

[Cite as *State v. Smith*, 2011-Ohio-1476.]

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-05-047
- vs -	:	<u>OPINION</u> 3/28/2011
SHANNON N. SMITH,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 09CR25637

David Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Michael K. Allen and Thomas P. Longano, 810 Sycamore Street, 4th Floor, Cincinnati, Ohio 45202, for defendant-appellant

YOUNG, J.

{¶1} Defendant-appellant, Shannon Smith, appeals her conviction and sentence in the Warren County Court of Common Pleas for voluntary manslaughter and tampering with evidence after a jury found her guilty of fatally stabbing her former boyfriend, Robert Takach. We affirm Smith's conviction and sentence for those offenses.

{¶2} Smith and Takach met when they were children and became boyfriend and girlfriend several years later. They had their first child, a boy, in 2004; started living together in 2005; had a second child, a girl, in 2007. Smith's and Takach's relationship was typical at first. However, as Takach's alcohol and drug use increased, their relationship became tumultuous and, at times, violent. In 2008, Takach was ordered to undergo treatment at Sojourner Recovery Services, a residential alcohol, drug abuse and mental health treatment facility in Hamilton, Ohio. Takach was admitted to Sojourner on May 6, 2008. Smith attended at least two of his counseling sessions, one on June 11, 2008, and the other on June 18, 2008. Takach completed the Sojourner program and was discharged from it on August 11, 2008. By October 2008, Smith became romantically involved with another man, John Smallwood.

{¶3} On January 27, 2009, Takach showed up at Smith's apartment with a box of his clothes, which indicated to Smith that he wanted to move back in with her. At that time, Takach and Smith had not been together for most of the past year, and Smith was four months pregnant with Smallwood's child—a fact that Takach appears to have been aware of at the time he showed up at Smith's apartment. Smith did not want Takach to move back in, because she wanted to start a new life. However, she did not "say anything because [she] didn't want there to be a problem[.]" and so she agreed to let Takach stay for a day so he could spend some time with their children. Takach left with some friends about an hour later and did not return to Smith's residence until the next evening. He spent that night sleeping with the children in their bedroom.

{¶4} In the early afternoon of January 29, 2009, Smith and Takach became

involved in a confrontation that culminated in Smith stabbing Takach in the chest with a steak knife. After being stabbed, Takach yelled that he had been cut and ran out of Smith's apartment. He knocked on the door of a neighboring apartment and told the residents there that "the bitch stabbed him" and asked them to call the police and 911. Takach then lied down in the apartment's hallway and lost consciousness.

{15} Lieutenant Gerald Massey of the Franklin Police Department was the first officer to arrive at the crime scene. Once the paramedics arrived and began tending to Takach, Lieutenant Massey went upstairs to Smith's apartment, to which bystanders had directed him, and began questioning Smith about what had happened. Smith told Lieutenant Massey that she was trying to get Takach to leave the apartment and that Takach had been "over top of her arguing with her," and that she told him "not in front of the kids." Smith said that Takach began pulling her back to the bedroom with his *right* arm around her neck, "then he suddenly just let go and said I have been cut and ran out the door." When Lieutenant Massey remarked that Takach had sustained "a pretty significant cut," Smith stated that she did not "have any idea how it happened."

{16} Shortly thereafter, Detective Jeffrey Stewart arrived at the scene, and Lieutenant Massey told him that Smith had said that she did not know how Takach got cut. When Smith's and Takach's four-year-old son came into the room, Detective Stewart asked the child what had happened, and the child said that "his mommy stabbed his daddy and put the knife in the sink." Detective Stewart asked Smith where the knife was, and she pointed to the sink. Detective Stewart found a steak knife in the sink that had no visible blood on it. He then asked Smith to come to the police station, which she did.

{¶17} Detective Stewart took Smith to the interview room and advised her of her Miranda rights, and then asked her to tell him what happened. Smith provided Detective Stewart with the following account of events:

{¶18} Smith, Takach, and their two children woke up that morning and "everything was great." Smith made blueberry muffins for breakfast, and the four of them watched the movie, "Ice Age." Around 12:30 p.m., Smith told Takach that she and the children were going to visit her mother who lived across the street. Takach told her that she "wasn't leaving him alone so [she] could go across the street to call the father of the baby [with whom she was pregnant]." Takach began "pushing" Smith on her stomach and asking her, "how could [she] do this to him?" Smith told Takach "don't start acting like this in front of the kids," and Takach grabbed Smith's "throat with his arm" and told her "fine, we'll take care of this in the bedroom." When Takach began dragging Smith toward the bedroom, she tried to resist, "because [she] knew once we got in the bedroom that it – it was going to be absolutely no good." Smith stated that Takach had his *left* arm around her neck and was choking her so hard that she could neither breathe nor "even talk to tell him to stop." Smith felt around the counter for something to use to fend off Takach, and the first thing she found was a knife by the stove. She told Takach that he was leaving her no choice since he was endangering her life, her children's lives, and her unborn baby's life. Smith stated that she swung the knife at Takach, intending to cut his left arm, but missed and "cut down further."

{¶19} Detective Stewart's interview with Smith, which was recorded on audiotape, began at 1:21 p.m. and concluded at 1:51 p.m. At 2:13 p.m., Takach died at a local area hospital from the injuries he sustained when Smith stabbed him.

{¶10} Smith was indicted for murder in violation of R.C. 2903.02(B), a special felony; voluntary manslaughter in violation of R.C. 2903.03(A), a first-degree felony; and tampering with evidence in violation of R.C. 2921.12(A)(1), a third-degree felony. At her jury trial, Smith testified that she had been acting in self-defense and in defense of her unborn child when she stabbed Takach. At the close of evidence, the jury acquitted Smith of murder but convicted her of voluntary manslaughter and tampering with evidence. The trial court sentenced Smith to a prison term of nine years for voluntary manslaughter and one year for tampering with evidence, and ordered her to serve those terms consecutively.

{¶11} Smith now appeals, raising nine assignments of error, which we shall address in an order and manner that will facilitate our analysis of the issues raised therein.

{¶12} Assignment of Error No. 4:

{¶13} "THE DEFENDANT-APPELLANT'S FEDERAL AND STATE DUE PROCESS RIGHTS WERE VIOLATED BECAUSE HER CONVICTIONS FOR VOLUNTARY MANSLAUGHTER AND TAMPERING WITH EVIDENCE WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE."

{¶14} Assignment of Error No. 5:

{¶15} "THE DEFENDANT-APPELLANT'S CONVICTIONS FOR VOLUNTARY MANSLUAGHTER [sic] AND TAMPERING WITH EVIDENCE WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED AT TRIAL."

{¶16} Smith's fourth and fifth assignments of error present similar issues, and therefore we will address them together.

{¶17} Smith argues her convictions for voluntary manslaughter and tampering

with evidence are against the sufficiency and weight of the evidence.

{¶18} "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt; the relevant inquiry is whether, after viewing the evidence in a light most favorable to the state, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Downing*, Brown App. No. CA2009-Ohio-036, 2010-Ohio-5957, ¶16, quoting *State v. Gomez-Silva*, Butler App. No. CA2000-11-230, 2001-Ohio-8649, *5.

{¶19} "In determining whether a conviction is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Cummings*, Butler App. No. CA2006-09-224, 2007-Ohio-4970, ¶12.

{¶20} "While appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, 'these issues are primarily matters for the trier of fact to decide since the trier of fact is in the best position to judge the credibility of the witnesses and the weight to be given the evidence.' *State v. Walker*, Butler App. No. CA2006-04-085, 2007-Ohio-911, ¶26. Therefore, an appellate court will overturn a conviction due to the manifest weight of the evidence only in extraordinary circumstances to correct a manifest miscarriage of justice, and only when the evidence presented at trial weighs heavily in favor of acquittal. [*State*

v.] *Thompkins*, 78 Ohio St.3d [380,] 387[, 1997-Ohio-52]." *Downing*, 2010-Ohio-5957 at ¶28-29.

{¶21} Smith argues there was no evidence that she was under the influence of sudden passion or in a sudden fit of rage provoked by Takach when she stabbed him in the heart, four and one-half inches deep, and therefore the trial court should have granted her motion for acquittal on the voluntary manslaughter charge. We disagree.

{¶22} R.C. 2903.03, which defines the offense of voluntary manslaughter, states:

{¶23} "(A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another or the unlawful termination of another's pregnancy."

{¶24} The record provided ample evidence from which the jury reasonably could infer that Smith was under the influence of sudden passion or rage provoked by Takach. The state played for the jury the audiotaped recording of Smith's statement to Detective Stewart shortly after she fatally stabbed Takach. Smith stated that she believed Takach had "hinted" that he wanted to move back in with her when he came to her residence on October 27, 2009, but that she did not want him to do so, because she had had "enough of the beatings." Smith stated that Takach was angry with her for having a baby with another man, and that Takach began forcefully pushing on her stomach, intentionally causing her physical pain by doing so. Smith said that Takach told her she was "nasty" and asked her how she could do this to

him, meaning how could she become pregnant by another man. Smith also stated:

{¶25} "He [Takach] just kept, he just kept calling me names. Called me a bitch and a cunt and, you know, just being vulgar in front of the children. And then that's when I, I guess, I meant to cut him but from my understanding I guess I did worse."

{¶26} Smith's testimony and the other evidence presented at trial, when viewed in its entirety, provided ample support for the jury's finding that Smith, while under the influence of sudden passion or in a sudden fit of rage, which was brought on by serious provocation caused by Takach that was reasonably sufficient to incite Smith into using deadly force, knowingly caused Takach's death in violation of R.C. 2903.03(A).

{¶27} Smith also argues the state failed to present sufficient evidence to support her conviction for tampering with evidence in violation of R.C. 2921.12(A). This argument lacks merit.

{¶28} R.C 2921.12 defines the crime of tampering with evidence as follows:

{¶29} "(A) No person, knowing that an official proceeding or investigation is in progress, or is about to be or likely to be instituted, shall do any of the following:

{¶30} "(1) Alter, destroy, conceal, or remove any record, document, or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation[.]"

{¶31} Detective Stewart testified that Smith and Takach's four-year-old son told him that "his mommy stabbed his daddy and put the knife in the sink[.]" and when Detective Stewart asked Smith where the knife was, she pointed to the sink. Detective Stewart found a knife in the sink with no visible blood on it. The state

presented testimony from Steven M. Wiechman, a forensic scientist with the Miami Valley Regional Crime Lab, who visually and chemically tested the knife for blood and found none. Wiechman testified that since the knife had been used to stab Takach in the heart, he would have expected to find blood on it. The jury could have reasonably inferred from the evidence presented that Smith, knowing that an official investigation was in progress or was about to be or likely to be instituted, wiped the knife clean and then threw it in the sink with the other dishes in order to alter, destroy, conceal, or remove the knife, with the purpose to impair the knife's value or availability as evidence in the investigation that was either underway or about to be instituted, and therefore that she was guilty of tampering with evidence in violation of R.C. 2921.12(A)(1).

{¶32} Lastly, Smith argues she satisfied her burden of proving by a preponderance of the evidence the affirmative defense of self-defense, and therefore she should have been acquitted on the voluntary manslaughter charge. We disagree.

{¶33} Self-defense is an affirmative defense that a defendant must prove by a preponderance of the evidence. R.C. 2901.05. To establish self-defense, Smith had to prove that (1) she was not at fault in creating the situation giving rise to Takach's fatal stabbing; (2) she had "a bona fide belief," i.e., reasonable grounds to believe and an honest belief, even if mistaken, that she was in imminent danger of death or great bodily harm and that her only means of escape from such danger was by use of deadly force; and (3) she did not violate any duty to retreat or avoid the danger. See *State v. Barnes*, 94 Ohio St.3d 21, 24, 2002-Ohio-68, citing *State v. Robbins* (1979), 58 Ohio St.2d 74, paragraph two of the syllabus, and *State v. Thomas*, 77 Ohio St.3d

323, 330, 1997-Ohio-269.

{¶34} The state's evidence overwhelmingly supports the jury's decision to reject Smith's claim of self-defense. Detective Stewart testified at trial that Smith told him that she swung the knife at Takach "[u]p over her left shoulder," intending to cut him on his left arm, which Takach had around her neck, but missed Takach's arm and cut lower. During her direct examination, Smith testified that she "brought the knife around to cut [Takach's] arm." Under cross-examination by the state, Smith agreed with the prosecutor that she went "over [her] shoulder *** with the knife[.]" and that the blade went "in four and a half inches" into Takach's chest. During oral arguments before this court, Smith's counsel denied that Smith had said that she stabbed Takach in a backwards direction and asserted that she "came around from the side." However, the record does not support defense counsel's contention.

{¶35} Smith's testimony that she stabbed Takach over her left shoulder, as he was standing directly behind her, with his left arm around her neck, choking her, and that she struck him in his chest with the knife blade four inches deep, was a highly implausible explanation of how the stabbing occurred. For example, when the prosecutor asked Smith during cross-examination, "Would it be fair to say that your upper part of your body would be covering the very area [on Takach] that you stabbed him? Smith answered, "I'm not sure." However, when the prosecutor pressed Smith on the matter, Smith stated:

{¶36} "I think what happened, I think that he seen the knife kind of – I guess kind of a last minute maybe [sic] and had let go or began to let go so, therefore, I wasn't pressed up against him as hard. So I could have possibly – we could have possibly kind of disconnected."

{¶37} The prosecutor then questioned Smith as follows:

{¶38} "Q. So to make sure I'm understanding you, you were able to move slightly to the right in order to expose [Takach's] chest area?

{¶39} "A. Yes.

{¶40} "Q. Okay. So you moved to the right when you were trying to cut his left arm?

{¶41} "A. Yes. Because when he didn't let go all the way as in he didn't put his arms down. But he did free up from around my neck but still had his arm like this. (Indicating.) So then that gave me the chance to kind of move over a little bit. And then my arm was still going at the same time when that had happened.

{¶42} "Q. Do you turn?

{¶43} "A. Not until it had actually – until he had said that I had cut him. I did not turn around until then.

{¶44} "Q. Okay. So your back – when you actually cut him or stabbed him you had just moved over to the right?

{¶45} "A. Yes.

{¶46} "Q. Can I ask why?

{¶47} "A. I don't know.

{¶48} "Q. Well, let me ask you this. Wouldn't you be closer to his left arm if you were right where you were and not move away from it?

{¶49} "A. I could have been.

{¶50} "Q. But you move away from the left arm?

{¶51} "A. Not completely. I would say probably like maybe just, like, an inch to two inches at the most. I didn't take, like, a full step to the side.

{¶152} "Q. But you moved to the side enough where his left chest area where his heart is was [sic] exposed?

{¶153} "A. I'm guessing, yes, that's the way it would have happened, yeah.

{¶154} "Q. Okay. And that's not something that you mentioned to Detective Stewart immediately after in that interview, right?

{¶155} "A. Correct.

{¶156} "Q. And you didn't mention to Detective Stewart that he had lessened or loosened his hold on you when you were by the stove?

{¶157} "A. No, I did not."

{¶158} While Smith testified that she did not turn around until after Takach said he had been cut, Smith also testified that she did not know how blood got on the front of her shirt and pants.

{¶159} In addition to this, there were numerous other facts that called Smith's credibility into question. Lieutenant Massey, Officer Bill Brumfield, and Detective Stewart were the first three police officers to see Smith after she fatally stabbed Takach. All three officers testified that they saw no injuries on Smith even though Smith claimed that Takach had just choked her so hard that she "saw spots," could not breathe, and almost passed out, and even though Smith acknowledged and others agreed that she is fair-skinned. Moreover, while Smith stated in her audiotaped interview with Detective Stewart that she had been acting in self-defense and in defense of her children and her unborn baby when she stabbed Takach, she did not mention to Lieutenant Massey that she was pregnant, nor did she ever ask Detective Stewart to be checked by a doctor, even though she claimed that Takach had pushed hard on her stomach and choked her to the point where she almost

passed out.

{¶60} Furthermore, Smith admitted that she lied to Lieutenant Massey when she told him that she did not know how Takach got cut. Smith also acknowledged that she did not tell Lieutenant Massey that she was acting in self-defense when she stabbed Takach, claiming that she "was scared" and believed that Lieutenant Massey would not have believed her anyway. However, after the prosecutor pointed out to Smith that the police *did* believe her rather than Takach in previous domestic violence disputes between them, Smith agreed with the prosecutor that there had not been a time when an officer did not believe her when she told them her side of the story.

{¶61} When the evidence presented at Smith's trial is examined in a light most favorable to the state, it is apparent that the state presented ample evidence to support her convictions for voluntary manslaughter and tampering with evidence. Moreover, there is nothing in the record to show that the jurors lost their way or created a manifest miscarriage of justice when they convicted Smith of these charges and rejected her claim of self-defense.

{¶62} Therefore, Smith's fourth and fifth assignments of error are overruled.

{¶63} Assignment of Error No. 1:

{¶64} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY FAILING TO ADMIT EVIDENCE THAT WAS RELEVANT AND MATERIAL TO HER AFFIRMATIVE DEFENSE OF SELF-DEFENSE."

{¶65} Assignment of Error No. 2:

{¶66} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY DENYING HER FEDERAL CONSTITUTIONAL RIGHT TO

PRESENT A MEANINGFUL DEFENSE UNDER THE DUE PROCESS CLAUSE OF [sic] FOURTEENTH AMENDMENT AND THE COMPULSORY SERVICE CLAUSE OF THE SIXTH AMENDMENT."

{¶67} Smith's first and second assignments of error are closely related, and therefore we will address them together.

{¶68} Smith argues the trial court deprived her of her right to present a meaningful defense by excluding from evidence all but a small portion of Takach's Sojourner records. She asserts the Sojourner records would have corroborated her belief "that Takach was a brutal and violent man whom she reasonably feared[.]" and therefore the trial court committed reversible error by excluding these records from evidence. We disagree with this argument.

{¶69} A trial court has broad discretion in the admission or exclusion of evidence, and unless it has clearly abused its discretion and the defendant has been materially prejudiced thereby, an appellate court must not disturb the trial court's decision. See *State v. Barnes*, 94 Ohio St.3d 21, 23, 2002-Ohio-68.

{¶70} A defendant arguing self-defense may testify about the victim's reputation for violence or specific instances of the victim's prior violent conduct in order to establish the defendant's state of mind at the time of the incident. See, e.g., *State v. Baker* (1993), 88 Ohio App.3d 204, 208-211, and *State v. Evans*, Cuyahoga App. No. 79895, 2002-Ohio-2610, ¶26. The admissibility of such evidence is dependent on whether the defendant knew of the victim's reputation for violence or specific instances of the victim's prior violent conduct at the time of the incident. *State v. Blackmon* (1998), 131 Ohio App.3d 465, 468. This evidence is admissible not because it establishes something about the victim's character, but because it

"tends to show why the defendant believed the victim would kill or severely injure him." *State v. Austin* (1996), 115 Ohio App. 3d 761, 764, quoting *State v. Carlson* (1986), 31 Ohio App.3d 72. This evidence is also not hearsay, since the evidence is not being admitted to prove the truth of the matter asserted, i.e., that the victim was violent, but rather to show its effect on the accused. See Evid.R. 801(C).

{¶71} Smith testified at trial that Takach had a problem with alcohol and drugs and that using those substances made him aggressive. She stated that Takach would curse at her, attempt to gouge out her eyes, punch and slap her in the face, spit in her face, kick her in the stomach, and pull her hair. She estimated that Takach beat her approximately 20 times after their first child was born, but she did not call the police on these occasions because she was scared. Smith testified that when Takach hit her in September or October 2007, she told him she was going to take the children and leave, and Takach, who appeared to be intoxicated, put a gun to her head and told her that if she did so, he would kill her. She testified that on October 24, 2007, Takach choked her, spit in her face, and attempted to gouge out her eyes, and was charged with domestic violence as a result. She testified that she attended one of Takach's counseling sessions at Sojourner in June 2008, at which time she told one of Takach's counselors that she feared that Takach's former behavior would resurface. She testified that on October 12, 2008, Takach again cursed at her, pushed her, and smacked her in the face, and was again charged with domestic violence.

{¶72} Smith called as a witness Middletown Police Officer Kathy Masako Jones, who testified that on October 24, 2007, she responded to a call reporting a "male beating a female" at Takach and Smith's residence, and that upon arrival, she

saw that Smith was upset and had been crying, and had a black and blue eye and "some swelling and redness on the side of her face[.]" Smith told Officer Jones that Takach "had struck her in the face and attempted to gouge out her eyes" and that she tried to defend herself by stabbing him with a butter knife. Takach told Officer Jones that Smith tried to stab him, but when he lifted his shirt to show Officer Jones his injuries, the officer saw that Takach, who was intoxicated at the time, only had "a scratch, a superficial type of scratch on his chest." Officer Jones did not charge Smith, since the officer believed that Smith had been acting in self-defense.

{¶73} When Smith offered Takach's Sojourner records into evidence, the trial court refused to admit all but one redacted page of them, which was a summary of Takach's June 11, 2008 counseling session that Smith attended. The redacted page states:

{¶74} "[Smith] states that she cannot be subjected to that kind of [behavior] and does not want her children subjected to it. She reports that her 3 yr old son already calls her a 'f—king b—ch' and ignores her attempts to discipline him and provide structure. She states that she is convinced that this is due to his witnessing the arguments and beatings she received from [Takach] when he had been drinking. [Takach] expressed extreme remorse and regret for his past [behavior] and pleaded for another chance. Clinician intervened and asked [Smith] if she wants to pursue family sessions at all. She stated that she wants to be supportive of [Takach] but does not want an intimate relationship with him. [Takach] wanted to know if there was another man in her life. [Smith] became frustrated and stated that her decision was about how she had been treated in the past and her fear in the present. She stated, again, that neither she nor her children had to live like that. [Takach] thanked

her for being clear because he felt he was getting some closure out of the discussion.

{¶75} "He admits that his heart is breaking at the prospect of having destroyed his family."

{¶76} Prior to trial, the state requested that the Sojourner records be excluded from evidence on the grounds that they were hearsay and that admission of the records would violate Takach's patient-physician privilege. In response, Smith argued the records were not hearsay because they fell within the medical records exception to the hearsay rule contained in Evid.R. 803(4), and admission of the records would not have violated Takach's patient-physician privilege because he did not voluntarily seek treatment at Sojourner, but rather had been ordered to go there as a result of violating the terms of his probation. Following her conviction, Smith moved for a new trial based on the trial court's refusal to admit all but one redacted page of Takach's Sojourner records. The trial court overruled the motion, explaining its reasoning as follows:

{¶77} "[O]n these records[,] you indicated that I did not permit the admission of records that [Smith] had knowledge of. I permitted the admission of records where Mr. Takach was making statements to counselors that [Smith] was aware of."

{¶78} Smith asserts that the trial court erred in excluding from evidence all but a small portion of the Sojourner records, because those records would have confirmed that Takach had a long history of violent and aggressive behavior that landed him in the treatment program; that he had an "extreme problem" with psychological, alcohol, and drug issues," and had trouble controlling his violent behavior; and that alcohol and drug use contributed to his problems with others, including arguments and physical fights with family. Smith contends the records

corroborated her testimony that Takach was jealous of her being with other men; that while he was on drugs he had "an impulse control disorder and conduct problem"; and that Takach admitted in these records to his past physical and verbal abuse against her, including the incident in which Takach held a gun to her head. Smith also contends that the records would have shown that upon discharge from the program, Takach was resisting treatment and that he had a high potential for relapse, and that admitting this evidence would have refuted the picture that the state attempted to paint, i.e., that Takach had some problems in the past, but that he was better after his treatment at Sojourner. Smith concludes by asserting that "[i]n reality, as [she] knew – and the Sojourner records confirmed – Takach was a ticking time bomb waiting to go off." We find these arguments unpersuasive

{¶79} The trial court was correct to exclude from evidence any of the Sojourner records of which Smith was not aware. See *Blackmon*, 131 Ohio App.3d at 468 (admissibility of evidence regarding victim's reputation for violence or specific instances of his prior violent conduct depends on whether defendant knew of the reputation or specific instances at time of incident). Smith contends that she knew that Takach was sent to Sojourner and the reasons why he was ordered to go there and that she even attended two or three of his counseling sessions. As noted, Smith attended Takach's June 11, 2008 counseling session, and also attended the June 18, 2008 counseling session, which the trial court appears to have overlooked. However, Smith does not appear to have attended any other.

{¶80} While it is clear that Smith knew of some of the facts in the Sojourner records at the time of the fatal stabbing, e.g., that in September or October 2007, Takach, while intoxicated, put a gun to her head and threatened to kill her if she left

with their children, the evidence fails to show that Smith knew about many of the items whose exclusion she is now challenging. For instance, there was no showing that Smith was aware that Takach was resisting treatment or that he had a high potential for relapse. In fact, Smith's Sojourner records that were proffered into the record show that at the time of Takach's admission into the program, Takach's resistance to treatment was rated as "Moderate" and his relapse potential was rated as "High," but at the time of Takach's discharge his resistance to treatment was rated as "Low" and his release potential was rated as "Moderate."

{¶81} Furthermore, there was already evidence in the record that corroborated Smith's testimony that Takach abused alcohol and used marijuana. For instance, the state presented the testimony of Darryl Short, a primary clinician at Sojourner, who testified that Takach was admitted to Sojourner to receive treatment for alcohol dependence. Both Takach's mother and the state acknowledged that Takach had used alcohol and drugs and that his use of those substances had gotten him into trouble. Dr. Lee Lehman, who is the chief deputy coroner in Montgomery County, testified that at the time of Takach's death, there was no alcohol in Takach's system, but there was a low concentration of marijuana found in his system. As to the incident in September or October 2007 when Takach held a gun to Smith's head, the state did not deny that the incident occurred, though it did cross-examine Smith as to whether the incident made her as afraid of Takach as she had claimed. Moreover, the redacted page of Takach's Sojourner records that was admitted into evidence showed that Takach was jealous with respect to Smith's relationship with other men:

{¶82} "[Smith] stated that she wants to be supportive of [Takach] but does not

want an intimate relationship with him. [Takach] wanted to know if there was another man in her life. [Smith] became frustrated and stated that her decision was about how she had been treated in the past and her fear in the present."

{¶83} Furthermore, any error the trial court may have committed in excluding all but one page of the Sojourner records was, at most, harmless, given the highly implausible account of events that Smith gave in support of her claim of self-defense, as discussed in our response to Smith's first and second assignments of error. When the evidence presented in this case is examined in its totality, the exclusion of the Sojourner records did not deprive Smith of a substantial right, and therefore any error in the exclusion of that evidence was harmless. See Crim.R. 52(A) and *State v. Hensley*, Warren App. No. CA2009-11-156, 2010-Ohio-3822, ¶23.

{¶84} Smith also argues the trial court deprived her of her right to present a meaningful defense by excluding from evidence a number of Takach's prior criminal convictions and past criminal conduct of which she had knowledge, because she "was aware of Takach's criminal past" and this evidence would have "corroborated her belief that Takach was a dangerous criminal whom she had reason to fear." We find this argument unpersuasive.

{¶85} Evid.R. 403 states:

{¶86} "(A) Exclusion mandatory

{¶87} "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury.

{¶88} "(B) Exclusion discretionary

{¶89} "Although relevant, evidence may be excluded if its probative value is

substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence."

{¶190} Several of Takach's prior criminal convictions and some of his past criminal conduct that Smith sought to have admitted into evidence occurred prior to 2007. They included: a 2002 conviction for obstructing official business, for which Takach was fined \$150 and court costs; a 2004 incident in which Smith called the police after Takach came to her place of employment, she told him she did not want to speak with him, and Takach left without hurting her in any way; and a 2005 conviction for disorderly conduct, for which Takach was fined \$100 and court costs. The trial court clearly did not abuse its discretion in excluding these matters from evidence under Evid.R. 404(B).

{¶191} Smith also sought to introduce evidence of Takach's November 8, 2007 convictions for domestic violence and abusing a police officer, for which he was sentenced to an aggregate term of 60 days in jail, with 28 days suspended on a number of conditions, including that he stay away from Smith. However, these convictions appear to have arisen from the October 24, 2007 incident, which Smith and Officer Jones testified about at Smith's trial. It appears that the trial court chose to exclude evidence of Takach's conviction for abusing a police officer to avoid the dangers of unfair prejudice or confusion of the issues, which the court was obligated to do under Evid.R. 403(A), or to prevent undue delay or the needless presentation of cumulative evidence at trial, which the trial court had the discretion to do under Evid.R. 403(B). The same is true for the trial court's decision to exclude from evidence Takach's February 29, 2008 convictions for menacing and for abusing a police officer, which stemmed from an incident in which Takach, apparently while

intoxicated, made threats against Smallwood and a woman and her two children who lived with him, and made racist comments to the officer who arrested him on that occasion. The trial court did not abuse its discretion or otherwise err in excluding from evidence these prior criminal convictions or past criminal conduct.

{¶192} Smith also argues the trial court erred by limiting the testimony of her self-defense expert, John Benner. This argument lacks merit.

{¶193} Evid.R. 702 states in pertinent part:

{¶194} "A witness may testify as an expert if all of the following apply:

{¶195} "(A) The witness' testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

{¶196} "(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

{¶197} "(C) The witness' testimony is based on reliable scientific, technical, or other specialized information."

{¶198} Evid.R. 704 states:

{¶199} "Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact."

{¶100} Evid.R. 704 does not render opinion evidence on an ultimate issue admissible, but instead, merely provides that opinion evidence on an ultimate issue is not excludable per se. 1980 Staff Note to Evid.R. 704. The general rule in Ohio as to the admissibility of opinion evidence on an ultimate issue was stated in the first two paragraphs of the syllabus in *Shepherd v. Midland Mutual Life Ins. Co.* (1949), 152

Ohio St. 6:

{¶101} "Although a witness may be qualified to give an opinion concerning a matter upon which opinion evidence may be admissible in and pertinent to the determination of an issue, as a general rule such an opinion, whether expert or otherwise, may not be admitted when it, in effect, answers the very question as to the existence or non-existence of an ultimate fact to be determined by the jury.

{¶102} "Where an ultimate fact to be determined by the jury is one depending upon the interpretation of certain scientific facts which are beyond the experience, knowledge or comprehension of the jury, a witness qualified to speak as to the subject matter involved may express an opinion as to the probability or actuality of a fact pertinent to an issue in the case, and the admission of such opinion in evidence does not constitute an invasion or usurpation of the province or function of the jury, even though such opinion is on the ultimate fact which the jury must determine."

{¶103} While testimony on an ultimate issue to be decided by the trier of fact is not inadmissible per se in this state, the decision whether to admit or exclude such testimony is within the trial court's sound discretion, and the trial court does not abuse its discretion in excluding such testimony where it "is not essential to the jury's understanding of the issue and where the jury can come to a correct decision without it." *Bostic v. Connor* (1988), 37 Ohio St.3d 144, paragraph three of the syllabus.

{¶104} Benner has extensive military and law enforcement experience and is currently a part-time deputy with the Adams County Sheriff's Department. He is also a full-time firearms and physical self-defense trainer for local law enforcement agencies and is a knife designer as well. The trial court permitted Benner (1) to testify about "lateral vascular neck restraint" or chokeholds; (2) to define and

distinguish for the jury the terms, "blood cut," i.e., a cut that targets the areas of the body such as large arteries or veins that will probably result in death, and "mechanical cut," i.e., a cut that targets areas of the body such as tendons that stop limbs such as arms and legs from functioning; and (3) to testify that "[i]t is not always possible to cut where you intend to." However, the trial court refused to allow Benner to testify that (1) police officers and civilians, male and female alike, are taught to use a knife to get out of a choke hold; (2) a person being choked could use either a blood cut or mechanical cut, and if the person used a mechanical cut, the cut might still be lethal but use of the cut still would be appropriate to escape a chokehold; and (3) persons involved in using lethal force should wait a minimum of 24 hours to make any statements, because such persons can experience memory loss or memory "distortion."

{¶105} The trial court did not abuse its discretion in refusing to allow Benner to testify that police officers and civilians, male and female alike, are taught to use a knife to get out of a chokehold and that a person being choked could use either a blood cut or mechanical cut, and if the person used a mechanical cut, the cut might still be lethal but use of the cut still would be appropriate to escape a chokehold, since these matters are not "beyond the knowledge or experience possessed by lay persons," nor do they dispel "a misconception common among lay persons," and therefore would have done little, if anything, to aid the jury. See *Bostic*, 37 Ohio St.3d 144, paragraph three of the syllabus, and *State v. Kraus*, Warren App. No. 2006-10-114, 2007-Ohio-6027, ¶37-38.

{¶106} Furthermore, the trial court did not abuse its discretion in refusing to allow Benner to testify that persons involved in using lethal force should wait a

minimum of 24 hours to make any statements, because such persons can experience memory loss or "memory distortion," because there was an insufficient showing that Benner is qualified as an expert "by specialized knowledge, skill, experience, training, or education" to testify about memory loss or "memory distortion," Evid.R. 702(B), or that his testimony on those issues would have been "based on reliable scientific, technical, or other specialized information." Evid.R. 702(C).

{¶1107} In light of the foregoing, Smith's first and second assignments of error are overruled.

{¶1108} Assignment of Error No. 3:

{¶1109} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY OVERRULING HER PRETRIAL MOTION TO DISMISS THE VOLUNTARY MANSLAUGHTER CHARGE."

{¶1110} Smith argues the trial court erred by overruling her pretrial motion to dismiss the charge of voluntary manslaughter because of the state's alleged failure to file a more specific bill of particulars on that charge. This argument lacks merit.

{¶1111} The state's amended bill of particulars stated:

{¶1112} "On or about the time period of January 29, 2009, at 30 Beam Drive, #G, Franklin, Warren County, Ohio, IF [sic] the Defendant's version of the story is to be believed, the victim and the defendant engaged in an argument over the defendant leaving the home which escalated to a physical confrontation, rising to the level to seriously provoke the defendant to stab the victim, thereby causing his death. According to the defendant, she was upset at this time."

{¶1113} Smith argues the amended bill of particulars violated her due process

right to have adequate notice of the charges against her because it failed to specify "what the serious provocation was[.]" However, the amended bill of particulars referenced the argument that Smith had with Takach immediately before she stabbed him, which seriously provoked her to stab him. This information was adequate to enable Smith to prepare a defense to the voluntary manslaughter charge.

{¶1114} Smith also argues that, by capitalizing the word "IF" in the amended bill of particulars, the state showed that it did not believe that she was guilty of the charge of voluntary manslaughter, and therefore she never should have been charged with that offense in the first place. However, by capitalizing the word "IF" in the amended bill of particulars, the state was merely acknowledging that in light of the evidence that existed against Smith, the jury might reasonably conclude that she had been seriously provoked as a result of Takach's actions, and therefore that she was guilty of voluntary manslaughter rather than murder, which, in fact, is what the jury found.

{¶1115} Consequently, Smith's third assignment of error is overruled.

{¶1116} Assignment of Error No. 6:

{¶1117} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT IN VIOLATION OF THE RULES OF EVIDENCE AND THE DEFENDANT-APPELLANT'S FEDERAL AND STATE DUE PROCESS RIGHTS BY ADMITTING EVIDENCE OF OTHER BAD ACTS."

{¶1118} Smith argues the trial court erred by admitting evidence of her prior bad acts outside those alleged in the indictment. This argument lacks merit.

{¶1119} Evid.R. 404(B) states:

{¶1120} "Evidence of other crimes, wrongs, or acts is not admissible to prove

the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶121} The trial court permitted the state to present testimony from Brandy Witlock that on one occasion in September 2008, she saw Smith, who was behind the wheel of a car at the time, drive into Witlock's yard and hit Takach with her car. The state also presented the testimony of Deputy Reiff, who testified that he investigated a domestic violence incident between Smith and Takach that occurred on October 12, 2008, in which Takach told the deputy that Smith hit him with a frying pan, and that he charged Smith with domestic violence as a result. Finally, Officer Jones testified that as to the October 24, 2007 domestic violence incident involving Smith and Takach, discussed earlier, she learned that Takach had assaulted Smith, and that Smith, in turn, tried to stab Takach with a butter knife.

{¶122} Initially, Officer Jones' testimony about Smith's conduct with respect to the October 24, 2007 incident was not prejudicial to Smith, as Officer Jones testified that she did not charge Smith as a result of her actions that night because she believed that Smith was acting in self-defense. However, the other evidence of Smith's prior misconduct tended to disprove Smith's claim that she was acting in self-defense or in defense of her unborn child when she stabbed Takach and that stabbing him in the heart was merely an accident. Therefore, the trial court did not abuse its discretion in admitting any of this evidence, since the "issue of whether the stabbing was intended or accidental was the subject of a genuine controversy." *State v. Muncey* (Feb. 8, 1999), Madison App. No. CA98-03-013, *3, quoting *State v. Anderson* (July 21, 1993), Hamilton App. No. C-920733, *1-2.

{¶123} Consequently, Smith's sixth assignment of error is overruled.

{¶124} Assignment of Error No. 7:

{¶125} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY DENYING HER FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO CONFRONT THE WITNESSES AGAINST HER AT TRIAL."

{¶126} Smith argues the trial court committed reversible error by admitting Detective Stewart's testimony that Smith's and Takach's son told him that his "mommy stabbed his daddy and put the knife in the sink." We find this argument unpersuasive.

{¶127} Evid.R. 803(2) provides a hearsay exception for "excited utterances," which are defined as "[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."

{¶128} In this case, the child, who was four years old at the time of the stabbing, made the statement to Detective Stewart shortly after he had witnessed the event. Smith argues the child's statement was not made while he was still under the stress from the event, since Detective Stewart testified that the boy appeared "[h]appy" and was even trying to show him one of his toys. However, a trial court has discretion in evidentiary matters, and its decision will not be overturned absent an abuse thereof, see, e.g., *State v. Partin*, Warren CA2010-04-040, 2011-Ohio-794, ¶51, and given the nature of the event coupled with the child's age, the trial court's admission of the child's statement was not an abuse of discretion, as the child's statement clearly was not the product of any reflective thought on his part. See *State*

v. Wallace (1988), 37 Ohio St.3d 87, 92. Moreover, Smith admitted that she stabbed Takach and threw the knife in the sink, and thus any error in the admission of the child's statement would have been harmless in any event.

{¶129} Thus, Smith's seventh assignment of error is overruled.

{¶130} Assignment of Error No. 8:

{¶131} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY SENTENCING HER TO A NEARLY MAXIMUM SENTENCE FOR VOLUNTARY MANSLAUGHTER AND RUNNING IT CONSECUTIVE TO THE TAMPERING WITH EVIDENCE CHARGE."

{¶132} Smith argues the trial court erred by imposing on her an almost maximum sentence for voluntary manslaughter and ordering her to serve that sentence consecutive to her sentence for tampering with evidence. We disagree.

{¶133} In reviewing a felony sentence, an appellate court "must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law" and if so, whether the prison term imposed by the trial court constituted an abuse of discretion. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶26.

{¶134} Here, Smith has failed to show that her sentence was clearly and convincingly contrary to law, as the prison terms imposed for voluntary manslaughter and tampering with the evidence are within the statutory range for those offenses. Moreover, the trial court did not abuse its discretion in ordering her to serve those sentences consecutively, given Smith's actions, which included fatally stabbing her children's father in front of them.

{¶135} Consequently, Smith's eighth assignment of error is overruled.

{¶136} Assignment of Error No. 9:

{¶137} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT BY NOT GRANTING HER MOTION FOR A NEW TRIAL."

{¶138} Smith argues the trial court erred by not granting her motion for a new trial, because the exclusion of the Sojourner records "eviscerated" her ability to present an effective defense and the jury's verdicts convicting her of voluntary manslaughter and tampering with evidence were not supported by sufficient evidence. We disagree with these arguments for the reasons set forth in our response to Smith's first, second, fourth and fifth assignments of error.

{¶139} Accordingly, Smith's ninth assignment of error is overruled.

{¶140} Judgment affirmed.

POWELL, P.J. and BRESSLER, J., concur.