IN THE COURT OF APPEALS FOR TRUMBULL COUNTY, OHIO
ELEVENTH APPELLATE DISTRICT

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	**Case No. 2017 TR 00108**
v.	:	**Regular Calendar**
NASSER HAMAD,	:	**ORAL ARGUMENT REQUESTED**
Defendant-Appellant	:	

BRIEF OF APPELLANT NASSER HAMAD ON APPEAL FROM THE TRUMBULL COUNTY COURT OF COMMON PLEAS

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AUTHORITIES

The trial court failed to order a mistrial or give an appropriate curative instruction after the prosecutor engaged in gross misconduct that resulted in unfair trial to

STATEMENT OF THE CASE

Appellant Nasser Hamad was indicted for two counts of Aggravated Murder, with firearm and aggravated circumstances specifications (Count I and Count II), as well as six counts of Attempted Aggravated Murder, also with firearm specifications (Count III through Count VIII), in the Trumbull County Court of Common Pleas. Though the State sought imposition of the death penalty as to Counts I and II, the jury did not ultimately make the requisite findings for that penalty to be imposed. Appellant will therefore only engage in a cursory discussion of the death penalty aspect of the case, as it is otherwise irrelevant to the issues raised in the instant appeal.

Numerous pre-trial motions were filed by Appellant's trial counsel and Counsel for the State, most of which are not germane to this appeal. Prior to trial, the State filed a Motion in Limine to prohibit Appellant from introducing expert psychological testimony regarding self-defense. T.d. 97. Defendant filed a responsive Memorandum. T.d. 100. The trial court issued a preliminary judgment entry in which it found that the State's motion was premature, noting that "there is a very thin line separating the battered women's syndrome, wherein expert testimony is permissible, and post-traumatic stress disorder (PTSD), where the field of precedent is minimal. The Court further finds that even if it were to allow expert testimony, it would be limited to establish a diagnosis only. The expert would not be permitted to offer an opinion as to the self-defense claim." T.d. 108, p. 1.

During trial, Appellant filed a Supplement to Motion for Expert Testimony, asking the Court to permit the testimony of his expert, Dr. James Reardon. T.d. 152. In the Supplement, Appellant specifically set forth his diagnosis for PTSD by Dr. Reardon and a concussion, and that the expected testimony was intended to assist the jury in understanding Appellant's subjective state of mind as it relates to self-defense and prior calculation and design. *Id.* 4-5, 9-10. The trial

court issued an entry denying Appellant's request, finding that though Ohio "has in certain instances permitted expert testimony to aid the trier of fact in a self-defense analysis, this Court finds that those instances are both rare and inapplicable to the facts here." T.d. 153, p.1. The trial court also placed its reasoning on the record. T.p. VII, 2263-2264. Dr. Reardon was permitted to testify during the mitigation portion of the trial. T.p. IX, 2711-79.

After the testimony of Defendant, and before resting his case, Appellant proffered that Dr. Reardon would have been called, and indicated that his report would be marked and entered into the record. T.p. VII, 2398. With the trial Court's permission, Appellant added Dr. Reardon's curriculum vitae to his proffer. T.p. VII, 2406-2407.

Following juror qualification, the case proceeded to jury trial on October 19, 2017. Appellant filed a request for a jury instruction on the inferior offense of Voluntary Manslaughter as to Counts I and II. T.d. 154. Appellant also made this request orally, which following argument was denied by the trial court. T.p. VII, 2404-2406. On October 30, 2017, the jury returned a verdict of guilty against Appellant as to each count contained in the indictment.

The case proceeded to the mitigation phase on November 6, 2017. On November 8, 2017, the jury returned its verdict, finding that the State had not proved the aggravating circumstances in Counts I and II outweighed the mitigating factors beyond a reasonable doubt, and thus imposing a sentence of life with parole eligibility after thirty (30) years on each count.

A sentencing hearing held the following day, at which time the trial court found that Count III merged with Count IV, Count V merged with Count VI, and Count VII merged with Count VIII for the purposes of sentencing. The State elected to proceed on Counts III, V, and VII. Thereafter the Court imposed sentence as follows:

Count I, A life sentence in prison without eligibility for parole for thirty (30) years, plus three a mandatory three-year term on the firearm specification, to be served prior to and consecutive to the life sentence.

Count II, A life sentence in prison without eligibility for parole for thirty (30) years, plus three a mandatory three-year term on the firearm specification, to be served prior to and consecutive to the life sentence.

Count III, A sentence of eleven (11) years in prison, plus three years on the firearm specification.

Count V, A sentence of eleven (11) years in prison, plus three years on the firearm specification.

Count VII, A sentence of eleven (11) years in prison, plus three years on the firearm specification.

The Court ordered that each count be run concurrent to Count I, resulting in an aggregate term of life imprisonment with eligibility for parole after thirty years, plus three years each for the firearm specifications contained in Counts I and II, which were ordered to be served consecutive and prior to the life sentence. T.p. IX, 2960-61.

Appellant timely appealed.

STATEMENT OF FACTS

Given the voluminous nature of the trial transcript, Appellant will provide a brief overview of the evidence before citing specific portions of the record.

This case involves a shooting that took place at Appellant's residence, which is located at 1564 Niles-Cortland Road, Trumbull County, Ohio. The facts adduced at trial demonstrated that Appellant had previously been involved in a series of offensive communications with Bryce Hendrickson and John Shively on Facebook. Appellant was the target of racist comments, insults, and death threats arising out of his relationship with Mr. Hendrickson's mother, Tracy Hendrickson. Appellant, for his own part, responded with his own insults and threats of physical violence.

The situation came to a head on February 25, 2017. On that date, Mr. Shively's mother, April Trent, drove both him and Mr. Hendrickson, along with Joshua Haber and Joshua Williams, to Appellant's residence. Shortly after confronting Appellant, a physical altercation broke out. Appellant ended up on the ground, where he was kicked and struck numerous times. At the conclusion of the fight, Appellant went inside, while the young men and Ms. Trent returned to the van.

Appellant exited his residence with a handgun and began firing at the van, which was still on his property. He then went back into his home. At that time, Bryce Hendrickson and Shively attempted to flee on foot, while Haber remained near the van. Appellant returned outside, having reloaded his weapon, and fired several more times. When Haber attempted to jump into the rear of the van, Appellant shot at him again. Ultimately, each of the individuals in the van was shot one or more times. Haber and Williams died as a result of those injuries.

Testimony

At trial, numerous witnesses provided testimony about the events surrounding the shooting.[1] Of these witnesses, several first had their attention drawn to the scene when they observed a fight in Appellant's yard. They saw a group of young people beating up someone who was down on the ground. T.p. V, 1372, 1385. The victim of this assault was being kicked and hit. *Id.* These individuals called 911, but were unable to provide any testimony about how the fight ended. T.p. V, 1377, 1385.

[1] It should be noted that February 25, 2017 fell on a Saturday, that the events transpired at approximately 4:30 p.m., and that Appellant's residence was situated in close proximity to a shopping mall. Thus, a substantial number of fact witnesses were identified and provided testimony. Appellant submits that the testimony provided by these witnesses was largely consistent. To avoid needless repetition, and in the interest of judicial economy, Appellant will only provide a general recitation of their testimony.

The gold van then started to back out of Appellant's driveway, but whipped around, missed the road and ended up back in his yard. T.p. V, 1359, 1377, 1448. Shortly thereafter, Appellant exited his residence with a handgun and began shooting at the occupants of the van. T.p. V, 1372, 1378, 1398-99, 1449. As Appellant began shooting, several other witnesses had their attention drawn to the scene and also contacted 911. T.p. V, 1420, 1462, 1476, 1492.

While shooting at the van, Appellant left his porch and approached on foot. T.p. V, 1437, 1450, 1658. Upon reaching the vehicle, he fired several more rounds at the occupants. T.p. V, 1662. At this time, Appellant was holding the gun either immediately next to or actually within the van. T.p. V, 1658. Thereafter, Appellant returned to his residence. T.p. V, 1436, 1493.

While Appellant was inside, a few individuals exited the van and began to flee. T.p. V, 1459. Appellant exited the house again and resumed shooting. T.p. V, 1476, 1494. One of the individuals attempted to jump back into the rear of the van and was shot by Appellant. T.p. V, 1339, 1463, 1481. Appellant then started back to his house, at which time law enforcement arrived. T.p. V, 1422, 1496.

As the officers approached, they observed Ms. Trent's van parked parallel to State Route 46, and that traffic was stopped outside Appellant's residence. *Id.* Officer Mark Klaholz observed Appellant walking up the stairs to the house holding a firearm. *Id.* Though Officer Klaholz said, "Drop the gun. Drop the gun," Appellant continued into the home. *Id.*, at 1545-46.

At approximately the same time, Officer Brian Butto also arrived. *Id.* 1564-65. He described the scene as chaotic and observed a woman rendering aid to Trent, who had suffered severe injuries. *Id.* A male, later identified as Bryce Hendrickson, approached Officer Butto and identified Appellant as the one who "shot us all." *Id.*, at 1566. Other injured individuals were observed within the van and subsequently identified as Haber and Williams.

Officer Klaholz moved behind a vehicle for cover and continued to issue verbal commands for Appellant to come out with his hands up. *Id.* Shortly thereafter, a woman's voice came from inside the residence stating, "He's put the gun down." Appellant exited the residence with his hands up and laid down on the front steps. *Id.*, 1546-47. He was arrested without incident and a knife was seized from his person. *Id.*

Officer Butto further testified that, after Appellant was arrested, he saw Bryce Hendrickson and yelled, "That's what you get, you little bitch. How do you like that?" *Id.*, 1573. Other witnesses testified that Appellant appeared angry and was actually shouting. T.p. V, 1403, 1427. According to these witnesses, Defendant yelled, "I'm not done with you, you little bitch," and "That's what you get, you little bitch. How do you like that?" T.p. V, 1408, 1573.

Appellant was placed in the rear of a police cruiser while officers attempted to secure the scene. At that time, Appellant informed law enforcement that he was afraid of retaliation from family members of the individuals in the van. *Id.,* 1573-74.

A crime scene was established and investigators secured a substantial quantity of evidence, including but not limited to the following, bullet fragments, shell casings, Appellant's firearm, two magazines for ammunition, a knife from Appellant, a knife found discarded nearby, blood samples, and the gold van. T.p. V, 1551, 1575, 1586; VI, 1890, 1895-1909, 1938, 1943-47, 1958-68. Appellant acknowledges that the forensic testimony generally demonstrated that the bullets came from Appellant's gun, that the blood came from Appellant and the occupants of the van, and that one of the knives was Appellant's, while the other had the DNA of Bryce Hendrickson. *Id.*; see also T.p. VII, 2102-2106, 2117.

Dr. Humphrey Germaniuk, the Warren County Coroner, testified regarding his autopsy of Haber. T.p. VII, 2074-82. He ruled that the cause of death was a gunshot wound which traversed

the abdomen and hit the aorta. *Id.* The parties stipulated that Williams was killed by multiple gunshot wounds, and that Bryce Hendrickson died from causes unrelated to anything done by Appellant. T.d. 149, T.d. 151.

Additional testimony regarding the events leading up to the shooting, and as to the event itself, was provided by Shively, Trent, Tracy Hendrickson, and Appellant, who took the stand in his own defense.

On direct, Shively admitted that there was a heated exchange on Facebook giving rise to the events at Appellant's residence. T.p. VI, 1682-83. At that time, he did not explicitly reference any remarks that he made. He also admitted to going to Appellant's residence on February 25, 2017, though the only reason he would give was "to take care of the problem...however it happened." T.p. VI, 1686-87. He explained that he, Haber and his mother went to pick up Bryce Hendrickson. T.p. VI, 1687. At Hendrickson's house, they also picked up Williams. T.p. VI, 1688. Shively denied ever having or seeing a weapon while the group was en route to Appellant's residence. T.p. VI, 1689.

According to Shively, Appellant exited his house to confront them. T.p. VI, 1692. He then moved to Appellant's side, Appellant turned, and they "kind of like scuffled, and we rolled down the hill." *Id.* At that point, "everybody else stepped out of the van and jumped in, and got it." *Id.* Though Shively admits that Appellant was kicked while lying on the ground, he claims to have no memory as to who was doing the kicking. T.p. VI, 1693.

Thereafter, everyone got back into the van and Trent put the vehicle in reverse. T.p. VI, 1694. At the same time, Appellant exited his house with a firearm and began shooting. *Id.* After the first round of shots, Shively looked up to see Appellant approximately six to seven feet from

the van. *Id.* Shively got out and moved to the driver's side, then ran to the street to wave down help. *Id.* Appellant came out and fired more shots, so Shively ran. T.p. VI, 1700.

When cross-examined, Shively admitted that Bryce Hendrickson was actually posting to the Facebook chat under the name Joaquin Guzman, a famous drug trafficker also known as "El Chapo." T.p. VI, 1711-12. Shively admitted that he asked Appellant for his address, so they could "just take care of the problem." T.p. VI, 1715. He sent a text about how they were going to "whop this old nigger's ass," though he claimed that he "didn't mean it in any racial form." T.p. VI, 1722. Shively was evasive about his purpose in going to Appellant's home, merely repeating that they went to "resolve the problem." T.p. VI, 1724. Shively admitted that Bryce Hendrickson brought a knife and informed them of that fact while they were driving to Appellant's house. T.p. VI, 1730.

When asked by investigators, "'You just went there to talk to him like, dude, why are you—'" Shively responded, "'I wouldn't say that because I would be lying. I'm not going to say that we went there to whip his ass, but like, we went there to take care of it.'" T.p. VI, 1736-37. Shively testified that he did not recall making that statement. *Id.*

Shively acknowledged that Bryce had asked for a ride on Facebook, then stated, "I ain't got a ride or I'd cave this numb skull's lumpy head in" and "[to Appellant] I ain't scared of you. I ain't scared of jail. I ain't scared of shit. You dead boy." Finally, he admitted that the repeated kicks and stomps to Appellant could have been fatal, and that they could have come back to the house later. T.p. VI, 1790.

Trent testified as well, claiming that she drove herself and the young men over to Appellant's house to defuse the situation, and that she had never thought about fighting. T.p. VI, 1826, 1861. Her version of the fight mirrored the testimony previously provided by her son. T.p. VI, 1834-43. On cross, she originally claimed that the boys never discussed what they were going

to do, and that they knew what she wanted. T.p. VI, 1865. Like her son, she claimed to have no memory of the statement she provided to investigators, wherein she stated the following:

> I think the boys thought they were just going to whop him down. They were just going to beat his butt. Knew this guy caused a lot of problems, a lot of hurt for them and I was wrong, I never should have done what I did. I put these kids in a position that they wouldn't have been able to get to if it wasn't for me.

Id. Similarly, she did not recall telling Detective Villaneuva that, on the way to Appellant's house, she knew it was going to be a fight. T.p. VI, 1879. Ms. Trent also claimed to have never seen the fight, not even for a moment, despite the fact that it was taking place immediately next to her and involved two of her sons. T.p. VI, 1874-1878.

Tracy Hendrickson was called by agreement as the trial court's witness and testified as to her ongoing relationship with Appellant. T.p. VII, 2129. She indicated that her husband, Brian Hendrickson, and her son, Bryce Hendrickson, had previously been abusing drugs and had been trying to cause problems for Appellant. T.p. VII, 2134-39. Appellant called the police to no avail. *Id.* Mrs. Hendrickson was aware of photos the boys sent to Appellant, showing them holding guns and a knife. T.p. VII, 2157-58.

Her account of the incident differed from that of Bryce and Trent, as she did not see the shooting itself. T.p. VII, 2167. At that time, the prosecutor made a wholly unfounded accusation that Mrs. Hendrickson had been coached by defense counsel, insinuating that she was perjuring herself at the direction of the defense. T.p. VII, 2168. The trial court declined to order a mistrial upon Appellant's motion but gave the jury a cautionary instruction. T.p. VII, 2168-69.

When questioned by defense counsel, Mrs. Hendrickson went into greater detail as to Bryce, his drug abuse and his propensity for violence. T.p. VII, 2200-2203. The abuse from her family started with texts to her phone, then shifted to Appellant's Facebook when her phone was disconnected. T.p. VII, 2209. She provided details about the abusive and threatening language

used by Bryce, calling Appellant "filthy, nasty sand nigger and camelhumper and habeeb." *Id.* Shortly before the incident, she sent a birthday card to her son. T.p. VII, 2222. They found the card returned on Appellant's door and, in Bryce's handwriting, the statement, "We hope you die." T.p. VII, 2223.

Appellant testified in his own defense. He explained that there was a history of abuse and threats coming from the Hendrickson family, including racial slurs and death threats. T.p. VII, 2280, 2285-95. The Hendrickson's backed up these threats by driving by Appellant's home at all hours, sometimes multiple times in one day, and once entering his driveway at night. *Id.* They also sent pictures of themselves holding firearms and knives. *Id.* As a result, Appellant testified that he was in a state of fear. *Id.* Unfortunately, though he called the police, no real action was ever taken. T.p. VII, 2290-91.

On February 25, 2017, Appellant was in his home when he heard a vehicle pulling into the gravel driveway. T.p. VII, 2303. Not recognizing the vehicle, he went outside and waved. *Id.*, at 2304. Trent, who Appellant did not know, exited the van and started yelling at him about threatening her seventeen-year-old son. *Id.*, at 2305-06. Around that time, Shively also exited the van and moved behind Appellant. *Id.*, at 2308. A few moments later, the van door slammed open, revealing even more people inside. *Id.*, at 2309. According to Appellant, Shively was smirking, had his hands hidden in his pockets or under his shirt, and was up to something. *Id.*, at 2310-11.

Based on Shively's conduct, Appellant grabbed him and threw him to the ground. *Id.* Following that, the other young men were "all on [him] that quick." *Id.* He felt something hard and metallic hit his back, then his head, then his spine. *Id.*, at 2312. Appellant testified, "I wanted to defend myself somehow. You can't just stay down there. If you do, I would have been dead. My skull would have been crushed. My spine would have been broke." *Id.* He described being

down on the ground, turning on his knees, trying to grab their legs to stop the blows that were coming in to his throat and his side. *Id.*, at 2313-15.

As a few of his assailants headed back to the van, Appellant was able to get back to his feet. *Id.*, at 2315-16. At that time, Appellant overhead someone yelling, "Get the gun. Grab the gun." *Id.,* at 2319. He made his way back into the house, describing his primal concerns as "fear and survival." *Id.,* at 2318. Appellant continued back to the bedroom to retrieve his firearm, as he feared that his attackers would "swiss cheese my house." *Id.,* at 2320. After getting his handgun, Appellant paused halfway between the bedroom and the front door, and overheard more yelling, "We, we not done with you, bitch. Come on out, sand nigger." *Id.*

Fearing that there was little he could do if his attackers had firearms, Appellant cocked his gun, at which time he noticed that his hand was injured. *Id.,* at 2321. Heading outside, he saw that several of the individuals were outside the van with the sliding door open, and again heard "Grab the gun" or "get the gun." *Id.,* at 2323. Appellant testified that he had his firearm ready at his side, and that his purpose was to hold them for the police. *Id.* He further stated, "You know, this has to stop. It doesn't matter. They came to my house in broad daylight. And it's happened before. Nobody does anything." *Id.* By this time, he had figured out who the individuals were, in light of the threats coming from Bryce and Shively. *Id.*, 2323-24.

Though Appellant instructed everyone to stop moving, he observed that "the guy in the front seat...actually went down. He was kind of out of my sight." *Id.* Appellant fired two shots, low, to "hit him in the leg, you know. Send a message." *Id.* Meanwhile, the passengers in the back seat were "all moving. You can't tell exactly what they're doing. But one guy was there—they're all underneath—you could tell they're bending underneath the seat." *Id.*, at 2325. When asked if he thought they were going for a weapon, Appellant responded, "Oh yeah. I'm still convinced right

now they had a gun or guns on them. It wasn't just a knife." *Id.*, at 2326. Though he could not remember how many times he shot toward the rear of the vehicle, Appellant acknowledged that, "I never aimed the whole time. I just used the line of my body when I did it." *Id.*, at 2326. He continued firing because "they kept reaching for something," and were "still a threat to me." *Id.*, at 2327.

Appellant approached the van, again telling its occupants "Don't move...Don't move, motherfuckers." *Id.*, at 2328. At that point, Bryce Hendrickson lunged at Appellant while holding a knife. *Id.*, at 2329. Appellant testified that, "I must have fired a couple shots there." *Id.* Finally, Appellant noted that the guy in the middle, who he believed to be Shively, put his hands up, and "that's why he never got shot." *Id.*

Shortly thereafter, Appellant realized he was out of bullets, and went back inside to get more ammunition, as "they were a big threat, just as worse or maybe worse than before," because now "they had more time to grab the gun—or they have it now." *Id.*, at 2334. He went back outside and saw that they had not left, and "[he] knew, [he] felt that they definitely got [a gun]." *Id.*, at 2325. According to Appellant, the people inside the van kept reaching for something and so he fired a few more times. *Id.*, at 2338-39.

At sentencing, the trial court spontaneously stated the following:

> Mr. Hamad, *there is no question that the five gunshot victims came onto your property with the specific criminal intent to put, as they said, a beat down on you.* However, the animus of that behavior was prompted by an equal and ongoing juvenile exchange of immature, immoral, unscrupulous, racist and obscene bravado. The people in that minivan as well as yourself participated in this relentless blather that would be too much even for the Jerry Springer show.
>
> When that fight had clearly ended, Mr. Hamad, you got your gun and you shot five people *in a fit of rage because you were assaulted.* While it is true that this event never would have happened if the 44-year old driver of that minivan had even an ounce of common sense, it is equally true that your response to her poor judgment cause the death of two young people.

> ...It is unfortunate that after 47 years of dedicating yourself to your family and working hard to maintain your business, *you allowed such foolishness to reduce you to such a state.*

T.p. IX, 2958-59. (Emphasis added).

LAW AND ARGUMENT

FIRST ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY FAILING TO INSTRUCT THE JURY ON THE INFERIOR OFFENSE OF VOLUNTARY MANSLAUGHTER, IN VIOLATION OF APPELLANT'S RIGHTS AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND COMPARABLE PROVISIONS OF THE OHIO CONSTITUTION. (T.p. VII, 2406)

Issue Presented for Review and Argument

1. Does a trial court commit error when it fails to instruct the jury as to an inferior offense, where the facts adduced at trial could reasonably support acquittal as to the original offense, but conviction as to the inferior offense?

During Appellant's trial, the Court improperly denied his request for a jury instruction on the inferior offense of voluntary manslaughter in violation of Appellant's right to a fair trial as guaranteed by the Sixth Amendment to the U.S. Constitution and Article I, Sections 10 and 16 of the Ohio Constitution. Appellant requested a jury instruction be given on voluntary manslaughter both orally and in writing. T.p. VII, p. 2404-2405. The court orally declined to instruct the jury on voluntary manslaughter, stating, "I think there is at certain times a fine line...but, in this case... I don't think it's warranted." T.p. VII, p. 2406.

Appellant was originally indicted on two counts of aggravated murder and six counts of attempted aggravated murder. The Ohio aggravated murder statute provides "No person shall purposely, and with prior calculation and design, cause the death of another." R.C. 2903.01(A). Ohio's voluntary manslaughter statute reads, "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 and is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another." R.C. 2903.03(A).

Voluntary manslaughter is "an inferior-degree offense of aggravated murder as its elements are contained within the indicted offense, except for one or more additional mitigation elements." *State v. Ryan* (2018), 11th Dist., Ashtabula Co. No. 2016-A-0036, 2018 WL 3207162 (June 29, 2018). The test for whether a judge should give the jury instruction on voluntary manslaughter is the same as applied to an instruction on a lesser included offense. *State v. Shane* (2002), 63 Ohio St.3d 630, 590 N.E.2d 272, 274. Namely, if the "evidence presented at trial would reasonably support both an acquittal on the charged crime of murder and a conviction for voluntary manslaughter," then the court shall issue such instruction. *Id.* at 274-75.

In *State v. Perry*, the Eleventh District applied this test to the charge of aggravated murder, holding that "a defendant charged with aggravated murder is entitled to an instruction on voluntary manslaughter only when the evidence produced at trial would reasonably support both an acquittal on the charge of aggravated murder and a conviction for voluntary manslaughter." *State v. Perry* (1997), 11th Dist., Trumbull No. 94-T-5165, 1997 WL 590789 (Aug. 29, 1997). The Eleventh District has also determined that jury instructions for both self-defense and voluntary manslaughter are not inconsistent. *State v. Warner* (2006), 11th Dist. Portage No. 2006-P-0048, 2007 WL 1731628 (June 5, 2007). The Court noted that the two theories are not mutually exclusive and that it is actually common in mutual combat situations where "once attacked, it is reasonable for a person to be acting under the influence of sudden passion or in a fit of rage and, at the same time, be acting to defend himself." *Id.*, at ¶ 71.

When considering the charge of voluntary manslaughter, the jury must first determine if there was a reasonably sufficient provocation on the part of the victim to trigger a sudden fit of

rage or sudden passion. *Perry*, at 5. If the jury finds this objective standard has been met, they must next consider whether the defendant was actually under the influence of sudden passion or rage. In making the determination on whether to instruct the jury on voluntary manslaughter, "the trial court must view the evidence in the light most favorable to defendant." *Ryan*, at 114.

In the instant case, the record reflected more than sufficient evidence of provocation on the part of the victims. It is uncontroverted that the incident took place at Appellant's house following weeks of the alleged victims making threatening and racist comments, including "you dead boy," and sent him pictures of them holding guns and knives. T.p. VI, 1799; VII, 2139. Shively admitted that they were there to "take care of the problem" and had previously sent a text saying that they were going to "woop this old nigger's ass." T.p. VI: 1689, 1722. Numerous witnesses, including Shively, admitted that Appellant had been beaten and kicked while on the ground. T.p. VI: 1686, 1693. These strikes could have been fatal. T.p. VI, 1778. Trent told investigators that the boys were "just going to whop him down...they were just going to beat his butt." T.p. VI, 1865. Appellant testified that he heard the alleged victims say, "Get the gun," or "grab the gun." T.p. VII, 2319.

Additionally, there was testimony that, following Appellant's arrest, he yelled at Bryce Hendrickson, "That's what you get, you little bitch. How do you like that?" *Id.*, 1573. Other witnesses testified that Appellant appeared angry and was actually shouting. T.p. V, 1403, 1427. According to these witnesses, Defendant yelled, "I'm not done with you, you little bitch," and "That's what you get, you little bitch. How do you like that?" T.p. V, 1408, 1573.

Finally, even the trial court acknowledged that the facts at trial clearly supported conviction for voluntary manslaughter, as "there is no question...the five gunshot victims came onto your property with the...intent to put...a beat down on you...[Y]ou shot five people in a fit of rage

because you were assaulted...[Y]ou allowed such foolishness to reduce you to such a state." T.p. IX, 2958-59.

Under these circumstances, where the trial court itself explicitly acknowledged that the facts demonstrated Appellant acted in a fit of rage, its failure to instruct on the inferior offense of voluntary manslaughter constituted reversable error.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED BY PROHIBITING APPELLANT FROM INTRODUCING EXPERT TESTIMONY REGARDING PTSD AND A CONCUSSION SUFFERED BY APPELLANT, AS IT RELATED TO SELF-DEFENSE, VOLUNTARY MANSLAUGHTER, AND PRIOR CALCULATION AND DESIGN, IN VIOLATION OF THE OHIO RULES OF EVIDENCE AND DEFENDANT'S RIGHTS UNDER THE UNITED STATES AND OHIO CONSTITUTIONS. T.d. 153; T.p. VII, 2263-2264.

Issue Presented for Review and Argument

1. Does a trial court commit error when it prohibits a criminal defendant from presenting expert psychological testimony regarding the defendant's PTSD as it pertains to self-defense, voluntary manslaughter, and prior calculation and design?

The admission of expert testimony is governed by the Ohio Rules of Evidence, and the Ohio Supreme Court has held that, "Courts should favor the admissibility of expert testimony whenever it is relevant and the criteria of Evid.R. 702 are met." *State v. Nemeth* (1998), 82 Ohio St.3d 202, 207, 994 N.E.2d 1332. Relevant evidence is that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Evid.R. 401. Rule 702 sets forth the requirements for expert testimony as:

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

> (C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:
>
> > (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
> >
> > (2) The design of the procedure, test, or experiment reliably implements the theory;
> >
> > (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

Evid. R. 702.

A defendant asserting self-defense must be established that he had "'a *bona fide belief* that he [she] was in imminent danger of death or great bodily harm and that his [her] only means of escape from such danger was in the use of such force.'" *State v. Koss* (1990), 49 Ohio St.3d 213, 215, 551 N.E.2d 970 (quoting *State v. Robbins* (1979), 58 Ohio St.2d 74, paragraph two of the syllabus). This is a subjective test, requiring examination of the defendant's state of mind. *Id.*

In *Koss*, the Ohio Supreme Court recognized the admissibility of testimony regarding "battered woman syndrome" "to assist the trier of fact in determining whether the defendant acted in self-defense." *Id.*, at 218. Such testimony does not establish a new defense, rather it is only to assist the jury in determining whether the defendant had an bona fide belief that he or she is in imminent danger of death or serious bodily harm. *Id.* at 217.

The Supreme Court engaged in an extensive analysis of similar expert psychological testimony in *Nemeth*, where it held that testimony in a homicide prosecution regarding abuse suffered by a child defendant was both relevant and admissible under Rule 702. 82 Ohio St.3d 202, 215. It noted that the evidence was relevant regarding whether the defendant:

> (1) had acted with prior calculation and design as charged in the indictment, (2) had acted with purpose as required for the lesser included offense of murder, (3) had created the confrontation or initiated the aggression, and (4) had an honest belief that he was in imminent danger, a necessary element in the affirmative defense of self-defense.

Id., at 207. With regard to the Rule 702, the Court discussed that the general scientific and medical acceptance of post-traumatic stress disorder in children "therefore unquestionably meet[s] the requisite level of reliability for admission as the subject of expert testimony." *Id.*, at 212.

Notably, though these two decisions dealt with testimony regarding the effects of patterns of abuse in women and children, the Supreme Court did not set down a bright-line rule restricting psychological testimony to only these cases. Instead, the analysis rests purely in the Rules of Evidence. The Court has previously held that a trial court committed prejudicial error by prohibiting the testimony of a clinical psychologist regarding a Vietnam veteran's PTSD. *State v. Warner* (2007), 11th Dist., 2007-Ohio-3016, ¶ 45, ¶ 120. In particular, the Court found that the evidence was critical to a manslaughter analysis:

> Evidence that the defendant is suffering from post traumatic stress disorder is appropriate in a case where the defendant seeks a voluntary manslaughter instruction. Post traumatic stress disorder is a condition beyond the general understanding of lay persons. The expert testimony may assist the jury in determining if the defendant acted under the influence of sudden passion or acted in a fit of rage.

Id., at ¶ 44.

The Sixth Circuit Court of Appeals, hearing a petition for habeas corpus, found that a defendant received ineffective assistance of counsel where his attorney failed to present "known, persuasive PTSD evidence in support of his express trial strategy" to establish the inferior offense of voluntary manslaughter. *Reddy v. Kelly* (2016), 657 Fed.Appx. 531, 544. The attorney possessed a report diagnosing Reddy with PTSD and explaining that establishing a "nexus" between his illness, history of abuse, and the homicide. *Id.*, at 536. In its decision, that court noted that "Ohio

law makes clear that PTSD evidence is admissible to support that a defendant had the mental state necessary to reduce murder to voluntary manslaughter." *Id.*, at 544 (citing multiple cases).

The First District Court of Appeals has also noted that a psychiatrist could properly testify regarding a defendant's PTSD as a result of his military service in Vietnam, which could cause hyperarousal and misperception regarding whether he was in imminent danger. *State v. Purcell*, (1995) 1st Dist., 107 Ohio App.3d 501, 504-506, 669 N.E.2d 60 (holding that the State was permitted to call its own expert in rebuttal regarding PTSD effects on state of mind).

Evidentiary rulings are reviewed for abuse of discretion, which "implies that the [trial] court acted unreasonably, arbitrarily, or unconscionably." *Rigby v. Lake County* (1991), 58 Ohio St.3d 269, 271, 569 N.E.2d 1056. A trial court's decision concerning the admission of evidence is subject to harmless error review, which requires a reviewing court to determine whether an abuse of discretion by the trial court affected a substantial right of the defendant, and if it was harmless beyond a reasonable doubt. *State v. Lundgren* (1995) 73 Ohio St.3d 474, 486, 653 N.E.2d 304.

Moreover, the United States Supreme Court has held that the Due Process Clause and Sixth Amendment to "the Constitution guarantee[] criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky* (1986), 476 U.S. 683, 690 (quoting *California v. Trombetta* (1984), 467 U.S. 485). In *Crane*, the Court held that it was a denial of a defendant's right to a fair trial where he was not permitted to present competent, reliable evidence regarding the credibility of his confession. *Id.* Restrictions on a defendant's right to present relevant evidence may not be arbitrary or disproportionate to the purposes they are designed to serve. *United States v. Scheffer* (1998), 523 U.S. 303, 308; *see also State v. Swann* (2008), 119 Ohio St.3d 552, 2008-Ohio-4837, 895 N.E.2d 821. Such restrictions on a defendant's ability to introduce relevant

evidence are unconstitutional when they "undermine[] fundamental elements of the defendant's defense." *Scheffer* 523 U.S., at 315.

Appellant submits that the trial court's prohibition of Dr. Reardon's testimony in this case was an abuse of discretion and a violation of his constitutional right to present a complete defense, requiring reversal. As demonstrated by the above-referenced cases, psychological testimony regarding Defendant's PTSD diagnosis was relevant to whether he acted with prior calculation and design in firing gunshots at the five victims, whether he did so in a sudden fit of rage after being provoked, whether he created the confrontation, and whether he had a *bona fide* belief that he was in imminent danger of death or serious bodily harm. Each of these determinations rests in whole or in part on Appellant's state of mind.

Dr. Reardon's expected testimony, as proffered by the defense in his twenty-four page report and *curriculum vitae*, meets each of the requirements of Rule 702. As discussed at length by the Ohio Supreme Court in *Nemeth* and *Koss*, and reflected by the Court's own decision in *Warner*, the specific characteristics and symptoms experienced by a person diagnosed with PTSD are facts which are beyond the knowledge of laypersons, and such an individual may act in unexpected ways to a layperson.

Moreover, Dr. Reardon's *curriculum vitae*, as well as his expert testimony during the mitigation stage of the trial, reflect his specialized knowledge, skill, experience, training, and education regarding psychology and PTSD. T.p. IX, 2711-25. He applied this expertise using extensive, recognized scientific testing specifically conducted upon Appellant to diagnose him with Post-Traumatic Stress Disorder with Dissociative Symptoms according to the DSM-5. Dr. Reardon's Report, p. 19-23. Appellant submits that Dr. Reardon's proffered report and summary

of qualifications, as backstopped by his testimony at the mitigation hearing, demonstrate that his testimony unquestionably meets the criteria of Rule 702 to be admitted into evidence.

The trial court's failure to permit this testimony during Appellant's case-in-chief was extraordinarily prejudicial. Dr. Reardon's found that Appellant's "scale scores are greater than the cut-off for the dissociative subtype of PTSD." *Id.* at 22. He notes that "Dissociation is defined as a largely unconscious, defensive alteration in awareness, that develops as an avoidance to overwhelming—often post-traumatic-psychological distress." *Id.* At the mitigation hearing, he also explained that Appellant was anxious and hypervigilant prior to the day of the shooting. T.p. IX, 2728. Dr. Reardon testified that he believed that the initial physical altercation was the "activating event," he determined that Appellant suffered an "immediate onset" of a PTSD reaction." *Id.*, at 2730-31. Such a reaction, in a state of dissociation, can lead to altered reactions including perceiving threats that are not there. *Id.*, 2730-33.

This psychological testimony, under the circumstances of this case, would be of critical importance to the jury in evaluating and understanding Appellant's statement to law enforcement and his testimony at trial. It is relevant to Appellant's self-defense claim, prior calculation and design, and the potential inferior offense of voluntary manslaughter. Accordingly, the trial court's failure to permit the admission of this evidence was prejudicial to Appellant, and requires reversal for a new trial.

THIRD ASSIGNMENT OF ERROR

APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE IN VIOLATION OF HIS RIGHT TO DUE PROCESS AS GUARANTEED BY THE OHIO CONSTITUTION.

Issues Presented for Review and Argument

> 1. Did Appellant's convictions violate his right to due process where the greater weight of the credible evidence demonstrated that he did not cause the deaths of Haber and Williams with "prior calculation and design?"
>
> 2. Did Appellant's convictions violate his right to due process where the greater weight of the credible evidence demonstrated that he was acting in self-defense in his use of deadly force?

It is well-established that a reviewing court may reverse a verdict of guilty where it is against the manifest weight of evidence. *State v. Robinson* (1955), 162 Ohio St. 486, 487 (holding that although a verdict is supported by sufficient evidence, a court of appeals may still determine that the verdict is against the manifest weight of the evidence) (superseded by constitutional amendment on other grounds); *see also, State v. Banks* (1992), 10th Dist., 78 Ohio App.3d 206. 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." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387 (quoting Black's Law Dictionary (6 Ed. 1990), 1594).

The Ohio Supreme Court has promulgated the following standard for reviewing challenges relating to the manifest weight of the evidence,

> The court, 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 [finder 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.

Id. (citing *State v. Martin* (1983), 1st Dist., 20 Ohio App.3d 172, 175).

Thus, the reviewing court in a manifest weight challenge has the opportunity to consider the entire record and independently evaluate the credibility of the witnesses. In the exceptional case in which the evidence weighs heavily against conviction, the court may exercise its discretionary power to order a new trial. *Id.* When a court of appeals reverses a judgment of a trial

court on the basis that the verdict is against the weight of the evidence, it sits as a "thirteenth juror" and disagrees with the fact finder's resolution of the conflicting testimony." *Thompkins*, 78 Ohio St.3d, at 387 (citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 2218).

Appellant's convictions in this case were against the weight of the evidence. There are two branches to this argument: first, the greater weight of the credible evidence adduced at trial demonstrated that Appellant did not act with "prior calculation and design," and; second, the greater weight of the credible evidence adduced at trial demonstrated that Appellant was acting in self-defense. These two branches will be addressed independently.

Prior Calculation and Design

In requiring the State to prove "prior calculation and design," it was the General Assembly's apparent intention "to require more than a few moments of deliberation...and to [instead] require a scheme designed to implement the calculated decision to kill." *State v. Taylor* (1997), 78 Ohio St.3d 15, 19, citing *State v. Cotton* (1978), 56 Ohio St.2d 8, 11. Ohio appellate courts have interpreted this language to require "some sort kind of studied analysis with its object being the means by which to kill." *State v. Trewartha* (2005), 10th Dist., 165 Ohio App.3d 91, 97-98, citing *State v. Ellenwood* (1999), 10th Dist., 1999 WL 717998 (Sept. 16, 1999), quoting *State v. Jenkins* (1976), 8th Dist., 48 Ohio App.2d 99, 102. Consequently,

> where evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill, a finding by the trier of fact of prior calculation and designed is justified.

Cotton, 56 Ohio St.2d, at paragraph three of the syllabus.

It is impossible to articulate a bright-line test that emphatically distinguishes between the presence or absence of "prior calculation and design," as the Supreme Court of Ohio has expressly

refused to set down such a rule. *Taylor,* 78 Ohio St.3d, at 20. However, Appellant notes that Ohio courts, including the Supreme Court of Ohio, have previously declined to uphold findings of "prior calculation and design" in explosive, short-duration situations. *Id.*, citing *State v. Reed* (1981), 65 Ohio St.3d 117 (after a botched theft, accused shot pursuing civilian and police officer); *State v. Mulkey* (1994), 98 Ohio App.3d 773 (street-gang attack on victim); *State v. Davis* (1982), 8 Ohio App.3d 205 (excluded patron shot bar owner and doorman).

Rather, the State can prove "prior calculation and design" from the circumstances surrounding a murder in several ways, (1) evidence of a preconceived plan leading up to the murder, (2) evidence of the perpetrator's encounter with the victim, including evidence necessary to infer that the defendant had a preconceived notion to kill regardless of how the robbery unfolded, or (3) evidence that the murder was executed in such a manner that circumstantially proved the defendant had a preconceived plan to kill. *Trewartha,* 165 Ohio App.3d, at ¶ 19; see also, *State v. Cassano* (2002), 96 Ohio St.3d 94; *State v. Goodwin* (1999), 84 Ohio St.3d 331; *State v. Campbell* (2000), 90 Ohio St.3d 320.

In the instant matter, the facts adduced at trial demonstrated that Appellant had no preconceived plan leading up to the murder. When the van arrived on his property, he was busy rolling cigarettes with his live-in girlfriend. T.p. VII, 2303. He had no idea who the occupants of the van were when he originally exited the house. *Id.,* at 2304. Under any version of the facts, he did not have a firearm on his person during that initial contact, nor did he use the knife that was on his person. Even after retrieving the firearm, Appellant's conduct did not demonstrate a plan to kill. Rather, he did not specifically aim at anyone, and fired low to avoid killing anyone. T.p. VII, 2326-27. Ultimately, though the facts demonstrate that Appellant's conduct caused injury and death to the occupants of the van, they were indicative of an uncalculated reaction to the events as

they unfolded before him. Accordingly, to the extent that his convictions were against the manifest weight of the evidence as it pertains to "prior calculation and design," they must be reversed for a new trial.

Self-Defense

Appellant asserted that he was acting in self-defense, as he believed that his attackers had a firearm and intended to use the same. This belief was based upon a variety of factors, including but not limited to: the vicious assault on his person, the alleged victims stating "get the gun," his eventual recognition that they were the same individuals who had sent him threats and pictures of themselves holding guns and knives, and their conduct in reaching into an unseen area of the van. T.p. VI, 1790; VII, 2319, 2323-24, 2327.

To establish self-defense, a defendant must establish the following, (1) that he was not at fault in creating the situation giving rise to the affray, (2) he had a bona fide belief that he was in imminent danger of death or great bodily harm, and (3) his only means of escape from such danger was the use of such force. *State v. Tunnicliff* (2000), 11th Dist., Portage Co. No. 99-P-0011, 2000 WL 757607 (June 9, 2000), 2, citing *State v. Robbins* (1979), 58 Ohio St.2d 74, 80.

Notably, though Appellant concedes that he was involved in a verbal altercation with Hendrickson and Shively over Facebook, he did not initiate the physical confrontation on February 25, 2017. Rather, the alleged victims came to Appellant's residence to "whop that old nigger's ass." T.p. VI, 1722. Though Appellant admittedly slammed one of the young men to the ground, he did so only after being effectively cornered in a threatening manner. T.p. VII, 2311. After being repeatedly struck and kicked by four men, and while retreating into his home, Appellant heard them say, "Get the gun, get the gun." T.p VII, 2319.

Appellant knew that his walls would do little to stop bullets if they decided to "swiss cheese" the house. T.p. VII, 2320. Moreover, by that time, he had come to realize that these were the individuals involved in the Facebook messages, who had sent him threats and pictures of themselves while armed. T.p. VII, 2323. Finally, in the time that it took Appellant to go inside, recover his handgun, and return to the front door, the alleged victims had not left his property, continued to say "get the gun," and in fact appeared to be reaching for something, potentially a weapon. *Id.* Thus, Appellant had a bona fide belief that his attackers had demonstrated the desire, the ability, and the means to kill him regardless of whether he remained in his home.

Respectfully, the facts adduced at trial demonstrated that Appellant was not at fault in creating the confrontation, that he had a bona fide belief that he was in imminent danger, and his only means of escape was to utilize deadly force. As such, his convictions were against the greater weight of the evidence and must be reversed for a new trial.

FOURTH ASSIGNMENT OF ERROR

THE TRIAL COURT FAILED TO ORDER A MISTRIAL OR GIVE AN APPROPRIATE CURATIVE INSTRUCTION AFTER THE PROSECUTOR ENGAGED IN GROSS MISCONDUCT THAT RESULTED IN UNFAIR TRIAL TO APPELLANT, IN VIOLATION OF HIS RIGHTS AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Issue Presented for Review and Argument

1. Did the trial court's limited curative instruction and denial of Appellant's motion for mistrial following prosecutorial misconduct result in an unfair trial to Appellant, in violation of his rights as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution?

Under the Sixth and Fourteenth Amendments to the United States Constitution, criminal defendants are guaranteed the right to a fair trial by an impartial jury and due process of law. Thus, the test for prosecutorial misconduct on appeal is whether that conduct deprived the appellant of a

fair trial. *State v. Fears* (1999), 86 Ohio St.3d 329, 332, citing *State v. Apanovitch* (1987), 33 Ohio St.3d 19.

As recognized by the Supreme Court of Ohio, "the prosecution must avoid insinuations and assertions which are calculated to mislead the jury." *State v. Smith* (1984), 14 Ohio St.3d 13, 14. Moreover, attorneys are "not to allude to matters which will not be supported by admissible evidence...[or] make unfair or derogatory personal reference to opposing counsel." *Id.* Even in closing arguments, where parties are typically permitted greater leeway in their remarks, where a prosecutor intimates "that defense counsel [has] suborned perjury by manufacturing, conceiving and fashioning lies to be presented in court" and there is "no evidence to substantiate those accusations...[s]uch conduct is well beyond the normal latitude allowed in closing arguments and is clearly improper."

In the instant matter, the State engaged in such "clearly improper" conduct during the cross-examination of Tracy Hendrickson. At trial, Mrs. Hendrickson indicated that she hid behind the fireplace during the incident and admitted that she had never mentioned that detail to investigators. T.p. VII, 2166. Thereafter, the prosecuting attorney stated, "It's only after -- the defense has talked to you numerous times; correct? ... And now we have an idea of what our defense would be, that you should hide behind the fireplace?" *Id.* This comment did not just insinuate, but outright asserted, that Mrs. Hendrickson had colluded with defense counsel to manufacture her testimony.

The trial court found that the State's comments were "totally improper." T.p. VII, 2168. It also instructed the jury to disregard "the question by the prosecutor as to any correspondence or any discussion between this witness and the defense...this witness is well within her rights to speak to either side at any time. There is not any reference or any – anything to be drawn from that in

any way, shape or form." *Id.* However, the trial gave no further instructions and denied Appellant's motion for a mistrial.

As an initial matter, Appellant concedes that the jury is presumed to have followed the court's instructions. *State v. Raglin* (1998), 83 Ohio St.3d 253, 264. Thus, Appellant will assume *arguendo* that the jury properly disregarded any comments relative to discussions between Mrs. Hendrickson and defense counsel. However, even conceding that point, Appellant respectfully submits that the trial court's curative instruction did not fully address or eliminate the prejudicial impact of the prosecutor's improper statements.

The prejudice caused by the prosecutor's misconduct has little to do with the simple allegation that Mrs. Hendrickson spoke to defense counsel. Rather, the prejudice arises out of the insinuation that she had recently manufactured her testimony, either under her own auspices or as some scheme concocted with defense counsel, and that she was nothing more than a mouthpiece for the defense ("what *our* defense would be"). Respectfully, the trial court's instruction did little, if anything, to address that particularly insidious aspect of the prosecutor's comments.

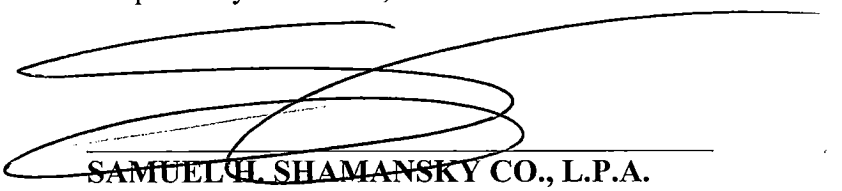
Appellant submits that Mrs. Hendrickson's testimony was of vital importance in the instant matter. She was present throughout the whole incident, had first-hand knowledge of events prior to February 25, 2017, and yet was the only individual on scene not directly involved in the shooting. She had reason to be sympathetic both to Appellant as her romantic partner and to Bryce Hendrickson as her son. Moreover, Mrs. Hendrickson appeared not as a witness for either side, but as a witness for the court. Thus, the prosecutor's misconduct in insinuating she was nothing more than a mouthpiece for Appellant was improper and denied him the right to a fair trial. Accordingly, because the trial court failed to provide a complete curative instruction as to that issue and denied

Appellant's motion for a new trial, Appellant respectfully submits that the only proper remedy is that his convictions be reversed.

CONCLUSION

For the reasons set forth above, Appellant submits that his convictions were contrary to law and must be reversed.

Respectfully submitted,



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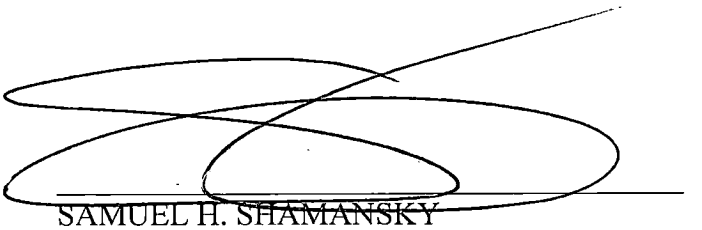
CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was duly served upon the Trumbull County Prosecutor's Office, 160 High Street, N.W., Warren, Ohio 44481, on August 24, 2018, by regular U.S. Mail.



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