**[Cite as *State v. Thomas*, 2015-Ohio-2935.]**

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

| | |
|---|---|
| STATE OF OHIO | C.A. No. 27266 |
| Appellee | |
| v. | APPEAL FROM JUDGMENT ENTERED IN THE |
| RANDY A. THOMAS | COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO |
| Appellant | CASE No. CR 13 07 2069 |

DECISION AND JOURNAL ENTRY

Dated: July 22, 2015

---

MOORE, Judge.

**{¶1}** Defendant, Randy A. Thomas, appeals from the judgment of the Summit County Court of Common Pleas. We affirm.

I.

**{¶2}** On April 13, 2013, Mr. Thomas fatally shot Anthony Smith. The Summit County Grand Jury indicted Mr. Thomas for aggravated murder in violation of R.C. 2903.01(A) with an attendant firearm specification pursuant to R.C. 2941.145. The case proceeded to a jury trial. After the State rested, Mr. Thomas testified on his own behalf as follows. On the date at issue, Mr. Smith was selling drugs outside of Mr. Thomas' grandmother's house. Mr. Thomas asked Mr. Smith why he could not go further down the street to sell drugs, and Mr. Smith responded by challenging Mr. Thomas to a fistfight. Mr. Thomas accepted, and the men met one street away. Once they arrived, Mr. Thomas swung once at Mr. Smith, but he missed. Mr. Smith pulled out a gun, which Mr. Thomas was able to knock out of Mr. Smith's hand. Mr. Thomas then gained

control of the gun, and Mr. Smith began to come toward him. Fearing that Mr. Smith would regain control of the gun, Mr. Thomas shot Mr. Smith. Based upon this scenario, Mr. Thomas claimed that he shot Mr. Smith in self-defense.

**{¶3}** The jury rejected Mr. Thomas' self-defense theory, finding him guilty of the lesser included offense of murder and the firearm specification. The trial court sentenced Mr. Thomas to fifteen years to life in prison on the murder conviction, and to three years of incarceration on the firearm specification, to be served consecutively.[1]

**{¶4}** Mr. Thomas timely appealed from the sentencing entry, and he now presents fourteen assignments of error for our review. We have re-ordered and consolidated certain assignments of error to facilitate our discussion.

II.

**ASSIGNMENT OF ERROR I**

> THE TRIAL COURT ERRED IN DENYING A *BATSON* CHALLENGE WHEN IT IMPROPERLY APPLIED THE THREE STEP PROCESS ESTABLISHED BY THE U.S. SUPREME COURT.

**ASSIGNMENT OF ERROR II**

> DUE PROCESS WAS VIOLATED WHEN THE TRIAL JUDGE'S BIAS FOR THE PROSECUTION WAS DEMONSTRATED DURING THE *BATSON* CHALLENGE.

**{¶5}** In his first assignment of error, Mr. Thomas argues that the trial court erred in overruling his *Batson* challenge. In his second assignment of error, Mr. Thomas argues that his due process rights were violated when the trial court judge assisted the prosecution during the *Batson* challenge. We disagree with both contentions.

[1] The trial court further ordered that this sentence run consecutively to a one-year sentence imposed on Mr. Thomas in an unrelated case.

**{¶6}** A party may exercise peremptory challenges for any reason, "as long as that reason is related to his view concerning the outcome of the case to be tried[.]" (Internal quotations and citation omitted.) *Batson v. Kentucky*, 476 U.S. 79, 89 (1986). However, "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race[.]" *Id.*

**{¶7}** Here, in his first and second assignments of error, Mr. Thomas relies on a discussion between the parties and the trial court, which they had *in anticipation of* the State using a peremptory challenge against Juror No. 13 and *in anticipation* of the defense responding with a *Batson* challenge. While the State has argued in its merit brief that the trial court properly accepted the peremptory challenge, the record reveals that the State did not actually proceed to exercise the peremptory challenge against Juror No. 13, and that Juror No. 13 ultimately sat on the jury as Juror No. 10. Therefore, the arguments presented in the first and second assignments of error, which are premised upon the trial court's granting of the peremptory challenge, are unfounded. Further, to the extent that Mr. Thomas appears to have argued in his second assignment of error that the trial court exhibited bias toward the prosecution necessitating disqualification, such an issue is not properly before us. *See Catanzarite v. Boswell*, 9th Dist. Summit No. 24184, 2009-Ohio-1211, ¶ 7-9, citing, *Conti v. Spitzer Auto World Amherst, Inc.*, 9th Dist. Lorain No. 07CA009121, 2008-Ohio-1320, ¶ 24 (appellate courts have no jurisdiction to vacate a judgment due to judicial bias, as only the Chief Justice or her designee has authority to pass on judicial bias).

**{¶8}** Accordingly, Mr. Thomas' first and second assignments of error are overruled.

**ASSIGNMENT OF ERROR III**

> COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE UNDER *STRICKLAND* OR *CRONIC* WHEN [COUNSEL] FAILED IN OPENING STATEMENT TO ASSERT THE AFFIRMATIVE DEFENSE UPON WHICH [COUNSEL] RELIED, I.E. SELF-DEFENSE, AND THUS UNDERMINED ITS [SIC.] BURDEN ESTABLISHED BY OHIO LAW.

**{¶9}** In his third assignment of error, Mr. Thomas argues that his trial counsel was ineffective by failing to inform the jury of his argument of self-defense during opening statements. We disagree.

**{¶10}** This Court must analyze claims of ineffective assistance of counsel under a standard of objective reasonableness. *See Strickland v. Washington*, 466 U.S. 668, 688 (1984); *State v. Bradley*, 42 Ohio St.3d 136, 142 (1989). Under this standard, a defendant must show (1) deficiency in the performance of counsel "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) that the errors made by counsel were "so serious as to deprive the defendant of a fair trial[.]" *Strickland* at 687. A defendant must demonstrate prejudice by showing that, but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Id.* at 694. In applying this test, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Id.* at 689. "There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States v. Cronic*, 466 U.S. 648, 658 (1984). "Most obvious, of course, is the complete denial of counsel." *Id.* at 659.

**{¶11}** Here, in his opening statement, Mr. Thomas' trial counsel focused on the element of intent as contained in the aggravated murder statute, urging the jury to consider whether the State could prove that Mr. Thomas killed Mr. Smith with "prior calculation and design[.]" *See*

R.C. 2903.01(A). Counsel also asked the jury to focus on the absence of witnesses to the shooting, and the fact that the jury would hear that what occurred during the incident happened "quickly and instinctively[,]" and there was "little time for thought, reflection, [and] planning."

**{¶12}** It appears that defense counsel focused his opening statement upon the element of intent. If he were successful in his effort, the jury could either acquit on the aggravated murder count, or convict on the lesser included offense of murder. In fact, counsel's efforts in focusing the jury's attention on the element of intent resulted in the conviction on the lesser offense of murder. From a review of the record, one might infer that defense counsel did not specifically argue self-defense because counsel may have planned to direct the defense's case in response to how the State's case developed. Therefore, counsel's failure to specifically argue self-defense in his opening statement appears to be a trial tactic, and does not amount to deficient performance. *See State v. Clayton*, 62 Ohio St.2d 45, 49 (1980) (holding that trial tactics and strategies do not constitute a denial of effective assistance of counsel). Further, trial counsel's failure to specifically argue self-defense in opening statement did not foreclose counsel from raising it as an affirmative defense during trial, and Mr. Thomas testified that he shot Mr. Smith in self defense. *See, e.g., State v. Kinsworthy*, 12th Dist. Warren No. CA2013-06-053, 2014-Ohio-1584, ¶ 46 (trial counsel not ineffective for failing to argue an alibi defense in opening argument where counsel did present alibi evidence through witnesses' testimony as the case progressed and referenced the alibi during closing arguments).

**{¶13}** Accordingly, Mr. Thomas' third assignment of error is overruled.

**ASSIGNMENT OF ERROR VII**

OHIO UNCONSTITUTIONALLY PLACES THE BURDEN OF PROOF OF SELF DEFENSE ON THE DEFENDANT IN VIOLATION OF THE SECOND, FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL

CONSTITUTION AND ARTICLE I, SECTIONS 1, 4 AND 10 OF THE OHIO CONSTITUTION.

**{¶14}** In his seventh assignment of error, Mr. Thomas argues that Ohio unconstitutionally places the burden on the defendant to prove self-defense.

**{¶15}** However, Mr. Thomas does not cite to, and this Court has not located, any part of the record wherein he brought this issue to the attention of the trial court. "The failure to raise a constitutional issue at the trial level [forfeits] the right to advance a constitutional argument at the appellate level." *State v. Cross*, 9th Dist. Summit No. 25487, 2011-Ohio-3250, ¶ 41, quoting *State v. McGinnis*, 9th Dist. Medina No. 05CA0061-M, 2006-Ohio-2281, ¶ 29, citing, e.g., *State v. Awan*, 22 Ohio St.3d 120 (1986), syllabus. "While a defendant who forfeits such an argument still may argue plain error on appeal," this Court generally will not undertake a plain-error analysis if a defendant fails to do so. *Cross* at ¶41, citing *State v. Hairston*, 9th Dist. Lorain No. 05CA008768, 2006-Ohio-4925, ¶ 11. Mr. Thomas has not argued plain error on appeal, and we decline to create a plain-error argument on his behalf.

**{¶16}** Accordingly, Mr. Thomas' seventh assignment of error is overruled.

**ASSIGNMENT OF ERROR IV**

THE TRIAL COURT ERRED IN GIVING A "DUTY TO RETREAT"[ ]JURY INSTRUCTION IN VIOLATION OF OHIO LAW AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION.

**ASSIGNMENT OF ERROR V**

THE "AT FAULT" JURY INSTRUCTION CONTAINED IN THE SELF-DEFENSE JURY INSTRUCTIONS WAS UNCONSTITUTIONALLY VAGUE.

**{¶17}** In his fourth assignment of error, Mr. Thomas argues that the trial court erred by improperly giving a duty to retreat instruction. In his fifth assignment of error, Mr. Thomas argues that the trial court erred by improperly giving an "at fault" jury instruction that was vague. We disagree.

**{¶18}** Mr. Thomas presented no objection in the trial court to the jury instructions that he challenges in his fourth and fifth assignments of error. Therefore, he has forfeited all arguments pertaining to these instructions except for that of plain error. *See State v. Eafford*, 132 Ohio St.3d 159, 2012-Ohio-2224, ¶ 11. Pursuant to Crim.R. 52(B), plain error will only be found if it affects a substantial right. "There are three requirements to finding plain error." *State v. Proctor*, 9th Dist. Summit No. 26740, 2013-Ohio-4577, ¶ 4, citing *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶ 15-16. "First, there must be an error." *Proctor* at ¶ 4, citing *Payne* at ¶ 16. "Second, the error must be obvious." *Proctor* at ¶ 4, citing *Payne* at ¶ 16. "Lastly, the error must have affected the outcome of the trial." *Proctor* at ¶ 4, citing *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). "The plain error rule should be applied with caution and should be invoked only to avoid a clear miscarriage of justice." *Proctor* at ¶ 4, quoting *State v. Long*, 53 Ohio St.2d 91, 95 (1978).

**{¶19}** As part of the trial court's instructions on self-defense, it advised the jury that, in order to find that Mr. Thomas had proved self-defense, it must, in part, find that he "had not violated any duty to retreat or escape to avoid danger." It then explained:

> Now, I have just used the term, "duty to retreat." The defendant had a duty to retreat if he:
>
> A, was at fault in creating the situation giving rise to the dispute between Randy Thomas and Anthony Smith that began on Seventh Avenue and continued on Eighth Avenue, and/or the shooting that occurred on Eighth Avenue; and
>
> B, he did not have reasonable grounds to believe and an honest belief that he was in immediate danger of death or great bodily harm or that he had a reasonable means of escape from that danger other than by the use of deadly force.
>
> The defendant no longer had a duty to retreat if:
>
> One, he retreated or escaped from the situation or reasonably indicated his intention to retreat or escape from the situation and no longer participated – participate in it; and

> Two, he then had reasonable grounds to believe and an honest belief that he was in immediate danger or death or great bodily harm; and
>
> Three, the only reasonable means of escape from that danger was by the use of deadly force, even though he was mistaken as to the existence of that danger.

**{¶20}** In his brief, Mr. Thomas maintains that "the trial court instructed that [Mr.] Thomas had a duty to retreat." He then argues that the trial court should not have instructed the jury that Mr. Thomas had a duty to retreat, because he maintains that "retreat is only required when the defendant can do so in complete safety." In support, he cites *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751 and *State v. Marbury*, 2d Dist. Montgomery No. 19226, 2004-Ohio-1817.

**{¶21}** However, as set forth above, the trial court did not instruct the jury that Mr. Thomas had a duty to retreat. Instead, it explained the circumstances under which Mr. Thomas would have had a duty to retreat and when any such duty would have ended. Further, Mr. Thomas' argument is premised upon a statement in *Marbury* that "retreat is required only when the defendant can do so in complete safety." *Id.* at ¶ 22. However, the Tenth District, when discussing this proposition set forth in *Marbury*, noted as follows:

> [I]n regards to his duty to retreat, the language in *Marbury* which appellant quotes in support of the proposed instruction is dicta and has never been adopted or even considered by this or any other appellate court. Moreover, the *Marbury* court's dicta expanded on a Supreme Court of Ohio case dealing with the duty to retreat in a locked prison cell. *State v. Cassano*, 96 Ohio St.3d 94, 2002-Ohio-3751. The *Cassano* court concluded that retreat was impossible under those circumstances and that an instruction regarding the duty to retreat was therefore erroneous. That opinion provides little support for the dicta in *Marbury*.

*State v. Gripper*, 10th Dist. Franklin No. 12AP-396, 2013-Ohio-2740, ¶ 21.

**{¶22}** Based upon the limited argument in this assignment of error, we cannot say that the trial court committed plain error in failing to structure its jury instructions to reflect this

proposition. *See Proctor*, 2013-Ohio-4577, at ¶ 4 (requiring there to be error, and that error to be obvious, to constitute plain error).

**{¶23}** With respect to the "at fault" language in the self-defense instruction, the trial court instructed the jury that, in order to prove self-defense, Mr. Thomas was required, in part, to demonstrate that he was "not at fault in creating the situation giving rise to the dispute between [Mr.] Thomas and [Mr.] Smith that began on Seventh Avenue and continued on Eighth Avenue, and/or the shooting that occurred on Eighth Avenue[.]" Mr. Thomas maintains that the "at fault" instruction was vague. However, Mr. Thomas failed to provide, in his merit brief or at oral argument, this Court with an alternative instruction that would have clarified the issue of fault in reference to the defense of self-defense. Accordingly, given the limited argument advanced in Mr. Thomas' brief, particularly in the context of a review for plain error, we cannot say that the result would have been different had the trial court given a more precise instruction. *See id.* at ¶ 4.

**{¶24}** Therefore, Mr. Thomas' fourth and fifth assignments of error are overruled.

**ASSIGNMENT OF ERROR X**

THE TRIAL COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON VOLUNTARY MANSLAUGHTER AND RECKLESS HOMICIDE.

**{¶25}** In his tenth assignment of error, Mr. Thomas argues that the trial court erred by failing to instruct the jury on voluntary manslaughter and reckless homicide. We disagree.

**{¶26}** "This Court reviews a trial court's decision to give or decline to give a particular jury instruction for an abuse of discretion under the facts and circumstances of the case." *State v. Meadows*, 9th Dist. Summit No. 26549, 2013-Ohio-4271, ¶ 7, quoting *State v. Sanders*, 9th Dist. Summit No. 24654, 2009-Ohio-5537, ¶ 45. An abuse of discretion connotes that the trial court

was "unreasonable, arbitrary, or unconscionable[]" in its ruling. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

**{¶27}** After the parties rested, Mr. Thomas requested an instruction on voluntary manslaughter, which the trial court denied. A person commits voluntary manslaughter when he knowingly causes the death of another "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[.]" R.C. 2903.03. Voluntary manslaughter is an offense of an inferior degree to murder. *State v. Shane*, 63 Ohio St.3d 630, 632 (1992). The trial court should give a jury an instruction on voluntary manslaughter when the evidence presented at trial would reasonably support both an acquittal for murder and a conviction for voluntary manslaughter. *State v. Terrion*, 9th Dist. Summit No. 25368, 2011-Ohio-3800, ¶ 12. "Additionally, before providing a voluntary manslaughter instruction, the trial court must make a determination that 'evidence of reasonably sufficient provocation occasioned by the victim has been presented to warrant such an instruction.'" *Terrion* at ¶ 13, quoting *Shane* at paragraph one of the syllabus.

**{¶28}** "The inquiry into the mitigating circumstances consists of both objective and subjective components." *Terrion* at ¶ 13, citing *Shane* at 634. "The objective component determines whether the provocation in a given case 'is reasonably sufficient to bring on sudden passion or a sudden fit of rage[.]'" *Terrion* at ¶ 13, citing *Shane* at 634. "Reasonably sufficient provocation is provocation 'sufficient to arouse the passions of an ordinary person beyond the power of his or her control.'" *Terrion* at ¶ 13, citing *Shane* at 635. The subjective component involves the "'emotional and mental state of the defendant and the conditions and circumstances that surrounded him at the time' to determine if he was in fact provoked." *Terrion* at ¶ 13,

quoting *Shane* at 634. In making its decision as to whether to charge the jury with voluntary manslaughter, "'[t]he trial judge should evaluate the evidence in the light most favorable to the defendant, without weighing the persuasiveness of the evidence[,]' although the trial court still decides the issue as a matter of law." *State v. Williams*, 9th Dist. Summit No. 24169, 2009-Ohio-3162, ¶ 14, quoting *Shane* at 637.

**{¶29}** Here, we cannot say that the trial court erred in determining that the evidence was insufficient for a jury to conclude that Mr. Thomas "had been provoked by sudden passion or a fit of rage to cause the death of" Mr. Smith. *State v. Platt*, 9th Dist. Wayne No. 18835, 1998 WL 887220, *3 (Dec. 16, 1998). *See* R.C. 2903.03. Instead, Mr. Thomas testified that, when he fired the gun, he was angry and afraid that Mr. Smith would regain control of the gun and shoot Mr. Thomas. Mr. Thomas' testimony, therefore, demonstrated that he shot Mr. Smith because he feared Mr. Smith would have killed or hurt him, not because Mr. Smith had provoked him into firing the gun due to a fit of rage or sudden passion. Under these circumstances, the trial court did not err by failing to instruct on voluntary manslaughter.

**{¶30}** With respect to reckless homicide, defense counsel did not request an instruction on reckless homicide, and therefore has forfeited all but plain error. *State v. Horton*, 9th Dist. Summit No. 26407, 2013-Ohio-3902, ¶ 50. R.C. 2903.041, the reckless homicide statute, provides: "(A) No person shall recklessly cause the death of another * * *." A definition of "recklessly" appears in former R.C. 2901.22(C): "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature." Reckless homicide is a lesser included offense of aggravated murder. *State v. Teets*, 4th Dist. Pickaway No. 02CA1, 2002-Ohio-6799, ¶ 32. The trial court must instruct the jury on a lesser included offense "where the

evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction on the lesser-included offense." *State v. Carter*, 89 Ohio St.3d 593, 600, 2000-Ohio-172.

**{¶31}** However, here, "the jury could not have reasonably found against the [S]tate on the element of purposefulness, as [Mr. Thomas] conceded that he intended to shoot [Mr. Smith], but claimed that it was in self-defense." *State v. McCurdy*, 1st Dist. Hamilton No. C-020808, 2003-Ohio-5518, ¶ 15. Therefore, it was not plain error for the trial court to decline to provide an instruction on the lesser included offense of reckless homicide, as it was inconsistent with self-defense.

**{¶32}** Accordingly, Mr. Thomas' tenth assignment of error is overruled.

**ASSIGNMENT OF ERROR XIV**

THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A MURDER CONVICTION UNDER THE FOURTEENTH AMENDMENT.

**{¶33}** In his fourteenth assignment of error, Mr. Thomas argues that his conviction was not supported by sufficient evidence. We disagree.

**{¶34}** The issue of whether a conviction is supported by sufficient evidence is a question of law, which we review de novo. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. When considering a challenge to the sufficiency of the evidence, the court must determine whether the prosecution has met its burden of production. *Id.* at 390 (Cook, J. concurring). "The relevant question is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus.

**{¶35}** Mr. Thomas was convicted of the lesser offense of murder, in violation of R.C. 2903.02(A), which provides, in relevant part, that "[n]o person shall purposely cause the death of another * * *." Former R.C. 2901.22(A) provides that "[a] person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature."

**{¶36}** At trial, the State presented, in part, the testimony of police officers and witnesses to the events prior to and after the shooting. Collectively, these witnesses recalled that, on April 13, 2013, Mr. Smith arrived outside of Mr. Thomas' grandmother's house, where Mr. Thomas was present. Mr. Thomas and Mr. Smith then engaged in a verbal altercation, during which Mr. Smith said that they could "get that work in[,]" which meant that Mr. Smith was challenging Mr. Thomas to a fistfight. Mr. Thomas replied that they could go a street over to Eighth Ave. to fight. The two men got into their respective vehicles and drove to a location a short distance away on Eighth Ave. No one witnessed a physical altercation between them on Eighth Ave. However, Phyllis Brown, who lived across the street from where the men met on Eighth Ave., heard three gun shots fired, and looked out her window. Outside she saw Mr. Thomas holding a gun several feet from Mr. Smith, who was sitting on the ground. She also saw Mr. Thomas drive away. After Mr. Thomas left and Mr. Smith unsuccessfully tried to start his car and enter a nearby house, Ms. Brown went outside to assist Mr. Smith, who was bleeding heavily. No gun was located at the scene.

**{¶37}** It is undisputed that Mr. Thomas fatally shot Mr. Smith. However, Mr. Thomas contends that there was insufficient evidence to sustain his conviction for murder. Instead, Mr.

Thomas maintains that the evidence was sufficient only to show that he acted in self-defense, or that he was guilty of voluntary manslaughter or reckless homicide.

**{¶38}** First, we note, as the State has pointed out, Mr. Thomas fails to cite portions in the record in support of his argument in violation of App.R. 16(A)(7).

**{¶39}** Further, a sufficiency of the evidence challenge is not a proper vehicle to review self-defense, which is an affirmative defense. *State v. Geter-Gray*, 9th Dist. Summit No. 25374, 2011-Ohio-1779, ¶ 9, quoting *State v. Goff*, 128 Ohio St.3d 169, 2010-Ohio-6317, ¶ 36, quoting *State v. Thomas*, 77 Ohio St.3d 323, 326 (1997) ("[S]elf-defense is an affirmative defense[.]"). This is because "a defendant may be convicted of a crime in accordance with due process strictures upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. Thus, the due process sufficient evidence guarantee does not implicate affirmative defenses, because proof supportive of an affirmative defense cannot detract from proof beyond a reasonable doubt that the accused had committed the requisite elements of the crime." (Internal citations and quotations omitted.) *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶ 37. *See also State v. Bundy*, 4th Dist. Pike No. 11CA818, 2012-Ohio-3934, ¶ 31.

**{¶40}** Moreover, Mr. Thomas does not appear to develop an argument that his conviction was not supported by sufficient evidence, and, instead seems to argue that the evidence supported a determination that he was in a sudden fit of rage or passion when he shot Mr. Smith. As set forth in our discussion of Mr. Thomas' tenth assignment of error, the trial court did not instruct the jury on voluntary manslaughter because there was insufficient evidence to support such an instruction. Further, such an argument would be more appropriate in a challenge to the weight, not the sufficiency, of the evidence. An appellant's "assignment of error provides a roadmap for our review and, as such, directs our analysis of the trial court's

judgment." *See State v. Brown*, 9th Dist. Summit No. 23637, 2008-Ohio-2670, ¶ 24. Accordingly, we confine our review to the sufficiency of the evidence.

**{¶41}** Further, although Mr. Thomas generally asserts in his argument in support of his fourteenth assignment of error that he should have been convicted only of reckless homicide, no instruction was sought or given to the jury on reckless homicide, and he develops no further argument as to how the evidence demonstrated only recklessness.

**{¶42}** Although Mr. Thomas does not develop a proper sufficiency argument, we have reviewed the record, and the evidence, when viewed in a light most favorable to the State, supports his conviction for murder. The State provided evidence that Mr. Thomas and Mr. Smith engaged in an argument outside of Mr. Thomas' grandparents' home, and they agreed to meet a short distance away to engage in a fistfight. After they arrived at their agreed upon location to engage in the fight, Mr. Thomas shot Mr. Smith multiple times, firing a fatal shot to Mr. Smith's chest. Mr. Thomas conceded in his testimony that he shot Mr. Smith. Mr. Thomas then fled the scene with the gun and was later apprehended in another state. Construing this evidence in a light most favorable to the State, we conclude there was sufficient evidence to establish that Mr. Thomas purposely caused the death of Mr. Smith.

**{¶43}** Accordingly, Mr. Thomas' fourteenth assignment of error is overruled.

**ASSIGNMENT OF ERROR VI**

THE TRIAL COURT IMPROPERLY ANSWERED JURY QUESTION 3 IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION AND EQUIVALENT PROVISIONS OF OHIO LAW.

**ASSIGNMENT OF ERROR VIII**

[MR. THOMAS] WAS DENIED HIS RIGHT TO BE PRESENT AT ALL CRITICAL STAGES OF HIS TRIAL WHEN THE COURT ANSWERED JURY QUESTIONS IN HIS ABSENCE AND COUNSEL DID NOT WAIVE HIS

PRESENCE IN VIOLATION OF CRIM.R. 43(A), THE OHIO AND FEDERAL CONSTITUTIONS.

**ASSIGNMENT OF ERROR IX**

[MR.] THOMAS WAS DENIED HIS RIGHT TO A PUBLIC TRIAL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS OF THE FEDERAL CONSTITUTION WHEN THE COURT FAILED TO RECEIVE AND ANSWER THE JURY QUESTIONS IN OPEN COURT, WITH [MR.] THOMAS AND HIS COUNSEL PRESENT AND ON THE RECORD.

**{¶44}** In his sixth, eighth, and ninth assignments of error, Mr. Thomas argues that the trial court erred in answering a jury question and that the court improperly answered the question without his or his counsel's presence in open court. We disagree.

**{¶45}** Included with the exhibits in this case is what appears to be a list of questions from the jury, which presumably was presented to the trial court. The third of these questions reads:

> Under Self Defense, Part(A) states, "he was not at fault in creating the situation that gave rise to the dispute […]"/ We are having trouble analyzing the issue of "fault." If he/were say "10%" at fault for having agreed to fist fight, is he considered at fault as it pertains to the wording in this section?

**{¶46}** Also included in the exhibits is what appears to be the trial court's response to the jury's questions. Therein, the court stated:

> You must re-review and apply your collective understanding of the meaning of the terms used in the jury instructions. The court cannot further define the meaning of those terms.

**{¶47}** Although Mr. Thomas argues, as part of his sixth assignment of error, that "[i]t appears from the transcript[ ]that the court did not consult the defense concerning this question[,]" and, as part of his eighth and ninth assignments of error, that neither defense counsel nor Mr. Thomas were present when the trial court answered the question, the transcript is silent on whether the trial court consulted with the parties regarding the question and on whether the parties were present when the court answered the question. Mr. Thomas' sixth, eighth, and ninth

assignments of error depend, in whole or in part, upon the premises that Mr. Thomas and his counsel were not consulted prior to the court answering the jury question, and that they were not present when the court proceeded to answer the question. However, on direct appeal, our review is limited to the record, and from this record, we cannot determine the accuracy of these premises. *See State v. Charlton*, 9th Dist. Lorain No. 12CA010206, 2014-Ohio-1330, ¶ 49, (where proof outside of the record is required to support an assignment of error, the argument raised in the assignment of is not appropriate for consideration on direct appeal), and *State v. Batton*, 9th Dist. Lorain No. 96CA006505, 1997 WL 600661, *5 (Sept. 17, 1997) ("we cannot presume error from a silent record").

**{¶48}** Moreover, in his sixth assignment of error, Mr. Thomas argues that the trial court improperly answered the jury question in violation of the Sixth, Eighth, and Fourteenth Amendments of the federal constitution and equivalent provisions of Ohio law. However, his argument in support of this assignment of error fails to discuss or in any way analyze the federal constitutional amendments and state law cited in his assignment of error. *See* App.R. 16(A)(7).

**{¶49}** Further, we note that in Mr. Thomas' ninth assignment of error, he maintains in part that the court erred by not answering the jury question on the record. We would agree that the best practice is for the trial court to answer jury questions on the record. However, Mr. Thomas has pointed this Court to no authority in support of his argument that the trial court commits reversible error in failing to do so, and we decline to construct an argument on his behalf. *See* App.R. 16(A)(7).

**{¶50}** Accordingly, Mr. Thomas' sixth, eighth, and ninth assignments of error are overruled.

**ASSIGNMENT OF ERROR XI**

> THE TRIAL COURT ERRED IN FAILING TO HOLD [A] HEARING OR DECLARE MISTRIAL WHERE JURORS RECEIVED OUTSIDE COMMUNICATION ON TWO OCCASIONS IN VIOLATION OF *REMMER V. UNITED STATES*, 347 U.S. 227 (1954) AND *STATE V. PHILLIPS*, 74 OHIO ST.3D 72 (1995).

**{¶51}** In his eleventh assignment of error, Mr. Thomas argues that the trial court erred when it failed to hold a hearing or declare a mistrial where one juror relayed to the others that she knew one of the witnesses, and where a juror complained of hearing reactions in the gallery to the witnesses' testimony. We disagree.

**{¶52}** "When it is alleged that outside contact with a juror has been made regarding the subject matter of the proceedings, a trial court must conduct 'a hearing with all interested parties permitted to participate' to 'determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial[.]'" *State v. Owens*, 9th Dist. Summit No. 25872, 2012-Ohio-3667, ¶ 6, quoting *Remmer* at 229-230. *Phillips* at 88.

**{¶53}** Here, Mr. Thomas did not object to the trial court's failure to hold *Remmer* hearings. Therefore, he has forfeited all arguments except that of plain error. *See State v. Wooten*, 5th Dist. Stark No. 2008 CA 00103, 2009-Ohio-1863, ¶ 38 (applying the plain error doctrine to an argument that the trial court failed to hold *Remmer* hearings when appellant did not challenge such a failure in the trial court).

**{¶54}** Here, after Ms. Brown testified, Juror No. 1 indicated to the trial court that she realized that she was acquainted with Ms. Brown. The trial court then inquired of Juror No. 1 in chambers, where all counsel and Mr. Thomas were present. Juror No. 1 explained that she was familiar with Ms. Brown through one of her friends, but she did not know her very well. Juror

No. 1 indicated that she could be fair and impartial. Thereafter, the attorneys inquired of Juror No. 1, and then following exchange took place:

> THE COURT: Have you talked with any other members of the jury about the fact that you have got this indirect acquaintance with her at this point?
>
> JUROR [NO. 1]: Well, when I was back there, I said I may know one of the witnesses, you know, but I didn't say her name, you know.
>
> THE COURT: Did any of the other jurors respond back to you on that topic?
>
> JUROR [NO. 1]: No. They just listened. They – no, they didn't say anything.

**{¶55}** Mr. Thomas argues that the trial court was required to hold a hearing with respect to the other jurors to determine if what Juror No. 1 had told them would improperly influence them. However, we cannot say that if the trial court had held a hearing with the other jurors that there is a reasonable probability that the error resulted in prejudice. *State v. Rogers*, Slip Opinion No. 2015-Ohio-2459, ¶ 22.

**{¶56}** The second incident that Mr. Thomas argues required a hearing pertained to the trial court receiving a complaint from a juror that he/she could hear the gallery respond to witness testimony. Outside the presence of the jury, the trial court addressed the gallery as follows:

> I have received a complaint from one of the members of the jury this morning that as the testimony is being given, the jury can hear audible responses from the members of the gallery. "Audible" means that they hear it. So they are hearing people huffing, or disagreeing, or making some sound of agreement.
>
> I have previously warned the gallery about this. I will not warn the gallery again. If we hear any more sounds or reactions of any kind to the testimony that's being given or to the video that's about to be shown, I will clear the courtroom and there will be no one in the gallery during the rest of the testimony in this case.
>
> I know you all want to be here. So if you want to be here, you have to show that by being completely silent and not moving your heads and not expressing any sound whatsoever to the testimony.

> And the deputies are instructed to let me know if anyone – if they can see anyone violating that rule. And if they see it, they will give me a signal, at which point the [c]ourt will order the courtroom cleared.
>
> * * *

**{¶57}** Mr. Thomas argues that the trial court was required to hold a hearing to determine the effect of the gallery's audible reactions during testimony on the jury. "A *Remmer* hearing must be held when the trial court learns of 'private communication, contact, or tampering * * * with a juror during a trial about the matter pending before the jury.'" *State v. Johnson*, 112 Ohio St.3d 210, 2006-Ohio-6404, ¶ 263, quoting *Remmer*, 347 U.S. at 229. Here, the gallery's reactions did not constitute private communications with the jury, and we are aware of no authority that requires the trial court to conduct a hearing in such a situation. Further, the situation addressed by the trial court here appears similar to that of outbursts by a member of a gallery. The Ohio Supreme Court has held that, in that context, "[w]here the communication is innocuous and initiated by a spectator in the form of an outburst, a hearing is not necessarily required." *Johnson* at ¶ 264, quoting *White v. Smith*, 984 F.2d 163, 166 (6th Cir.1993). This is because "[a]n in-court emotional outburst directed at the defendant, not the jury, is a situation quite unlike the private communication with the jury encountered in *Remmer*. The outburst * * * was not a purposeful intrusion into the sanctity of the juror's domain." (Internal quotations and citations omitted.) *Johnson* at ¶ 264. Accordingly, we are not persuaded by Mr. Thomas' argument that the trial court was required to hold a *Remmer* hearing to determine the effect on the jury of the gallery's audible reactions to testimony. Further, even if the trial court had held such a hearing, Mr. Thomas has not established a reasonable probability that the outcome of the case would have been different. *See Rogers*, Slip Opinion No. 2015-Ohio-2459, at ¶ 22.

**{¶58}** Accordingly, the trial court's failure to hold *Remmer* hearings in these instances did not amount to plain error. Therefore, Mr. Thomas' eleventh assignment of error is overruled.

**ASSIGNMENT OF ERROR XII**

> DEFENSE COUNSEL WAS INEFFECTIVE THROUGHOUT THIS CASE UNDER *STRICKLAND* AND THE CUMULATIVE AFFECT OF THE INEFFECTIVENESS DEPRIVED [MR.] THOMAS OF HIS SIXTH AND FOURTEENTH AMENDMENT[] RIGHT TO COUNSEL EVEN IF THE ERRORS INDIVIDUALLY DID NOT DO SO.

**{¶59}** In his twelfth assignment of error, Mr. Thomas argues that his trial counsel was ineffective throughout his case. We disagree.

**{¶60}** As set forth in our discussion of Mr. Thomas' third assignment of error, this Court must analyze claims of ineffective assistance of counsel under a standard of objective reasonableness. *Strickland*, 466 U.S. 668, 688; *Bradley*, 42 Ohio St.3d at 142. Under this standard, a defendant must show (1) deficiency in the performance of counsel "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment[,]" and (2) that the errors made by counsel were "so serious as to deprive the defendant of a fair trial[.]" *Strickland* at 687. A defendant must demonstrate prejudice by showing that, but for counsel's errors, there is a reasonable probability that the outcome of the trial would have been different. *Id.* at 694. In applying this test, "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Id.* at 689. This Court need not address both prongs of *Strickland* where an appellant fails to prove either prong. *See State v. Ray*, 9th Dist. Summit No. 22459, 2005-Ohio-4941, ¶ 10.

**{¶61}** In this assignment of error, Mr. Thomas argues that his trial counsel was ineffective to the extent that trial counsel failed (1) to object to the trial court's overruling of his

*Batson* challenge, as discussed in his first assignment of error, (2) to object to the trial court's bias displayed during the *Batson* discussion, as discussed in his second assignment of error, (3) to argue self-defense as discussed in his third assignment of error, (4) to object to the trial court's instruction on the duty to retreat, as discussed in his fourth assignment of error, (5) to object to the trial court's "at fault" instruction, as discussed in his fifth assignment of error, (6) to have jury questions received and answered with Mr. Thomas present in open court and on the record, as discussed in his sixth, eighth, and ninth assignments of error, (7) to challenge the burden of proof in self-defense law, as discussed in his seventh assignment of error, (8) to object to the court's failure to give jury instructions on voluntary manslaughter and reckless homicide, as discussed in his tenth assignment of error, and (9) to object to the trial court's failure to hold *Remmer* hearings, as discussed in his eleventh assignment of error.

**{¶62}** In regard to defense counsel's failure to object to the court's overruling of his purported *Batson* challenge and to the trial court's purported bias displayed during the *Batson* challenge, as we discussed in response to Mr. Thomas' first and second assignments of error, the State did not proceed to exercise a peremptory challenge against Juror No. 13. Further, claims of bias must be made to the Chief Justice or her designee. Accordingly, counsel was not ineffective for failing to object.

**{¶63}** As we have already concluded that Mr. Thomas' trial counsel was not ineffective for failing to specifically argue self-defense in our discussion of his third assignment of error, we will not here reiterate our discussion.

**{¶64}** With respect to Mr. Thomas' argument that trial counsel was ineffective for not objecting to the trial court's "duty to retreat" instruction, as we discussed in response to his fourth assignment of error, he relies on dicta from another district. We cannot say counsel was

deficient for failing to base an objection on dicta from a Second District case. In regard to the "at fault" instructions, Mr. Thomas has presented no alternate instruction that would have been proper. Accordingly, we cannot say that there is a reasonable probability that the outcome of the case would have been different had defense counsel objected to the instruction. Therefore, trial counsel was not ineffective for failing to object to these instructions.

**{¶65}** In regard to the trial court purportedly responding to the jury question without Mr. Thomas present, the transcript is silent as to whether the trial court consulted defense counsel prior to answering the question and as to whether Mr. Thomas was present when the court answered the jury question. Further, Mr. Thomas does not cite any authority or develop an argument that supports his contention that the trial court was required to answer the question on the record. Accordingly, we cannot say that trial counsel was deficient for failing to make these arguments.

**{¶66}** With respect to Mr. Thomas' argument that trial counsel was ineffective for failing to lodge constitutional challenges to Ohio's practice of placing the burden of self-defense on the defendant, the United States Supreme Court has upheld this practice when it was challenged as violating the Fourteenth Amendment. *Martin v. Ohio*, 480 U.S. 228, 231 (1987). Further, we cannot say that defense counsel was deficient for failing to advance an argument that the State is precluded from placing this burden of proof on the defendant based upon the other constitutional provisions cited in Mr. Thomas' seventh assignment of error. Accordingly, we cannot say that trial counsel was ineffective for failing challenge the burden of proof for self-defense on constitutional grounds.

**{¶67}** In regard to failing to object to the court's decision not to give a jury instruction on voluntary manslaughter, as set forth in our discussion of Mr. Thomas' tenth assignment of

error, his trial counsel did request a voluntary manslaughter instruction, and the trial court did not err in denying this request. Accordingly, defense counsel was not ineffective in this regard. With respect to failing to object to the trial court's failure to give a reckless homicide instruction, such an instruction was not supported by the facts of this case as set forth in our discussion of Mr. Thomas' tenth assignment of error, as recklessness was inconsistent with Mr. Thomas' testimony that he shot Mr. Smith in self-defense. Accordingly, trial counsel was not ineffective in this regard.

**{¶68}** With respect to defense counsel's failure to request a *Remmer* hearing following the juror's complaint of hearing the gallery react to the witnesses' testimony, we concluded in our discussion of Mr. Thomas' eleventh assignment of error that a hearing was not mandated in such a situation. In regard to defense counsel's failure to request a *Remmer* hearing of all of the jurors following Juror No. 1's disclosure to them that she knew a witness, Mr. Thomas has not identified in what way there is a reasonable probability that the outcome of this case would have been different if defense counsel had requested a *Remmer* hearing. Instead, he appears to rely on language in *Remmer* that, at such hearings, prejudice is presumed. *See Remmer*, 347 U.S. at 229. However, *Remmer* further held that this presumption was not conclusive. *See id.* Further, in cases following *Remmer*, the United States Supreme Court has held that the defendant must demonstrate actual prejudice. *See State v. Hessler*, 90 Ohio St.3d 108, 121, 2000-Ohio-30 (identifying cases). Accordingly, especially in light of the vague and limited nature of Juror No. 1's disclosure to the other jurors, as set forth in our discussion of Mr. Thomas' eleventh assignment of error, we cannot say that there is a reasonable probability that the outcome of this case would have been different if defense counsel had requested a *Remmer* hearing for the remaining jurors. Accordingly, defense counsel was not ineffective in this regard.

**{¶69}** Therefore, Mr. Thomas' twelfth assignment of error is overruled.

**ASSIGNMENT OF ERROR XIII**

THE CUMULATIVE ERRORS THROUGHOUT THE TRIAL DENIED [MR. THOMAS] DUE PROCESS UNDER THE FOURTEENTH AMENDMENT.

**{¶70}** In his thirteenth assignment of error, Mr. Thomas argues that the cumulative errors that occurred throughout the trial denied him his due process rights. We disagree.

**{¶71}** Cumulative error exists only where the errors during trial actually "deprive[d] a defendant of the constitutional right to a fair trial." *State v. DeMarco*, 31 Ohio St.3d 191 (1987), paragraph two of the syllabus. "[T]here can be no such thing as an error-free, perfect trial, and * * * the Constitution does not guarantee such a trial." *State v. Hill*, 75 Ohio St.3d 195, 212 (1996), quoting *United States v. Hasting*, 461 U.S. 499, 508-09 (1983). To support a claim of cumulative error, there must be multiple instances of harmless error. *State v. Garner*, 74 Ohio St.3d 49, 64, 1995-Ohio-168.

**{¶72}** Mr. Thomas argues that, were we to conclude that the trial court erred as he has argued in his assignments of error above, and were we to conclude such errors were harmless, then the cumulative error doctrine applies. However, as we have not found multiple instances of harmless error above, Mr. Thomas' thirteenth assignment of error is overruled. *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, ¶ 132 (unless there exists multiple errors, the cumulative error doctrine does not apply).

III.

**{¶73}** Mr. Thomas' 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.

CARLA MOORE
FOR THE COURT

SCHAFER, J.
CONCURS.

CARR, J.
DISSENTING.

**{¶74}** Although I agree with my colleagues that many of Thomas's arguments are not reviewable on direct appeal due to a lack of record, the record that is available necessitates my dissent on the issues regarding the jury instructions and the jury questions.

**{¶75}** In Thomas's fifth assignment of error, he alleges that the jury instruction on "at fault" was too vague. In his sixth assignment of error, he primarily argues that the trial court

impermissibly answered jury questions without consulting defense attorneys, however, he also argues that the trial court's answer to the question on "at fault" was improper. I agree with both contentions.

**{¶76}** As related by the lead opinion, Thomas testified at trial that he shot Smith in self-defense after Smith pulled a gun on him during a fist fight. Thomas admitted that he agreed to a fist fight with Smith and attempted to punch Smith first but missed connecting. At trial, the judge charged the jury on self-defense and instructed the jury that they would have to find Thomas was "not at fault in creating the situation giving rise to the dispute between [Mr.] Thomas and [Mr.] Smith that began on Seventh Avenue and continued on Eighth Avenue, and/or the shooting that occurred on Eighth Avenue[.] The court did not define what "at fault" meant.

**{¶77}** During deliberations, the jury asked a question pertaining to the "at fault" instruction, submitting that they were having trouble with analyzing the issue of fault. Specifically, the jury asked:

> Under Self Defense, Part(A) states, "he was not at fault in creating the situation that gave rise to the dispute […]"/ We are having trouble analyzing the issue of "fault" if he/were say "10%" at fault for having agreed to fist fight, is he considered at fault as it pertains to the wording in this section?

**{¶78}** The trial court replied by telling the jury that he could not further define "at fault" and that they had to use their collective understanding of the terms used in the jury instructions. The problem with this reply is that "at fault" was not defined in the court's prior charge to the jury. In defense of the trial court, the Ohio Jury Instructions (OJI) do not define "at fault" either. However, the instructions in OJI are merely suggestions to assist or guide the trial courts. There are times they may be incomplete or even incorrect for a particular case. *See State v. Napier*, 105 Ohio App.3d 713 (1st Dist.1995).

> In *State v. Burchfield*, 66 Ohio St.3d 261, 263 (1993), Justice Pfeiffer, writing for a unanimous court, in taking issue with a particular instruction from OJI, noted that "while OJI is widely used in this state, its language should not be blindly applied in all cases." *Accord State v. Martens*, 90 Ohio App.3d 338, 343 (3d Dist.1993) ("The instructions found in [OJI] are not mandatory. * * * Requiring a trial court to rigidly follow these instructions would remove judicial * * * flexibility necessary to manage the various situations that arise during a jury trial."); *State v. Mitchell*, 10th Dist. Franklin No. 88AP-695, 1989 WL 47083, * 3 (May 2, 1989) ("Ohio Jury Instructions are not officially sanctioned instructions. Rather, [they] are the product of a committee of the Ohio Judicial Conference which suggests model instructions, but which have no force or effect as a rule of law. They are merely the suggestions of one or more trial or appellate judges as to what those judges feel is an appropriate instruction. They are promulgated for the guidance of trial judges as a guide, not as a 'bible.' ").

*Napier* at 720-721.

**{¶79}** Although it is not defined by OJI, "at fault" in the context of self-defense is clearly defined by case law and generally means that "the defendant must not have been the first aggressor in the incident." *State v. Hendrickson*, 4th Dist. Athens No. 08CA12, 2009-Ohio-4416, ¶ 61. However, an initial aggressor may still act in self-defense in certain circumstances. The classic example is what allegedly happened here when a fist fight turned into a gun fight.

> 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. 2 Wayne R. LaFave, *Substantive Criminal Law*, Section 10.4(e) (2d Ed.2003). 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.

*Hendrickson* at ¶ 28.

**{¶80}** Based on the contents of the question, the jury was definitely confused and unsure how to proceed in the situation here, where Thomas agreed to a fist fight, threw a punch, and Smith pulled out a gun. Further clarification and guidance were required to assist the jury in its deliberations.

**{¶81}** The Ohio Supreme Court has recently reiterated the critical nature of jury instructions. *State v. Griffin*, 141 Ohio St.3d 392, 2014-Ohio-4767.

> Jury instructions are critically important to assist juries in determining the interplay between the facts of the case before it and the applicable law. We have stated that jury instructions "must be given when they are correct, pertinent, and timely presented." *State v. Joy*, 74 Ohio St.3d 178, 181 (1995), citing *Cincinnati v. Epperson*, 20 Ohio St.2d 59 (1969), paragraph one of the syllabus. We also stated that a "court must give all instructions that are relevant and necessary for the jury to weigh the evidence and discharge its duty as the factfinder." *Id.*, citing *State v. Comen*, 50 Ohio St.3d 206 (1990), paragraph two of the syllabus.

*Griffin* at ¶ 5.

**{¶82}** I realize our standard of review is plain error here, because trial counsel did not object nor request additional instructions. Moreover, I realize that the trial court did not have of the benefit of Ohio Jury Instructions on point. Nevertheless, under the facts of this case and considering the nature of the charge, to wit: aggravated murder, I cannot say that I am confident the result of the trial would not have been different if "at fault" were defined and additional guidance given to the jury on the concept of "initial aggressor." I would reverse on the fifth and sixth assignment of error and remand for a new trial.

APPEARANCES:

JOHN P. PARKER, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.