[Cite as *State v. Terry*, 2023-Ohio-2234.]

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

STATE OF OHIO Appellee v. MELVIN MICHAEL THOMAS TERRY Appellant	C.A. No. 30137 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 20 02 0636

DECISION AND JOURNAL ENTRY

Dated: June 30, 2023

FLAGG LANZINGER, Judge.

{¶1} Melvin Michael Thomas Terry appeals his convictions for murder, felony murder, felonious assault, and tampering with evidence from the Summit County Court of Common Pleas. For the following reasons, this Court affirms.

I.

{¶2} Certain facts underlying this appeal are not in dispute. There is no dispute that Mr. Terry shot and killed N.K., one of the victims in this matter. There is also no dispute that a bullet grazed the arm of J.L., the other victim in his matter, during the course of the shooting. The dispute centered upon whether Mr. Terry acted in self-defense when he shot and killed N.K.

{¶3} The shooting occurred shortly after 11:00 p.m. on January 8, 2020. At trial, the State presented evidence indicating that Mr. Terry and N.K. arranged to meet at a house in Akron so that N.K. could buy marijuana from Mr. Terry. Mr. Terry's grandfather owned the house and used it as a rental property. Mr. Terry did not live at the house at the time of the underlying incident

but had lived there in the past. Mr. Terry knew the current tenant, L.J., and felt comfortable meeting people in the driveway of the house.

{¶4} When N.K. arrived at the house, Mr. Terry had already backed his vehicle (a Buick) into the driveway and was parked with the front of his Buick facing the street. N.K. then backed his vehicle (a Jeep) into the driveway in front of Mr. Terry's Buick with the front of his Jeep also facing the street.

{¶5} The State presented evidence, including surveillance video obtained from the house, indicating that N.K. walked up to the passenger side of Mr. Terry's Buick, opened the passenger-side door, and entered the Buick. N.K. then exited the Buick less than ten seconds later and began to run toward his Jeep. The surveillance video indicated that Mr. Terry exited his Buick and fired several shots at N.K. as N.K. ran toward his Jeep. The surveillance video also indicated that an object fell from N.K.'s person as N.K. ran toward his Jeep. N.K. continued to run toward his Jeep without picking up the object. Mr. Terry continued to shoot at N.K. even after N.K. entered his Jeep and began to drive away. Almost immediately after N.K. got into his Jeep and started to drive, N.K. crashed into the porch of a neighboring house. Mr. Terry then left the scene in his Buick.

{¶6} J.L., who was a passenger in N.K.'s Jeep, exited the Jeep and made contact with L.J. (the tenant of the house), who had come outside after hearing the gunshots. According to L.J., J.L. told her to call the police because his friend (N.K.) was dead. J.L. had been struck by one of the bullets, which grazed his arm.

{¶7} The State presented evidence indicating that the police recovered seven shell casings from the driveway, all of which came from the same gun. The State also presented evidence indicating that N.K. sustained three, possibly four, gunshot wounds (two of the wounds may have

been caused by the same bullet), and that N.K. sustained at least one of the gunshot wounds while N.K. was inside Mr. Terry's Buick. The State further presented evidence indicating that the Buick had three bullet holes in the passenger-side door, and that the front windshield of the Buick was shot out.

{¶8} During their investigation, the police were unable to identify the object that fell from N.K.'s person while N.K. ran toward his Jeep, even after enhancing the surveillance video. The surveillance video, however, indicated that L.J. (the tenant) picked the object up and took it into the house before the police arrived. After the police viewed the surveillance video, the police questioned L.J. about the object she picked up from the driveway. L.J. initially claimed that she did not pick anything up. L.J. later claimed that she picked up her cell phone, and then later claimed that it was a bag of marijuana. At trial, after being granted immunity and called as the court's witness, L.J. claimed for the first time that it was a gun. L.J. testified that she threw the gun over a bridge a few days after the incident.

{¶9} The police investigated the matter and identified Mr. Terry as the shooter. A warrant was issued for Mr. Terry's arrest on February 7, 2020, and Mr. Terry turned himself in on February 10, 2020. The State presented evidence indicating that Mr. Terry's father took the Buick to a body shop to have the passenger-side door repaired and the front windshield replaced after Mr. Terry turned himself in to the police. The police later located the Buick at the body shop through the vehicle's OnStar system. The police discovered blood on the passenger-side door and submitted it for DNA testing. A forensic scientist testified that the DNA profile for the blood was consistent with N.K.

{¶10} Mr. Terry testified on his own behalf as the sole witness for the defense. According to Mr. Terry, as soon as N.K. opened the passenger-side door of his Buick, N.K. pointed a gun at

him. As a result, Mr. Terry picked up his own gun, which he kept on the floor, and started shooting at N.K. Mr. Terry acknowledged that N.K. never shot at him. Mr. Terry then testified that he exited his Buick and continued to shoot at N.K. as N.K. ran toward his Jeep because he thought N.K. would be shooting at him. Mr. Terry testified that, even though he acted in self-defense, he did not call the police because he was scared. Mr. Terry also testified that he left the scene with his gun, but that he did not know what happened to the gun after that. According to Mr. Terry, N.K. was trying to rob him at gun point, so he acted in self-defense because he feared for his life.

{¶11} After hearing the evidence, which included the testimony of 16 witnesses and the introduction of over 40 exhibits, the jury found Mr. Terry guilty of murder, felony murder, felonious assault with respect to N.K., felonious assault with respect to J.L., and tampering with evidence. Mr. Terry now appeals, raising four assignments of error for this Court's review.

II.

ASSIGNMENT OF ERROR I

> THE TRIAL COURT COMMITTED PLAIN ERROR IN FAILING TO PROPERLY INSTRUCT THE JURY ON THE AFFIRMATIVE DEFENSE[] OF SELF-DEFENSE, RELIEVING THE STATE OF ITS DUTY TO DISPROVE SELF-DEFENSE BEYOND A REASONABLE, IN DEROGATION OF DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS PROTECTED BY THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE 1, [SECTIONS] 5, 10, AND 16 OF THE OHIO CONSTITUTION.

{¶12} In his first assignment of error, Mr. Terry argues that the trial court erroneously instructed the jury regarding self-defense.[1] Mr. Terry acknowledges that he is limited to arguing

[1] Mr. Terry does not dispute that the trial court correctly instructed the jury regarding the State's burden of proof under R.C. 2901.05(B)(1), that is, if the defendant presents evidence that "tends to support that [he] used the force in self-defense, * * * the prosecution must prove beyond a reasonable doubt that the accused person did not use the force in self-defense[.]" *See State v. Brooks*, 170 Ohio St.3d 1, 2022-Ohio-2478, ¶ 2 (holding that H.B. 228, which shifted the burden

plain error on appeal because his trial counsel did not object to the jury instructions on self-defense. *See State v. Fazenbaker*, 9th Dist. Summit No. 29108, 2021-Ohio-3447, ¶ 17, quoting Crim.R. 30(A) ("Absent plain error, a party waives any challenge to jury instructions unless the party 'objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection.'"). For the following reasons, this Court overrules Mr. Terry's first assignment of error.

{¶13} "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Crim.R. 52(B).

> By its very terms, [Crim.R. 52(B)] places three limitations on a reviewing court's decision to correct an error that was not raised below. First, an error, i.e., a deviation from a legal rule, must have occurred. Second, the error complained of must be plain – that is, it must be an obvious defect in the * * * proceedings. Third, the error must have affected substantial rights. We have interpreted this * * * to mean that the trial court's error must have affected the outcome of the proceedings.

State v. Harris, 9th Dist. Summit No. 29583, 2020-Ohio-4365, ¶ 19, quoting *State v. Martin*, 154 Ohio St.3d 513, 2018-Ohio-3226, ¶ 28. Thus, "[t]his Court may not reverse the judgment of the trial court on the basis of plain error, unless appellant has established that the outcome of trial clearly would have been different but for the alleged error." *State v. Higgins*, 9th Dist. Summit No. 27700, 2018-Ohio-476, ¶ 27, quoting *State v. Klingel*, 9th Dist. Lorain No. 15CA010876, 2017-Ohio-1183, ¶ 29. More simply, "[a]n improper or erroneous jury instruction does not constitute plain error unless, but for the error, the outcome of the trial would clearly have been different." *State v. Barker*, 8th Dist. Cuyahoga No. 111597, 2023-Ohio-453, ¶ 28. As the Ohio Supreme Court has stated, "[n]otice of plain error under Crim.R. 52(B) is to be taken with the utmost caution,

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of proof on self-defense to the prosecution, "applies to all trials conducted on or after its effective date of March 28, 2019, irrespective of when the underlying alleged criminal conduct occurred.").

under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus.

{¶14} Mr. Terry presents two arguments in support of his first assignment of error, which this Court will address in turn. First, Mr. Terry argues that the trial court erred by instructing the jury that he had a duty to retreat. Mr. Terry argues that, because his trial began on July 12, 2021, which was after the April 6, 2021, effective date of Ohio's "stand your ground" law (i.e., R.C. 2901.09), he had no duty to retreat before using self-defense. Mr. Terry, therefore, argues that the trial court erred by instructing the jury that he had a duty to retreat.

{¶15} "Whether 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, ¶ 135. R.C. 2901.09 provides, in relevant part, that "a person has no duty to retreat before using force in self-defense * * * if that person is in a place in which the person lawfully has a right to be." R.C. 2901.09(B). It also provides that "[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 * * * believed that the force was necessary to prevent injury, loss, or risk to life or safety." R.C. 2901.09(C).

{¶16} This Court has yet to address whether Ohio's "stand your ground" law (i.e., R.C. 2901.09) applies in situations where the conduct (like here) occurred prior to the statute's effective date (i.e., prior to April 6, 2021), but the trial (like here) occurred after its effective date. At least three appellate districts (i.e., the First, Second, and Eighth District Courts of Appeals) have held that it does not apply if the conduct occurred prior to the statute's effective date. *See State v. Parker*, 1st Dist. Hamilton No. C-210440, 2022-Ohio-3831, ¶ 7-17; *State v. Degahson*, 2d Dist. Clark No. 2021-CA-35, 2022-Ohio-2972, ¶ 14-23, *appeal allowed*, 168 Ohio St.3d 1479, 2022-Ohio-4617; *State v. Hurt*, 8th Dist. Cuyahoga No. 110732, 2022-Ohio-2039, ¶ 54-61, *appeal*

allowed, 168 Ohio St.3d 1457, 2022-Ohio-4201. At least two appellate districts (i.e., the Fifth and Eleventh District Courts of Appeals), on the other hand, have held that it does apply if the trial occurs after the statute's effective date, regardless of when the conduct occurred. *See State v. Robinette*, 5th Dist. Stark No. 2021 CA 00124, 2023-Ohio-5, ¶ 51-52; *State v. Wagner*, 11th Dist. Lake No. 2021-L-101, 2022-Ohio-4051, ¶ 15, *motion to certify allowed*, 169 Ohio St.3d 1466, 2023-Ohio-773, *and appeal allowed*, 169 Ohio St.3d 1467, 2023-Ohio-773. This issue is currently pending before the Ohio Supreme Court. *See Degahson*, 2022-Ohio-4617; *Hurt*, 2022-Ohio-4201; and *Wagner*, 2023-Ohio-773. This Court will summarize the relevant appellate decisions below.

{¶17} Before we discuss the relevant appellate decisions that have addressed R.C. 2901.09, this Court will address the Ohio Supreme Court's recent decision in *State v. Brooks*, 2022-Ohio-2478. In *Brooks*, the Ohio Supreme Court addressed amendments to R.C. 2901.05 that "shifted the burden from the defendant to the state to prove beyond a reasonable doubt that the accused did not use force in self-defense." *Brooks* at ¶ 6. As amended, R.C. 2901.05(B)(1) states, in relevant part:

> 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 beyond a reasonable doubt that the accused person did not use the force in self-defense[.]

(Emphasis added.) R.C. 2901.05(B)(1).

{¶18} In *Brooks*, the Ohio Supreme Court addressed the following certified-conflict question regarding R.C. 2901.05:

> Does legislation that shifts the burden of proof on self-defense to the prosecution (2018 H.B. 228, eff. March 28, 2019) apply to all subsequent trials even when the alleged offenses occurred prior to the effective date of the act?

Brooks at ¶ 1. The Court answered the certified-conflict question in the affirmative, holding that the amended statute "applies to all trials conducted on or after its effective date of March 28, 2019, irrespective of when the underlying alleged criminal conduct occurred." *Id.* at ¶ 2.

{¶19} In reaching the above holding, the Court concluded that applying the amended statute to all subsequent trials after its effective date–even when the alleged offenses occurred prior to the amended statute's effective date–"does not violate the prohibition against ex post facto laws." *Id.* at ¶ 13. In support of this conclusion, the Court explained that "[n]othing in R.C. 2901.05 as amended creates a new crime or increases the burdens or punishment for a past crime." *Id.* The Court also explained that "R.C. 2901.05 as amended neither provides nor takes away any substantive right. * * * The only thing that the amendments to R.C. 2901.05 changed is which party has the burden of proving or disproving a self-defense claim at trial." *Id.* at ¶ 15.

{¶20} After concluding that the amended statute does not violate the prohibition against ex post facto laws, the Court explained that "the question here is merely whether the General Assembly expressly made the statute as amended retroactive and if so, whether it is remedial in nature." *Id.* at ¶ 13. The Court explained the difference between "remedial" and "substantive" laws as follows:

> A statute may not be applied retroactively unless the General Assembly expressly makes it retroactive. * * * Generally, when the legislature has made a statute expressly retroactive, the determination whether that statute is unconstitutionally retroactive in violation of the Ohio Constitution depends on whether it is "remedial" or "substantive"—if the law is "remedial," then its retroactive application is constitutional; if the law is substantive, then its retroactive application is unconstitutional. * * * Laws relating to procedures—rules of practice, courses of procedure, and methods of review—are ordinarily remedial in nature. * * * But laws affecting rights, which may be protected by procedure, are substantive in nature.

Id. at ¶ 10.

{¶21} The Court concluded that the amended statute's express language (i.e., the statute's use of the present tense and the prospective burden-allocating language, i.e., "*at the trial* of a person who is accused of an offense * * *") indicates that it does not apply retroactively. (Emphasis sic.) *Id.* at ¶ 14, quoting R.C. 2901.05(B). The Court then indicated that "the allocation of the burden of proof is not easily categorized" as either procedural (and, thus, ordinarily remedial) or substantive in nature, and considered its holdings in analogous cases. *Id.* at ¶ 16-19. The Court concluded:

> When we previously reviewed matters like the one before us here, we found that applying an amended statute to a defendant who is tried after the amended statute's effective date for conduct that occurred prior to its effective date was permissible unless doing so would violate the Ohio's Retroactivity Clause.
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> * * *
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> The 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.
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> * * *
>
> We therefore answer the certified-conflict question ("Does legislation that shifts the burden of proof on self-defense to the prosecution (2018 H.B. 228, eff. March 28, 2019) apply to all subsequent trials even when the alleged offenses occurred prior to the effective date of the act?") in the affirmative.

Brooks at ¶ 19, 21.

{¶22} The First, Second, and Eighth District Courts of Appeals have distinguished the Ohio Supreme Court's holding in *Brooks* from the present issue, reasoning that *Brooks* is not dispositive. *See Parker*, 2022-Ohio-3831, at ¶ 7-17; *Degahson*, 2022-Ohio-2972, at ¶ 14-23; *State v. Duncan*, 8th Dist. Cuyahoga No. 110784, 2022-Ohio-3665, ¶ 25-30, *appeal allowed*, 169 Ohio St.3d 1430, 2023-Ohio-381. The Fifth and Eleventh District Courts of Appeals, on the other hand, have concluded that the analysis in *Brooks* applies to R.C. 2901.09. *Robinette*, 2023-Ohio-5, at ¶

51-52; *Wagner*, 2022-Ohio-4051, at ¶ 15-27. Having discussed *Brooks*, this Court will now turn to the relevant appellate decisions that have specifically addressed R.C. 2901.09.

{¶23} The First District Court of Appeals addressed R.C. 2901.09 after the Ohio Supreme Court decided *Brooks* in *State v. Parker*, 2022-Ohio-3831, at ¶ 7-17. The First District acknowledged *Brooks* but relied, in part, upon the Second District's decision in *Degahson* and the Eighth District's decision in *Hurt*[2] to conclude that R.C. 2109.09 does not apply retroactively to conduct that occurred prior to the statute's April 6, 2021, effective date. *Parker* at ¶ 14-18. This Court finds the First District's analysis–including its reliance upon *Degahson* and *Hurt*–to be persuasive and will summarize its reasoning here.

{¶24} In *Parker*, the First District applied a two-step test for determining whether the "stand your ground" law (i.e., R.C. 2901.09) applies retroactively to conduct that occurred prior to the statute's April 6, 2021, effective date. *Parker*, 2022-Ohio-3831, at ¶ 12-15. The First District explained the two-step test as follows:

> First, we must determine whether the legislature intended that the statute apply retroactively. * * * "A statute is presumed to operate prospectively, unless expressly made retrospective." * * * "In order to overcome the presumption that a statute applies prospectively, a statute must 'clearly proclaim' its retroactive application." * * *.
>
> Second, if there is such a clear proclamation, we must determine if the statute is in violation of the Ohio Constitution, Article II, Section 28, which provides "[t]he general assembly shall have no power to pass retroactive laws." * * * Whether a statute is unconstitutionally retroactive, "depends on whether it is 'remedial' or 'substantive'—if the law is 'remedial,' then its retroactive application is constitutional; if the law is substantive, then its retroactive application is unconstitutional." * * * Laws affecting procedure are typically remedial in nature, while laws that affect rights are substantive.

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[2] This Court notes that the Eighth District decided *Hurt* about one month before the Ohio Supreme Court decided *Brooks*. Even after *Brooks*, however, the Eighth District has continued to follow its reasoning in *Hurt*. *See, e.g., State v. Duncan*, 8th Dist. Cuyahoga No. 110784, 2022-Ohio-3665, ¶ 27-30.

Id. at ¶ 12-13.

{¶25} Applying the first part of the two-part test, the First District concluded that R.C. 2901.09 does not contain any language to suggest that the General Assembly intended it to apply retroactively. *Id.* at ¶ 14; *Hurt*, 2022-Ohio-2039, at ¶ 58 (same); *Degahson*, 2022-Ohio-2972, at ¶ 17 (same). In doing so, the First District acknowledged the language in R.C. 2901.09(C) providing that "[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 * * * reasonably believed that the force was necessary to prevent injury, loss, or risk to life or safety." *Parker* at ¶ 10, quoting R.C. 2901.09(C); *Degahson* at ¶ 15 (same). The First District indicated that it could end the analysis there because the second step (i.e., the question of constitutional retroactivity) is not addressed unless a court determines that the General Assembly expressly made the statute retroactive. *Parker* at ¶ 14, citing *Degahson* at ¶ 17; *Hyle v. Porter*, 117 Ohio St.3d 165, 2008-Ohio-542, ¶ 9. The First District, however, elected to proceed to the second step of the two-part test. *Parker* at ¶ 15. The First District then concluded that R.C. 2901.09 is substantive in nature because it created a right (i.e., the right to stand one's ground) that did not previously exist. *Id.* at ¶ 15; *Degahson* at ¶ 19-20 (holding same and citing cases from Alaska, Louisiana, Florida, Michigan, and Kentucky that hold that the analogous "stand your ground" laws in those states are substantive in nature and do not apply to conduct that occurred prior to the law's effective date).

{¶26} After completing its analysis of the two-part test, the First District also concluded that the application of R.C. 1.58 yielded the same result. *Parker* at ¶ 16. R.C. 1.58 governs the effect of an amendment to a statute on existing conditions. While analyzing R.C. 1.58, the First District explained that "[w]hen a criminal statute is amended, 'the substantive provisions of the former law apply to all pending prosecutions, but the defendants receive the benefit of a reduced

'penalty, forfeiture, or punishment' in the statute as amended[.]'" *Id.*, quoting *Hurt* at ¶ 59. The First District concluded that, because the "stand your ground" law "'does not set out a penalty, punishment, or forfeiture, but instead provides the substantive law regarding an individual's duty to retreat before using self-defense,' the former law was correctly applied" to the defendant's case. *Id.* at ¶ 17, quoting *Hurt* at ¶ 61 and citing *Degahson* at ¶ 21-22. The First District ultimately concluded that, "[f]or all of these reasons, the trial court did not err in instructing the jury based on the former self-defense statute." *Parker* at ¶ 18.

{¶27} As noted, this Court finds the First District's analysis in *Parker*, which relied upon the Second District's decision in *Degahson* and the Eighth District's decision in *Hurt*, to be persuasive. Because a conflict exists between these decisions and decisions from at least two other appellate districts (i.e., the Fifth and Eleventh District Courts of Appeals), this Court will address the conflicting authority on this issue. *See State v. Wagner*, 169 Ohio St.3d 1466, 2023-Ohio-773 (determining that a conflict exists between *Hurt* and *Wagner*).

{¶28} The Eleventh District addressed the present issue in *State v. Wagner*, which was decided after *Parker*, *Degahson*, and *Hurt*.[3] *Wagner*, 2022-Ohio-4051, at ¶ 15-27. In *Wagner*, the Eleventh District recognized that the present issue "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." *Id.* at ¶ 27. The Eleventh District reasoned that the analysis in *Brooks* applies to R.C. 2901.09 because R.C. 2901.09(C) refers to the "trier of fact[,]" which is akin to the prospective "at the trial"

[3] The *Wagner* decision acknowledges the decisions in *Degahson* and *Hurt* but does not mention *Parker*. *See Wagner* at ¶ 21.

language in R.C. 2901.05. *Id.* at ¶ 25, 27.[4] The Eleventh District, therefore, held that "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." *Id.* at ¶ 27. The Eleventh District also noted that, "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." *Id.* at ¶ 25. As a result, the Eleventh District concluded that R.C. 2901.09, like R.C. 2901.05, applies to trials that occur after the effective date of the statute, regardless of when the alleged offense occurred. *Id.* at ¶ 27.

{¶29} The Fifth District also addressed the present issue in *State v. Robinette*, 5th Dist. Stark No. 2021 CA 00124, 2023-Ohio-5, ¶ 51-52. The Fifth District, however, provided little analysis and summarily concluded that "the same rationale used by the Supreme Court in *Brooks* would apply to the amendment to R.C. 2901.09[.]" *Id.* at ¶ 52, citing *Wagner*, 2022-Ohio-4051, at ¶ 28.

{¶30} This Court is unpersuaded by the rationale in *Wagner* and *Robinette* and concludes that *Brooks* is not dispositive of the present issue. Like *Parker*, *Degahson*, and *Hurt*–as well as the subsequent appellate decisions that have followed those decisions–this Court concludes that R.C. 2901.09 does not apply to conduct that occurred prior to the statute's April 6, 2021, effective date. *See State v. Barker*, 2d Dist. Montgomery No. 29227, 2022-Ohio-3756, ¶ 34-43 (distinguishing *Brooks* and following *Degahson* and *Hurt*); *State v. Dixon*, 2d Dist. Greene No. 2021-CA-29, 2022-Ohio-3157, ¶ 31 (following *Degahson*); *State v. Midkiff*, 2d Dist. Clark No. 2021-CA-39, 2022-Ohio-4004, ¶ 10-14 (following *Degahson*, *Dixon*, and *Hurt*); *State v. Cunningham*, 2d Dist.

[4] This Court notes that the *Wagner* decision appears to sometimes erroneously cite R.C. 2109.05 (regarding probate bonds) instead of R.C. 2901.05, and R.C. 2105.09 (regarding the disposition of escheated lands) instead of R.C. 2901.09.

Montgomery No. 29122, 2023-Ohio-157, ¶ 14, fn. 2 (following *Degahson*); *State v. Jones*, 2d Dist. Montgomery No. 29214, 2022-Ohio-3162, ¶ 39 (following *Degahson*); *Duncan*, 2022-Ohio-3665, at ¶ 25-30 (distinguishing *Brooks* and following *Hurt* and *Degahson*); *State v. Miree*, 8th Dist. Cuyahoga No. 110749, 2022-Ohio-3664, ¶ 67-73, *appeal allowed*, 169 Ohio St.3d 1430, 2023-Ohio-381 (distinguishing *Brooks* and following *Hurt* and *Degahson*). Mr. Terry's first argument in support of this assignment of error, therefore, lacks merit.

{¶31} Next, Mr. Terry argues that the trial court's instruction regarding the presumption of self-defense that arises when a defendant uses force against someone who unlawfully and without privilege enters the vehicle occupied by the defendant was confusing. More specifically, he argues that the trial court's instruction that the State could prove that this presumption did not apply if the State proved by a preponderance of the evidence that the victim (N.K.) had a right to be in the vehicle was confusing because the State still has the burden of disproving self-defense beyond a reasonable doubt. For the following reasons, this Court disagrees.

{¶32} The trial court instructed the jury regarding the presumption that arises when a person against whom force is used is in that person's vehicle as follows:

> Now, the defendant is presumed to have acted in self-defense when using defensive force that was intended or likely to cause death or great bodily harm to another if the person against whom the defensive force was used was in the process of entering or had entered unlawfully and without privilege to do so the vehicle occupied by the defendant.
>
> The State claims this presumption does not apply. The presumption does not apply if the State proves that the person against whom the defensive force was used had a right to be in the vehicle.

Mr. Terry acknowledges in his merit brief that this instruction comports with R.C. 2901.05(B)(2). The trial court continued with its instructions as follows:

> Even if the State rebuts the presumption of self-defense, the State must still prove beyond a reasonable doubt that this defendant did not use the force in self-defense.

> *Specified evidence that is more likely or not to be true, but we'll get a definition on that.*

(Emphasis added.) Mr. Terry relies upon the emphasized portion of that instruction to argue that the trial court's instruction was confusing because "more likely or not" is the burden for a preponderance of the evidence, not reasonable doubt. Mr. Terry's argument, however, ignores the remainder of that jury instruction wherein the trial court stated:

> And that just has to do with the issue of the presumption of self-defense being appropriate if somebody has unlawfully entered your vehicle.
>
> The State can rebut that by proving by a preponderance of the evidence that the person had the right to be in the vehicle.
>
> * * *
>
> There's a presumption the defendant acted in self-defense. When using defensive force that was intended or likely to cause death or great bodily harm to another, if the person against whom the defensive force was used was in the process of entering or had entered unlawfully and without privilege to do so the vehicle occupied by the defendant.
>
> The State claims that presumption does not apply, and it does not apply if the State proves by a preponderance of the evidence that the person against whom the defensive force was used had a right to be in the vehicle.
>
> And preponderance of the evidence means the greater weight of the evidence. That is evidence that you believe because it outweighs or overbalances in your mind the evidence opposed to it.
>
> A preponderance means evidence that is more probable, more persuasive or of greater probative value.

{¶33} The trial court's jury instructions, when read as a whole, indicate that the trial court instructed the jury that the State had to disprove Mr. Terry's claim that he acted in self-defense beyond a reasonable doubt. The trial court's jury instructions also indicate that the trial court instructed the jury that the State could rebut the presumption that Mr. Terry acted in self-defense under R.C. 2901.05(B)(2) by a preponderance of the evidence. *Cromer v. Children's Hosp. Med.*

Ctr. of Akron, 142 Ohio St.3d 257, 2015-Ohio-229, ¶ 35, quoting *Kokitka v. Ford Motor Co.*, 73 Ohio St.3d 89, 93 (1995) (requiring reviewing courts to consider the jury instructions "as a whole[.]"). Those were correct statements of the law. *State v. White*, 142 Ohio St.3d 277, 2015-Ohio-492, ¶ 46 ("We require a jury instruction to present a correct, pertinent statement of the law that is appropriate to the facts."); R.C. 2901.05(B)(1) (providing that the State must disprove the defendant's claim of self-defense beyond a reasonable doubt); R.C. 2901.05(B)(4) (providing that the presumption of self-defense under R.C. 2901.05(B)(2) is a rebuttable presumption that the State may rebut by a preponderance of the evidence). Mr. Terry, therefore, has not established any error in the trial court's jury instruction regarding the presumption of self-defense that arises when a person is in his or her vehicle. Because "error * * * [is] the starting point for a plain-error inquiry[,]" Mr. Terry's argument is not well-taken. *State v. Gibson*, 9th Dist. Summit No. 30078, 2022-Ohio-1653, ¶ 15, quoting *State v. Hill*, 92 Ohio St.3d 191, 200 (2001) and citing Crim.R. 52(B).

{¶34} In light of the foregoing, Mr. Terry's first assignment of error is overruled.

ASSIGNMENT OF ERROR II

> THE TRIAL COURT COMMITTED PLAIN ERROR IN INSTRUCTING THE JURY ON DEFENDANT'S FLIGHT, IN DEROGATION OF DEFENDANT'S RIGHT TO DUE PROCESS OF LAW AS PROTECTED BY THE 5TH AND 14TH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE 1, [SECTIONS] 5, 10, AND 16 OF THE OHIO CONSTITUTION.

{¶35} In his second assignment of error, Mr. Terry argues that the trial court committed plain error by instructing the jury on flight. For the following reasons, this Court disagrees.

{¶36} The standard for plain error set forth above applies equally here. Specific to this assignment of error, though, "[e]vidence of flight is admissible as it tends to show consciousness of guilt, and a jury instruction on flight is appropriate if there is sufficient evidence in the record

to support the charge." *State v. Ammons*, 9th Dist. Lorain No. 20CA011605, 2022-Ohio-1902, ¶ 31.

{¶37} Here, there was no dispute that Mr. Terry left the scene of the shooting and did not turn himself in until three days after a warrant was issued for his arrest. During the State's cross-examination of Mr. Terry at trial, Mr. Terry acknowledged that he "fle[d]" the area after the shooting with his gun, and that he knew the police were going to arrive. Then, when instructing the jury, the trial court issued the following instruction:

> Testimony has been admitted indicating that the defendant, Melvin Terry, fled the scene or attempted to conceal a crime. You are instructed that the fact the defendant left the scene alone does not raise a presumption of guilt, but it may tend to indicate the defendant's consciousness or awareness of guilt.
>
> If you find that the facts do not support that the defendant left the scene, or if you find that some other motive prompted the defendant's conduct, or if you are unable to decide what the defendant's motivation was, then you should not consider the evidence for any purpose.
>
> However, if you find that the facts support that the defendant engaged in such conduct, and if you decide that the defendant was motivated by a consciousness or awareness of guilt, you may but are not required to consider that evidence in deciding whether the defendant is guilty of the crimes charged. You alone determine what weight, if any, to give to this evidence.

{¶38} This Court addressed an almost verbatim flight instruction in *State v. Nichols*, 9th Dist. Summit No. 24900, 2010-Ohio-5737, ¶ 10. There, like here, the defendant was limited to arguing plain error on appeal. *Id.* at ¶ 7. This Court rejected the defendant's argument that the trial court committed plain error by instructing the jury on the issue of flight, explaining:

> By the plain language of the instruction, * * * it is clear that the trial court emphasized repeatedly the jury's role as factfinder. Specifically, the trial court instructed that the jury must decide, first, whether [the defendant] in fact fled the scene; second, if so, whether or not he was motivated by a consciousness of guilt; and third, what weight, if any, to accord the evidence. This Court has repeatedly stated that "[i]t is presumed that the jury will obey the trial court's instructions." * * * Accordingly, as a whole, the trial court's flight instruction was sufficiently clear to enable the jury to understand its role, as well as the law as applied to the facts.

Id. at ¶ 12.

{¶39} The Eighth District also addressed an almost verbatim flight instruction in *State v. Davis*, 8th Dist. Cuyahoga No. 109890, 2021-Ohio-2311, ¶ 28. There, again like here, the defendant was limited to arguing plain error on appeal. *Id.* at ¶ 29. The Eighth District concluded that the trial court erred by instructing the jury on flight because there was no evidence that the defendant deliberately fled from the scene. *Id.* at ¶ 32-22. The Eighth District held, however, that the error did not result in a manifest injustice. *Id.* at ¶ 33. The Eighth District explained that, reading the flight instruction as a whole, "it allowed the jury to reach its own conclusions on the issue of flight, including whether [the defendant] actually fled the scene, and [the defendant's] motivation for leaving the scene." *Id*. As a result, the Eighth District declined to find plain error. *Id; see Hurt*, 2022-Ohio-2039, at ¶ 75 (holding that, even if the trial court erred by giving a flight instruction, it did not result in prejudice because the jury instruction "allowed the jury to reach its own conclusions on the issue of flight, including whether [the defendant] actually fled the scene, and his motivation for leaving the scene.").

{¶40} Here, even assuming the trial court did err by instructing the jury on flight, this Court cannot say, nor has Mr. Terry established, that the result of the trial would have been different. In his merit brief, Mr. Terry asserts that "[t]he issue of flight never should have been injected into the case at all, and, given the closeness of the evidence, an instruction on that issue was prejudicial[.]" Yet Mr. Terry has not challenged the weight of the evidence, nor has he otherwise explained the "closeness" of the evidence such that the flight instruction resulted in prejudice. As previously noted, plain error is reserved for "exceptional circumstances" and "only to prevent a manifest miscarriage of justice." *State v. McAlpin*, 169 Ohio St.3d 279, 2022-Ohio-1567, ¶ 259, quoting *Long*, 53 Ohio St.2d 91 (1978), paragraph three of the syllabus. Mr. Terry

has not established that the trial court's flight instruction, even if erroneously given, meets those standards. Accordingly, Mr. Terry's second assignment of error is overruled.

ASSIGNMENT OF ERROR III

> THE TRIAL COURT COMMITTED PLAIN ERROR IN INSTRUCTING THE JURY ON THE DOCTRINE OF TRANSFERRED INTENT, WITHOUT A CORRELATING INSTRUCTION ON HOW SELF-DEFENSE APPLIED TO THAT DOCTRINE.

{¶41} In his third assignment of error, Mr. Terry argues that the trial court committed plain error by instructing the jury on the doctrine of transferred intent without a correlating instruction on how self-defense applies to that doctrine. Initially, this Court notes that this issue is also pending before the Ohio Supreme Court in *Hurt*, 168 Ohio St.3d 1457, 2022-Ohio-4201. Notwithstanding, this Court rejects Mr. Terry's argument outright. Even assuming without deciding that the doctrine of transferred intent applies to self-defense, Mr. Terry cannot establish reversible error. The jury's verdict indicates that it rejected Mr. Terry's claim that he acted in self-defense with respect to N.K. Thus, even if the trial court had provided a correlating jury instruction on how self-defense applies to the doctrine of transferred intent, there is no indication that the result of the trial clearly would have been different (i.e., that the jury would have found Mr. Terry not guilty of the felonious assault charge related to J.L.). *See Hurt*, 2022-Ohio-2039, at ¶ 69-71 (addressing a similar argument and holding that there was no reversible error); *State v. Vinson*, 10th Dist. Franklin No. 19AP-574, 2022-Ohio-2031, ¶ 40 (same); *State v. Howard*, 4th Dist. Ross No. 07CA2948, 2007-Ohio-6331, ¶ 31-35 (same). Mr. Terry's third assignment of error is, therefore, overruled.

ASSIGNMENT OF ERROR IV

> DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, IN DEROGATION OF DEFENDANT'S RIGHTS AS PROTECTED BY THE 6TH AND 14TH AMENDMENTS TO THE UNITED STATES

CONSTITUTION, AND ARTICLE 1, [SECTIONS] 5, 10, AND 16 OF THE OHIO CONSTITUTION.

{¶42} In his fourth assignment of error, Mr. Terry argues that his trial counsel rendered ineffective assistance by not objecting to the jury instructions at issue in the preceding assignments of error. For the following reasons, this Court disagrees.

{¶43} "[I]n Ohio, a properly licensed attorney is presumed competent." *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, ¶ 62. To prevail on a claim of ineffective assistance of counsel, Mr. Terry must establish: (1) that his counsel's performance was deficient to the extent that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[;]" and (2) that "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). A deficient performance is one that falls below an objective standard of reasonable representation. *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus. To establish prejudice, Mr. Terry must show that there existed a reasonable probability that, but for his counsel's errors, the outcome of the proceeding would have been different. *State v. Sowell*, 148 Ohio St.3d 554, 2016-Ohio-8025, ¶ 138. "This Court need not address both prongs of *Strickland* if an appellant fails to prove either prong." *State v. Carter*, 9th Dist. Summit No. 27717, 2017-Ohio-8847, ¶ 27

{¶44} Mr. Terry's ineffective-assistance argument relies entirely on a determination that the trial court erroneously instructed the jury. This Court, however, has already determined that the trial court correctly instructed the jury and/or that Mr. Terry has not established prejudice as a result of the allegedly erroneous jury instructions. Accordingly, Mr. Terry cannot establish that he suffered prejudice as a result of his trial counsel's performance. Mr. Terry, therefore, cannot establish ineffective assistance. *Id.*; *see State v. Parker*, 1st Dist. Hamilton No. C-210440, 2022-Ohio-3831, ¶ 21. Mr. Terry's fourth assignment of error is overruled.

III.

{¶45} Mr. Terry's assignments of error are overruled. The judgment of the Summit 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 Summit, 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.

JILL FLAGG LANZINGER
FOR THE COURT

SUTTON, P. J.
CONCURS.

CARR, J.
DISSENTING.

{¶46} I respectfully dissent as I believe that the General Assembly intended for the "stand your ground" law set forth in R.C. 2901.09 to be interpreted and applied in the same manner as the presumption of innocence statute, R.C. 2901.05. I find it significant that the language used in both R.C. 2901.05 and R.C. 2901.09 focuses on the evidence presented *at trial*. R.C. 2901.09(C), in particular, takes care to direct the "trier of fact" on how to analyze whether a person who possibly acted in self-defense had a reasonable belief that force was necessary. Given the language set forth in the pertinent statutes, as well as the timing of the amendments to the statutes, I would conclude that the Supreme Court's holding in *State v. Brooks*, 170 Ohio St.3d 1, 2022-Ohio-2478, is, in fact, controlling in the present case. Accordingly, I would sustain Terry's first assignment of error on the basis that the trial court committed plain error in instructing the jury.

APPEARANCES:

RUSSELL S. BENSING, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.