[Cite as *State v. Claren*, 2023-Ohio-2219.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF WAYNE	)	

STATE OF OHIO Appellee v. PAUL CLAREN Appellant	C.A. No. 21AP0041 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF WAYNE, OHIO CASE No. 2016 CRC-I 000289

DECISION AND JOURNAL ENTRY

Dated: June 30, 2023

SUTTON, Presiding Judge.

{¶1} Defendant-Appellant, Paul Claren, appeals from the judgment of the Wayne County Court of Common Pleas. For the following reasons, this Court affirms.

I.

Relevant Background

{¶2} As way of background information, this is Mr. Claren's third appeal to this Court regarding Case No. 2016 CRC-1 000289. In *State v. Claren*, 9th Dist. Wayne No. 17AP0030, 2019-Ohio-260, ¶ 2-6 ("*Claren I*"), this Court set forth relevant factual and procedural history as follows:

* * *

> On September 19, 2016, the Wayne County Grand Jury issued an indictment charging [Mr.] Claren for offenses stemming from an August 18, 2016 incident resulting in the death of B.G. Count one charged [Mr.] Claren with aggravated murder in violation of R.C. 2903.01(A), a special felony. Count two charged [Mr.] Claren with murder in violation of R.C. 2903.02(A), a special felony. Counts one and two each included two specifications, respectively: a firearm specification

> pursuant to R.C. 2941.145(A), and a repeat violent offender specification pursuant to R.C. 2941.149(A). Count three charged [Mr.] Claren with having weapons while under disability, a felony of the third degree, in violation of R.C. 2923.13(A)(2).
>
> [Mr.] Claren entered a plea of not guilty to all charges. The matter proceeded to a trial before a jury.
>
> * * *
>
> The jury returned a verdict finding [Mr.] Claren guilty on count one as to the charge of aggravated murder and the firearm specification. The jury also returned a verdict finding [Mr.] Claren guilty on count three, as to the charge of having a weapon while under disability. The jury did not return a verdict on count two of the indictment.
>
> * * *
>
> After the jury returned the verdicts and following the sentencing hearing, the trial court issued a sentencing entry stating that [Mr.] Claren was guilty of aggravated murder with a firearm specification and having a weapon while under disability. The sentencing entry also found [Mr.] Claren to be a repeat violent offender, and sentenced [Mr.] Claren accordingly.
>
> * * *
>
> Regarding count two [for murder], in the August 22, 2017 journal entry, the trial court stated "[c]ount [two], [m]urder, is a lesser included offense of [c]ount [one] and given the verdict on [c]ount [one], the jury did not render a verdict on [c]ount [two]." The trial court set the matter over for a sentencing hearing. On August 24, 2017, the trial court issued a [sentencing] entry stating the fact of [Mr.] Claren's conviction as to counts one and three, and indicating that the jury did not render a verdict on count two. Further, the August 24, 2017 sentencing entry stated[:] "the court finds that [Mr.][Claren] is a repeat, violent offender." Ostensibly, the trial court based this finding on the repeat violent offender specification of count one. The trial court then sentenced [Mr.] Claren, on count one, to three years in prison on the firearm specification to run consecutive to a term of life imprisonment without parole on the charge of aggravated murder and, on count three, to three years in prison to run concurrent with the sentence imposed under count one. The trial court did not indicate any verdict or finding as to count two of the indictment, and did not otherwise address its disposition or purport to enter a sentence on that count.

In determining there was no final, appealable order, the *Claren I* Court dismissed Mr. Claren's appeal for lack of jurisdiction. *Claren I* at ¶ 15. After dismissal of Mr. Claren's first appeal, the

State filed a motion to dismiss count two, on the charge of murder, because it "is a hanging charge that is acting to prevent [Mr. Claren] 's conviction and sentence from becoming a final, appealable order." The trial court then issued an order dismissing the murder charge in the indictment.

{¶3} Mr. Claren filed a second appeal to this Court, arguing the trial court erred in failing to instruct the jury on self-defense, including the castle doctrine, as to aggravated murder. Mr. Claren also argued his trial counsel was ineffective for failing to object on this same issue. *State v. Claren*, 9th Dist. Wayne No. 19AP0015, 2020-Ohio-615, ¶ 11, 29 ("*Claren II*"). Based upon the trial court's refusal to permit the jury to consider self-defense, and the castle doctrine, as to the aggravated murder charge, the *Claren II* Court reversed Mr. Claren's conviction for aggravated murder and remanded the matter for a new trial. *Id*. at ¶ 26-28.

{¶4} A second jury trial commenced on August 9, 2021, and ended on August 16, 2021. Mr. Claren was tried on count one, aggravated murder, the lesser included offense of murder, and all relevant specifications. The jury returned a guilty verdict as to the lesser included offense of murder and the firearm specification. On August 19, 2021, the trial court held a hearing and determined Mr. Claren was a repeat violent offender. The trial court sentenced Mr. Claren to twenty-eight years to life imprisonment.

{¶5} Mr. Claren now appeals raising two assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

THE TRIAL COURT'S DECISION TO INSTRUCT THE JURY ON THE OFFENSE OF MURDER AS A LESSER INCLUDED OFFENSE TO AGGRAVATED MURDER OVER THE OBJECTION OF [MR. CLAREN], AFTER THE CLOSE OF EVIDENCE[,] WAS ERROR AS A MATTER OF LAW AND VIOLATED THE PROTECTIONS GUARANTEED BY ART.1, SEC. 10 OF THE OHIO CONSTITUTION AND THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

{¶6} In his first assignment of error, Mr. Claren challenges the trial court's instruction to the jury, in his second trial, on the lesser included offense of murder because he was "previously placed in jeopardy on the [m]urder charge[.]"

{¶7} "The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution protect criminal defendants against multiple prosecutions for the same offense." *State v. Hartman*, 9th Dist. Medina No. 12CA0057-M, 2013-Ohio-4407, ¶ 9, quoting *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, ¶ 14. Each clause "prohibits (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *Hartman* at ¶ 9, quoting *State v. Gustafson*, 76 Ohio St.3d 425, 432 (1996). "While the Double Jeopardy Clause protects a defendant from successive prosecutions for a single offense, society also has an interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." (Internal quotations and citation omitted.) *Hartman* at ¶ 9, quoting *Brewer* at ¶ 16. Thus, "the United States Supreme Court has long recognized that double jeopardy will not bar retrial of a defendant who successfully overturns his conviction on the basis of trial error, through either direct appeal or collateral attack." *Id.* As the Supreme Court of the United States indicated in *United States v. Tateo*, 377 U.S. 463, 466 (1964):

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest.

{¶8} During Mr. Claren's first trial, the trial court instructed the jury, in relevant part, as follows:

* * *

> If you find that the State failed to prove all of the elements, essential elements of aggravated murder, your verdict must be not guilty. If you find [Mr. Claren] not guilty of aggravated murder or * * * if all of you are unable to agree on a verdict, on the aggravated murder charge, you will then continue your deliberations to decide whether the State has proved beyond a reasonable doubt all of the essential elements of the lesser included offense of murder. The offense of murder is distinguished from aggravated murder by the absence or failure to prove the element of prior calculation and design. All the other elements are the same as the aggravated murder.

* * *

The jury subsequently returned a guilty verdict on aggravated murder and did not return a verdict on murder. As previously indicated, after Mr. Claren's appeal in *Claren I* was dismissed for lack of jurisdiction, the trial court, at the State's request, dismissed the murder charge to create a final, appealable order. Moreover, the trial court's order did not indicate the murder charge was dismissed with prejudice. *See State v. Troisi*, 169 Ohio St.3d 514, 2022-Ohio-3582, ¶ 40 ("It has been held that 'since neither Crim.R. 48(A) nor Crim.R. 48(B) expressly provides for a dismissal with prejudice, a dismissal * * * with prejudice may be entered only where there is a deprivation of a defendant's constitutional or statutory rights, the violation of which would, in and of itself, bar further prosecution.'" *State v. Mills*, 11th Dist. Trumbull Nos. 2020-T-0046 and 2020-T-0047, 2021-Ohio-2722, ¶ 6, quoting *State v. Jones*, 2d Dist. Montgomery No. 22521, 2009-Ohio-1957, ¶ 13; *see also State v. Sutton*, 64 Ohio App.2d 105, 108 (9th Dist.1979).

{¶9} Mr. Claren then filed his appeal in *Claren II,* and this Court, due to an incorrect jury instruction, reversed Mr. Claren's aggravated murder conviction and remanded the matter for a new trial.

{¶10} It is basic law that an "action of the Court of Appeals in reversing and remanding the cause to the Court of Common Pleas for further proceedings "has the effect of reinstating the case to the Court of Common Pleas *in statu quo ante*. The cause is reinstated on the docket of the court below in precisely the same condition that obtained before the action that resulted in the appeal and reversal." *Armstrong v. Marathon Oil Co.*, 32 Ohio St.3d 397, 418 (1987), quoting 5 Ohio Jurisprudence 3d, 426, Appellate Review, Section 717 (1978). *See also State v. Allen*, 10th Dist. Franklin Nos. 13AP-460, 13AP-462, 2014-Ohio-1806, ¶ 29, ("Since our prior decision vacated defendant's sentences, the July 20, 2011 disbursement orders were also rendered nullities."); *In re C.P.*, 10th Dist. Franklin Nos. 09AP-823, 09AP-854, 2010-Ohio-346, ¶ 20 ("In this case, we reversed and remanded the matter to the trial court because of the trial court's error. The effect of that remand was to reinstate the case as if the hearing on FCCS's motion for permanent custody had just concluded."); *State v. Davis*, 12th Dist. Butler No. CA89-09-123, 1990 WL 165137, *2 (Oct. 29, 1990) ("[T]he error which resulted in a reversal occurred at the deliberative stage of the proceedings, *after* the evidence had been submitted to the court. Upon remand, therefore, it was not necessary for the panel to consider additional evidence." (Emphasis in original.)).

{¶11} Here, the error regarding the jury instruction occurred during Mr. Claren's first trial. This Court reversed and remanded the matter to the trial court based upon this particular error. As such, the effect of that remand was to reinstate the case as if the first trial had never occurred, which was prior to the dismissal of the murder charge for the purpose of finality. Therefore, because this case was reinstated at the point of error, for retrial of Mr. Claren, the trial court did not violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution

and Section 10, Article I of the Ohio Constitution by instructing the jury on the lesser included offense of murder.

{¶12} Accordingly, Mr. Claren's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE DEFENSE OF SELF-DEFENSE PURSUANT TO THE PLAIN LANGUAGE OF R.C. 2901.05.

{¶13} In his second assignment of error, Mr. Claren argues, pursuant to R.C. 2901.05(B)(3)(a) and (b), the State can *only* rebut the presumption of self-defense by proving: (1) the victim had a lawful right to be in the residence; or (2) Mr. Claren did not have a lawful right to be in the residence. As a preliminary matter, it is undisputed Mr. Claren did not object to the jury instructions given at trial regarding self-defense. However, prior to trial, Mr. Claren submitted proposed jury instructions, regarding the rebuttable presumption of self-defense, and responded to the State's objections to those jury instructions.

{¶14} "A defendant who does not object to a jury instruction he believes to be erroneous generally waives his right to have the issue reviewed on appeal, absent an error that would constitute plain error." *State v. Gates*, 9th Dist. Summit No. 20257, 2001 WL 324393, *2-3 (Apr. 4, 2001); *see also* Crim. R. 30(A). The Supreme Court of Ohio, however, carved out a narrow exception to this general rule. In *State v. Wolons*, 44 Ohio St.3d 64 (1989), paragraph one of the syllabus, the *Wolons* Court stated:

> A party does not waive his objections to the court's charge by failing to formally object thereto (1) where the record affirmatively shows that a trial court has been fully apprised of the *correct* law governing a material issue in dispute, and (2) the requesting party has been unsuccessful in obtaining the inclusion of *that* law in the trial court's charge to the jury.

(Emphasis added.) Indeed, "[t]he trial court is required to provide the jury with all instructions that are relevant and necessary in order for it to weigh the evidence and discharge its duty as fact finder." *Gates* at * 3, citing *State v. Comen*, 50 Ohio St.3d 206 (1990) paragraph two of the syllabus. "In criminal cases 'if the requested instructions contain a correct, pertinent statement of the law and are appropriate to the facts they must be included, at least in substance, in the court's charge to the jury.'" *Gates* at *3, citing *State v. Nelson*, 36 Ohio St.2d 79 (1973) paragraph one of syllabus.

{¶15} In the present matter, the record reveals Mr. Claren requested specific jury instructions regarding the rebuttable presumption of self-defense, including:

* * *

> PRESUMPTION-REBUTTABLE
>
> The [S]tate claims that the presumption of self-defense does not apply. This presumption does not apply if the [S]tate proves by a preponderance of the evidence that [B.G.] had a right to be in, or was a lawful resident of, the residence. Even if the [S]tate rebuts the presumption of self-defense or defense of another, the [S]tate must still prove beyond a reasonable doubt that [Mr. Claren] did not use the force in self-defense.

* * *

> EFFECT OF FAILURE TO REBUT PRESUMPTION
>
> If the [S]tate failed to prove by a preponderance of the evidence that [B.G.] had a right to be in the residence, then the presumption that [Mr. Claren] acted in self-defense has not been rebutted, and your verdict must be NOT GUILTY.
>
> Only if you find the [S]tate proved by a preponderance of the evidence that [B.G.] had a right to be in the residence, you must then consider whether the [S]tate has proven beyond a reasonable doubt that [Mr. Claren] did not act in self-defense or defense of another.

* * *

The State objected to the use of Mr. Claren's proposed jury instructions because it "is not limited to the two factors contained in [R.C.] 2901.05(B)(3) when rebutting the presumption contained in [R.C.] 2901.05(B)(2)." The State further argued Mr. Claren's proposed instructions are "a narrow, limited operation of the rebuttable presumption."

{¶16} Pursuant to the current version of R.C. 2901.05:

> (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.
>
> (2) Subject to division (B)(3) of this section, a person is presumed to have acted in self-defense or defense of another when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force.
>
> (3) *The presumption set forth in division (B)(2) of this section does not apply if either of the following is true*:
>
> *(a) The person against whom the defensive force is used has a right to be in, or is a lawful resident of, the residence or vehicle.*
>
> *(b) The person who uses the defensive force uses it while in a residence or vehicle and the person is unlawfully, and without privilege to be, in that residence or vehicle.*
>
> (4) The presumption set forth in division (B)(2) of this section is a *rebuttable presumption* and may be rebutted by a preponderance of the evidence, provided that the prosecution's burden of proof remains proof beyond a reasonable doubt as described in divisions (A) and (B)(1) of this section.

(Emphasis added.)

{¶17} The Third District Court of Appeals, in *State v. Hadley*, 3d Dist. Marion No. 9-11-30, 2013-Ohio-1942, addressed a nearly identical argument, as made by Mr. Claren, regarding the

presumption of self-defense. In *Hadley*, the language in R.C. 2901.05(B)(2)[1], which is relevant to this matter, stated:

> (a) The presumption set forth in division (B)(1) of this section does not apply if the person against whom the defensive force is used has a right to be in, or is a lawful resident of, the residence or vehicle.
>
> (b) The presumption set forth in division (B)(1) of this section does not apply if the person who uses the defensive force uses it while in a residence or vehicle and the person is unlawfully, and without privilege to be, in that residence or vehicle.

(Emphasis omitted.) *Hadley* at ¶ 54. Based upon the above-cited language, Mr. Hadley, like Mr. Claren, wrongly argued:

> R.C. 2901.05(B)(2) provides for only two narrow and specific grounds upon which the prosecution can rebut the presumption of self-defense set forth in R .C. 2901.05(B)(1). Thus, according to [Mr.] Hadley, under R.C. 2901.05(B)(2), the prosecution's rebuttal evidence in this case would be limited to either: a) proving by a preponderance of the evidence that [the victim] was a lawful resident of [Mr.] Hadley's home; or b) proving by a preponderance of the evidence that [Mr.] Hadley was unlawfully and without privilege to be in his residence. It is undisputed that neither of these two scenarios is present in this case. Thus, [Mr.] Hadley argues that the prosecution could not have possibly rebutted the presumption of self-defense and, therefore, he would have been acquitted had the jury been instructed under R.C. 2901.05(B).

Id. at ¶ 51. In overruling Mr. Hadley's assignment of error, our sister district aptly reasoned:

> Nothing in this language refers to circumstances which may be sufficient to *rebut* the presumption [of self-defense]. On the contrary, these sections describe circumstances which negate the existence of the presumption itself. Thus, the defendant is precluded from invoking and/or is not entitled to the presumption of self-defense if the person against whom the defensive force was used had a right to be in or was a lawful resident of the residence at issue, or if the defendant used the defensive force while he or she was unlawfully or without privilege to be in the residence.

[1] The language regarding the presumption of self-defense in a former version of the statute, which is found in R.C. 2901.05(B)(2)(a) and (b), is substantively identical to the language in the current version of the statute, which is found in R.C. 2901.05(B)(3)(a) and (b). Therefore, a legal analysis of the language in either version of the statutes would be the same.

Id. at ¶ 55. We agree with the Third District Court of Appeals' analysis of the statutory language regarding the presumption of self-defense and the State's ability to rebut the presumption in manners other than those argued by Messrs. Hadley and Claren. *See State v. Williams*, 9th Dist. Summit No. 29444, 2020-Ohio-3269, ¶ 9, (The elements of self-defense in a deadly force case require a defendant "was not at fault in creating the situation giving rise to the affray; * * * [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 in the use of such force; and * * * [did] not * * * violate[ ] any duty to retreat or avoid the danger." *State v. Robbins*, 58 Ohio St.2d 74 (1979), paragraph two of the syllabus.) "[T]he State must disprove one of the elements of self-defense beyond a reasonable doubt." *Williams* at ¶ 10.

{¶18} Based upon the foregoing, Mr. Claren's proposed jury instructions, regarding the State's ability to rebut the presumption of self-defense, under either version of the statute, were legally deficient because they did not present the trial court with the correct governing law on a material issue in dispute. Thus, the requested jury instructions do not fit within the *Wolons* exception and Mr. Claren has forfeited all but plain error on appeal.

{¶19} As this Court has previously stated, "[i]n order to establish plain error, there must be (1) a deviation from a legal rule; (2) that is obvious, and; (3) that affects the appellant's substantial rights." *State v. Smith*, 9th Dist. Summit No. 25069, 2010-Ohio-3983, ¶ 27. "The appellant 'bears the burden of demonstrating that a plain error affected his substantial rights[,]'"which means that the error affected the outcome of the trial. *Id*., quoting *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, ¶ 14; *see also State v. Armstrong*, 152 Ohio App.3d 579, 2003-Ohio-2154, ¶ 45 (9th Dist.). The record, however, reveals Mr. Claren has not made a plain error argument on appeal. To the extent that such an argument exists, "it is not this [C]ourt's duty

to root it out." *Cardone v. Cardone*, 9th Dist. Summit No. 18349, 1998 WL 224934, *8 (May 6, 1998). Therefore, Mr. Claren has not met his burden of establishing the trial court committed plain error. *State v. Bennett*, 9th Dist. Lorain No. 12CA010286, 2014-Ohio-160, ¶ 68 ("Because [Mr. Claren] has not established prejudice, we do not find that his alleged error rises to the level of plain error.").

{¶20} Accordingly, Mr. Claren's second assignment of error is overruled.

III.

{¶21} Mr. Claren's two assignments of error are overruled. The judgment of the Wayne County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Wayne, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

BETTY SUTTON
FOR THE COURT

STEVENSON, J.
CONCURS.

CARR, J.
CONCURRING IN JUDGMENT ONLY.

{¶22} While I agree that Claren's first assignment of error should be overruled, I do not believe that the timing of the order dismissing the murder charge is a determinative factor in the analysis. This Court reversed Claren's aggravated murder conviction because the trial court failed to instruct the jury on self-defense and the castle doctrine. *State v. Claren*, 9th Dist. Wayne No. 19AP0015, 2020-Ohio-615, ¶ 26-28. The jury's failure to consider the murder charge resulted directly from the flawed jury instruction. Because the jury's failure to render a verdict on the murder charge resulted from trial court error, jeopardy did not attach with respect to the murder charge. I would overrule Claren's first assignment of error solely on that basis.

{¶23} With respect to the second assignment of error, I would address Claren's argument on the merits and conclude that the trial court did not err with respect to the jury instructions.

APPEARANCES:

NORMAN R. "BING" MILLER, Attorney at Law, for Appellant.

DANIEL R. LUTZ, Prosecuting Attorney, and PHILIP BOGDANOFF, Assistant Prosecuting Attorneyfor Appellee.