[Cite as *State v. Fambro,* 2017-Ohio-5646.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2016-T-0063**
- vs -	:	
WILLIAM L. FAMBRO,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 2015 CR 00848.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, *LuWayne Annos,* Assistant Prosecutor, and *Christopher D. Becker,* Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Michael A. Partlow, 112 South Water Street, Suite C, Kent, OH 44240 (For Defendant-Appellant).

DIANE V. GRENDELL, J.

{¶1} Defendant-appellant, William L. Fambro, appeals his convictions for Aggravated Murder with a Firearm Specification and Having Weapons While Under Disability following a jury trial in the Trumbull County Court of Common Pleas. The issues before this court are whether a trial court commits reversible error by excluding as hearsay threatening statements made by the victim against the defendant in a murder prosecution; whether a witness who receives a letter from the defendant may

authenticate the letter by testifying that she is familiar with his writing and where the letter discusses matters particular to the defendant's case; and whether a conviction for Aggravated Murder is against the manifest weight of the evidence despite a claim of self-defense where the defendant fired eight shots at the unarmed victim and then attempted to conceal his involvement in the killing. For the following reasons, we affirm Fambro's convictions.

{¶2} On October 22, 2015, the Trumbull County Grand Jury returned an Indictment charging Fambro with Aggravated Murder with a Firearm Specification (Count 1), an unclassified felony in violation of R.C. 2903.01(B) and (F) and R.C. 2941.145; Aggravated Robbery with a Firearm Specification (Count 2), a felony of the first degree in violation of R.C. 2911.01(A)(1) and/or (3) and (C), and R.C. 2941.145; and Having Weapons While Under Disability (Count 3), a felony of the third degree in violation of R.C. 2923.13(A)(2) and (B).

{¶3} On the same date, Fambro was arraigned and entered a plea of not guilty.

{¶4} Beginning on May 2, 2016, Fambro's case was tried before a jury. The following witnesses testified on behalf of the State:

{¶5} Baresh Patel is the general manager of the Riverview Motel, located on Parkman Road in Warren, Ohio. On the afternoon of October 14, 2015, he registered Teresa Hunter as a motel guest.

{¶6} Mike Surati was working at the Riverview Motel on October 15, 2015. At 10:30 a.m., checkout time, Surati entered Room 25, found a body on the floor, and called 911.

{¶7} Lieutenant Gregory Hoso of the Warren Police Department received a dispatch on October 15, 2015, of a possible drug overdose at the Riverview Motel. Inside Room 25, Lieutenant Hoso discovered shell casings and a dead body, later identified as Teresa Hunter.

{¶8} Diondra Staggers drove her mother, Felecia Staggers, to the Riverview Motel on October 14, 2015, because Fambro, also known as Big Shot, is blind and needed a ride.

{¶9} Felecia Staggers and her daughter often drove Fambro places because he is blind, although "he can see certain things." On October 14, 2015, she met him at the Riverview Motel. Fambro gave her the keys to a friend's car and asked her to drive him to the Jefferson School. Along the way, they stopped on the Summit Street Bridge where Fambro asked her to throw a bag of trash into the Mahoning River. It was a white plastic bag and felt heavy. Felecia thought there might be bottles inside it. The Jefferson School is located on Tod Avenue with access from 5th Street. Felecia walked with Fambro to Hampshire Housing, where Carrie Fambro, his wife and mother of his child, lives.

{¶10} A few days before trial, Felecia received a card and letter from Fambro, signed Big Shot. In the card, Fambro wrote: "I hope you still care enough to help me." In the letter, Fambro wrote: "I would hope that you would go to Cleveland this week. But anyway, I told them you only put the gun in the river, there was nothing else." Felecia denied knowing that the bag contained a gun.

{¶11} On cross-examination, Felecia admitted that there were certain discrepancies between her trial testimony and information she provided to the police in pre-trial interviews.

{¶12} Jenica Bennett is a relation of Fambro. She described Fambro as blind, but not completely so. Fambro is able to count money.

{¶13} Bennett went with Fambro to purchase a handgun on September 11, 2015. The weapon was a Lorcin L22, serial number 022903. Fambro helped Bennett pay for the gun. Bennett and Fambro returned to her house. Later that day, after she had driven Fambro to an aunt's house, Bennett discovered the gun was missing. She called Fambro who denied taking the gun while threatening Bennett and her family. Nevertheless, Bennett continued to have contact with Fambro.

{¶14} After learning of Hunter's murder, Bennett contacted the police and reported the gun stolen.

{¶15} Raheen Whittaker was fishing in the Mahoning River near the Summit Street Bridge when he hooked a white plastic bag. Inside he found "a pistol, a couple clips and some shells." Whittaker turned the bag over to the police. The pistol was a Lorcin L22 with the serial number 022903.

{¶16} Carrie Fambro married Fambro on October 9, 2015. At that time, he was living in Jamestown Village. She identified Fambro as the person in certain photographs made from motel security video presented to her by the police on October 16, 2015.

{¶17} Tresca Washington is Hunter's sister. In October 2015, she was living with Hunter, Hunter's children, Fambro, and others in Jamestown Village. At

approximately 1:00 or 2:00 p.m., on October 14, 2015, Fambro and Hunter left together to go shopping and get a room. Later that afternoon, Washington spoke with Hunter who indicated that "she didn't want to be where she was." Shortly after that, Fambro returned to the apartment to pick up a duffle bag.

{¶18} Eric Laprocina, a forensic officer with the Warren Police Department, viewed security video from the Riverview Motel, in particular the camera angle/channel that encompassed Hunter's room, from approximately 2:00 p.m. on October 14, 2015, until Lieutenant Hoso arrived the next day at approximately 11:00 a.m. The only persons to enter the room during this time were Hunter, Fambro, a Riverview employee and general manager, and police and medical personnel. Officer Laprocina was also responsible for searching the victim's car, which was found at the Jefferson School on Tod Avenue.

{¶19} Sergeant Geoffrey Fusco of the Warren Police Department recovered evidentiary items from the crime scene, including two live rounds, eight shell casings, and a finger nail from the victim's index finger.

{¶20} Detective Wayne A. Mackey of the Warren Police Department identified persons in the video footage and interviewed witnesses in the course of the investigation. He acknowledged that Felecia Staggers provided false information in pre-trial interviews.

{¶21} Doctor Humphrey Don Germaniuk, the Trumbull County Medical Examiner and Coroner, performed an autopsy on Hunter. He testified that Hunter's death was caused by six gunshot wounds. Dr. Germaniuk described two of the wounds as contact wounds ("the muzzle of the firearm is pressed right up against the skin and

discharged"). He noted that two of the wounds showed stippling (indicating that the firearm was discharged at close or "intermediate range") and that two of the bullets entered Hunter's back.

{¶22} Michael E. Roberts, a forensic scientist with the Bureau of Criminal Investigation, testified that the bullets recovered from the victim and crime scene were .22 caliber. Roberts further testified that, "based off the chamber wall marks," the cartridge casings recovered from the crime scene were fired by the Lorcin L22 found in the Mahoning River.

{¶23} Lindsey Nelsen-Rausch, a forensic scientist with the Bureau of Criminal Investigation, testified that Hunter was a major contributor of DNA found on two of the live rounds recovered from the crime scene, but Fambro was excluded as a major contributor.

{¶24} Erica Jimenez, a forensic scientist with the Bureau of Criminal Investigation, testified that a DNA profile consistent with Fambro's profile was obtained from a washcloth found at the crime scene.

{¶25} William Fambro testified on his own behalf. He has been completely blind since 1999, unable to distinguish color, shade, or movement, as the result of a tumor on his optical nerves. He is able to handle money because he folds and positions bills of different dollar amounts in a particular way. He was given the nickname "Big Shot" while still a baby in his mother's womb.

{¶26} Fambro met Hunter about three years before her death. They had been romantically involved until about April 2015.

{¶27} Fambro was in the process of moving out of the apartment he was sharing with Hunter and into his wife's (Carrie Fambro's) apartment in October 2015.

{¶28} Fambro gave Hunter money to buy a car and, in turn, she gave him permission to use it when he needed a ride. Fambro had his own keys to the car.

{¶29} Fambro admitted helping Bennett purchase the Lorcin L22 but denied stealing it and denied that he was ever confronted by Bennett about the gun being stolen.

{¶30} Fambro testified that on October 14, 2015, he was with Hunter when she rented a room at the Riverview Motel. Fambro had gone with Hunter that day because he wanted a ride to the grocery store. He believed Hunter rented the room in order to meet someone, perhaps for selling pills. While at the motel, Fambro used a wash cloth to wash his hands. By about 3:30 p.m., Fambro wanted to leave and called Felecia to come pick him up or walk with him back to his apartment.

{¶31} During this time, Hunter began fighting with Fambro. They were sitting next to each other on the bed. Hunter was upset because of his recent marriage to Carrie and because he wanted Hunter and her sister to leave his apartment. She began cussing and shouting. Fambro felt "very scared" and "threatened." Fambro declared his intent to leave when Hunter threatened him and "hit [him] up side [his] head with a weapon * * * a metal gun." Fambro grabbed her arm and, after a struggle, "got the gun from her." Hunter grabbed hold of Fambro's shirt and wrist. Fambro believed he was going to die and "just fired a shot." They fell from the bed to the floor. Fambro "fired and fired" as he "backed off" until "the gun just clicked." Fambro heard a gurgling noise for 15 to 20 seconds during which time he thought Hunter might still be alive.

{¶32} Fambro grabbed his belongings in a backpack as well as the gun and a bag of bullets. He described himself as "confused" and "in shock." He did not contact the police because they would not have "taken it the way that [he] would have told it." Fambro left the motel room and met Felecia. He gave her his own key to Hunter's car. She drove him to the Powerhouse Bar, located north/northwest of the Summit Street Bridge. Fambro told Felecia that he had shot Hunter and that he had a gun. On her own accord, she took the gun and tossed it into the river.

{¶33} Next, Felecia drove Fambro to his apartment on Lodwick Drive where he picked up some of his belongings. Felecia drove the vehicle to the Jefferson School, where she again on her own accord wiped down the interior of the vehicle. She then walked him to Carrie's apartment.

{¶34} A couple of days later, Fambro was interviewed by Detective Mackey. Fambro explained that he was not forthcoming about what had happened to Hunter because he "didn't want to get Felecia in any type of trouble" for "basically helping [him] out with the ride." In a video of the interview with Detective Mackey, Fambro denied being in the motel room with Hunter until confronted with surveillance video which showed him entering the room. Fambro claimed that he had a "bump" on his head where Hunter struck him with the gun, although no other witness corroborated the existence of an injury.

{¶35} On May 6, 2016, the jury returned guilty verdicts on all three counts of the Indictment.

{¶36} On May 10, 2016, a sentencing hearing was held. On the State's motion, the trial court merged the Aggravated Murder and the Aggravated Robbery convictions,

with the State electing to have Fambro sentenced for Aggravated Murder. The court sentenced Fambro to life imprisonment without the possibility of parole for Aggravated Murder with a mandatory, consecutive three-year prison term for the Firearm Specification and to a consecutive three-year prison term for Having Weapons While Under Disability.

{¶37} On May 19, 2016, the trial court issued its Entry on Sentence and, on June 9, 2016, an Amended Entry on Sentence.

{¶38} On June 20, 2016, Fambro filed a Notice of Appeal. On appeal, Fambro raises the following assignments of error:

{¶39} "[1.] The trial court erred, to the prejudice of the appellant, by preventing the appellant from testifying concerning threatening statements made by the alleged victim to the appellant."

{¶40} "[2.] [The] trial court erred, to the prejudice of the appellant, by permitting the admission of State's exhibits 89 and 90."

{¶41} "[3.] The appellant's convictions are against the manifest weight of the evidence."

{¶42} In his first assignment of error, Fambro contends the trial court erred by prohibiting him from testifying directly about threatening statements made by Hunter that were relevant and material to his self-defense claim.

{¶43} The following exchange occurred during Fambro's trial testimony:

Q. Did she threaten you?

A. Yes.

Q. Okay. Was it a mild threat?

A. No.

Q. All right. Keep going.

A. She said, "I'm gonna kill you."

Mr. Becker[1]: Objection.

Mr. Rouzzo[2]: Your Honor, that's 803(3), that number is a state of mind of the declarant. I'm not offering it to prove the truth of the matter asserted.

* * *

The Court: I disagree with you. He can't state "she said this" and "she said that" because he can make up whatever he wants. He can say he felt threatened, that she threatened to kill him, but he doesn't get up there and say "she said this," "she said that." That's clearly hearsay. * * * You can get in what you want to get in. He already said he was hit in the head with the gun. He can say he was in fear for my life (sic). He can say she was threatening, but he's not going to get up there and make up some story or come up with a story he said she told him. That objection is sustained. You can go a different route.

Mr. Pentz[3]: I would like to proffer. Is that possible?

The Court: Absolutely.

Mr. Pentz: I'm going to object to you overruling this. Had I been able to offer this testimony it would have gone toward establishing my self-defense claim. She would have said, "I'm going to fucking kill you and your bitch." And I need to get this evidence in to show he was, in fact, fearful, imminently.

The Court: You can always get it in, but you can't get it in by him making that statement he claimed "she said." There's plenty of other ways you can do it. If you don't do it, shame on you. There's other ways you can do that without saying "she said." The objection is sustained.

1. Prosecuting attorney.
2. Defense attorney.
3. Defense attorney.

{¶44} "[A] trial court is vested with broad discretion in determining the admissibility of evidence in any particular case, so long as such discretion is exercised in line with the rules of procedure and evidence." *Rigby v. Lake Cty.*, 58 Ohio St.3d 269, 271, 569 N.E.2d 1056 (1991). Ordinarily, a trial court's hearsay rulings will be reviewed for abuse of discretion. *State v. McKelton*, 148 Ohio St.3d 261, 2016-Ohio-5735, 70 N.E.3d 508, ¶ 97; *State v. Dever*, 64 Ohio St.3d 401, 410, 596 N.E.2d 436 (1992) ("[t]he trial court has broad discretion to determine whether a declaration should be admissible as a hearsay exception"); *but see John Soliday Fin. Group, L.L.C. v. Pittenger*, 190 Ohio App.3d 145, 2010-Ohio-4861, 940 N.E.2d 1035, ¶ 28 (5th Dist.) ("while the trial court has discretion to admit or exclude relevant evidence, it has no discretion to admit hearsay").

{¶45} "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). The staff notes acknowledge the "relative nature" of what properly constitutes hearsay. "If a statement is not offered to prove its truth but is offered for some other reason such as simply to prove the statement was made, if such fact is relevant, it is not hearsay." 1980 Staff Note, Evid.R. 801(C). Additionally, "[w]ords constituting conduct are not hearsay, e.g., words of a contract, libel, slander, threats and the like." *Id.*

{¶46} Threats are often, but not consistently, treated as non-hearsay statements. *State v. Skatzes*, 104 Ohio St.3d 195, 2004-Ohio-6391, 819 N.E.2d 215, ¶ 132 ("[s]tatements offered as evidence of * * * threats * * * directed to the witness, rather than for the truth of the matter asserted therein, are not hearsay") (citation omitted);

State v. Jalowiec, 91 Ohio St.3d 220, 227, 744 N.E.2d 163 (2001) ("[t]estimony about threats is not hearsay"); *State v. Skipper*, 2d Dist. Montgomery No. 25404, 2013-Ohio-4508, ¶ 14 ("threats are 'verbal acts' which are not hearsay").

{¶47} "The very act of uttering the words constitutes the threat whether or not the declarant actually intended to act in the manner described in the threat." *Skipper* at ¶ 14; *State v. Williams*, 38 Ohio St.3d 346, 348, 528 N.E.2d 910 (1988) ("[a] statement is not hearsay if it is admitted to prove that the declarant made it, rather than to prove the truth of its contents"); *State v. Taylor*, 8th Dist. Cuyahoga No. 45374, 1983 WL 5896, 3 (Mar. 31, 1983) ("[e]vidence of a threat is commonly offered to show the threat was made, rather than to prove the truth of any fact existing at or before it was made"); *State v. Beckwith*, 8th Dist. Cuyahoga No. 102544, 2016-Ohio-3267, ¶ 23 (cases cited).

{¶48} In addition to distinguishing threats as "verbal acts," rather than "statements" in the sense of "oral or written assertion[s]," Evid.R. 801(A), the case law recognizes that threats are "adduced to show the state of mind of the deceased [victim] or of the defendant rather than to prove the truth of the matter asserted therein." (Citation omitted.) *State v. Berger*, 8th Dist. Cuyahoga No. 87603, 2006-Ohio-6583, ¶ 11; *State v. McLaughlin*, 10th Dist. Franklin No. 09AP-836, 2010-Ohio-1228, ¶ 12 ("a defendant may introduce proof of the victim's threats against him in order to establish his belief that he was in danger at the time of the killing") (citation omitted).

{¶49} Applying these precedents to Fambro's proffered testimony that Hunter threatened to kill him and "his bitch," the testimony should have been allowed. In the first instance, the threats could not have been offered to prove the truth of the matter asserted, inasmuch as Hunter did not kill anyone. Moreover, the testimony was offered

for the purpose of establishing that the threat was made and the effect that it had on Fambro at the time he killed Hunter. *State v. Woodruff*, 11th Dist. Lake No. 96-L-111, 1997 WL 837549, 3 (Dec. 31, 1997) ("instances of the victim's prior conduct" are admissible when arguing self-defense "because they tend to show why the defendant believed the victim would kill or severely injure him").

{¶50} Even if the proffered testimony were deemed to constitute hearsay, courts routinely admit such testimony under various hearsay exceptions, such as a then existing mental, emotional, or physical condition, Evid.R. 803(3) ("[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition"), or an excited utterance, Evid.R. 803(2) ("[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition"). *See*, *e.g.*, *State v. Lewis*, 12th Dist. Fayette No. CA2010-08-017, 2011-Ohio-415, ¶ 35 ("testimony regarding the victim's threat to file false domestic violence charges against appellant constitutes admissible hearsay pursuant to Evid.R. 803(3) inasmuch as it reflects the victim's then existing state of mind"); *State v. Fort*, 8th Dist. Cuyahoga No. 56922, 1990 WL 61716, 3 (May 10, 1990) ("[t]o the extent that the out-of-court threat is shown to demonstrate the declarant's intentions or state of mind, it is admissible as an exception to the hearsay bar by Evid.R. 803(3)"); *State v. Smith*, 87 Ohio St.3d 424, 433, 721 N.E.2d 93 (2000) ("[t]he threatening statements by Danny, if believed, tended to show that Danny was agitated and angry," and so "were admissible as excited utterances under Evid.R. 803(2)").

{¶51} The issue then becomes whether the trial court's exclusion of the proffered testimony was harmless error. "Any error, defect, irregularity, or variance

which does not affect substantial rights shall be disregarded." Crim.R. 52(A). "Nonconstitutional error is harmless if there is substantial other evidence to support the guilty verdict." *State v. Webb*, 70 Ohio St.3d 325, 335, 638 N.E.2d 1023 (1994).

{¶52} Here, the error in precluding the admission of direct evidence of Hunter's threat is mitigated by several considerations. The trial court did grant Fambro wide latitude to testify regarding his state of mind and Hunter's conduct in the moments before the shooting. Fambro testified that Hunter hit him in the head with the gun; she threatened him; her tone and her volume scared him; and when struck in the head, he thought he was going to die "because of her tone, her anger, and the situation." Although defense counsel avoided repeating the substance of Hunter's threat, the prosecuting attorney did so in closing argument, questioning the credibility of the claim that Hunter announced her intention to kill Fambro: "How did he know she had a gun? He can't see. 'I'm going to pull out this gun now, William, and shoot and kill you.' Is that what she said? Does that make sense? If you're that mad that he's married and a jealous lover, aren't you just going to say, well, boom? You don't announce your intentions and say, 'I'm going to kill you now, William.'"

{¶53} Fambro's self-defense claim was further undermined by other evidence in the record, such as: the murder weapon being directly connected with Fambro; Fambro's efforts to conceal the crime; and the nature of Hunter's wounds (two shots in the back and two shots with the gun pressed against her body).

{¶54} In light of these circumstances, it cannot be reasonably concluded that the exclusion of direct testimony that Hunter threatened to kill Fambro affected the outcome of the trial. *State v. Tucker*, 12th Dist. Butler No. CA10-10-263, 2012-Ohio-139, ¶ 16-19

(although the witness' proffered testimony that the victim indicated his intent to kill the appellant was admissible pursuant to the existing state of mind exception, such error was harmless in light of "overwhelming evidence of appellant's guilt"); *State v. Gunn*, 2d Dist. Montgomery No. 16617, 1998 WL 453845, 6 (Aug. 7, 1998) ("[g]iven the nature of Grimme's wounds, however, Gunn's [self-defense] claim borders on the incredible").

{¶55} The first assignment of error is without merit.

{¶56} In his second assignment of error, Fambro contends that the card and letter received by Felecia Staggers and admitted into evidence were not properly authenticated. "Despite the fact that Ms. Staggers never provided any testimony concerning her familiarity with appellant's handwriting, the trial court admitted the exhibits." Appellant's brief at 14.

{¶57} "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A). "This low threshold standard does not require *conclusive* proof of authenticity, but only sufficient foundational evidence for the trier of fact to conclude that the document is what its proponent claims it to be." (Citation omitted.) *State v. Guyton*, 11th Dist. Ashtabula No. 2016-A-0023, 2016-Ohio-8110, ¶ 25.

{¶58} "[E]xamples of authentication or identification conforming with the requirements of this rule" include: "[t]estimony that a matter is what it is claimed to be"; "[n]onexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation"; and the "[a]ppearance, contents, substance,

internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Evid.R. 901(B)(1), (2), and (4).

{¶59} Staggers identified the State's exhibits as a card and letter she received from Big Shot, i.e., Fambro. She testified that she had seen his handwriting and things he had written previously. On cross-examination, Staggers elaborated that she had watched him write and "help[ed] him fill out his bills when [they] used to be together." She also agreed with a question from defense counsel that she was "not that familiar with his handwriting."

{¶60} Staggers' testimony was sufficient to establish a foundation for the admission of the card and letter. She identified them as items she received from Fambro. They are addressed to Felicia and signed Big Shot. The contents of the card and letter are particular to the circumstances of Fambro's case: he hoped Staggers would go to Cleveland where she used to live and refer to her putting a gun in the river. *State v. Townsend*, 7th Dist. Mahoning No. 04 MA 110, 2005-Ohio-6945, ¶ 55 (in determining authenticity, the court may consider "distinctive contents, such as facts that only the alleged writer would know," while "challenges to the authorship of documents such as letters normally go to the weight rather than admissibility"); *State v. Keeton*, 5th Dist. Richland No. 03 CA 43, 2004-Ohio-3676, ¶ 35-36 (letter from "Li'l Bro" was properly authenticated where a corrections officer testified that a particular witness was known as "Li'l Bro" and the letter referred to the circumstances of a case involving the witness).

{¶61} The second assignment of error is without merit.

{¶62} In his third assignment of error, Fambro argues his convictions are against the manifest weight of the evidence.

{¶63} In Ohio, "a court of appeals has the authority to reverse a judgment as being against the weight of the evidence." *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 7. "No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause." Ohio Constitution, Article IV, Section 3(B)(3).

> Weight of the evidence concerns "the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*."

State v. Thompkins, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *Black's Law Dictionary* 1594 (6th Ed.1990).

> The court [of appeals], reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial

> should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.

Id., quoting *State v. Martin*, 20 Ohio App.3d 172, 485 N.E.2d 717 (1st Dist.1983).

{¶64} "In weighing the evidence, the court of appeals must always be mindful of the presumption in favor of the finder of fact." *Eastley* at ¶ 21; *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3 ("every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts") (citation omitted).

{¶65} In order to convict Fambro of Aggravated Murder, the State was required to prove that he "purposely cause[d] the death of another * * * while committing or attempting to commit * * * aggravated robbery." R.C. 2903.01(B).

{¶66} Under Ohio law, self-defense is an affirmative defense which privileges the defendant "to use that force which is reasonably necessary to repel the attack." *State v. Williford*, 49 Ohio St.3d 247, 249, 551 N.E.2d 1279 (1990). "To establish self-defense, the following elements must be shown: (1) the slayer was not at fault in creating the situation giving rise to the affray; (2) the slayer has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) the slayer must not have violated any duty to retreat or avoid the danger." *State v. Robbins*, 58 Ohio St.2d 74, 388 N.E.2d 755 (1979), paragraph two of the syllabus.

{¶67} "[W]here the state is required to prove beyond a reasonable doubt every element of a crime as defined by statute, the defendant may fairly be required to prove,

by a preponderance of the evidence, the affirmative defense of self-defense." *State v. Jackson*, 22 Ohio St.3d 281, 283, 490 N.E.2d 893 (1986).

{¶68} Fambro maintains that his testimony that he was acting in self-defense was uncontroverted: "Not one witness testified that [Fambro] planned to kill the victim" or "established any motivation whatsoever for [Fambro] to do so." Moreover, "[t]he jury apparently became confused and distracted by the various red herrings in this case, i.e. precisely where the gun was tossed into the river and did not understand [Fambro's] fear of the victim since he was not permitted to explain the threats that the victim had made." Appellant's brief at 18.

{¶69} Initially, we note that, "[w]hile often relevant, motive is not an element of the crime of aggravated murder and it is not indispensable that motive be established." *State v. Zaffino*, 9th Dist. Summit No. 21514, 2003-Ohio-7202, ¶ 46; *State v. Hill*, 8th Dist. Cuyahoga No. 98366, 2013-Ohio-578, ¶ 15 ("[t]he state is not required to prove motive to support a murder conviction").

{¶70} It is equally uncontroverted that Fambro killed Hunter and tried to conceal the crime. The fact that Fambro never raised his claim of self-defense during the investigation of Hunter's killing gives strong support to the jury's conclusion that he failed to establish self-defense by a preponderance of the evidence. Other evidence weighs heavily in favor of this conclusion. Although he denied any connection with the Lorcin L22, the source of the gun was a relative of Fambro's who testified that he helped her purchase the gun and then stole it. However Fambro might have acquired the gun from his relative, the evidence presented no plausible reason why Hunter should have been in possession of the weapon. Although Fambro claims Hunter struck

him in the head with the gun, no witness testified to observing any injury to Fambro. Moreover, Fambro fired eight shots at Hunter, striking her six times at various distances and twice in the back, after wrestling the weapon from her. Stated otherwise, Fambro shot Hunter after she had been disarmed.

{¶71} Finally, the exclusion of Fambro's testimony that the victim expressly threatened to kill him does not alter the outcome. As noted under the first assignment of error, the exclusion of such testimony was harmless. Fambro testified that Hunter did threaten him and put him in fear for his life and the prosecutor addressed the inherent improbability of Hunter verbally advising Fambro that she intended to kill him if, in fact, that was her intention.

{¶72} The third assignment of error is without merit.

{¶73} For the foregoing reasons, Fambro's convictions for Aggravated Murder with a Firearm Specification and Having Weapons While Under Disability are affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, J., concurs with a Concurring Opinion,

THOMAS R. WRIGHT, J., concurs in judgment only.

TIMOTHY P. CANNON, J. concurring.

{¶74} We should refrain from suggesting the trial court has discretion to admit hearsay. Hearsay is inadmissible. Evid.R. 802. The majority cites to *State v.*

McKelton, 148 Ohio St.3d 261, 2016-Ohio-5735 for the proposition that a trial court's hearsay rulings will ordinarily be reviewed for abuse of discretion. *Id.* at ¶97. As support for that proposition, however, the *McKelton* Court cites to *State v. Hymore*, 9 Ohio St.2d 122, 128 (1967), which reviewed a trial court's ruling on relevancy, not hearsay. I agree with the standard of review as set forth in the other case cited by the majority, *John Soliday Fin. Group, L.L.C. v. Pittenger*, 190 Ohio App.3d 145, 2010-Ohio-4861 (5th Dist.): "[W]hile the trial court has discretion to admit or exclude relevant evidence, it has no discretion to admit hearsay. Evid.R. 802 requires the exclusion of hearsay unless an exception applies. Thus, we review de novo the trial court's decision regarding whether evidence is hearsay or nonhearsay under Evid.R. 801." *Id.* at ¶28, citing *State v. Sorrels*, 71 Ohio App.3d 162, 165 (1st Dist.1991).