prove it by a preponderance of the evidence. *State v. Smith*, 10th Dist. Franklin No. 04AP-189, 2004-Ohio-6608, ¶ 16. To establish self-defense through the use of deadly force, defendants must prove (1) they were not at fault in creating the situation giving rise to the affray, (2) they had a bona fide belief that they were in imminent danger of death or great bodily harm and their only means of escape from such danger was the use of such force, and (3) they 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.

*State v. Walker*, 8th Dist. Cuyahoga No. 97648, 2012-Ohio-4274, ¶ 56.

{¶20} Although the trial court stated that Amey acted in a fit of rage, the trial court’s statements supports self-defense. While rendering the verdict, the trial court stated,

[m]oreover, the actions of La’Dale Davis that evening, starting with the confrontation that led to the earlier fight, but more importantly, the renewed and unexpected confrontation in the hallway and Davis’[s] aggressive behavior towards both the defendant and Janice Gresham is sufficient evidence to establish beyond a reasonable doubt that the defendant acted as the result of — as a direct

result of sudden passion brought on by serious provocation by the victim that was reasonably sufficient to cause him to shoot.

(Tr. 412.)

{¶21} Reviewing the record, witnesses testified that Davis was known to be violent. Davis's own sister testified that Davis was talking crazy and that she felt compelled to leave her grandmother's home to search for him. Range testified that she could not calm Davis down and that his anger elevated while speaking with Janice on the phone. Janice testified that when she returned home Davis was waiting for her at her apartment. Janice went on to state that she and Davis argued and that Janice's mother barricaded the door to keep Davis from entering. Once Janice's mother allowed Janice and Davis to enter, Davis began arguing with the mother. All the while Amey remained outside of the apartment, calm and telling Janice to give Davis his things. When Davis and Janice exited the apartment, Davis punched Janice in the side of the head, causing her to fall on the stairs. Amey did not get involved. Janice ran back in to her apartment, screaming, leaving Amey and Davis outside. Janice testified that shortly thereafter, she heard two gunshots. Janice and her mother exited the apartment and saw Davis lying on the ground, and Amey was gone. Janice, nor her mother heard any screams or arguing while they were inside of the apartment.

{¶22} In order to find Amey guilty of voluntary murder, the trial court must be able to reasonably find that Davis had seriously provoked Amey and that the serious provocation was reasonably sufficient to have incited him to use deadly force. *See State v. Franklin*, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 75.

{¶23} First, the trial court expressed that Amey was not at fault in creating the situation giving rise to the affray by stating, "the actions of La'Dale Davis that evening, starting with the

confrontation that led to the earlier fight, but more importantly, the renewed and unexpected confrontation in the hallway and Davis's aggressive behavior towards both the defendant and Janice Gresham" is what caused the situation. (Tr. 412.)

{¶24} Second, the trial court believed that Amey had 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 the use of such force. The trial court stated that Amey's actions were "as a direct result of sudden passion brought on by serious provocation by the victim that was reasonably sufficient to cause him to shoot." (Tr. 412.) Given the fact that Davis brutally beat Amey just hours before; it took two officers to get Davis off of Amey; and that the use of pepper spray on Davis did not deter Davis from beating Amey, we find that these facts support self-defense.

{¶25} Finally, the police officer who interviewed Amey, testified that Amey stated that Davis came after him and grabbed him. As they struggled, Amey felt as if the only way to get away from Davis was to shoot him. The trial court acknowledged that because of the brutal beating earlier, Amey would feel as if his life were in jeopardy.

{¶26} Accordingly, the trial court's rejection of the defense's claim of self-defense was erred when the evidence supported such a claim. While Amey did not testify at his trial, that does not bar him from asserting a self-defense claim. *See, e.g., State v. Hawthorne*, 8th Dist. Cuyahoga No. 105121, 2018-Ohio-1180, ¶ 15, citing *State v. Eichelbrenner*, 1st Dist. Hamilton No. C-110431, 2013-Ohio-1194, ¶ 24. ("A defendant who does not testify is not precluded from requesting an instruction on self-defense if the evidence otherwise supports the defense").

{¶27} We find that the evidence supports Amey's claim of self-defense, and that trial court indirectly acknowledged his claim. We reject the state's argument that Amey was provoked by sudden passion or sudden fit of rage. We find that there is not sufficient evidence

to convict Amey of voluntary manslaughter and determine that the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed.

{¶28} Therefore, we reverse his conviction for voluntary manslaughter and remand to the trial court.

{¶29} Judgment is vacated and remanded.

It is ordered that the appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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ANITA LASTER MAYS, JUDGE

MARY EILEEN KILBANE, P.J., CONCURS;  
SEAN C. GALLAGHER, J., DISSENTS WITH SEPARATE OPINION

SEAN C. GALLAGHER, J., DISSENTING:

{¶30} The majority concludes the trial court erred by rendering inconsistent verdicts — claiming that Amey could not have been guilty of voluntary manslaughter, which includes the element of knowingly causing the death of another, because the trial court concluded that Amey did not act knowingly for the purposes of the felonious assault count — but the majority also concludes as a matter of law that Amey acted in self-defense, which necessarily presumes that

the use of lethal force was applied knowingly and purposefully. Because of this inconsistency, I must respectfully dissent.

{¶31} Before the shooting, Amey was attacked by the victim, La'Dale Davis. There is no dispute about the facts of the first altercation. Amey and Gresham separately left the scene under the belief that Davis had been escorted off the premises by security officers. Sometime later that same evening, Amey met up with Gresham, but Amey had taken the opportunity to arm himself with an illegally possessed and carried firearm. Amey claimed he intended to escort Gresham, who was afraid of Davis, to her apartment to get some personal belongings so she could stay at a hotel.

{¶32} In the second altercation, Davis assaulted Gresham outside of her apartment as she attempted to descend the steps to leave. Amey remained downstairs from the landing, according to Gresham, indicating that Amey was looking up at the time of the shooting. According to Amey's statement to police officers, Davis was downstairs and coming up toward Amey when the shooting occurred. Davis was shot in the upper chest at a downward angle from a distance between one and four feet.

{¶33} It is undisputed that Amey did not attempt to intervene in Davis's second attack on Gresham, who managed to get inside the apartment and shut the door. Immediately after the door was closed, two shots were fired. Gresham was asked to clarify that point, and she repeated that the shots were heard immediately after the door was closed. In the fleeting moment between Gresham's successful escape and the shots being fired, Amey told police officers that Davis attacked him but he managed to break free long enough draw the illegally possessed firearm from its concealed location and shoot at Davis twice. When Gresham exited the apartment two or three minutes later, she observed Davis lying at the bottom of the stairs.

Amey had fled the scene and discarded the firearm in the sewer. Amey told police officers that Davis said he would kill Amey during the fight. There is no evidence establishing whether that statement was hyperbole or a prediction, but it is undisputed that Davis was unarmed and that Amey's injuries were not severe enough to warrant medical attention. Police officers documented bite marks Amey claims to have been caused by Davis.

{¶34} The majority concludes that Amey's voluntary manslaughter conviction must be reversed because it is inconsistent with the acquittal from the felonious assault charge predicated on the same underlying act. Both offenses required the offender to act knowingly. As the Ohio Supreme Court has unambiguously held, however, "a verdict that convicts a defendant of one crime and acquits him of another, when the first crime requires proof of the second, *may not be disturbed merely because the two findings are irreconcilable*. 'Consistency in the verdict is not necessary.'" (Emphasis added.) *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, ¶ 81, quoting *United States v. Powell*, 469 U.S. 57, 62, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984), and *Dunn v. United States*, 284 U.S. 390, 393, 52 S.Ct. 189, 76 L.Ed. 356 (1932); *State v. Frierson*, 8th Dist. Cuyahoga No. 105618, 2018-Ohio-391, ¶ 45; *State v. Morris*, 8th Dist. Cuyahoga No. 94923, 2011-Ohio-824, ¶ 12.

{¶35} Each count in an indictment is considered as if it was a separate indictment. *Gardner*. The sufficiency of the verdict will only be construed in the light of the designated count. *Frierson* at ¶ 45. Thus, when reviewing the sufficiency of the evidence in support of the voluntary manslaughter count, we can only review the verdict as it relates to that count — the stated reasons for the acquittal on the felonious assault count is irrelevant.

{¶36} The majority recognizes this principle, but then chooses to ignore the law and instead create an exception based on the misplaced belief that the Ohio Supreme Court's

conclusion does not apply because the two verdicts in this case were “not a result of a companionate acquittal or an attempt to avoid redundancy.” The majority provides no support for that speculative conclusion, and in fact, it has been “consistently held” that an appellate court is not even permitted consider the reasons for the inconsistent verdicts. *State v. Humphries*, 8th Dist. Cuyahoga No. 99924, 2014-Ohio-5423, ¶ 17, citing *State v. Trewartha*, 165 Ohio App.3d 91, 2005-Ohio-5697, 844 N.E.2d 1218 (10th Dist.). The law is unambiguous — inconsistency between two verdicts is not a basis to reverse. *Gardner* at ¶ 81. This court has adopted and applied this principle. *State v. Webster*, 8th Dist. Cuyahoga No. 102833, 2016-Ohio-2624, ¶ 93; *State v. Shepherd*, 8th Dist. Cuyahoga No. 102951, 2016-Ohio-931, ¶ 30. I would follow the well-settled law and overrule Amey’s argument.

{¶37} The majority also concludes that Amey proved he acted in self-defense as a matter of law but the state presented insufficient evidence to convict Amey of voluntary manslaughter. These conclusions are internally inconsistent and combine two independent standards of review that will needlessly confuse the trial court upon the ordered remand. It is well settled that reversing a conviction as being against the weight of the evidence leads to a new trial, while a conviction unsupported by sufficient evidence results in a complete acquittal. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541; *State v. Kozlosky*, 195 Ohio App.3d 343, 2011-Ohio-4814, 959 N.E.2d 1097, ¶ 31 (8th Dist.).

{¶38} Nevertheless, Amey claims to have acted in self-defense. He therefore concedes that he knowingly killed Davis; it is Amey’s belief that killing Davis was legally justified. Thus, there is sufficient evidence supporting the elements of the voluntary manslaughter charge for which the state bore the burden at trial. *State v. Chandler*, 8th Dist. Cuyahoga No. 105246, 2017-Ohio-8573, ¶ 19, citing *State v. Bandy*, 1st Dist. Hamilton No. C-160402, 2017-Ohio-5593,

¶ 46, and *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, 840 N.E.2d 1032, ¶ 38. The state bears no burden in proving that Amey was provoked by sudden passion or in a fit of rage. That element is in mitigation of a greater offense for which Amey bears the burden of proof. *State v. Henry*, 8th Dist. Cuyahoga No. 102634, 2016-Ohio-692, ¶ 29, citing *State v. Rhodes*, 63 Ohio St.3d 613, 617, 590 N.E.2d 261 (1992), fn. 2. All that is left is to determine whether the trial court's rejection of Amey's claim of self-defense is against the weight of the evidence. *Kozlosky*.

{¶39} When reviewing a claim challenging the manifest weight of the evidence, the court, reviewing the entire record, must weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. *Thompkins* at 387.

{¶40} Amey claims the trier of fact lost its way in finding him guilty of voluntary manslaughter because Amey acted in self-defense. The trial court did not find Amey credible. Essentially, Amey is asking this court to believe his version of events because he was the only living person present during the shooting. Every element of self-defense must be proven; the absence of one negates the affirmative defense altogether. *State v. Jackson*, 22 Ohio St.3d 281, 284, 490 N.E.2d 893 (1986).

{¶41} Amey was beaten by Davis earlier in the evening. No one disputes this fact. However, Amey had the opportunity to reflect, and upon contemplation, Amey retrieved a firearm he was not legally entitled to possess and concealed that firearm in anticipation that it may be needed in confronting Davis. Amey returned to the scene of the confrontation, thereby escalating an already tense situation that had been limited to fisticuffs. Regardless of whether

Davis reignited a fight on the stairs, Amey instigated and escalated the second confrontation by returning to the area with a firearm.

{¶42} A defendant, having willingly advanced toward a volatile situation in which he already thought the other would harm him, cannot rely on the affirmative defense of self-defense when the others actually do that which the defendant feared. *State v. Sekic*, 8th Dist. Cuyahoga No. 95633, 2011-Ohio-3978, ¶ 15. In order to prevail on the issue of self-defense, the defendant bears the burden of proving that he was not at fault in starting the affray, that he had a bona fide belief that he faced imminent danger of death or great bodily harm, that his only means of escape was the use of such force, and that he violated no duty to retreat or avoid the danger. *Jackson* at 284.

{¶43} Amey feared Davis would attack him, and when that second attack manifested, Amey claimed that Davis said he would kill him. Even if that is believed to be more than mere hyperbole, Amey failed to demonstrate any other element of self-defense. Amey, after having time to reflect, armed himself in preparation for Davis's continued belligerence. A defendant may not claim self-defense if he has a reasonable means to avoid the confrontation. *State v. Melchior*, 56 Ohio St.2d 15, 20, 381 N.E.2d 195 (1978). Further, a defendant cannot base the claim of self-defense on an attack that occurred hours earlier. *Id.*; *Chandler*, 8th Dist. Cuyahoga No. 105246, 2017-Ohio-8573, at ¶ 17.

{¶44} And finally, there is no evidence that Amey did not violate a duty to retreat. The majority claims that Amey "felt as if the only way to get away from Davis was to shoot him." Amey did not testify at trial, but Gresham did. She testified that Amey was not near Davis when she fled into the safety of her apartment. The majority's conclusion that Amey proved no

violation of his duty to retreat stems from the defense counsel's question to one of the police officers who had conducted the investigative interview. Counsel asked:

Ultimately what [Amey] told you was — and whether it's an interview technique or not you agreed with him — if you've got no way out of there and this man beat you up earlier, you might believe in your mind [(referring to Amey)] you have no other choice but to fire a shot, correct, that's what you told him?

The officer affirmatively responded. This does not satisfy the no violation of the duty to retreat prong of self-defense. Although the video of the earlier altercation may depict brutality, Amey's injuries were not severe enough to warrant medical intervention, suggesting that he was not in imminent danger of death or great bodily harm.

{¶45} In light of the fact that Amey knowingly armed himself to prepare for any possible confrontation with Davis, this is not the exceptional case that warrants appellate intervention. There simply is no evidence demonstrating that Amey acted in self-defense as defined under the law.

{¶46} I would affirm the convictions.