[Cite as *State v. Hendrickson*, 2009-Ohio-4416.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ATHENS COUNTY

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	Case No. 08CA12
	:	
v.	:	AMENDED
	:	DECISION AND JUDGMENT ENTRY
Ronald Hendrickson, II,	:	
	:	
Defendant-Appellant.	:	**Released 8/24/09**

APPEARANCES:

Jon Paul Rion, Rion, Rion & Rion, L.P.A., Inc., Dayton, Ohio, for Appellant.

C. David Warren, Athens County Prosecutor, and George Reitmeier, Athens County Assistant Prosecutor, Athens, Ohio, for Appellee.

Harsha, J.

{¶1} Ronald Hendrickson confronted his ex-girlfriend Jodi Blankenship over her plans to have her new paramour visit at the house Hendrickson and Blankenship shared. This confrontation ended with Blankenship's death. Hendrickson now appeals his conviction for aggravated murder and contends that the trial court erred when it denied his request for a jury instruction on self-defense. He argues an instruction was warranted because he presented sufficient evidence to show that he was not "at fault" in creating the violence that led to the victim's death. All the evidence indicates Hendrickson provoked an argument with his ex-girlfriend over her plans to see her new boyfriend at the house. However, he did not threaten or use any physical violence against her; yet, there is some evidence that she responded to his non-deadly aggression by stabbing him twice in the

abdomen with a knife. Because Blankenship was not legally entitled to use deadly force against him, Hendrickson's "fault" in starting a verbal confrontation did not preclude him from defending himself against the potentially deadly attack. Thus, the trial court erred in finding against Hendrickson on the "not-at-fault" element.

{¶2} Nevertheless, we find that Hendrickson was not entitled to an instruction on self-defense. As an alternative basis for denying his request, the court found that all the evidence showed that his use of force was greatly disproportionate to his apparent danger, i.e. the amount of force was unreasonable as a matter of law. Hendrickson argues that whether he used a disproportionate amount of force was an issue for the jury. Under a self-defense claim, a defendant may only use force that is reasonably necessary to repel the attack in light of the perceived threat. The evidence showed that Hendrickson suffered two minor stab wounds that did not require stitches and he successfully disarmed Blankenship. Nonetheless, she suffered 14 stab wounds, including six wounds that were fatal. Her throat was slashed, and she was stabbed in the heart, lungs, abdomen, and shoulder. She also suffered from a broken vertebrae and multiple defensive wounds on her hands and arms. Because all the evidence indicated Hendrickson's level of force far exceeded that which was reasonably necessary in view of the threat the victim posed during their "struggle," the trial court properly concluded as a matter of law that he was not entitled to an instruction on self-defense.

{¶3} Next, Hendrickson contends that the trial court erred in failing to instruct the jury on the inferior offense of voluntary manslaughter. The trial court found that the instruction was not justified because the evidence indicated that Hendrickson acted solely out of fear. Hendrickson argues that there was ample evidence from which the jury could

have reasonably found that he acted under "sudden passion" or a "sudden fit of rage" brought on by the victim's "serious provocation." He argues that after the victim stabbed him, he reacted out of fear and "passion" and points to their violent struggle. However, Hendrickson's testimony clearly demonstrates that he acted out of fear rather than a sudden passion or fit of rage. He consistently testified that he was "fearful" for his life and "scared" he might die and that he reacted to protect himself. Based on his entire testimony, we find that his single, fleeting reference to "passion" did not warrant an instruction on voluntary manslaughter, i.e. it fails to show that he was actually under the influence of a sudden passion or fit of rage.

{¶4} Finally, Hendrickson contends that his trial counsel was ineffective because he failed to properly advise him on the possible maximum prison term he was facing if convicted after trial. Hendrickson contends that trial counsel failed to pursue a "flat" 15-year plea deal based on counsel's erroneous belief that the maximum sentence for aggravated murder was life with possible parole after 20 years. Even if we assume that trial counsel's performance was deficient, Hendrickson cannot prove resulting prejudice based on the record before us. Hendrickson argues that by misadvising him of the maximum sentence, trial counsel "could have inadvertently induced" him to proceed to trial. However, there is no evidence in the record concerning the specific plea negotiations in this case. Specifically, there is no evidence that the State actually offered the 15-year plea deal. And there is no evidence that Hendrickson would have accepted any specific plea deal had he been properly informed of the maximum penalty. Because he fails to demonstrate a reasonable probability that, but for his counsel's erroneous

advice, he would have pleaded guilty, we reject his ineffective assistance of counsel claim in its present context.

{¶5} Accordingly, we affirm the trial court's judgment.

I. The Procedural History and Facts

{¶6} In April 2007, an Athens County grand jury indicted Hendrickson on one count of aggravated murder, in violation of R.C. 2903.01(A). The case ultimately proceeded to trial, which produced the following evidence.

{¶7} During the early morning hours Hendrickson fatally stabbed his ex-girlfriend, Jodi Blankenship, in a house they shared with three other Hocking College students. The evidence showed that during their two and a half year relationship, they frequently argued and would often break up. After their final break up in February 2007, Hendrickson was upset and very depressed. Then in March, Blankenship began dating Dale Wible.

{¶8} On evening in April, Hendrickson and Blankenship got into an argument over Wible's plans to visit her that weekend. Brian Mannazzi, one of the roommates, testified that Hendrickson went upstairs to Blankenship's room and they began arguing. He testified that at some point after 11:30 p.m., they were still arguing and Blankenship locked herself in a downstairs bathroom, which she commonly did when they were "arguing severely." Mannazzi stated that he saw Hendrickson outside the bathroom as they continued to argue and later heard Hendrickson walk outside to the breaker box and cut off the power to some parts of the house. Mannazzi testified that the second time he saw Hendrickson outside the bathroom it "scared" him because Hendrickson was "crouched" in the corner with the lights off. He testified that Hendrickson may have had something in his hands. He stated that he returned to bed and was just falling asleep

when he heard the bathroom door open. He testified that he heard Blankenship say "Ron" in a "surprised voice" and then heard her scream for about 30 seconds; he then heard Hendrickson yell "Jodi you stabbed me."

{¶9} Corey Suydam, another roommate, testified that he saw Hendrickson sitting in the corner outside the bathroom that night with the lights off, just "staring ahead." Suydam testified that he later awoke to the sound of a woman screaming. When he went to the area outside the bathroom, he saw Blankenship on the ground covered with blood and Hendrickson standing over her. Hendrickson kept saying "she stabbed me, she stabbed me" and showed Suydam where he had been stabbed. Suydam called 911.

{¶10} Dale Wible testified that he was on the phone with Blankenship when Hendrickson came to her room that evening and could hear Hendrickson yelling in the background. Hendrickson began ridiculing and making threatening statements to Wible, telling Blankenship that if Wible spent the night that weekend, "bad shit is going to happen." Hendrickson also said that he had "ranger training" and would use it against Wible. Blankenship told Wible that Hendrickson would not leave her room. When asked why he did not call the police, Wible explained that she had begged him not to because during a previous incident, the police were called and made her leave the house for the weekend. He testified that at some point after 11:30 p.m., Blankenship left her room and locked herself in the downstairs bathroom. While she was in the bathroom, they exchanged several text messages between 12:00 a.m. and 12:15 a.m. and then had a 30 minute telephone conversation between 12:15 a.m. and 12:45 a.m. Wible testified that he could hear the door rattling as Hendrickson tried to enter the bathroom. Suydam's 911 call occurred at 12:49 a.m.

{¶11} Several responding officers and emergency personnel testified concerning their observations upon arriving at the scene. Officer Shawn Champ with the Nelsonville Police Department, the first responding officer, testified that as he walked up to the house Hendrickson, who was bleeding from his side, approached him and stated, "I stabbed her, I stabbed her." Because Hendrickson did not appear to be seriously injured and Officer Keith Tabler had just arrived, Officer Champ went inside the house to check on the other victim. He discovered Blankenship's lifeless body on the floor and found a knife next to her body. Officer Table, also with the Nelsonville Police Department, testified that when he arrived at the scene, he observed Hendrickson holding his side, rocking back and forth, and mumbling. He asked Hendrickson what happened and Hendrickson responded, "I think I killed her." Officer Brian Sass with the Hocking College Police Department testified that Hendrickson also made statements to him at the scene concerning what happened; Hendrickson stated, "She stabbed me and I took the knife and I stabbed her and stabbed her and stabbed her and stabbed her." Timothy Rodehaver, a paramedic with the Southeast Ohio EMS, testified that when he arrived Hendrickson was sitting outside. He testified that while assessing Hendrickson's injuries, Hendrickson told him that "he had been stabbed and in self-defense he had stabbed her." Rodehaver testified that Hendrickson had a small stab wound on his left side and another small wound underneath the stab wound.

{¶12} Jonathan Jenkins, a crime scene investigator with the Ohio Bureau of Criminal Identification and Investigation, testified that he "processed" the scene. He described the knife found near Blankenship's body as a pocket knife; a folding blade with a partial serrated blade and smooth blade with a clip on it. He also testified that the

locking mechanism on the bathroom door was bent, that there was a crack in the door jam, and that paint chips had fallen off the door frame onto the floor. He recovered several writings from Hendrickson's room, including notes, poems, and Biblical verses Hendrickson had previous given to Blankenship. Finally, he found several knives in the trunk of Hendrickson's car.

{¶13} Dr. Manesha Pandey, who performed the autopsy on Blankenship's body, testified that the cause of death was "multiple sharp force trauma." According to her testimony, Blankenship suffered 14 stab wounds, six of which were fatal. Her neck was slashed and her right thyroid artery and right thyroid cartilage were sliced in two. She also suffered from a fractured cervical vertebrae. She also sustained stab wounds to her heart, lungs, abdomen, hips, and shoulder and several "defensive wounds" to her arms and hands.

{¶14} The State also presented testimony from friends and family members of Blankenship. None of them ever knew Blankenship to carry a knife.

{¶15} Then the defense presented its case. Hendrickson, who was a park ranger student, testified that during his relationship with Blankenship, he was "verbally cruel" toward her, but denied ever hitting her. He testified that during the weeks following their final break up, he was "very depressed" and gave Blankenship several writings including poems, notes, and Biblical scriptures expressing his despair. While he testified that he was moving on with his life, he admitted that he was "concerned" about Wible's upcoming visit that weekend. Hendrickson testified that when he arrived home on the evening of April 11th, he discovered some writings that he had previously given to Blankenship under his bedroom door. He tried to call her a couple of times, but she did not answer her cell

phone. So, he went upstairs to her room. According to Hendrickson, he attempted to engage in a causal conversation with her, but she was on the phone with Wible. He testified that when she got off the phone, he tried to talk to her about the plans for the weekend. Hendrickson testified that at some point, she began talking to Wible again and stated "he won't" several times; she then grabbed him by the arm and started pulling him off of her bed and said "he won't leave." Hendrickson testified that as he walked toward the door, she held the phone up so that he could hear what they were saying. Hendrickson testified that he became upset and started yelling at them. He testified that Blankenship then took items from her purse, walked downstairs, and locked herself in the bathroom.

{¶16} Hendrickson testified that he followed her downstairs, "shook" the door to see if it was locked, and "persisted in yelling." He then went outside and turned off the breaker switches to the lights in an effort to get her to come out of the bathroom. He then sat down on the floor outside the bathroom for a "long time." At some point, when he heard the door to their bathroom open, he stood up and saw Blankenship standing in the bathroom doorway using her cell phone as a light.

{¶17} Hendrickson testified that she then said, "I have a knife." According to Hendrickson, he "laughed" and raised his arm to lean against the door jam, partially blocking her exit. He testified that he then felt a sharp pain on his left side and that it "shocked" him. He testified that he then "made contact" with Blankenship and "started pushing away." He testified that he was "very scared" and thought he was going to die, that he was "fearful" for his life, and that he was "just panicking" and "in passion." He testified that he twice yelled "what's the knife for" in an effort to get help and started

pushing with both hands. He testified that he believed he may have gotten a hold of the knife, but he was not sure. He testified that she was "trying to resist me" and that she then said, "oh my gosh Ron" which "startled" him. He stated that he stopped pushing, but that she then came back toward him and pushed him backward. Hendrickson stated that he was "panicking" and thought he was a "dead man." The next thing he remembered was pushing and pulling, from side to side, and back and forth, "trying to stop me from getting stabbed and stuff." When asked why he fought with Blankenship, Hendrickson stated, "To save myself. I didn't want to die. To stop myself from getting stabbed." At trial, Hendrickson identified the knife used in the stabbing and testified that he had given it to Blankenship as a gift in 2005 and that she carried it in her purse. He also testified that he did not receive stitches for the two stab wounds he sustained.

{¶18} Other witnesses also testified on Hendrickson's behalf. Shalon Chrislit and Brittany Franks generally testified about Hendrickson's activities that night before he returned home. Chrislit testified that Hendrickson was in a "great mood" that night and that he had made plans with another woman, Caitlin Williams, to go out that weekend. Hendrickson's mother, Penny Hendrickson, also testified. She testified that in 2006 she had a conversation with Blankenship and her mother during which they joked about the "strange" gift Hendrickson had given Blankenship; she testified that Hendrickson had given Blankenship a knife as a gift in 2005. His father, Ronald Hendrickson Sr., also testified. He testified that the weekend following the stabbing as he was cleaning out Hendrickson's room, he discovered the pants Hendrickson had been wearing before he went to Blankenship's room that night. He testified that when he picked them up, a

Leatherman knife fell out of them. The defense argued that had Hendrickson intended to stab Blankenship, he would have likely used this knife.

{¶19} Hendrickson requested jury instructions on self-defense and voluntary manslaughter. The trial court denied his requests, and the jury found him guilty of aggravated murder. The court later sentenced Hendrickson to life in prison, with parole eligibility after 30 years. Hendrickson now appeals.

II. Assignments of Error

{¶20} Hendrickson presents three assignments of error:

FIRST ASSIGNMENT OF ERROR

> THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND DENIED APPELLANT HIS FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO A TRIAL BY JURY AND DUE PROCESS WHEN IT REFUSED TO INSTRUCT ON THE AFFIRMATIVE DEFENSE OF SELF-DEFENSE

SECOND ASSIGNMEMT OF ERROR

> THE TRIAL COURT COMMITTED PREJUDICIAL ERROR AND VIOLATED THE DUE PROCESS CLASUSES OF THE STATE AND FEDERAL CONSTITUTIONS WHEN IT REFUSED APPELLANT'S REQUEST TO INSTRUCT ON THE INFERIOR OFFENSE OF VOLUNTARY MANSLAUGHTER

THIRD ASSIGNMENT OF ERROR

> TRIAL COUNSEL WAS INEFFECTIVE UNDER THE SIXTH AMENDMENT OF THE U.S. CONSTITUTION FOR FAILING TO PROPERLY ADVISE HIS CLIENT ABOUT THE POSSIBLE MAXIMUM TERM HE WAS FACING

III. Jury Instructions

{¶21} In his first assignment of error, Hendrickson contends that the trial court should have instructed the jury of the affirmative defense of self-defense. In his second assignment of error, he contends that the trial court should have instructed the jury on the inferior offense of voluntary manslaughter.

A. Standard of Review

{¶22} We have previously set out our standard of review regarding a trial court's jury instructions:

> The law requires a trial court to give the jury all instructions that are relevant and necessary for the jury to properly weigh the evidence and reach their verdict as the fact finder. *State v. Comen* (1990), 50 Ohio St.3d 206, 443 N.E.2d 640, paragraph two of the syllabus. The jury instructions 'must be based upon the actual issues in the case as presented by the evidence.' *State v. Tompkins* (Oct. 25, 1996), Clark App. No. 95-CA-0099, 1996 WL 612855, citing *State v. Scimemi* (June 2, 1995), Clark App. No. 94-CA-58, 1995 WL 329031. Where it is possible that 'reasonable minds might reach the conclusion sought by the specific instruction' the court must provide guidance to the jury. See *Murphy v. Carrollton Mfg. Co.* (1991), 61 Ohio St.3d 585, 575 N.E.2d 828. While the actual wording of the charge is left to the court's discretion, the need for an instruction presents a question of law. Id.

State v. Dyer, Scioto App. No. 07CA3163, 2008-Ohio-2711, at ¶11, quoting *State v. Monroe*, Scioto App. No. 05CA3042, 2007-Ohio-1492, at ¶50; see, also, *State v. Babu*, Athens App. No. 07CA36, 2008-Ohio-5298, ¶21.

B. Instructions on Self-Defense

{¶23} Under Ohio law self-defense is an affirmative defense, which a defendant must prove by a preponderance of the evidence. R.C. 2901.05(A); *State v. Martin* (1986), 21 Ohio St.3d 91, 488 N.E.2d 166, syllabus. In order to establish self-defense, a defendant has to prove that (1) he was not at fault in creating the situation giving rise to the affray, (2) he had reasonable grounds to believe and an honest belief that he was in immediate danger of death or great bodily harm and that his only means of escape from such danger was by the use of force, and (3) he had not violated any duty to escape to avoid the danger. *State v. Williford* (1990), 49 Ohio St.3d 247, 249, 551 N.E.2d 1279; *State v. Robbins* (1979), 58 Ohio St.2d 74, 388 N.E.2d 755, paragraph two of the

syllabus. A defendant is privileged to use only that force that is reasonably necessary to repel the attack. *Wiiliford* at 249, citing *State v. McLeod* (1948), 82 Ohio App. 155, 157, 80 N.E.2d 699. The elements of self-defense are cumulative, and if defendant fails to prove *any one* of the elements by a preponderance of the evidence, he fails to demonstrate that he acted in self-defense. See *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, 772 N.E.2d 81, ¶72, citing *State v. Jackson* (1986), 22 Ohio St.3d 281, 284, 490 N.E.2d 893.

{¶24} A defendant must meet the burden of going forward with evidence of a nature and quality sufficient to raise an affirmative defense. *State v. Howard*, Ross App. No. 07CA2948, 2007-Ohio-6331, ¶28, citing R.C. 2901.05; *State v. Cross* (1979), 58 Ohio St.2d 482, fn. 5, 391 N.E.2d 319; *State v. Abner* (1978), 55 Ohio St.2d 251, 379 N.E.2d 228. The trial court, as a matter of law, cannot give a jury instruction on an affirmative defense if a defendant fails to meet this burden. Id., citing *Cross* at fn. 5; *Abner* at 253-254; *State v. Melchior* (1978), 56 Ohio St.2d 15, 20, 381 N.E.2d 195. "The proper standard for determining in a criminal case whether a defendant has successfully raised an affirmative defense under R.C. 2901.05 is to inquire whether the defendant has introduced sufficient evidence which, if believed, would raise a question in the minds of reasonable men concerning the existence of such issue." *Melchior* at paragraph one of the syllabus. A trial court does not err by refusing to instruct on self-defense when the defendant fails to produce sufficient evidence to support that defense. *Howard* at ¶29, citing *State v. Nichols*, Scioto App. No. 01CA2775, 2002-Ohio-415.

{¶25} In denying Hendrickson's request for a jury instruction on self-defense, the trial court stated:

> In the case at bar, there is legally insufficient evidence showing that the defendant was not at fault in creating the encounter that led to Jodi Blankenship's death. The undisputed evidence shows that defendant and Blankenship argued over Blankenship's new boyfriend. Blankenship attempted to withdraw from the argument by entering the bathroom and locking the door. Rather than leaving Blankenship alone, the defendant rattled the door, cut the electrical power [sic] the bathroom, then waited outside the door for at least an hour for Blankenship to emerge. When she finally opened the door, the defendant confronted her in the doorway. Defendant has failed to show there is legally sufficient evidence on the "lack of fault" element of self defense.
>
> Furthermore, there is no evidence supporting any reasonable conclusion that the defendant's use of force was anything other than greatly disproportionate to his apparent danger. Defendant received two minor wounds, and returned these with fourteen severe stab wounds to vital parts of the victim's body, six of which were imminently fatal. Accordingly, the defendant has not shown there is sufficient evidence justifying an instruction on self defense, and his request for the same is denied.

{¶26} Hendrickson contends that he presented sufficient evidence to show that he was not "at fault" in creating the encounter that led to Blankenship's death. Hendrickson argues that while his actions may have created the situation leading up to the affray, he did not provoke the violence that resulted. In support of his position, he relies on *State v. Gillispie*, 172 Ohio App.3d 304, 2007-Ohio-3439, 874 N.E.2d 870, where the court stated:

> The first prong of the *Robbins* test for self-defense – that the defendant was not at fault in creating the situation giving rise to the affray – does not require a showing that the defendant played no part in it. Neither does it preclude the defense if the defendant was engaged in criminal conduct when he was attacked. *State v. Turner*, 171 Ohio App.3d 82, 869 N.E.2d 708. Rather, it requires a defendant to show that he was not "at fault" in creating the situation; that is, that he had not engaged in such wrongful conduct toward his assailant that the assailant was provoked to attack the defendant.

Gillispie at ¶17.

{¶27} Hendrickson argues that because the evidence showed that Blankenship started the "actual physicality of the assault" by stabbing him, the trial court erred when it focused on events leading up the physical exchange. If the evidence shows that the defendant threatened the victim or was the aggressor, he will normally be unable to establish that he was not "at fault" in creating the situation which gave rise to his use of force. See *Melchior*, supra, at 20; see, also, *Robbins*, supra, at 80. Thus, the "not-at-fault" requirement generally means that the defendant must not have been the initial aggressor in the incident. See *Robbins.* And, as we have previously concluded, the concept of not being "at fault" is broader than simply not being the immediate aggressor. See *Nichols*, supra, at *4. In *Nichols* we found that trial court properly rejected an instruction on self-defense where the evidence showed that the defendant was "at fault" for creating the affray even though the victim threw the first punch. We noted that a person may not provoke an assault or voluntarily enter an encounter and then claim a right of self-defense. Id. Our holding in *Nichols* is consistent with the *Gillispie* decision where a defendant is "at fault" if he engaged in "such wrongful conduct" as to provoke the violent situation. See *Gillispie* at ¶17.

{¶28} Thus, the aggressor in an encounter normally may not avail himself of the protection of self-defense. *Williford*, supra, at 249. However, while Hendrickson was verbally aggressive with Blankenship and created an environment ripe for physical confrontation, there is no evidence in the record that he threatened Blankenship with deadly force and/or physically assaulted her. Yet, Blankenship responded to Hendrickson's non-deadly "aggression" by using deadly force, i.e. by stabbing him twice in the abdomen with a knife. In other words, Blankenship did not simply respond to

Hendrickson's provocation with the use of physical force, which may have been justified. Rather, she used deadly force in response to a situation that did not justify it. Because Blankenship's use of deadly force against Hendrickson was not lawful, Hendrickson was justified in defending himself against a deadly attack. In other words, a "non-deadly aggressor" who begins an encounter may justifiably defend himself against a deadly attack. He may do so because the use of deadly force by the victim in response to non-deadly aggression is an unlawful use of force. See 2 LaFave, Substantive Criminal Law (2 Ed. 2003) 153-154, Section 10.4(e). For instance, if the initial aggressor slaps the victim with an open hand, should the law preclude that aggressor from defending himself if the victim pulls a gun and starts shooting? To adopt such a policy would be to encourage victims to overreact with deadly force rather than restricting the victims to only the degree of force necessary to repel the initial attack. Thus, we conclude that the trial court erred in finding that Hendrickson failed to show that he was not "at fault" in creating the situation giving rise to Blankenship's death.

{¶29} Nevertheless, Hendrickson was not entitled to an instruction of self-defense because no reasonable juror could believe that the degree of force he used, i.e. stabbing Blankenship 14 times, was "reasonably necessary" to repel the attack. As an alternative basis for denying his request, the trial court found that all the evidence showed his use of force was greatly disproportionate to his apparent danger. Hendrickson contends that the trial court erred when it cited his use of excessive force as a basis for denying the instruction. He argues that whether he used a disproportionate amount of force was a

fact issue for the jury and not an appropriate consideration concerning whether he was legally entitled to the instruction.

{¶30} Under a self-defense claim, a person is privileged to use only that force that is reasonably necessary to repel the attack. See *Williford*, supra, at 249. The second element of the affirmative defense of self-defense requires the defendant to prove that he had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape was the use of such force. See *State v. Thomas* (1997), 77 Ohio St.3d 323, 330, 673 N.E.2d 1339, citing *Williford* at 249, and *Robbins* at paragraph two of the syllabus. This second element has both objective and subjective components. The defendant's belief must be objectively reasonable under the circumstances, and the defendant must have subjectively and honestly believed that danger was imminent. *State v. Keith*, Franklin App. Nos. 08AP-28, 08AP-29, 2008-Ohio-6122, ¶23, citing *Thomas* at 330-331. The objective part of the test requires consideration of "whether, considering all of the defendant's particular characteristics, knowledge, or lack of knowledge, circumstances, history, and conditions at the time of the attack," a reasonable person would believe that danger was imminent. Id., citing *Thomas* at 330. The subjective part requires consideration of whether the defendant himself actually believed that he was in imminent danger. Id.

{¶31} Implicit in this second element of self-defense, i.e. that the defendant's use of deadly force was in "good faith," is the requirement that the degree of force used was "warranted" under the circumstances and "proportionate" to the perceived threat. See *State v. Palmer* (1997), 80 Ohio St.3d 543, 564, 687 N.E.2d 685; see, also, *Cassano*, supra. In *Cassano*, the Supreme Court of Ohio found that the trial court's erroneous

instruction on the "duty to retreat" element of self-defense was harmless because the defendant had no basis for a "bona fide belief that he was in imminent danger of death or great bodily harm" and could "escape from such danger" only by using deadly force. Id. at ¶74-76. The Court noted that even under the defendant's version, when he stabbed the victim, the victim had no weapon and that once the defendant retrieved the "shank" from the victim, he was not in danger. The Court also found that the defendant repeatedly stabbed the victim after the victim ceased to pose any conceivable threat to him. Id. at ¶77. Thus, the Court found that the defendant was not prejudiced by the trial judge's erroneous instruction on the duty to retreat because no reasonable jury could have believed that he acted in self-defense. Id., citing *Palmer*, supra, at 564. In *Palmer*, the Supreme Court of Ohio found that the trial court properly refused to instruct the jury on self-defense in part because no reasonable jury could have believed that the defendant used deadly force in "good faith." Id. The Court found that even if the defendant was justified in attempting to strike the victim with his fist and that the gun defendant was carrying accidently discharged, defendant's act of firing a second shot into the victim's head and his act of firing two shots into the second's victim's head "were certainly not warranted." Id.

{¶32} In *State v. Rice*, Butler App. No. CA2003-01-015, 2004-Ohio-697, the Twelfth District Court of Appeals considered whether the trial court erred in failing to instruct the jury on self-defense as requested. There, the evidence showed that the victim was stabbed in the chest five times. According to the defendant, he was arguing with the victim in her vehicle when she hit him with her fists. He hit her back so she pulled out a knife, waved it in his face, and attempted to stab him. He grabbed her hand

and pushed it down to keep the knife away from him. Defendant maintained that the knife "could have possibly cut her at that time." Id. at ¶27. In concluding that the trial court did not err in refusing to instruct the jury on self-defense, the Twelfth District held that a defendant is privileged to use only the level of force that is reasonably necessary to repel the attack. Id. at ¶28. Even assuming the defendant's version, however, the court found that he had not demonstrated that the force reasonably necessary to repel the victim's attack required stabbing her five times in the chest. Thus, the court found that defendant had failed to demonstrate that he acted in self-defense and that the trial court did not err in failing to instruct the jury on self-defense. Id at ¶29.

{¶33} We have specifically held that self-defense is inappropriate if the force used is "so grossly disproportionate as to show revenge or as criminal purpose." *Nichols*, supra, at *3 (concluding that trial court properly refused to instruct the jury on self-defense where the evidence showed in part that defendant inflicted severe harm on the victim, that "exceeded that which was conceivably necessary to 'repel' the attack"), citing *State v. Speakman* (Mar. 27, 2001), Pickaway App. No. 00CA35, 2001 WL 315198, unreported; see, also, Ohio Jury Instructions, CR 421.23 ("Excessive Force. If the defendant used more force than reasonably necessary and if the force used is greatly disproportionate to the apparent danger, then the defense of [self-defense] is not available.").

{¶34} According to Hendrickson, after Blankenship stabbed him, he started "pushing." He believed he may have gotten a hold of the knife, but was not sure. As he continued to "push," she "tried to resist me" and then said, "oh my gosh Ron." He stopped "pushing," but she then came toward him and pushed him backward. The next

thing he remembered was pushing and pulling, from side to side, and back and forth. While he admitted to several responding officers at the scene that he "stabbed" Blankenship, Hendrickson testified that he did not actually remember stabbing her.

{¶35} Although Hendrickson may not remember stabbing Blankenship, the evidence shows that she in fact suffered from 14 stab wounds, six of which were fatal. Several of the stab wounds were to vitals areas of the body. As described above, her neck was slashed and her right thyroid artery and right thyroid cartilage were sliced in two. She also suffered from a fractured cervical vertebrae. She also sustained stab wounds to her heart, lungs, abdomen, hips, and shoulder and stab wounds to her arms and hands, which were described as "defensive wounds." According to Hendrickson, he suffered from two small stab wounds on his left side; he did not receive stitches for his injuries. Other than the initial pain in his left side from being stabbed, Hendrickson's testimony showed that he suffered from no other injuries during the "struggle." And there was no other evidence of any defensive wounds on his hands or arms.

{¶36} Moreover, as for the "struggle" that ensued after Blankenship inflicted the two minor stab wounds, Hendrickson testified that during this time Blankenship tried to "resist" him, which suggests defensive action on her part. Then, after believing that he "may" have gotten a hold of the knife, there was only one specific instance in which he described that she came at him and "pushed" him backward, stating "oh my gosh Ron." Other than that instance where she merely "pushed" him, there was no other testimony concerning the "threat" she actually posed as he continued "pushing and pulling." Thus, it is clear that at some point during the "struggle," Blankenship no longer posed a conceivable threat to him and his actions were no longer "defensive." See *State v. Broe*,

Hamilton App. No. C-020521, 2003-Ohio-3054, ¶75 (finding that the trial court's erroneous instruction on the "duty to retreat" element was harmless error because while one blow to the victim's head may have constituted self-defense, the next several blows defendant rendered to her head while she was attempting to rise "removed [defendant's] action from being defensive."). See, also, *Cassano*, supra, at ¶77.

{¶37} We are quick to acknowledge that the law does not require one who is exercising self-defense in response to a deadly threat to measure his efforts with the eye of a surgeon. The exigency of that situation does not require analytical precision. To paraphrase Justice Holmes in *Brown v. United States* (1921), 256 U.S. 335, 65 L.Ed.2d 961, detached reflection in the presence of deadly force is an unreasonable demand. However, we do not impose such an unreasonable standard here. Given the severity of Blankenship's numerous stab wounds, their location, and the multiple defensive wounds, along with Hendrickson's two minor stab wounds and vague description of the "struggle" and the threat Blankenship posed, we agree with the trial court's finding that Hendrickson's force was grossly disproportionate to the perceived danger. Because no reasonable jury could believe that stabbing Blankenship 14 times after disarming her was "reasonably necessary" to repel her attack, the trial court did not err in refusing to instruct the jury on self-defense. In other words, arguably Hendrickson may have been justified in using deadly force until he was safe from Blankenship's efforts to stab him. Once he eliminated her threat to his life or serious bodily injury, he had to stop using deadly force. He did not. Therefore, his use of force was excessive. Hendrickson's continued use of deadly force did not indicate he exercised it in good faith. His use of force was so grossly disproportionate to the actual threat Blankenship represented after she had been

disarmed that it indicates he acted out of revenge or criminal purpose rather than self-defense.

{¶38} Therefore, we conclude that Hendrickson was not entitled to an instruction on self-defense. Accordingly, we overrule Hendrickson's first assignment of error.

C. Voluntary Manslaughter

{¶39} R.C. 2903.03(A) defines "voluntary manslaughter" and provides: "No 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 * * *." Voluntary manslaughter is an inferior-degree offense to aggravated murder. See *State v. Elmore,* 111 Ohio St.3d 515, 2006-Ohio-6207, 857 N.E.2d 547, ¶80.

{¶40} Before a trial court gives a voluntary manslaughter instruction in a murder case, the court first must determine "whether evidence of reasonably sufficient provocation occasioned by the victim has been presented to warrant such an instruction." Id. at ¶81, citing *State v. Shane* (1992), 63 Ohio St.3d 630, 590 N.E.2d 272, paragraph one of the syllabus. "In making that determination, trial courts must apply an objective standard: 'For provocation to be reasonably sufficient, it must be sufficient to arouse the passions of an ordinary person beyond the power of his or her control.'" Id., quoting *Shane* at 635. "If insufficient evidence of provocation is presented, so that no reasonable jury would decide that an actor was reasonably provoked by the victim, the trial judge must, as a matter of law, refuse to give a voluntary manslaughter instruction." *Shane* at 634.

{¶41} "Once the court finds that the evidence shows that the defendant was sufficiently provoked under the objective standard, the inquiry shifts to a subjective standard: whether the defendant actually was under the influence of sudden passion or in a sudden fit of rage." *State v. Sudderth*, Lawrence App. No. 07CA38, 2008-Ohio-5115, ¶14, citing *Shane*, supra. It is at this point that the defendant's emotional and mental state and the conditions and circumstances that surrounded him at that time must be considered. *Shane* at 634. However, "[e]vidence supporting the privilege of self-defense, i.e. that the defendant feared for his own and other's personal safety, does not constitute sudden passion or a fit of rage as contemplated by the voluntary manslaughter statute." *Sudderth* at ¶14, quoting *State v. Harris* (1998), 129 Ohio App.3d 527, 535, 718 N.E.2d 488; see, also *State v. Perdue,* 153 Ohio App.3d 213, 2003-Ohio-3481, 792 N.E.2d 747, at ¶12. "While self-defense requires a showing of fear, voluntary manslaughter requires a showing of rage, with emotions of 'anger, hatred, jealously, and/or furious resentment.'" Id. at ¶14, quoting *State v. Levett*, Hamilton App. No. C-040537, 2006-Ohio-2222, at ¶29 (citations omitted). "Fear alone is insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or fit of rage." *Perdue* at ¶12, citing *State v. Mack* (1998), 82 Ohio St.3d 198, 201, 694 N.E.2d 1328.

{¶42} In denying Hendrickson's request for a voluntary manslaughter instruction, the trial court stated:

> In the case at bar, the defendant produced evidence that he feared for his life and struggled with the victim. He could not remember actually stabbing her. His fear for his safety, alone, does not justify an instruction on voluntary manslaughter, and the defendant has not produced legally sufficient evidence that he was under the influence of a sudden passion or fit or rage.

> Accordingly, the defendant's request for an instruction on voluntary manslaughter is denied.

{¶43} Hendrickson argues that there was ample evidence from which the jury could have reasonably found that he acted under "sudden passion" or a "sudden fit of rage" brought on by Blankenship's "serious provocation." He argues that after Blankenship unexpectedly stabbed him, he acted out of fear *and* "in passion" and points to their "mutual-combat" struggle and the ferocity of the attack.

{¶44} However, even if we assume that the evidence supports an objective finding that Hendrickson was sufficiently provoked by Blankenship, we conclude that the evidence fails to show that Hendrickson actually acted under a sudden passion or fit of rage sufficient to warrant a voluntary manslaughter instruction. First, Hendrickson's act of killing Blankenship by stabbing her 14 times demonstrates a purposeful killing, not an impulsive one. See *State v. Carter* (2000), 89 Ohio St.3d 593, 602, 734 N.E.2d 345. In *Carter*, the Supreme Court of Ohio found that the trial court did not err in refusing to instruct the jury on voluntary manslaughter as the defendant requested. The Court concluded that the defendant's request was properly denied because the evidence, including that the victim was stabbed 18 times, fully supported a purposeful killing. Id. at 602; see, also, *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, 785 N.E.2d 439, ¶70 (voluntary-manslaughter instruction was not warranted where defendant's act of killing the victims by shooting one victim five times and shooting the other victim in the back of the head demonstrates purposeful killing).

{¶45} Second, the record clearly demonstrates Hendrickson's subjective belief that he acted out of fear and not sudden passion or rage. According to Hendrickson, he was "shocked" when Blankenship stabbed him and he immediately began pushing her

away. He was "very scared" and thought he was going to die. He twice yelled "what's the knife for" in an effort to get help. When asked about his mental state, Hendrickson testified, "I was fearful, very fearful for my life. And I was just panicking, I guess, and in passion." At some point he believed he may have gotten a hold of the knife and stopped pushing. However, when she came back toward him and pushed him backward, he was "panicking" and thought he was a "dead man." The next thing he remembered was pushing and pulling, "trying to stop me from getting stabbed and stuff." When asked why he fought with Blankenship, Hendrickson stated, "To save myself. I didn't want to die. To stop myself from getting stabbed."

{¶46} Clearly, the crux of Hendrickson's testimony was that acted out of fear, not passion or rage. He consistently testified that he was "fearful" for his life and "scared" he might die; he "panicked" and reacted to protect himself. Moreover, Hendrickson never testified that he acted under a sudden fit of rage. Hendrickson argues that their violent struggle supports a finding of rage. However, we find that his vague description of a "struggle" consisting of "pushing and pulling" where he does not even remember stabbing Blankenship 14 times does not satisfy his burden to produce evidence showing that he in fact stabbed her with emotions of "anger, hatred, jealously, and/or furious resentment in rage," especially where his testimony makes no mention of such emotions. Likewise, Hendrickson did not satisfy his burden to produce evidence showing that he acted under a sudden passion. Other than one fleeting reference to "I guess, and in passion" there is no other evidence that Hendrickson actually stabbed her under a sudden passion sufficient to warrant a voluntary manslaughter instruction. Because Hendrickson failed to present evidence to show that he actually acted under a sudden passion or fit of rage, the

trial court was correct in refusing to instruct on voluntary manslaughter. Thus, we overrule Hendrickson's second assignment of error.

IV. Ineffective Assistance

{¶47} In order to prevail on a claim of ineffective assistance of counsel, Hendrickson must show (1) his counsel's performance was deficient in that it fell below an objective standard of reasonable representation, and (2) the deficient performance prejudiced his defense so as to deprive him of a fair trial. *State v. Smith* (2000), 89 Ohio St.3d 323, 327, 731 N.E.2d 645, citing *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373, paragraph two of the syllabus. To establish prejudice, Hendrickson must show that there exists a reasonable probability that, were it not for counsel's errors, the result of the proceeding would have been different. *State v. White* (1998), 82 Ohio St.3d 16, 23, 693 N.E.2d 772; *Bradley,* at paragraph three of the syllabus.

{¶48} In his third assignment of error, Hendrickson contends that his trial counsel was ineffective for failing to properly advise him about the possible maximum term he was facing if convicted after trial. Hendrickson contends that trial counsel failed to pursue a "flat" 15-year plea deal based on counsel's erroneous belief that the maximum sentence for aggravated murder was life with possible parole after 20 years. Hendrickson argues that by advising him that he was only facing a 20-year to life sentence, and not the actual 30-year to life sentence he ultimately received, trial counsel "could have inadvertently induced" him to proceed to trial and that counsel's error should be "deemed prejudicial."

{¶49} Our review of the record shows that after the jury returned its verdict, the parties discussed the possible sentences with the court. During their discussion, defense counsel stated:

BY MR. HODGE: Thank you, Judge. We would submit there are no specifications in this case. It's a statutory sentence. There's only one sentence available to the Court, twenty to life.

* * *

BY THE JUDGE: Unless I'm reading the wrong grid Mr. Hodge, I think there are several options. I'm looking at 2929.03(A)(1)(a). Except as provided in (A)(2) of this section the trial court shall impose one of the following sentences. I think that's the section. Now if I'm wrong, tell me so. It says I have, one option is life in prison without parole. The second option is life imprisonment with parole eligibility after twenty years. A third is life in prison with eligibility after twenty five years. And a four [sic] is life in prison with thirty years. Is that your understanding, Mr. Warren?

{¶50} Thereafter, the court held a bench conference, during which the following exchange took place:

BY MR. HODGE: (Inaudible) my client in terms of (inaudible) egregious error on my part.

BY THE JUDGE: You advised him it was twenty to life?

BY MR. HODGE: Twenty to life, yes sir. I advised him of that and he turned down a flat fifteen. He turned down (inaudible) voluntary manslaughter. I'm sorry. A straight murder charge offer at a different time. (Inaudible) and that is an egregious error on my part.

BY MR. WARREN: Just for the record, we talked about some possibilities. We never offered a flat fifteen.

BY MR. HODGE: Well we had further discussions more recently where essentially (inaudible) from the Prosecutor was likely to be accepted. All I'm saying is he without being properly advised did not authorize me to do that. I don't know what to say here. I don't know what to say.

* * *

BY MR. HODGE: I can only apologize. It's just an egregious error on my part.

BY THE JUDGE: Do you want to speak to him?

BY MR. HODGE: There's nothing that can be done at this point.

{¶51} The court later sentenced Hendrickson to life imprisonment with parole eligibility after thirty years.

{¶52} The *Strickland* analysis applies to claims of ineffective assistance of counsel involving counsel's advice offered during the plea process. *Hill v. Lockhart* (1985), 474 U.S. 52, 58, 106 S. Ct. 366, 88 L.Ed.2d 203. A defendant who asserts that his counsel was constitutionally ineffective for encouraging him to plead guilty must prove both that his counsel's performance was deficient and that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Id. at 59. Similarly, a defendant who claims that his counsel was ineffective for encouraging him to reject a plea bargain and go to trial states a viable Sixth Amendment claim. See *Turner v. Tennessee*, 858 F.2d 1201, 1205 (6th Cir. 1988), vacated on other grounds, 492 U.S. 902 (1989), reinstated on other grounds, 940 F.2d 1000. The defendant must prove both deficient performance on the part of his counsel and that, but for his counsel's advice, there is a reasonable probability that he would have pleaded guilty. Id. at 1206.

{¶53} Here, we assume that trial counsel was deficient in failing to properly advise Hendrickson about the possible maximum term he was facing if convicted after trial. However, Hendrickson fails to demonstrate a reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different. First, as the State points out, there is no evidence that the State offered a "flat" 15-year term. In fact, while the prosecutor referenced "some possibilities" that were discussed concerning the

plea negotiations, there is no evidence in the record concerning the plea bargain process. Specifically, there is no evidence in the record concerning the plea offers actually made and/or rejected. Second, Hendrickson fails to demonstrate a reasonable probability that he would have accepted any particular offer, including a "flat" 15-year term, even if the State had offered it and his counsel had so advised. He fails to point to any evidence in the record to show that, but for his counsel's advice, there is a reasonable probability that he would have pleaded guilty. Hendrickson's contention that trial counsel "could have inadvertently induced" him to proceed to trial is insufficient. Because the record before us fails to support Hendrickson's claim that his trial counsel's deficient performance prejudiced him, we reject his ineffective assistance of counsel claim.[1]

V. Conclusion

{¶54} Having overruled each assignment of error, we affirm the trial court's judgment.

JUDGMENT AFFIRMED

[1] A direct appeal is not the proper avenue for an attack on counsel's performance that must rely upon evidence outside the record of the trial. Post-conviction relief may be available to contest those claims, however.

Kline, P.J., concurring in judgment only as to the first assignment of error.

{¶55} I concur in judgment and opinion as to the second and third assignments of error. However, I concur in judgment only as to the first assignment of error and write separately to explain my reasoning.

{¶56} Hendrickson contends in his first assignment of error that the trial court erred when it refused to instruct the jury on the affirmative defense of self-defense.

{¶57} I agree with the majority that a defendant has to prove by a preponderance of the evidence three separate elements to establish self-defense. That is, "(1) he was not at fault in creating the situation giving rise to the affray; (2) he had reasonable grounds to believe and an honest belief that he was in immediate danger of death or great bodily harm and that his only means of escape from such danger was by the use of force; and (3) he had not violated any duty to escape to avoid the danger." Majority opinion at ¶23, citing *Williford*. I further agree that if a defendant fails to prove any one of the three elements, then he fails to show that he acted in self-defense. Id.

{¶58} Here, the trial court found that Hendrickson failed to establish the first element. And, the trial court went on to find that Hendrickson also failed to establish the second element because of the excessive force used. Just one of the trial court's two findings was a sufficient basis for refusing to instruct the jury on the affirmative defense of self-defense.

{¶59} On appeal, Hendrickson asserts that the trial court erred when it found that he failed to establish the first and second elements of self-defense. The majority opinion agrees with Hendrickson as to the first element and finds that the trial court erred, but disagrees with Hendrickson as to the second element and finds that the trial court did not

err. However, because Hendrickson failed to establish all three elements of self-defense, the majority overruled Hendrickson's first assignment of error.

{¶60} I respectfully disagree with the majority as to whether Hendrickson presented sufficient evidence to show the first element of self-defense, to wit: that he was not "at fault" in creating the encounter that resulted in Blankenship's death. Even if we were to believe Hendrickson's account of the incident, I would still find, as a matter of law, that Hendrickson was at fault in creating the situation.

{¶61} Initially, I believe that Hendrickson was the first aggressor. "The 'not at fault' requirement * * * means that the defendant must not have been the first aggressor in the incident." *State v. Turner*, 171 Ohio App.3d 82, 2007-Ohio-1346, at ¶23, citing *State v. Robbins* (1979), 58 Ohio St.2d 74. See, also, *State v. Morris*, Franklin App. No. 05AP-1139, 2009-Ohio-2396, at ¶29; *State v. Smith*, Greene App. No. 2006 CA 68, 2007-Ohio-2969, at ¶31. Here, even according to Hendrickson's own testimony, he was the first aggressor in the incident with Blankenship. Hendrickson (1) followed Blankenship to the locked bathroom, (2) shook the door to the bathroom, (3) turned off the breaker switch to the bathroom light, and, then, (4) sat silently in the dark immediately outside the bathroom. When Blankenship opened the bathroom door, Hendrickson stood up to confront her. According to Hendrickson's own testimony, Blankenship did not leave the bathroom.

{¶62} Q: So [Blankenship] hadn't come out.

{¶63} A: I don't think she came out at all.

{¶64} Q: You don't think she came out.

{¶65} A: No. She was standing there. She didn't really come out.

{¶66} Q: Okay. And she's standing inside the bathroom. Correct?

{¶67} A: Yeah. Like at the threshold. (Day Five Transcript at 196-97)

{¶68} Thus, Hendrickson blocked Blankenship from leaving the bathroom. Then, according to Hendrickson's own testimony, he advanced on Blankenship in the dark, enclosed space.

{¶69} Q: So you heard the door open and what happened next?

{¶70} A: I stood up. And then at the door to the bathroom was Jodi. And I saw Jodi.

{¶71} Q: Alright. What happened next?

{¶72} A: She was standing there and she was holding a cell phone in her left hand like this using it as a light. And her right hand was down at her side. I heard her say I have a knife. I laughed. I –

{¶73} ***

{¶74} Q: And you said her hand was, her right hand was down to her side?

{¶75} A: Yes, that's correct.

{¶76} Q: What happens next when she says she—

{¶77} A: I laughed. And I moved my arm to lean against the door post.

{¶78} Q: Okay. And you say you moved your arm to lean on the door post. Are you talking about the door jam, the thing the door hangs on?

{¶79} A: That's, yeah, yeah.

{¶80} Q: The wood at the door?

{¶81} A: Yeah. Like where the hinge is attached to the wall.

{¶82} Q: And how did you, were you close enough to reach out and touch it.

{¶83} A: I kind of like had to lean into it. I was fairly close but I kind of had to lean.

{¶84} Q: So you put your hand up on the door, the wood facing, the door jam?

{¶85} A: Yes.

{¶86} Q: And which hand?

{¶87} A: My left. Or right I guess. This is my right.

{¶88} Q: Okay. Your right hand. So did you say anything to her?

{¶89} A: Well I just laughed.

{¶90} Q: What happened next?

{¶91} A: Then I felt a sharp pain on my left hand side. (Day Five Transcript at 165-67)

{¶92} Even after construing the evidence in Hendrickson's favor, I find that Hendrickson did the following: (1) laid in wait for Blankenship; (2) confronted Blankenship before she could leave the bathroom; (3) blocked Blankenship from leaving the bathroom; (4) laughed after being told about the alleged knife; and, then, (5) advanced upon Blankenship by leaning into the bathroom and putting his arm up to block the doorway. All of this happened before Blankenship allegedly stabbed Hendrickson. Based on this evidence, I find that Hendrickson was the first aggressor in the situation with Blankenship.

{¶93} The majority tries to accord *State v. Nichols* (Jan. 22, 2002), Scioto App. No. 01CA2775, 2002-Ohio-415, unreported, but I am not persuaded. In *Nichols*, the victim insulted the defendant while the two men were at the same bar. Because of this, the two men shoved each other and exchanged words. Later that night, the victim left the bar and walked to his car in the parking lot. The defendant followed the victim into the parking lot and, because of the prior incident, wanted to fight the victim. A fight then broke out, and the victim died after the defendant kicked him in the head. At trial, the

defendant requested a self-defense jury instruction. The trial court denied the defendant's request, and the jury found the defendant guilty of involuntary manslaughter. On appeal, this Court stated, "Ohio courts have long recognized that a person cannot provoke assault or voluntarily enter an encounter and then claim a right of self-defense." *Nichols*. Further, we found that the defendant "followed [the victim] to the parking lot when he could have left well enough alone. [The Defendant] was at fault for creating the situation and, thus, not entitled to an instruction on self-defense." *Nichols*. This was true even though the victim allegedly threw the first punch.

{¶94} Much like the defendant in *Nichols*, Hendrickson did not leave well enough alone. Instead, he shut off the power and sat silently outside of the bathroom for approximately forty-five minutes. Hendrickson then confronted Blankenship before she could leave the bathroom. Even after Blankenship allegedly warned Hendrickson that she had a knife, Hendrickson advanced upon her. Thus, he "creat[ed] the situation that gave rise to the affray," *Nichols*, and voluntarily entered into the encounter with Blankenship. See, also, *State v. Depew*, Ross App. No. 00CA2562, 2002-Ohio-6158, at ¶35 (relying on *Nichols* and finding that "[b]y entering his neighbor's yard, even at the victim's urging to do so, and choosing to confront the victim, [the defendant] voluntarily entered into the encounter with the victim").

{¶95} In *Nichols*, we also found that a self-defense claim was inappropriate because the victim did not seek out a confrontation. Here, I find no evidence that Blankenship sought to confront Hendrickson. Instead, Blankenship locked herself in the bathroom to get away from him. Blankenship then stayed in the locked bathroom for over forty-five minutes. After Blankenship opened the bathroom door, Hendrickson testified that she

said, "I have a knife." I can find just one reasonable construction of this statement; namely, that Blankenship was warning Hendrickson to stay away and let her out of the bathroom. This is especially true because Blankenship did not allegedly stab Hendrickson until after he laughed, put his arm against the door jam, and leaned forward.

{¶96} I find this case distinguishable from *Gillespie*, 172 Ohio App.3d 304, 2007-Ohio-3439, which the majority relies upon. In *Gillespie*, the defendant believed that the victim had stolen money and drugs from the defendant's house. The defendant also claimed that he saw the victim carrying a knife. As a result, the defendant armed himself with a loaded shotgun, went searching for the victim, and then confronted the victim. The defendant and other witnesses testified that, "while defendant was outside talking to [the victim's] mother, with his back turned to [the victim], [the victim] pulled a knife out of his pocket, opened it up and began approaching defendant." *Gillespie* at ¶7. Therefore, the defendant in *Gilliespie* was *not* the first aggressor. Rather, he had his back turned to the victim and was engaged in another activity when the altercation started. In the present case, Hendrickson's testimony reveals that he was facing Blankenship, had her cornered in an enclosed space, and then advanced upon her. Unlike the defendant in *Gillespie*, Hendrickson was clearly the first aggressor. And therefore, I believe that Hendrickson did indeed start the actual physicality of the assault.

{¶97} Moreover, although I do find *Gillespie* distinguishable from the present case, I also agree with Judge Donovan's dissent in *Gillespie*. As Judge Donovan wrote, "given the aggressive action taken by [the defendant] in order to recover his cash and drugs, he was at fault in creating the situation giving rise to the felonious assault. [The defendant] not only created the situation, but extended it after [the victim] had left [the defendant's]

residence a second time." Id. at ¶31 (Donovan, J., dissenting). I find this dissent persuasive.

{¶98} In 1927, this court held that "[t]he rule which warrants the right to use force has been stated in many different forms by various courts, but in every instance there must be the condition that the person, when unlawfully assaulted, must be without fault himself, as some of the courts say, or as other courts express it, he must be 'in the peace of the state.' In other words, a person can not provoke an assault or voluntarily enter into an encounter with another and then claim the right of self-defense." *Kohner v. State* (1927), 6 Ohio Law Abs. 201. I would follow this rule because I believe it represents sound public policy. That is, it discourages violent confrontations. One who seeks out a physical encounter should know that an acquittal based on self-defense would be unavailable at trial.

{¶99} Finally, I respectfully disagree with the majority's legal standard. The majority states that "a 'non-deadly aggressor' who begins an encounter may justifiably defend himself against a deadly attack. He may do so because the use of deadly force by the victim in response to non-deadly aggression is an unlawful use of force." But, in my view, "'[a] real or perceived threat of death or great bodily harm is required in order for the use of deadly force to be justified as self-defense[.]'" *State v. Hansen*, Athens App. No. 01CA15, 2002-Ohio-6135, at ¶28, quoting *Akron v. Dokes* (1986), 31 Ohio App.3d 24, syllabus. See, also, *State v. Robbins* (1979), 58 Ohio St.2d 74, at paragraph two of syllabus. Therefore, in my view, the question is not simply whether Blankenship responded to non-deadly aggression with deadly force. Instead, the question is whether Blankenship perceived that Hendrickson intended to kill her or inflict great bodily harm

upon her. Moreover, as stated earlier, the defendant must prove all elements of self-defense by a preponderance of the evidence. *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751, at ¶73. And even if we were to believe Hendrickson's testimony, I find that he failed to introduce sufficient evidence as to whether Blankenship did not perceive a threat of death or great bodily harm. See, generally, *State v. Thomas* (1997), 77 Ohio St.3d 323, 330 (stating that self-defense "is a combined subjective and objective test").

{¶100} In conclusion, I would find that Hendrickson (1) was the first aggressor, (2) voluntarily entered the encounter, and (3) "created an environment ripe for physical confrontation." Thus, I would find that Hendrickson failed to present sufficient evidence which, if believed, would show that he was not "at fault" in creating the encounter that resulted in Blankenship's death.

{¶101} Accordingly, I concur in judgment only as it relates to the first assignment of error.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Athens County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Kline, P.J.: Concurs in Judgment and Opinion as to Assignments of Error II and III; Concurs in Judgment Only with Attached Opinion as to Assignment of Error I.
Abele, J.: Concurs in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.