[Cite as *State v. Kiehl*, 2016-Ohio-8543.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2015-P-0020**
- vs -	:	
CHRISTOPHER A. KIEHL,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas.
Case No. 2014 CR 0706.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Kristina Reilly*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

J. Dean Carro and *Daniel D. Eisenbrei*, Baker, Dublikar, Beck, Wiley & Mathews, 400 South Main Street, North Canton, OH 44720 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} Appellant, Christopher A. Kiehl, appeals from the February 4, 2015 judgment of the Portage County Court of Common Pleas, following a jury trial, convicting him on one count of reckless homicide with a firearm specification. On appeal, appellant alleges the trial court erred in failing to provide the jury with a requested instruction on self-defense. For the reasons stated below, we affirm the judgment of the trial court.

Facts and Procedural History

{¶2} On September 25, 2014, appellant was indicted by the Portage County Grand Jury on two counts of murder: Count One, Purposeful Murder, in violation of R.C. 2903.02(A); and Count Two, Felony Murder, in violation of R.C. 2903.02(B). Both counts are unclassified felonies and carry firearm specifications under R.C. 2929.14 and R.C. 2941.145. Appellant entered a plea of not guilty at his arraignment.

{¶3} Prior to trial, appellant filed proposed jury instructions. A jury trial commenced on December 15, 2014. Appellee, the state of Ohio, submitted its proposed jury instructions during trial; appellant also submitted additional proposed instructions.

{¶4} At trial, it was established that on September 21, 2014, Brittany Mulhollen sent about a dozen friends a group text message inviting them to her residence for a bonfire around 8:00 p.m. One of those guests invited appellant. At the bonfire, it was determined that more seating was needed. Appellant attempted to bring his pickup truck to the fire so that guests could sit in the truck bed. While doing so, appellant's truck became stuck in a small drainage ditch that had recently been replanted with grass.

{¶5} Appellant revved the truck's engine in an attempt to get the truck out of the ditch, which caused the tires to spin and damaged the grass. Brittany's fiancé, Kyle Fox, screamed and cursed at appellant, and an argument ensued. Kyle was angry because he had assisted the owner of the property, Kenneth Mulhollen (Brittany's father), with digging the ditch. Appellant manually put his truck into four-wheel drive and was able to remove it from the ditch. Words were exchanged between appellant, Kyle,

and Mr. Mulhollen. Appellant quickly "peeled out" of the driveway. Kyle ran after appellant and jumped into the bed of the truck while it drove away. Kyle's cousin, David Fox, ran after the truck because he was concerned for Kyle's safety.

{¶6} Appellant heard something banging on the rear window, and he stopped the truck; he exited the truck carrying a licensed firearm. Kyle leapt from the truck bed and hit appellant on the head several times. Appellant struck a blow to Kyle's head with the firearm. According to appellant, he then struck Kyle a second time with the firearm, which apparently caused the firearm to discharge. Kyle was killed instantly.

{¶7} David heard the gunshot and ran faster toward the truck; he saw Kyle lying lifeless on the ground. Appellant immediately called 911. Some witnesses, guests at the bonfire, heard appellant calling himself a "murderer," while also stating on the 911 call that he had been "attacked."

{¶8} Lieutenant Gregory Johnson, Chief of the Detective Bureau for the Portage County Sheriff's Department, testified that he arrived at the scene around 1:00 a.m. He took a statement from appellant, who was still distraught. Appellant told the lieutenant that he had been told to leave the bonfire; he had trouble getting his truck back into regular drive; and he heard someone banging on the rear window of his truck after he drove away. Appellant also stated he got out of the truck with his firearm intending to "pistol whip" whoever was in the bed of his truck and that Kyle attacked and punched him two to three times, which had left marks on his head above his left eye and knocked off his glasses. Appellant said he hit Kyle with the firearm a couple of times and then heard it "go off." Appellant repeatedly told the lieutenant that he did not

remember chambering a round of ammunition in the firearm but also claimed that he never kept a round chambered when the firearm was in his truck.

{¶9} Robert Grudosky, one of the EMTs who reported to the scene, testified that his report indicates appellant presented with three hematomas, each about a quarter-inch in diameter, on the left side of his head. Appellant did not appear intoxicated, had a steady gait, and did not smell of alcohol.

{¶10} Detective James Acklin, with the Portage County Sheriff's Department, testified that he saw possible muddy handprints or fingerprints on the window between the truck's bed and passenger compartment. Mud was also found on the back bumper of appellant's truck.

{¶11} Larry Hootman, an agent with the Bureau of Criminal Investigation ("BCI"), also responded to the scene. Agent Hootman testified that he found a 1911 Colt .45 caliber with a magazine on the ground, as well as the spring, spring plug, and barrel bushing scattered on the ground nearby.

{¶12} Jonathan Gardner, a firearms expert with BCI, testified more specifically about the firearm parts found on the ground and stated the firearm was operable even without those parts. For the weapon to be fired, an individual would have to use both hands to grip the safety of the handle, depress it, and then pull the trigger. Agent Gardner stated a jolt to the firearm could cause the pieces to separate; because it was old, pieces could have come loose from repeated firing over time. Agent Gardner also recognized that if the victim pulled at the firearm, that could have aided in its discharge.

{¶13} Samuel Troyer, a forensic DNA analyst with BCI, testified that Kyle's DNA was found on the firearm. Specifically, the decedent's DNA was found on the lower grip, the bottom of the magazine, and the cartridges in the magazine.

{¶14} Dr. Dorothy Dean, a forensic pathologist with the Summit County Medical Examiner's Office, testified that a gunshot wound traveled through the left side of Kyle's neck and exited through his left hip. The bullet traveled through several vital organs on its path, thereby causing Kyle's death. Dr. Dean also noted blunt object injuries on the top of Kyle's head, the back of his left hand, and his right arm, which were consistent with appellant using the firearm to hit Kyle. Dr. Dean further opined that the firearm was not placed against Kyle's skin when it discharged and that the exit wound indicated Kyle's body was bent and twisted when the bullet entered his neck.

{¶15} At the close of the state's case, defense counsel moved for a Crim.R. 29 acquittal, which the trial court overruled.

{¶16} Detective Daniel Clevenger, a part-time detective and an instructor of concealed carry courses, testified for appellant that the firearm was old and worn out. He also testified that the firearm would not operate without the parts that had been found at the scene. The detective said the firearm had a light trigger pull of about three pounds, indicating very little pressure on the trigger was necessary for it to fire. Detective Clevenger also stated two hands were necessary to fire the weapon.

{¶17} Appellant testified that he was invited to the Mulhollen bonfire. He stated he became afraid of Mr. Mulhollen because he threatened to beat appellant for "turfing" the new lawn. Appellant threw some money at Mr. Mulhollen to pay for the damage. After appellant drove a few seconds down the road, he heard banging on the rear

window; he was not sure who it was, but appellant was frightened. Appellant slammed on his brakes and put his truck in park. He got out carrying his licensed firearm, which he intended to use only to "pistol whip" the individual. Appellant testified that Kyle stepped onto the rail of the bed, jumped on appellant, knocked off his glasses, and hit him several times on the top of his head. After appellant regained his footing, he hit Kyle with the butt of his firearm approximately two times. The firearm discharged and killed Kyle.

{¶18} At the close of appellant's case, defense counsel renewed its motion for a Crim.R. 29 acquittal, which the trial court overruled.

{¶19} Thereafter, there was a discussion regarding jury instructions. On Count Two, Felony Murder, the trial court instructed the jury on the defenses of self-defense and accident. On Count One, Purposeful Murder and its lesser included offenses, defense counsel chose the accident defense as opposed to self-defense, as all parties acknowledged the jury could not be instructed on both.

{¶20} The jury found appellant not guilty on both murder counts but found him guilty of Reckless Homicide, a lesser included offense of Count One, and the firearm specification. Reckless Homicide, in violation of R.C. 2903.041, is a third-degree felony.

{¶21} On February 4, 2015, the trial court sentenced appellant to a term of imprisonment of three years for the firearm specification and one year for the Reckless Homicide conviction, to be served consecutively for a total of four years.

Assignments of Error

{¶22} Appellant filed this appeal and asserts two assignments of error for our review:

> [1.] The trial court erred when it failed to instruct the jury on the defenses of accident *and* self-defense on Count One, where both instructions were requested and there was sufficient evidence in the record to support both theories. [emphasis sic]
>
> [2.] The trial court erred and violated Appellant Kiehl's fundamental right to present a defense under the Fourteenth Amendment when it failed to instruct the jury on self-defense on Count One where a self-defense instruction was requested and there was sufficient evidence to support such a charge.

{¶23} Under both assignments of error, appellant argues the trial court erred in failing to give instructions to the jury that were requested by defense counsel and supported by sufficient evidence.

Standard of Review

{¶24} We first address the parties' arguments regarding the appropriate standard of review. Appellant asserts this court must apply a de novo standard of review because his proposed jury instructions included both accident and self-defense. *See State v. Belanger*, 190 Ohio App.3d 377, 2010-Ohio-5407, ¶4 (3d Dist.) and *State v. Brown*, 4th Dist. Athens No. 09CA3, 2009-Ohio-5390, ¶34 (citations omitted) (whether sufficient evidence has been presented to support a requested jury instruction on an affirmative defense is a matter of law). Appellee responds that our review is limited to a determination of plain error because appellant did not object to the trial court's decision not to instruct the jury on self-defense as it pertained to Count One, Purposeful Murder. *See* Crim.R. 30(A) ("On appeal, a party may not assign as error the giving or the failure to give any instructions unless the party objects before the jury retires to consider its verdict, stating specifically the matter objected to and the grounds of the objection.").

{¶25} A "party does *not* waive his objections to the court's charge [to the jury] by failing to formally object thereto[.]" *State v. Wolons*, 44 Ohio St.3d 64 (1989), paragraph one of the syllabus (emphasis added), citing Crim.R. 30(A). It must be clear from the record, however, "that a trial court has been fully apprised of the correct law governing a *material issue in dispute*[.]" *Id.* (emphasis added). If there was no formal objection and the record does not reveal a material dispute over the jury instructions, appellate review must be limited to plain error under Crim.R. 52(B). *See State v. Holley*, 11th Dist. Ashtabula No. 98-A-0089, 1999 Ohio App. LEXIS 6101, *26 (Dec. 17, 1999), citing *State v. Moreland*, 50 Ohio St.3d 58, 62 (1990).

{¶26} Appellant's proposed jury instructions did include proposals for both accident and self-defense, but it is not clear that appellant intended both instructions to be applied to each count of murder. Following trial, defense counsel did not raise a formal objection to the trial court's decision not to instruct on self-defense as to Count One. The record also reveals there was no material dispute on the issue. Defense counsel, the prosecutor, and the trial court all agreed that the defendant was required to elect an instruction on either accident or self-defense as to Count One:

> DEFENSE COUNSEL: Our position as to Count One and what we're gonna be asking the Court to instruct is to include an instruction on reckless homicide * * *. And, uh, the defense we have asserted to this is accident, so we're gonna be asking the Court to instruct on accident as well.
>
> THE COURT: So you're choosing accident over self-defense?
>
> DEFENSE COUNSEL: Yes, Judge. We feel that's appropriate and consistent with [appellant's] testimony because he has - - it is not our position that he purposely pulled the trigger in self-defense. It's our position that the gun went off accidentally. So as to purposeful murder, our defense is accident and we're asking for the lesser included of reckless.

> THE COURT: Okay. [Prosecutor], I know you indicated yesterday on the record that the State was not going to ask for any lesser included on either count.
>
> PROSECUTOR: That's correct, Your Honor.
>
> THE COURT: And you're opposed to any inferior degree?
>
> PROSECUTOR: That's - - that's correct, Your Honor. And I believe they - - that it is also correct that they have to elect between self-defense and accident. And at this time, they've elected.

{¶27} We do not find that appellant's proposed jury instructions, without further objection or dispute, were sufficient to preserve his assignments of error for a de novo review. Appellant has forfeited all but plain error review on appeal.

{¶28} To constitute plain error, an error must be an obvious deviation from a legal rule that affected the outcome. *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). In other words, if an obvious legal error is found, the defendant must prove the outcome at trial would have been different absent that error. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, ¶17 (citations omitted). *See also State v. Carnes*, 11th Dist. Trumbull No. 2014-T-0120, 2015-Ohio-4429, ¶9.

Jury Instructions

{¶29} The specific issue before us is whether the trial court erred by failing to instruct the jury on both accident and self-defense with respect to Count One, Purposeful Murder.

{¶30} As stated above, following trial, defense counsel neither requested an instruction on self-defense for Count One nor objected to the lack of such instruction before the jury retired for deliberations. This is due to the fact that the defense's theory of the case was that appellant did not purposely pull the trigger in an act of self-defense;

rather, appellant's testimony was that the firearm discharged accidentally while he was assaulting the victim. "[W]here the failure to request a jury instruction is the result of a deliberate, tactical decision on the part of trial counsel, it is not plain error." *State v. Hubbard*, 10th Dist. Franklin No. 11AP-945, 2013-Ohio-2735, ¶35, citing *State v. Clayton*, 62 Ohio St.2d 45, 47-48 (1980).

{¶31} In light of appellant's testimony, even if defense counsel had requested a self-defense instruction on Count One, the trial court would not have erred in denying such request. "In a case of homicide, where defendant testifies that [he] did not intend to fire the fatal shot, and that [he] did not knowingly 'pull the trigger,' such testimony is entirely inconsistent and irreconcilable with the right of self-defense." *State v. Champion*, 109 Ohio St. 281 (1924), paragraph three of the syllabus.

> Self-defense presumes intentional, willful use of force to repel force or escape force. Accidental force or shooting is exactly the contrary, wholly unintentional and unwillful. It is similar to a person saying in one breath, 'I was insane at the time of the homicide,' and in the next breath, 'I shot in the exercise of my right of self-defense, with reasonable grounds therefor, as they appeared to me.'
>
> If the evidence warrants, the defendant has a right to one request or the other. By no manner of logic, law, or legerdemain is he entitled to both.

Id. at 286-287. *See also Hubbard*, *supra*, at ¶54, and *State v. Krug*, 11th Dist. Lake No. 2008-L-085, 2009-Ohio-3815, ¶104, quoting *State v. Barnd*, 85 Ohio App.3d 254, 260 (3d Dist.1993) ("'The defenses of accident and self-defense are inconsistent by definition. Accident involves the denial of a culpable mental state and is tantamount to the defendant not committing an unlawful act. In contrast, a defendant claiming self-defense concedes he had the purpose to commit the act, but asserts that he was justified in his actions.'").

{¶32} Appellant argues that this court's decision in *State v. Imondi*, 11th Dist. Lake No. 2014-L-019, 2015-Ohio-2605, issued after he was convicted, supports his position that he should not have been required to choose between instructions on accident and self-defense. In *Imondi*, the defendant presented alternative defenses to the domestic violence charge for which he was tried: he testified that (1) the victim was not harmed in the altercation, but (2) even if he were harmed, the defendant acted in self-defense at all times. We held the trial court was required to give a self-defense jury instruction because it was supported by sufficient evidence and it was not, in fact, inconsistent with the alternative theory that the victim was not harmed. *Id.* at ¶23.

{¶33} *Imondi* is inapposite to the case sub judice for two crucial reasons. First, the defendant in *Imondi* actually presented both defenses at trial. *Id.* at ¶11-12. Here, appellant argued self-defense only with respect to Count Two, Felony Murder and the underlying assault on the decedent. There was absolutely no testimony or evidence presented, however, that appellant intentionally pulled the trigger of the firearm in self-defense. To the contrary, appellant specifically testified that he did not pull the trigger, he was not aware that the firearm had fallen apart, and he does not know how the firearm discharged.

{¶34} Second, the alternative defenses offered in *Imondi* were not inconsistent. *Id.* at ¶23. In other words, the defendant asserted two consistent alternative defenses for an act he never denied was intentional, to wit: no harm was inflicted on the victim *or*, if there was harm, he acted in self-defense. Here, however, the alternative defenses offered on appeal are entirely inconsistent. Appellant asserts (a) he intended to pull the trigger, but it was in self-defense, *or* (b) he did not intend to pull the trigger, and it

discharged accidentally. To have requested instructions "both on accidental homicide and self-defense, under the same evidence, presents a most peculiar paradox – a direct contradiction in terms and truth." *Champion*, *supra*, at 286. There is a manifest risk of condoning perjury in this case that was not present in *Imondi*. *See, e.g., Mathews v. United States*, 485 U.S. 58, 65-66 (1988). We therefore hold that the trial court's decision to instruct only on accident on Count One was not an obvious deviation from a legal rule.

{¶35} Even assuming error, there is also no valid argument that the lack of a self-defense instruction was prejudicial. The jury found appellant not guilty of Felony Murder, indicating they found the cause of death was the gunshot, not the underlying assault. The jury also found appellant not guilty of Purposeful Murder, indicating they found the gunshot was not inflicted intentionally. A self-defense instruction is only warranted where there is sufficient evidence that the defendant committed an intentional act. *See Champion*, *supra*, at 286-287 ("Self-defense presumes intentional, willful use of force to repel force or escape force."). We can therefore extrapolate from the verdicts that a self-defense instruction on Count One would not have changed the outcome of the trial.

{¶36} We hold that the trial court did not commit plain error and did not violate appellant's fundamental right to present a defense under the Fourteenth Amendment.

{¶37} Appellant's assignments of error are without merit.

{¶38} For the reasons stated in this opinion, the judgment of the Portage County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J., concurs,

COLLEEN O'TOOLE, J., dissents with a Dissenting Opinion.

_____

COLLEEN O'TOOLE, J., dissents with a Dissenting Opinion.

{¶39} I respectfully dissent.

{¶40} Appellant argues under both assignments of error that the trial court erred in failing to give an instruction to the jury on the defenses of both accident and self-defense on count one. The majority finds appellant's assignments to be without merit. The majority holds that the trial court did not commit plain error and did not violate appellant's fundamental right to present a defense. Because I would reverse and remand, I disagree.

{¶41} "Our standard of review for determining whether the trial court properly refused to give a jury instruction is de novo. *State v. Brown*, 4th Dist. Athens No. 09CA3, 2009-Ohio-5390, ¶34. 'Requested jury instructions should be given if they are (1) correct statements of the applicable law, (2) relevant to the facts of the case, and (3) not included in the general charge to the jury.' *State v. Mitchell*, 11th Dist. Lake No. 2001-L-042, 2003-Ohio-190, at ¶10, citing *State v. DeRose*, 11th Dist. Lake No. 2000-L-076, 2002-Ohio-4357, at ¶33, quoting *State v. Edwards*, 11th Dist. Lake No. 2001-L-005, 2002-Ohio-3359, at ¶20. In determining whether a self-defense jury instruction is warranted, we look to '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.' *State v. Melchior*, 56 Ohio St.2d 15 * * * (1978), paragraph

one of the syllabus. We evaluate the evidence in a light most favorable to the defense. *State v. Belanger*, 190 Ohio App.3d 377, 2010-Ohio-5407, ¶3 * * * (3rd Dist.2010) (Citation omitted.)." (Parallel citations omitted.) *State v. Imondi*, 11th Dist. Lake No. 2014-L-019, 2015-Ohio-2605, ¶17.

{¶42} The state suggests that appellant did not specifically object to the jury instructions given under count one and that, therefore, this court's review is limited to plain error. The majority also finds that appellant has forfeited all but plain error review on appeal. This writer's review of the record reveals, however, that appellant's arguments were preserved for a de novo review.

{¶43} As stated, appellant filed proposed jury instructions before trial requesting an instruction on accident and self-defense. The state responded during trial suggesting that Ohio law required appellant to chose between the defenses of accident or self-defense on count one, citing to the 1924 case of *State v. Champion*, 109 Ohio St. 281 (1924). The trial court did not issue a written order. Instead, the court engaged in a discussion with counsel regarding the jury instructions.

{¶44} The record reveals that the trial court, the prosecutor, and defense counsel had an understanding that appellant was required to choose between the "inconsistent" defenses of accident and self-defense pursuant to *Champion* at least as to count one. The trial court felt bound by the *Champion* decision, at least as to count one, and as a result, no objection by defense counsel was made nor necessary.

{¶45} Appellant eventually chose the instruction of accident over self-defense on count one. However, the record does not establish that defense counsel voluntarily abandoned self-defense. In fact, with respect to count two, the trial court allowed

instructions on both accident and self-defense, the jury was instructed on both defenses, and appellant was acquitted under that count.

{¶46} During deliberations, the jury submitted questions to the trial court including: "If we cannot decide unanimously on reckless homicide do we have the option for self-defense or accidental or do we have to be unanimous?" The trial court referred the jury back to the instructions. This question reveals that had the jury been instructed on self-defense on count one, it may have yielded a different result. This writer finds the trial court erred in requiring appellant to choose between defenses pursuant to *Champion* under count one where there was evidence to support both instructions.

{¶47} On June 30, 2015, this court decided *Imondi* which distinguished *Champion.* In a unanimous decision, we held:

{¶48} "The Ohio Supreme Court has conflicting precedents on whether a trial court must give jury instructions when the defendant has requested jury instructions that go to inconsistent defenses. In *State v. Champion*, 109 Ohio St. 281, 286-87 * * * (1924), the Ohio Supreme Court found that the appellant was not entitled [to] a jury instruction for both accident and self-defense, explaining: 'If the evidence warrants, the defendant has a right to one request or the other. By no manner of logic, law, or legerdemain is he entitled to both.'

{¶49} "Later, in *State v. Martin*, 21 Ohio St.3d 91 * * * (1986), the Ohio Supreme Court considered whether 'the state of Ohio may (* * *) place the burden of proving self-defense on a defendant if the truth of that defense would negate an essential element of the crime charged.' *Id.* at 92-93. In *Martin*, the defense argued that placing the burden

on him to demonstrate he acted in self-defense forced him to negate the aggravated murder mens rea, the crime for which he was convicted. *Id.* at 93. The Ohio Supreme Court rejected Martin's argument holding that self-defense is an admission to 'the facts claimed by the prosecution' that utilizes 'independent facts or circumstances which the defendant claims exempt him from liability.' *Id.* at 94.

{¶50} "However, in *State v. Mundt*, 115 Ohio St.3d 22, 2007-Ohio-4836, ¶140 * * *, the Ohio Supreme Court noted that a lawyer's decision to present 'inconsistent alternative (defense) theories is not per se deficient performance' as 'the decision to advance two different theories of non-culpability is a trial tactic or strategy' that is not so unreasonable as to constitute ineffective assistance of counsel.

{¶51} "In light of *Mundt*, we cannot read *Champion* and *Martin* as requiring a defendant to admit the state's case in chief in order to argue self-defense. If arguing inconsistent defenses is a trial tactic that a competent trial attorney would utilize, then the jury should be instructed on the inconsistent defenses. Our conclusion is in agreement with the federal standard, which permits a defendant to argue inconsistent theories before a jury. *See Mathews v. United States*, 485 U.S. 58, 62 * * * (1988) [entrapment]. * * * *United States v. Goldson*, 954 F.2d 51, 55 (2d Cir. 1991); *United States v. Browner*, 889 F.2d 549, 555 (5th Cir. 1989) [self-defense].

{¶52} "Finally, there is no reason to require the defense to admit to the elements of the crime in order to receive a self-defense instruction. Although we have been unable to find a rationale for prohibiting instructions on inconsistent defenses, supporters are concerned with condoning perjury. *See Mathews* 485 U.S. at 65-66 (discussing this issue). However, it is possible to argue inconsistent defenses without a

defendant committing perjury. * * *." (Parallel citations omitted.) *Imondi, supra,* at ¶19-23.

{¶53} *Imondi* is similar to this case. Like the trial court in *Imondi*, the trial court in the case at bar erred in failing to instruct the jury on accident and self-defense on count one as it was warranted by the evidence. The court erred in requiring appellant to choose between "inconsistent" defenses on count one, despite permitting instructions on both defenses on count two. Again, appellant was acquitted of count two by the jury.

{¶54} An instruction on both defenses of accident and self-defense was necessary to allow the jury to fully consider the altercation between appellant and Mr. Fox. The record reveals Mr. Fox unlawfully entered appellant's vehicle just moments before his death. Appellant possessed his weapon lawfully in self-defense. During the altercation, the evidence at trial also suggests the weapon fired accidentally.

{¶55} According to appellant, he used his gun not as a firearm but rather as a blunt object to "pistol whip" Mr. Fox, who had unlawfully entered the bed of his truck and attacked appellant after appellant got out of the vehicle. In the process of defending himself and using the gun as a club rather than a firearm, appellant indicated the gun discharged accidentally. Appellant was not only entitled to an instruction on both accident and self-defense but was also entitled to a presumption of self-defense. *See* R.C. 2901.05(B)(1) ("a person is presumed to have acted in self defense or defense of another when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so entering, or has unlawfully and

without privilege to do so entered, the residence or vehicle occupied by the person using the defensive force.")

{¶56} Based on the facts presented, aspects of both defenses of accident and self-defense were required in order for the jury to have been able to consider the two differing theories of the case, i.e., the state's theory that the death was intended, and the defense's theory that appellant acted in self-defense and that the death was an accident. As stated, the jury was permitted to consider both defenses of accident and self-defense on count two, which involved the same conduct as count one. Appellant was acquitted of count two. By not allowing the same instructions on count one amounts to reversible error and warrants a new trial as appellant was denied a meaningful opportunity to present a complete defense. *Imondi, supra; California v. Trombetta*, 467 U.S. 479, 485 (1984).

{¶57} I find appellant's first and second assignments of error well-taken and would reverse and remand the trial court's judgment.

{¶58} For the foregoing reasons, I respectfully dissent.