APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 18-4106

DEMETREUS A. KEAHEY,
Petitioner - Appellant,
v.
DAVE MARQUIS, Warden,
Respondent - Appellee.

FILED
Oct 20, 2020
DEBORAH S. HUNT, Clerk

Before: SILER, SUTTON, and LARSEN, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Northern District of Ohio at Toledo.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's denial of Demetreus Keahey's petition for a writ of habeas corpus is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX B

RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 20a0335p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEMETREUS A. KEAHEY, *Petitioner-Appellant*, *v.* DAVE MARQUIS, Warden, *Respondent-Appellee.*	No. 18-4106

Appeal from the United States District Court
for the Northern District of Ohio at Toledo.
No. 3:16-cv-01131—John R. Adams, District Judge.

Argued: October 7, 2020

Decided and Filed: October 20, 2020

Before: SILER, SUTTON, and LARSEN,
Circuit Judges.

COUNSEL

ARGUED: Autumn Hamit Patterson, JONES DAY, Dallas, Texas, for Appellant. Mary Anne Reese,

OFFICE OF THE OHIO ATTORNEY GENERAL, Cincinnati, Ohio, for Appellee.

ON BRIEF: Autumn Hamit Patterson, JONES DAY, Dallas, Texas, Charlotte H. Taylor, JONES DAY, Washington, D.C., for Appellant. Mary Anne Reese, OFFICE OF THE OHIO ATTORNEY GENERAL, Cincinnati, Ohio, for Appellee.

OPINION

SUTTON, Circuit Judge. Demetreus Keahey requested a self-defense instruction during his state criminal trial for shooting Prince Hampton. The trial court rejected the request, and a jury convicted Keahey of attempted murder among other charges. He filed this habeas petition, pressing the argument that the denial of the instruction violated his Sixth and Fourteenth Amendment rights. The district court denied the petition. We affirm because the state trial court's decision was not contrary to, and did not unreasonably apply, Supreme Court precedent.

I.

Keahey and Kindra McGill lived together with their daughter. Also living with them were two boys, the product of McGill's prior relationship with Prince Hampton.

One day, Hampton came to the house and became enraged because his boys were spending so much time with Keahey. He pulled out a knife, charged Keahey, and stabbed him in the back. Fearing retribution, Keahey never identified Hampton as his assailant. Neither did McGill.

Soon after the stabbing, McGill took the kids and moved in with her mother, Joyce. Keahey moved in with his sister. Keahey and McGill exchanged text messages, in which they discussed McGill's reluctance to name Hampton as the attacker and Keahey's desire to retaliate. Despite a criminal history that prohibited firearm possession, Keahey got a gun.

Weeks later, Keahey and McGill planned to meet at the doctor's office for their daughter's appointment. Without informing anyone, Keahey decided to pick up McGill and their daughter himself. Keahey showed up early that morning, parked on the street, and waited out front. Hampton arrived to drop his boys off before the doctor's visit, and pulled into the driveway with the kids in the car. The prosecution and Keahey paint different pictures of what ensued.

The prosecution points to evidence showing that Keahey arrived thirsting for a fight. He ignored the plan to meet at the doctor's office and showed up early and unannounced at Joyce's home that morning. Joyce testified that Keahey took aim and fired at an unarmed Hampton when he helped the kids exit the car, then chased a fleeing Hampton down the sidewalk. One officer testified that Keahey gave up an opportunity to return safely to his vehicle when he decided to chase after a fleeing Hampton. While an officer found a knife on the scene, it was locked and closed, suggesting no one threatened Keahey with it. The police officer who canvassed the neighborhood discovered a bullet hole in Hampton's vehicle, another in a neighbor's living room, and shell casings scattered in the area. A neighbor observed two men running and one raising his arm as if to shoot, then heard a shot.

On the other side was Keahey's testimony that he shot Hampton in self-defense. Keahey testified that, while waiting out front for McGill and their daughter, Hampton arrived. He says Hampton jumped out of the car and charged at him with a knife. In response, Keahey fired back. Hampton bolted. Keahey scrambled. But before reaching his car, Keahey heard a gunshot and turned to see Hampton, gun in hand, coming down the driveway. To prevent Hampton "from getting a good shot off," Keahey fired more rounds. R.7-7 at 119. A neighborhood gun fight followed. After shooting Hampton twice, Keahey got in his car and sped off. Had he not shot Hampton, Keahey claimed, he would have "been dead." R.7-7 at 86.

Keahey sought a self-defense instruction, unsuccessfully. Even viewing the evidence in the defendant's favor, the Ohio trial judge reasoned, Keahey failed to present sufficient evidence to warrant the instruction.

On direct appeal, Keahey argued that the trial court's refusal to instruct the jury on self-defense violated state law and his Sixth Amendment and Fourteenth Amendment rights. The Ohio Court of Appeals rejected each of the arguments, once more for lack of evidence to support the instruction. *State v. Keahey*, 2014-Ohio-4729, 2014 WL 5421028, at *10 (Ohio Ct. App. Oct. 24, 2014). Keahey sought collateral relief in state court. That failed too.

Keahey filed a § 2254 habeas petition, claiming the state court violated his Sixth and Fourteenth Amendment rights by refusing to instruct the jury on self-defense. The district court rejected the claim.

This court granted a certificate of appealability to review the claim.

II.

The Antiterrorism and Effective Death Penalty Act applies to the state court's decision that the Sixth and Fourteenth Amendments did not require it to give a self-defense instruction. *See* 28 U.S.C. § 2254(d). To prevail, Keahey must show that the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." *Id.* § 2254(d)(1); *see Harrington v. Richter*, 562 U.S. 86, 100 (2011).

Contrary to federal law. Keahey has picked a difficult hill to climb in claiming the jury instruction ruling was "contrary to federal law." It makes no difference whether the jury instruction misread state law because federal habeas applies only to convictions that offend "the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 68, 71–72 (1991). That means he must show that the trial judge not only misread state law but also misread it so badly that it violated the Sixth and Fourteenth Amendments. That's not easy because "instructional errors of state law generally may not form the basis for federal habeas relief." *Gilmore v. Taylor*, 508 U.S. 333, 344 (1993). Even after that, he must show that such a botched interpretation violated clearly established United States Supreme Court decisions. And even then, he still must show that the mistake violated concrete Supreme Court holdings, *Marshall v. Rodgers*, 569 U.S. 58, 61 (2013), not generalized principles, *Woods v. Donald*, 575 U.S. 312, 318 (2015).

Keahey claims that two lines of cases help him. But neither one contains a holding on point that the state appellate court violated. Start with *Crane v. Kentucky*, 476 U.S. 683 (1986). It ruled that "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense," whether that right is "rooted directly in the Due Process Clause of the Fourteenth Amendment, . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment." *Id.* at 690 (quotation omitted). Defendants have used the principle to raise claims based on inconsistent jury instructions, *see Stevenson v. United States*, 162 U.S. 313 (1896), a capital defendant's right to a lesser included offense instruction, *see Beck v. Alabama*, 447 U.S. 625 (1980), the exclusion of evidence, *see Holmes v. South Carolina*, 547 U.S. 319 (2006), access to evidence, *see California v. Trombetta*, 467 U.S. 479 (1984), and the testimony of defense witnesses, *see Webb v. Texas*, 409 U.S. 95 (1972). But the Court has never invoked this principle to "squarely establish[]" a federal right to a self-defense instruction. *Knowles v. Mirzayance*, 556 U.S. 111, 122 (2009).

Move to *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). It establishes a narrow category of state jury-instruction mistakes that violate the clearly established right to "fundamental fairness." *Dowling v. United States*, 493 U.S. 342, 352 (1990) (quotation omitted); *Frey v. Leapley*, 931 F.2d 1253, 1255 (8th Cir. 1991); *Armstrong v. Bertrand*, 336 F.3d 620, 626 (7th Cir. 2003). To fit the theory, the state court's refusal to give the instruction must have "so infected the entire trial that the resulting conviction violates due process." *Cupp*, 414 U.S. at 147. But the Supreme

Court, regrettably for Keahey, has never invoked this principle in granting relief for the failure to give a self-defense instruction.

In the face of these precedents, Keahey has not shown that the state appellate court's decision was "contrary to" clearly established Supreme Court precedent. It neither "appl[ied] a rule that contradicts the governing law set forth in [Supreme Court] cases" nor arrived at a different conclusion after "confront[ing] a set of facts that are materially indistinguishable from a decision of [the Supreme] Court." *Early v. Packer*, 537 U.S. 3, 8 (2002) (quotation omitted).

Unreasonable application of federal law. Keahey does not do any better under the "unreasonable application" prong of AEDPA. That, too, is "difficult to meet." *Greene v. Fisher*, 565 U.S. 34, 38 (2011) (quotation omitted). A "federal habeas court may not [grant relief] simply because [it] concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously." *Williams v. Taylor*, 529 U.S. 362, 411 (2000). In "assessing whether a state court's application of federal law is unreasonable, the range of reasonable judgment can depend in part on the nature of the relevant rule that the state court must apply." *Renico v. Lett*, 559 U.S. 766, 776 (2010) (quotation omitted). Both of the relevant standards in this instance—that a criminal defendant is guaranteed the opportunity to present a defense and that the trial must comport with fundamental fairness—lack "specificity." *Harrington*, 562 U.S. at 101. That left the state courts with considerable "leeway" when deciding whether to submit the charge

to the jury. *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

Gauged by these modest requirements, the Ohio court of appeals' decision passes. It did not unreasonably apply either of the two relevant Supreme Court holdings in declining to instruct on self-defense. To our knowledge, the Court has discussed the denial of a state self-defense instruction in the context of constitutional rights only once—as a hypothetical possibility and in a dissent no less. *Gilmore*, 508 U.S. at 359 (Blackmun, J., dissenting). The *Gilmore* majority rejected the argument that "the right to present a defense includes the right to have the jury consider it" because "such an expansive reading of our cases would make a nullity of the rule . . . that instructional errors of state law generally may not form the basis for federal habeas relief." *Id.* at 344; *White v. Woodall*, 572 U.S. 415, 427 (2014).

Because the Supreme Court has never clearly established Keahey's alleged constitutional right to a self-defense instruction and because the state court did not unreasonably apply the most relevant Supreme Court holdings, he has no basis for habeas relief under § 2254(d)(1). In rejecting a similar claim, the Seventh Circuit put it this way: Declining to grant a request to "present a state-created, not federally required, defense is, as a first approximation anyway, at worst merely to make an error of state law; and if there is one fixed star in the confusing jurisprudence of constitutional criminal procedure, it is that a violation of state law does not violate the Constitution." *Eaglin v. Welborn*, 57 F.3d 496, 501 (7th Cir. 1995) (en banc); *see also Engle v. Isaac*, 456 U.S. 107, 120–21 (1982); *Nickerson v. Lee*, 971 F.2d

1125, 1137–38 (4th Cir. 1992). And as our court has put it in the evidentiary context: A "habeas petitioner's challenge to an 'evidentiary ruling' cannot satisfy § 2254(d)(1) unless the petitioner identifies 'a Supreme Court case establishing a due process right with regard to [the] *specific kind of evidence*' at issue." *Stewart v. Winn*, 967 F.3d 534, 538 (6th Cir. 2020) (quotation omitted).

By what measure anyway would federal courts gauge whether the state criminal defendant introduced enough evidence to have a federal right to a self-defense instruction? Would it be a "mere scintilla" of evidence supporting the defendant's theory? *See United States v. Morton*, 999 F.2d 435, 437 (9th Cir. 1993) (quotation omitted). Adequate evidence to raise a factual question for a reasonable jury? *See United States v. Branch*, 91 F.3d 699, 712 (5th Cir. 1996). Would "*some* evidence" do the trick? *See United States v. Scout*, 112 F.3d 955, 960 (8th Cir. 1997). No clearly established Supreme Court precedent gives an answer, confirming that the state courts did not unreasonably apply the relevant precedent.

Keahey offers several arguments in response, each unpersuasive. He starts with a precedent of our own, *Taylor v. Withrow*, which said that federal law guarantees a criminal defendant the right to a self-defense jury instruction "when the instruction has been requested" and "there exists evidence sufficient for a reasonable jury to find in his favor." 288 F.3d 846, 851–53 (6th Cir. 2002) (quotation omitted). But as it happens, the habeas claimant did not obtain relief in the case, making this language unnecessary to the decision. *See Freeman v. Wainwright*, 959 F.3d 226,

230 (6th Cir. 2020). Our court has treated *Taylor*'s language as non-binding dicta over, *Newton v. Million*, 349 F.3d 873, 879 (6th Cir. 2003), and over, *Phillips v. Million*, 374 F.3d 395, 397–98 (6th Cir. 2004). No doubt some unpublished opinions treated *Taylor*'s language as a holding, even as they denied habeas relief. *See Horton v. Warden, Trumbull Corr. Inst.*, 498 F. App'x 515, 522 n.2 (6th Cir. 2012); *Neal v. Booker*, 497 F. App'x 445, 451 (6th Cir. 2012). But the paper of unpublished decisions cannot escape the scissors of published decisions on point.

Making matters more difficult for Keahey, the Supreme Court has been more explicit in its interpretation of "clearly established Federal law" since *Taylor*. *Woods*, 575 U.S. at 317–18; *Lopez v. Smith*, 574 U.S. 1, 5–7 (2014). What *Taylor* said then could not satisfy AEDPA today. It noted that "[t]here is no Supreme Court decision unmistakably setting down th[e] precise rule" over what to do with a denied self-defense instruction under state law. *Taylor*, 288 F.3d at 852. A point of law on which "no Supreme Court decision" exists is not the kind of claim that the Court welcomes today. "[T]he Sixth Circuit's reliance on its own precedents [cannot] be defended . . . on the ground that they merely reflect what has been clearly established by our cases." *Parker v. Matthews*, 567 U.S. 37, 49 (2012) (quotation omitted).

Reliance on sister circuit decisions meets a similar fate. *See Lannert v. Jones*, 321 F.3d 747, 754 (8th Cir. 2003); *Bradley v. Duncan*, 315 F.3d 1091, 1098 (9th Cir. 2002); *Hagenno v. Yarborough*, 253 F. App'x 702, 704 (9th Cir. 2007). For "it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that

has not been squarely established by th[e] [Supreme] Court." *Knowles*, 556 U.S. at 122 (quotation omitted). Circuit precedent cannot "constitute clearly established Federal law, as determined by the Supreme Court." *Glebe v. Frost*, 574 U.S. 21, 24 (2014) (quotation omitted); *Smith v. Cook*, 956 F.3d 377, 391 (6th Cir. 2020).

Mathews v. United States, 485 U.S. 58 (1988), doesn't advance Keahey's cause either. While it says that "a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor," *id.* at 63, Keahey overlooks the reality that *Mathews* is not a constitutional case, *id.* at 66. The Court directly reviewed a district court's interpretation of federal common law, holding that a federal defendant "is entitled to an entrapment instruction whenever there is sufficient evidence from which a reasonable jury could find entrapment." *Id.* at 62. That is a world of difference from a habeas challenge to a state court decision. The Court has never applied *Mathews* to any defense besides an entrapment defense, *see Hardy v. Maloney*, 909 F.3d 494, 500 (1st Cir. 2018), and it has never invoked the decision to overrule a state court ruling on habeas.

Last and least, Keahey contends that we are bound under the law-of-the-case doctrine by the certificate of appealability, which said that *Taylor*'s conclusion is a holding. As a general principle, the law-of-the-case doctrine precludes reconsideration of issues that were expressly or impliedly decided at an earlier stage of the same case by the same or a superior court. *See Arizona v. California*, 460 U.S. 605, 618 (1983); *United States v. Moored*, 38 F.3d 1419, 1421–22 (6th Cir.

1994); Bryan A. Garner et al., The Law of Judicial Precedent 441 (2016). Application of the law-of-the-case doctrine has been historically limited to fully briefed "questions necessarily decided" in an earlier appeal, *Burley v. Gagacki*, 834 F.3d 606, 618 (6th Cir. 2016) (quotation omitted), and has traditionally been used to "enforce a district court's adherence to an appellate court's judgment," *Miller v. Maddox*, 866 F.3d 386, 390 (6th Cir. 2017). It does not apply to a certificate of appealability, which screens out claims "unworthy of judicial time and attention," ensures "that frivolous claims are not assigned to merits panels," and identifies only questions that warrant the resources deployed for full-briefing and argument. *Gonzalez v. Thaler*, 565 U.S. 134, 145 (2012). In keeping with this duty, the issuing judge does not make binding legal determinations. Rule 27(c) of the Federal Rules of Appellate Procedure doesn't allow for that. It provides that "[a] circuit judge . . . may not dismiss or otherwise determine an appeal or other proceeding," and "[t]he court may review the action of a single judge." Fed. R. App. P. 27(c). Any other approach would mean that "the single judge would be vested with a power that Rule 27(c) expressly prohibits." *McCoy v. Michigan*, 369 F. App'x 646, 653 n.3 (6th Cir. 2010).

We affirm.

APPENDIX C

No. 18-4106

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Oct 11, 2019
DEBORAH S. HUNT, Clerk

DEMETREUS A. KEAHEY, Petitioner-Appellant,

v.

DAVE MARQUIS, Warden, Respondent-Appellee.

O R D E R

Demetreus A. Keahey, an Ohio prisoner proceeding pro se, appeals the district court's judgment dismissing his 28 U.S.C. § 2254 petition for a writ of habeas corpus. This court construes his notice of appeal as an application for a certificate of appealability ("COA"). *See* Fed. R. App. P. 22(b)(2). Keahey has also filed a motion for leave to proceed in forma pauperis ("IFP") on appeal. *See* Fed. R. App. P. 24(a)(5).

In 2011, Prince Hampton, the former boyfriend of Keahey's daughter's mother, stabbed Keahey in the back and collapsed his lung. Weeks later, Keahey shot Prince outside the home of Keahey's daughter's grandmother. Prince did not testify at Keahey's trial. For his part, Keahey testified that he fired at Prince "[w]hen Prince hopped out of the car 'with a knife'" and

that he fired additional rounds when "he saw Prince holding a gun." *State v. Keahey*, No. E-13-009, 2014 WL 5421028, at *7, ¶ 35 (Ohio Ct. App. Oct. 24, 2014). But Keahey's requests for jury instructions on self-defense and necessity were denied. The jury convicted Keahey of felonious assault, attempted murder, having a weapon while under a disability, and improperly discharging a firearm at or into a habitation or school safety zone. The trial court sentenced Keahey to twenty-three years of imprisonment. The Ohio Court of Appeals affirmed, *id.* at *13, ¶ 67, and the Ohio Supreme Court denied leave to appeal. The United States Supreme Court denied certiorari.

Meanwhile, Keahey filed a motion to reopen his direct appeal. The Ohio Court of Appeals denied the motion to reopen, *State v. Keahey*, No. E-13-009 (Ohio Ct. App. Feb. 17, 2015), and the Ohio Supreme Court denied leave to appeal. Keahey also filed a petition for state post-conviction relief, which the trial court denied. The Ohio Court of Appeals affirmed, *State v. Keahey*, No. E-13-055, 2014 WL 5794329 (Ohio Ct. App. Nov. 7, 2014), and the Ohio Supreme Court denied leave to appeal.

Keahey then filed this § 2254 petition, raising seven grounds for relief. After the warden filed a response and Keahey filed a reply, the magistrate judge entered a report recommending that Keahey's petition be dismissed on the merits. The district court adopted the report and recommendation over Keahey's objections, dismissed his petition, and declined to issue a COA.

A COA may issue only if a petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003).

Grounds 1 & 2. Keahey argues that the trial court erred in denying his requests for jury instructions on self-defense (Ground 1) and necessity (Ground 2). In *Taylor v. Withrow*, 288 F.3d 846 (6th Cir. 2002), this court held that clearly established federal law guarantees a criminal defendant the right to a self-defense jury instruction "when the instruction has been requested and there is sufficient evidence to support such a charge." *Id.* at 851–53. In rejecting Keahey's first and second grounds, the district court stated that *Taylor* was incorrectly decided. Reasonable jurists could disagree. The district court noted, in the alternative, that habeas relief was precluded on Keahey's first ground because "fairminded jurists could disagree on the state court's adjudication" (citing *Harrington v. Richter*, 562 U.S. 86, 101 (2011)). The district court explained: "Given the state court record, jurists could reasonably conclude that Keahey had ample opportunity to retreat and was therefore not entitled to a self-defense jury instruction." *See Keahey*, 2014 WL 5421028, at *10, ¶ 46 (explaining that, to prevail on a theory of self-defense, a defendant, among other things, "must not have violated any duty to retreat or avoid the danger" (quoting *State v. Robbins*, 388 N.E.2d 755, 758

(Ohio 1979))). But the relevant inquiry under *Taylor* is whether "there exists evidence sufficient for a reasonable jury to find *in his favor*," 288 F.3d at 853 (emphasis altered), and it would exceed the scope of the COA inquiry for this court to apply that standard in the first instance here. Keahey's first ground therefore deserves encouragement to proceed further.

As to Keahey's second ground, however, the Ohio Court of Appeals explained that Keahey "testified at trial that he was forced to carry a gun because he was afraid of Prince." *Keahey*, 2014 WL 5421028, at *11, ¶ 56. The state appellate court concluded that Keahey was not eligible for a necessity instruction under Ohio law because "the defense of necessity requires pressure from physical forces, as opposed to the defense of duress, which involves a human threat." *Id.* A state court's interpretation of state law is binding on federal habeas review. *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (per curiam). Keahey's second ground therefore does not deserve encouragement to proceed further.

Keahey's remaining grounds allege that he received ineffective assistance of trial or appellate counsel. To prevail on an ineffective-assistance claim, a petitioner must establish that counsel's performance was deficient and that he suffered prejudice as a result. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish deficient performance, a petitioner "must show that 'counsel's representation fell below an objective standard of reasonableness.'" *Richter*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 688). "'Judicial scrutiny of counsel's performance must be highly deferential,' and should be guided by a measure of 'reasonableness under prevailing professional

norms.'" *Sylvester v. United States*, 868 F.3d 503, 510 (6th Cir. 2017) (quoting *Strickland*, 466 U.S. at 688–89). To demonstrate prejudice, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. In the appellate context, "[o]nly when ignored issues are clearly stronger than those presented, will the presumption of effective assistance of counsel be overcome." *Sylvester*, 868 F.3d at 510 (quoting *Monzo v. Edwards*, 281 F.3d 568, 579 (6th Cir. 2002)).

Ground 3. Keahey argues that appellate counsel was ineffective for failing to argue that the trial court should have merged at sentencing his convictions for attempted murder and improperly discharging a firearm. In rejecting this claim, the Ohio Court of Appeals reasoned as follows:

> It is undisputed that one of the bullets that appellant fired at the victim, Prince Hampton, also entered the nearby home of Brunell Hendrickson. Accordingly, because there were two separate victims in this case, there was a separate animus to support each offense, and they need not be merged at sentencing. Appellant's argument that his appellate counsel was ineffective for failing to raise this issue on appeal is, therefore, meritless.

State v. Keahey, No. E-13-009, slip op. at 8 (Ohio Ct. App. Feb. 17, 2015). Again, a state court's interpretation of state law is binding on federal habeas review. *See Richey*, 546 U.S. at 76. Under these

circumstances, reasonable jurists could not debate the district court's determination that Keahey "failed to establish that the state court decision involved an unreasonable application of clearly established federal law."

Ground 4. Keahey argues that appellate counsel was ineffective for failing to argue that he was denied the right to be present at critical stages of his trial. A criminal defendant is "guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). But this privilege is not guaranteed "when presence would be useless or the benefit but a shadow." *United States v. Gallagher*, 57 F. App'x 622, 626 (6th Cir. 2003) (per curiam) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 106–07 (1934), *overruled in part on other grounds by Malloy v. Hogan*, 378 U.S. 1, 17 (1964)).

Keahey points to his absence from: (i) a proceeding relating to the dismissal of a juror based on her communications with the bailiff; (ii) a jury view of the crime scene; (iii) proceedings relating to jury instructions and a motion to suppress evidence; and (iv) proceedings relating to notes to the trial court from the jury during deliberations. As to Keahey's first subclaim, the Ohio Court of Appeals found that the juror and the bailiff "[b]oth . . . stated that they were acquainted because their children played sports together. The bailiff also indicated that he made favorable comments to [the juror] about the integrity of the trial judge." *Keahey*, No. E-13-009, slip op. at 9. The state appellate court further found:

> After interviewing the bailiff and [the juror], the trial court and counsel for [Keahey] and the state interviewed each juror individually. Defense counsel waived [Keahey]'s presence during those interviews. None of the jurors stated that they heard the bailiff speak about the trial judge. Several jurors stated that they knew [the juror] and the bailiff were talking about their children. None of the jurors said that their view of [Keahey] or the case was tainted in any way by the conversation. After the interviews were concluded, [the juror] was dismissed as a juror and was replaced by an alternate.

Id., slip op. at 9–10. The state appellate court concluded that "the record does not show a violation of due process that rises to the level of preventing appellant from having a fair trial," and thus concluded that Keahey was not prejudiced by appellate counsel's omission. *Id.*, slip op. at 10.

As to Keahey's second subclaim, the Ohio Court of Appeals found "that [Keahey]'s attorney waived appellant's, and his own, presence at the jury view." *Id.* The state appellate court concluded, however, that "the record contains no evidence that [Keahey] was materially prejudiced by not attending the jury view and personally apprising the jury of 'points of interest.'" *Id.*, slip op. at 10–11. The state appellate court further concluded that, "[w]ithout such a showing, [Keahey] cannot establish that his due process rights were violated, and his second claim is without merit." *Id.*, slip op. at 11.

As to Keahey's third subclaim, the Ohio Court of Appeals found:

> [Keahey] was present during discussions regarding proposed jury instructions. [Keahey] was not present when defense counsel made a successful verbal motion to limit evidence at trial regarding [Keahey]'s involvement with drugs. However, a review of the record shows that counsel sought to exclude such evidence so that [Keahey] would not look like a 'big drug dealer' to the jury.

Id. The state appellate court concluded: "[Keahey] has not demonstrated prejudice in these instances, and his claim to the contrary is without merit." *Id.*

As to Keahey's fourth subclaim, the Ohio Court of Appeals found "that defense counsel waived [Keahey]'s presence each time the jury sent out a note." *Id.* The state appellate court concluded, however, that

> a thorough review of each of those instances reveals no prejudice to [Keahey], for the following reasons: (1) in its first note, the jury asked why they were not allowed to consider Count 1 of the indictment, which was not even before the jury for consideration, (2) in its second note, the jury asked for lunch, (3) in its third note, the jury asked to review police and hospital reports, to which the court replied that the jury should rely on trial testimony evidence that was already submitted in reaching its decision, and (4) the jury's final communication was to state that it had reached a verdict.

Id. Based on its determination that Keahey did not suffer prejudice, the state appellate court concluded that appellate counsel was not ineffective for omitting

this subclaim. *Id.*, slip op. at 12. Reviewing the state appellate court's findings and conclusions as to Keahey's first through fourth subclaims, the district court concluded that Keahey "failed to establish that the state court decision involved an unreasonable application of clearly established law." Reasonable jurists could not disagree.

Ground 5. Keahey argues that appellate counsel was ineffective for failing to argue that the evidence was insufficient to support the "knowingly" element of his conviction for improperly discharging a firearm. When reviewing a sufficiency challenge, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Under this deferential standard, a federal habeas court does "not reweigh the evidence, re-evaluate the credibility of witnesses, or substitute [its] judgment for that of the jury." *Brown v. Konteh*, 567 F.3d 191, 205 (6th Cir. 2009).

In rejecting this claim, the Ohio Court of Appeals determined that appellate counsel was not ineffective because Keahey's proposed sufficiency challenge lacked merit. *Keahey*, No. E-13-009, slip op. at 15. The state appellate court explained:

> Appellant argues that insufficient evidence was presented to support his conviction because he did not 'knowingly' shoot into Hendrickson's house. However, it is undisputed that appellant deliberately shot at Hampton in a residential neighborhood. Accordingly, after considering all

> of the circumstances presented in this case, we conclude that there was sufficient evidence presented to support the element of 'knowingly' . . . .

Id.; *see also State v. Wilson*, No. CA2018-03-022, 2019 WL 424198, at *7, ¶ 46 (Ohio Ct. App. Feb. 4, 2019) ("To act knowingly, a defendant merely has to be aware that the result *may* occur." (emphasis added)). Based on its determination that Keahey's sufficiency claim lacked merit, the state appellate court concluded that appellate counsel was not ineffective for omitting this claim. *Keahey*, No. E-13-009, slip op. at 15. Again, a state court's interpretation of state law is binding on federal habeas review. *See Richey*, 546 U.S. at 76. Under these circumstances, reasonable jurists could not debate the district court's conclusion that Keahey "failed to establish that the state court decision involved an unreasonable application of clearly established federal law."

Ground 6. Keahey argues that appellate counsel was ineffective for failing to argue that the trial court erred in denying his motion for mistrial based on the communications, described above in response to his fifth ground, between a juror and the bailiff. The Ohio Court of Appeals rejected this claim, reasoning in part that no prejudice resulted from the challenged communications because the trial "court determined that none of the jurors were influenced by the communication" and dismissed the juror directly involved. *Keahey*, No. E-13-009, slip op. at 13. "A trial judge's finding on the impartiality of a juror or jury is a factual finding, presumed correct under § 2254 review unless [the petitioner] proves otherwise by convincing evidence." *Young v. Trombley*, 435 F. App'x

499, 506 (6th Cir. 2011) (alteration in original) (quoting *Gall v. Parker*, 231 F.3d 265, 334 (6th Cir. 2000), *superseded on other grounds by statute as stated in Parker v. Matthews*, 567 U.S. 37, 48–49 (2012) (per curiam)); *see* 28 U.S.C. § 2254(e)(1). Because Keahey has failed to rebut the applicable presumption of correctness, he has failed to make a substantial showing of the denial of a constitutional right as to this claim.

Ground 7. Keahey argues that trial counsel was ineffective in several ways. First, Keahey faults counsel for failing to investigate and subpoena Prince and another witness, William Myers, as well as a ballistics expert. The Ohio Court of Appeals concluded that Keahey's "assertion that Prince would have admitted owning the knife" found at the crime scene "and carrying a gun on" the day of the shooting was "self-serving and speculative at best." *Keahey*, 2014 WL 5794329, at *8, ¶ 37. Although Keahey appended to his § 2254 petition an affidavit from Prince attesting that Prince "instigated the whole situation from the start and brought this upon [him]self," this affidavit was signed after briefing had concluded in Keahey's appeal from the denial of his petition for state post-conviction relief. "Under 28 U.S.C. § 2254(e)(2), a federal habeas court reviewing a habeas petition may not rely on evidence that was not presented to the state courts unless the petitioner can show that (1) he was diligent in seeking to develop his claims in the state courts, or (2) he satisfies the conditions set forth in § 2254(e)(2)." *Richey v. Bradshaw*, 498 F.3d 344, 351 (6th Cir. 2007). Under these circumstances, reasonable jurists could not debate the district court's conclusion that the state

appellate court's decision was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement" (quoting *Richter*, 562 U.S. at 103). *See Wogenstahl v. Mitchell*, 668 F.3d 307, 335 (6th Cir. 2012) (holding that conclusory allegations of ineffective assistance do not entitle a petitioner to habeas relief).

Regarding Myers, the Ohio Court of Appeals explained that "[d]efense counsel's decision not to call Myers to testify for the defense was addressed during the trial, when defense counsel told the court he would not be calling Myers to the stand because he is a 'loose cannon.'" *Keahey*, 2014 WL 5794329, at *8, ¶ 37. The district court concluded that the state appellate court's decision was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement" (quoting *Richter*, 562 U.S. at 103). Reasonable jurists could not disagree. Moreover, Keahey's allegation that Myers's testimony "would have also strongly supported the defense's position that there were two guns involved in this incident" is conclusory. *See Wogenstahl*, 668 F.3d at 335.

Keahey also faults counsel for failing to call a ballistics expert. As the Ohio Court of Appeals explained, however, Keahey's "claim that an expert would have been able to definitively state that bullets were recovered from two different guns is purely speculative." *Keahey*, 2014 WL 5794329, at *9, ¶ 43. This subclaim therefore does not deserve encouragement to proceed further. *See Wogenstahl*, 668 F.3d at 335.

Second, Keahey faults counsel for failing to request forensic testing of the knife found at the crime scene. In rejecting this subclaim, the Ohio Court of Appeals reasoned as follows:

> Testimony was presented at trial that Prince attacked appellant with a knife [during the prior altercation]. Although no witness saw Prince holding a knife on [the day of the shooting], testimony was presented that Prince owns and has been known to carry a knife. However, even if Prince's DNA were detected on [the] knife through testing, such evidence would do nothing to show that Prince actually threatened appellate with that particular weapon. Accordingly, appellant was not unduly prejudiced by defense counsel's decision not to insist that DNA tests be performed on the knife.

Keahey, 2014 WL 5794329, at *8, ¶ 40. The district court concluded that the state appellate court's decision was not "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement" (quoting *Richter*, 562 U.S. at 103). Reasonable jurists could not disagree.

Third, Keahey faults counsel for failing to secure his presence at the jury view of the crime scene. As discussed above in response to his fifth ground, however, reasonable jurists could not debate the district court's determination that the Ohio Court of Appeals reasonably concluded that Keahey was not prejudiced by his absence. This subclaim therefore does not deserve encouragement to proceed further.

Fourth, Keahey faults counsel for failing to move for recusal of the trial judge, who Keahey claims was head of the drug task force that prosecuted him in a prior case. According to Keahey, the trial court imposed consecutive sentences in the present case based in part on his prior case. In rejecting this subclaim, the Ohio Court of Appeals determined that, although "the trial judge state[d] that . . . he was a prosecutor for the Erie County Drug Task Force at the time of [Keahey]'s [prior] drug conviction . . . [a] review of the record does not show bias on the part of the trial judge, and [Keahey] does not offer any evidence from outside the record to demonstrate such bias." *Keahey*, 2014 WL 5794329, at *10, ¶¶ 50–51. The district court concluded that "Keahey has failed to demonstrate that the state court's ruling was contrary to clearly established federal law." Reasonable jurists could not disagree. *See Getsy v. Mitchell*, 495 F.3d 295, 311 (6th Cir. 2007) (noting that due process requires judicial recusal "[o]nly in the most extreme of cases").

Finally, in his objections to the magistrate judge's report and recommendation, Keahey argued that the magistrate judge erred in reviewing his habeas grounds under § 2254(d)(1) without addressing § 2254(d)(2). With the exception of his first and seventh grounds, however, Keahey failed to explain how the state appellate court's adjudications were based on an unreasonable determination of the facts. Regarding his seventh ground, Keahey points to Prince's affidavit in arguing that the state appellate court's decision was unreasonable. As discussed above, however, Prince's affidavit was not properly before the state appellate court.

Accordingly, the IFP motion is **GRANTED** and the COA application is **GRANTED** as to Keahey's claim that the trial court erred in denying his request for a self-defense jury instruction (Ground 1). The COA application is otherwise **DENIED**. The clerk is directed to issue a briefing schedule on Keahey's certified claim.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DEMETREUS A. KEAHEY, Petitioner, MARGARET BRADSHAW, WARDEN Respondent.	CASE NO.: 3:16CV1131 JUDGE JOHN ADAMS **JUDGMENT ENTRY**

For the reasons set forth in the Order filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Demetreus Keahey's Petition for a Writ of Habeas Corpus is hereby DISMISSED. Pursuant to 28 U.S.C § 1915(a)(3), the Court certifies that Petitioner may not take an appeal from the Court's decision in good faith, and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

October 4, 2018

/s/ John R. Adams
JUDGE JOHN R. ADAMS
UNITED STATES
DISTRICT JUDGE

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DEMETREUS A. KEAHEY, Petitioner,	CASE NO.: 3:16CV1131
	JUDGE JOHN ADAMS
MARGARET BRADSHAW, Warden	**ORDER AND**
Defendant.	**DECISION**

This matter appears before the Court on objections to the Report and Recommendation of the Magistrate Judge filed by Petitioner Demetreus Keahey. Upon due consideration, the Court overrules the objections and adopts the Report and recommended findings and conclusions of the Magistrate Judge and incorporates them herein. Therefore, it is ordered that the petition is hereby DISMISSED.

> Where objections are made to a magistrate judge's R&R this Court must:
>
> must determine de novo any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions.

Fed. R. Civ. P. 72(b)(3).

Initially, the Court notes that Keahey has repeatedly expressed that the R&R erred when it failed to analyze any of his claims under 28 U.S.C. § 2254(d)(2) which provides for relief in habeas if the state court's adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Keahey, however, has wholly failed to demonstrate any unreasonable determination of the facts related to the evidence presented. Moreover, it appears that Keahey seeks to rely on an affidavit from the victim that was not presented in any state proceeding. Even if this Court were inclined to review and consider the affidavit, it does not alter the reasonableness of the state court fact finding. Rather, the affidavit contends that the victim was the aggressor in the altercation that led to Keahey's conviction. As Keahey's claim of self-defense was rejected because he had the opportunity to retreat, the affidavit does nothing to change the legal landscape.

Keahey next contends that the R&R erred when it found that Keahey had not cited to any clearly established federal law in support of his claim that his rights were violated when the jury was not instructed on self-defense. Consistent with the conclusion reached by the R&R. the Sixth Circuit has "found no Supreme Court case which holds that a criminal defendant's right to present a defense includes the right to a specific jury instruction." *Newton v. Million*, 349 F.3d 873, 879 (6th Cir. 2003) (abrogated on other grounds as recognized in *English v. Berghuis*, 529 Fed. Appx. 734 (6th Cir. 2013)). As such, the R&R properly concluded that Keahey had failed to identify any

clearly established federal law that was violated when the state court denied his self-defense instruction.[1]

With respect to Ground Seven in his petition, Keahey raises the same argument with respect to the new affidavit from the victim that the Court addressed above. Keahey, however, packages the argument in a claim for ineffective assistance of counsel. Keahey asserts that failing to investigate this witness, Prince Hampton, was clearly prejudicial based upon the affidavit. Keahey also contends that failure to test the knife found on the scene for Hampton's DNA was also evidence of ineffective counsel.

When analyzing a *Strickland* claim under § 2254(d), our review is "'doubly deferential.'" *Cullen v. Pinholster*, 131 S.Ct. 1388, 1403 (quoting *Knowles v. Mirzayance*, 129 S.Ct. 1411, 1420 (2009)). The key question "'is whether there is *any reasonable argument* that counsel satisfied Strickland's deferential standard.'" *Foust v. Houk*, 655 F.3d 524, 533–34 (6th Cir. 2011) (emphasis added) (quoting *Harrington v. Richter*, 131 S.Ct. 770, 788 (2011)). Here, as the R&R noted, the state court found that testing for Hampton's DNA would not have assisted Keahey in any manner. Proving that the knife

---

[1] The Court notes that is also clear from the record that fairminded jurists could disagree on the state court's adjudication, thus habeas relief is precluded. *See Harrington v. Richter*, 131 S.Ct. 770, 786 (2011) ("A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." (internal quotation marks omitted)). Given the state court record, jurists could reasonably conclude that Keahey had ample opportunity to retreat and was therefore not entitled to a self-defense jury instruction.

belonged to Hampton would not have changed the conclusion with respect to Keahey ability to retreat, nor would it have demonstrated that Hampton had threatened Keahey. Finally, defense counsel's decision to not call the victim of Keahey's crime cannot be said to be ineffective. By Keahey's own admission, the victim had previously stabbed Keahey and the parties had an ongoing dispute based upon them both having children with the same woman. The fact that years later Keahey has been able to obtain an affidavit in which Hampton claims to have been the aggressor in their altercation does not alter this conclusion. As noted above, Hampton's status as an aggressor (or lack thereof) was not at issue when the trial court declined to give a self-defense instruction. As such, Keahey's objections to the R&R as it relates to this ground for relief lack merit.

Keahey next contends that the R&R erred when it found no error in his absence from portions of his trial. Keahey asserts that the trial judge interview a bailiff and a juror about a conversation they had over the lunch hour. Once that interview was complete, the trial court allowed the state and Keahey's counsel to question each juror individually. Keahey's counsel waived his presence during these interviews. The state court concluded that Keahey had suffered no prejudice from his absence. In this matter, the R&R correctly concluded that Keahey had failed to establish that the brief interview by the trial judge was a critical stage of the proceeding such that his claim could succeed without a showing of prejudice. In fact, Keahey made no reference to any clearly established federal law that would support a claim that such a stage of the proceedings was in fact critical. As such,

Keahey's objection on this ground for relief also lacks merit.

With respect to arguments related to a jury view, additional arguments regarding jury instructions, and notes from the jury, Keahey contends that the R&R's review was done in a summary fashion. Keahey, however, has not asserted any legal error in the R&R, and this Court is not required to fashion an argument on his behalf.

Keahey's next argument borders on frivolous when he contends that the R&R erred when it found there was sufficient evidence to convict him of discharging a firearm into an occupied structure. Keahey essentially contends that the state did not prove that he "knowingly" committed this offense. However, there is no dispute that Keahey intentionally fired his firearm repeatedly in a residential neighborhood. Under Ohio law, to prove that Keahey acted knowingly, the state was only required to prove that his conduct would "probably cause a certain result." Ohio Rev. Code. § 2901.22(B). There can be no doubt that repeatedly firing a firearm in the manner that Keahey did would probably result in stray bullets entering a residence. As such, he can maintain no claim that the evidence was insufficient to support his conviction.

Finally, Keahey contends the R&R erred in resolving his arguments regarding the failure of his trial judge to recuse. As the R&R correctly notes, due process guarantees Keahey a judge with no actual bias against him. *Wiiliams v. Pennsylvania*, 136 S.Ct. 1899, 1905 (2016). The state court proceedings establish that the Keahey did not demonstrate any

bias. Instead, Keahey then and now contends that the trial judge's tangential involvement in Keahey's conviction that occurred more than a decade prior to the current conviction required recusal. As the R&R properly concluded that Keahey's claim is dependent on a showing of actual bias, Keahey's objections lack merit.

I. Conclusion

Having found no merit to the objections raised by Keahey, the Court ADOPTS the Magistrate Judge's Report in its entirety. The Petition is DISMISSED.

The Court certifies, pursuant to 28 U.S.C. §1915(A)(3), that an appeal from this decision could not be taken in good faith, and that there is no basis upon which to issue a certificate of appealability.

This Order is entered pursuant to Federal Rule of Civil Procedure 58.

So ordered.

October 4, 2018

/s/ John R. Adams
JUDGE JOHN R. ADAMS
UNITED STATES
DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DEMETREUS A. KEAHEY,	)	Case No. 3:16CV1131
Petitioner,	)	JUDGE JOHN R. ADAMS
	)	MAGISTRATE JUDGE
v.	)	DAVID A. RUIZ
MARGARET BRADSHAW, Warden,	)	
	)	REPORT AND
Respondent.	)	RECOMMENDATION

This 28 U.S.C. § 2254 petition is before the magistrate judge pursuant to Local Rule 72.2(b)(2). Before the court is the petition of Demetreus A. Keahey ("Keahey") for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. The petitioner is in the custody of the Ohio Department of Rehabilitation and Correction pursuant to journal entry of sentence in the case of *State of Ohio v. Keahey*, Case No. 2011-CR-275 (Erie County October 4, 2012). (R. 7, RX 9, PageID #: 245–249.). For the following reasons, the magistrate judge recommends that the petition be denied.

The petitioner has filed a petition *pro se* for a writ of habeas corpus, arising out of his 2012 convictions for felonious assault, attempted murder, and other

crimes, in the Erie County (Ohio) Court of Common Pleas. In his petition, Keahey raises seven grounds for relief. As set forth in the habeas petition form, his grounds are:

> 1. The State Trial Court erred to the prejudice of the petitioner when denying the defense's request for a self-defense jury instruction violating 5th, 6th, and 14th Amendments.
>
> 2. The trial court erred to the prejudice of the petitioner and abused its discretion when the court declined to provide a jury instruction on necessity when sufficient evidence [that warranted this instruction].
>
> 3. The petitioner was denied effective assistance of appellate counsel when counsel failed to raise significant issues on direct appeal violating the 5th, 6th, and 14th Amendments.
>
> 4. The petitioner was denied effective assistance of trial counsel violating the 5th, 6th, and 14th Amendments.

(R. 1, § 12, PageID #: 5, 7–8, 10.) The petition form itself contains only the above four claims.

However, Keahey also filed an additional, supplemental petition in narrative form which reasserted the aforementioned claims and included additional claims, thereby asserting the following seven grounds for relief:

> 1. The state trial court erred to the prejudice of petitioner when denying the defense's request for a self-defense jury instruction which was an affirmative defense to the crime charged denying petitioner's fundamental constitutional rights to

present a defense, due process of law, and right to a fair trial guaranteed under the Fifth, Sixth, and the Fourteenth Amendments to the United States Constitution.

2. The state trial court erred to the prejudice of petitioner and abused its discretion when declining to provide a jury instruction on necessity an affirmative defense to the crime charged when sufficient evidence was submitted to support such instruction denying petitioner's fundamental constitutional rights to present a defense, due process of law, and right to a fair trial guaranteed under the Fifth, Sixth, and the Fourteenth Amendments to the United States Constitution.

3. The petitioner was denied effective assistance of appellate counsel when counsel failed to raise a claim on direct appeal that petitioner's offenses of improperly discharging a firearm at or into a habitation under R.C. 2923.161(A)(1), and attempted murder under R.C. 2923.02(A), should have been merged for sentencing as allied offenses under R.C. 2941.25(A), violating petitioner's constitutional rights under the Double Jeopardy Clause and right to effective assistance of counsel guaranteed by the Fifth, Sixth, and the Fourteenth Amendments to the United States Constitution.

4. The petitioner was denied effective assistance of appellate counsel when counsel failed to raise a claim on direct appeal that petitioner was denied his constitutional right to be present at critical stages of the trial

proceedings violating petitioner's rights under the Fifth, Sixth, and the Fourteenth Amendments to the United States Constitution.

5. The petitioner was denied effective assistance of appellate counsel when counsel failed to raise a sufficiency of evidence claim on direct appeal in regards to Count Eight for improperly discharging a firearm at or into a habitation under R.C. 2923.161(A), violating petitioner's [rights under the] Fifth, Sixth, and the Fourteenth Amendments to the United States Constitution.

6. The petitioner was denied effective assistance of appellate counsel when counsel failed to raise a claim on direct appeal regarding the trial court's denial of trial counsel's motion for mistrial when the bailiff came into contact with a juror in violation of R.C. 2945.33, violating petitioner's [rights under the] Fifth, Sixth, and the Fourteenth Amendments to the United States Constitution.

7. The petitioner was denied effective assistance of trial counsel when counsel failed to investigate and subpoena certain defense witnesses to testify at trial, failed to request forensic testing on the knife found at the scene for DNA or fingerprints, failed to secure the petitioner's presence at the jury view, and failed to move for recusal of the judge based on an actual conflict of interest violating the petitioner's [rights under the] Fifth, Sixth, and the Fourteenth Amendments to the United States Constitution.

(R. 1-1, PageID #: 24, 34, 41, 46, 54, 59, 62.)

The respondent has filed a Return of Writ, addressing the petitioner's seven claims as they are presented in the supplemental petition (R. 7, PageID #: 137–138), and Keahey has filed an Traverse (R. 10.)

I. FACTUAL AND PROCEDURAL BACKGROUND

The Ohio Court of Appeals provided the following background:

> Appellant and Kindra McGill are the parents of a daughter, K.K. In addition, Kindra is the former girlfriend of Prince Hampton, who is the father of her two boys, P.H. and D.H. Because of several factors, including Kindra's affiliation with both appellant and Prince, an incident arose at the home of Kindra and appellant on May 7, 2011, during which Prince pulled a knife and stabbed appellant in the back. Appellant was hospitalized for several days with a collapsed lung. Neither Kindra nor appellant named Prince as the person who stabbed appellant. Consequently, no one was charged with a crime in that instance. However, on June 15, 2011, text messages were exchanged between appellant and Kindra, in which the two discussed Kindra's reluctance to name Prince as appellant's attacker, and also appellant's desire to retaliate against Prince for the stabbing.
>
> At some point after May 7, 2011, Kindra and her children began living with Kindra's mother, Joyce McGill, at [redacted] Aspen Run Road in Sandusky, Ohio. On the morning of June 20, 2011, appellant drove to the Aspen Run Road

house with the stated intent of picking up K.K. and Kindra so he could take them to the doctor's office for K.K.'s scheduled appointment. Appellant arrived early, parked his vehicle on the street in front of the house, and walked inside. After a brief conversation with Joyce appellant went back outside, where he saw a vehicle pulling into the driveway. In the vehicle were Prince, Kindra's two boys, and A.C., the young son of Prince's then-girlfriend.

When Prince exited the vehicle, appellant drew a gun and fired several shots at Prince. One bullet hit Prince in the arm, and another went through his pants pocket, hitting him in the leg. That same bullet shredded a roll of paper money that was in Prince's pocket, causing confetti-like pieces of the bills to scatter on the ground.

After appellant began firing at him, Prince ran down the street. At that point, appellant got into his car and drove away. While witnesses' accounts varied, it is undisputed that someone shouted "you are a dead nigga" as appellant's vehicle drove down the street. Prince collapsed several blocks from McGill's house. Neighbors called 911, medical assistance was dispatched to the scene, and Prince was taken to the hospital. Police arrived on the scene in response to neighbors' calls, where they discovered that one bullet had gone through the door of Prince's vehicle, and another one had gone through the outside wall and into the living room of McGill's neighbor, Brunell Hendrickson. Still another bullet was found under Prince's vehicle, and several more were later found on the ground in

the surrounding area. In addition, a pair of flip-flop sandals and a closed pocket knife were found on the driveway near Prince's vehicle.

After the altercation appellant fled to Erie, Pennsylvania. On July 25, 2011, while appellant was still in Pennsylvania, the Erie County Grand Jury indicted him on one count of drug possession (in an unrelated case), one count of felonious assault on Prince Hampton, in violation of R.C. 2903.11(A)(2), one count of attempted murder of Prince Hampton, in violation of R.C. 2903.02(A), three separate counts of felonious assault on P.H, D.H. and A.C., one count of having a weapon while under disability, in violation of R.C. 2923.13(A)(3), and one count of improperly discharging a firearm at or into a habitation or school safety zone, in violation of R.C. 2923.161(A).

A jury trial was held on September 4, 5, 6, 7 and 10, 2012. Trial testimony was presented on behalf of the state by Joyce and Kindra McGill, Brunell Hendrickson, Jeremy Pruitt, Robert and Evelyn Brown, Eric Jensen, and various members of the Sandusky Police Department.

* * * * * *

On September 10, 2012, the jury returned a verdict of guilty to one count of felonious assault and one count of attempted murder of Prince, one count of having a weapon while under disability, and one count of improperly discharging a firearm at or into a habitation or school safety zone. Not-guilty verdicts were returned as to felonious assault on P.H., D.J. and A.C. The remaining

> charge of drug possession was later dismissed. On October 4, 2012, the trial court sentenced appellant to serve a total of 23 years in prison.

(R. 7, RX 20, PageID #: 377–380, 393; *State v. Keahey*, No. E-13-009, 2014 WL 5421028, at *1–*2, *9 (Ohio Ct. App. Oct. 24, 2014).)

A. Direct Appeal

Keahey filed a timely direct appeal of his conviction, raising five assignments of error:

> 1. The trial court erred to the prejudice of Appellant and abused its discretion in declining to provide jury instructions on self-defense, an affirmative defense to the crime charged.
>
> 2. The trial court erred to the prejudice of Appellant and abused its discretion in declining to provide jury instructions on necessity, an affirmative defense to the crime charged.
>
> 3. The trial court violated the defendant's Sixth Amendment right and abused its discretion in making findings of fact.
>
> 4. The trial court erred to defendant's prejudice in denying Defendant's Motion for a Mistrial.
>
> 5. The trial court's errors, when taken together, deprived appellant of the fair trial as guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section Sixteen of the Ohio Constitution Due Process Clauses.

(R. 7, RX 16, PageID #: 286.) The court of appeals affirmed the judgment of the trial court. (R. 7, RX 20, PageID #: 403; *Keahey*, 2014 WL 5421028, at *13.)

Keahey filed a timely appeal to the Supreme Court of Ohio. Keahey set forth the following propositions of law:

> 1. Whether the trial court erred to the prejudice of appellant and abused its discretion in declining to provide jury instructions on self-defense, an affirmative defense to the crime charged violating appellant's fundamental constitutional rights under the Due Process Clause and right to a fair trial guaranteed under the Fifth, Sixth, and the Fourteenth Amendments to the United States Constitution.
>
> 2. Whether the trial court erred to the prejudice of appellant and abused its discretion in declining to provide jury instructions on necessity, an affirmative defense to the crime charged violating appellant's fundamental constitutional rights under the due process clause and right to a fair trial guaranteed under the Fifth, Sixth, and the Fourteenth Amendments to the United States Constitution.
>
> 3. Whether the trial court violated the appellant's Sixth Amendment right and abused its discretion in making findings of fact.
>
> 4. Whether the trial court erred to appellant's prejudice in denying appellant's motion for a mistrial violating fundamental constitutional rights under the Due Process Clause and right to a fair trial guaranteed under the Fifth, Sixth, and the Fourteenth Amendments to the United States Constitution.
>
> 5. Whether the trial court's errors, when taken together, deprived appellant of a fair trial as

> guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section Sixteen of the Ohio Constitution Due Process Clause.

(R. 7, RX 22, PageID #: 407–408.) On April 8, 2015, the court declined to accept jurisdiction of the appeal. (R. 7, RX 24; *State v. Keahey*, 142 Ohio St.3d 1424, 28 N.E.3d 122 (2015).)

Keahey then filed a petition for a writ of certiorari in the United States Supreme Court. He presented three questions for review:

> 1. Whether the trial court erred to the prejudice of petitioner and abused its discretion when declining to provide a jury instruction on self-defense, an affirmative defense to the crime charged when sufficient evidence was submitted to support such an instruction violating petitioner's fundamental constitutional rights under the Due Process Clause and right to a fair trial guaranteed under the Fifth, Sixth, and the Fourteenth Amendments to the United States Constitution.
>
> 2. Whether the trial court erred to the prejudice of petitioner and abused its discretion when declining to provide a jury instruction on necessity, an affirmative defense to the crime charged when sufficient evidence was submitted to support such an instruction violating petitioner's fundamental constitutional rights under the Due Process Clause and right to a fair trial guaranteed under the Fifth, Sixth, and the Fourteenth Amendments to the United States Constitution.

> 3. Whether Ohio law that precludes a defendant from raising the defense of necessity when defendant is charged for an offense of having a weapon while under disability under R.C. 2923.13(A) is inconsistent and contrary to United States Court of Appeals and United States Supreme Court decisions.

(R. 7, RX 25, PageID #: 473.) The petition for writ of certiorari was denied on October 5, 2015. (R. 7, RX 26; *cert. denied*, 136 S.Ct. 71 (2015).)

B. Rule 26(B) Application

On January 2, 2015, Keahey filed an application to reopen his appeal pursuant to Ohio App. Rule 26(B). (R. 7, RX 27.) Keahey argued that appellate counsel was ineffective for failing to raise the following claims:

> (1.) Appellant counsel's failure to raise trial counsel's ineffectiveness when trial counsel failed to retain an expert witness for the defense when sufficient evidence existed for counsel to obtain an expert witness constituted ineffective assistance of counsel.
>
> (2.) Appellant counsel's failure to raise the trial court's error when failing to merge the attempted murder and improperly discharging a firearm at or into a habitation or school safety zone as allied offenses under R.C. 2941.25 constituted ineffective assistance of counsel.
>
> (3.) Appellant counsel's failure to raise a claim that appellant was denied his constitutional right to be present at trial constituted ineffective assistance of counsel.

> (4.) Appellant counsel's failure to raise a claim that the trial court erred when the court denied trial counsel's motion for mistrial when the Bailiff came into contact with a juror in violation of R.C. 2945.33, constituted ineffective assistance of counsel.
>
> (5.) Appellant counsel's failure to raise a claim that the state failed to present sufficient evidence under Count 8, constituted ineffective assistance of counsel.

(R. 7, RX 27, PageID #: 506, 508–509, 511–512.)

The court of appeals denied his application to reopen. (R. 7, RX 30.) The court reviewed the issues presented, and found that Keahey had failed to raise a colorable claim of ineffective assistance of appellate counsel. (R. 7, RX 30, PageID #: 570.)

Keahey then filed a timely appeal to the Supreme Court of Ohio. Keahey set forth the following proposition of law:

> The Court of Appeals erred when it denied appellant's application to reopen appeal when appellant was denied effective assistance of appellate counsel on direct appeal in violation of the Fifth, Sixth, and the Fourteenth Amendments to the U.S. Constitution.

(R. 7, RX 32.) The court declined to accept jurisdiction of the appeal. (R. 7, RX 34; *State v. Keahey*, 142 Ohio St.3d 1478, 31 N.E.3d 656 (2015).)

In addition, while the appeal to the state high court was pending, Keahey filed a motion for reconsideration with the state court of appeals, which was denied. (R. 7, RX 35, 37.)

C. Petition for Post-Conviction Relief

Keahey also filed a petition for post-conviction relief pursuant to Ohio Rev. Code § 2953.21, on July 5, 2013. (R. 7, RX 38.) His petition was based on four claims:

> 1. Petitioner's Sixth and Fourteenth Amendment rights to effective assistance of [trial] counsel was violated.
>
> 2. Conflict of interest [between defendant and trial judge].
>
> 3. Petitioner requested a jury view which counsel refused to allow petitioner to attend.
>
> 4. Petitioner's Sixth and Fourteenth Amendment rights to effective assistance of [trial] counsel was violated.

(R. 7, RX 38, PageID #: 669–671.) The trial court denied the petition. (R. 7, RX 42.)

Keahey appealed the denial, raising a single assignment of error:

> 1. The trial court committed error when they abused [their] discretion by denying defendant-appellant's post-conviction petition, in violation of defendant-appellant's due process rights under the 6th and 14th Amendments to the United States Const. and Art. I Sec. 10 of the Ohio Const.

(R. 7, RX 44.) The court of appeals found his assignment of error not well-taken, and affirmed the judgment of the trial court. (R. 7, RX 46, PageID #: 890–891; *State v. Keahey*, No. E-13-055, 2014 WL 5794329, at *10 (Ohio Ct. App. Nov. 7, 2014).)

Keahey filed an appeal with the Supreme Court of Ohio, raising a single proposition of law:

> 1. Whether the appellate court erred when affirming the trial court's denial of appellant's petition for postconviction relief without remanding this case back to the trial court for an evidentiary hearing.

(R. 7, RX 48.) The court declined to accept jurisdiction of the appeal. (R. 7, RX 57; *State v. Keahey*, 142 Ohio St.3d 1476, 31 N.E.3d 654 (2015).)

Keahey filed a timely petition for a writ of habeas corpus in this court.

II. HABEAS CORPUS REVIEW

This case is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254, which provides the standard of review that federal courts must apply when considering applications for a writ of habeas corpus. Under the AEDPA, federal courts have limited power to issue a writ of habeas corpus with respect to any claim that was adjudicated on the merits by a state court. The Supreme Court, in *Williams v. Taylor*, provided the following guidance:

> Under § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied—the state-court adjudication resulted in a decision that (1) "was contrary to ... clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "involved an unreasonable application of ... clearly established Federal law, as determined by the Supreme Court of the United States." Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite

> to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.

Williams v. Taylor, 529 U.S. 362, 412–413 (2002). *See also Lorraine v. Coyle*, 291 F.3d 416, 421–422 (6th Cir. 2002), *cert. denied*, 538 U.S. 947 (2003).

A state court decision is "contrary to" clearly established Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases." *Williams*, 529 U.S. at 405. *See also Price v. Vincent*, 538 U.S. 634, 640 (2003). A state court decision is not unreasonable simply because the federal court considers the state decision to be erroneous or incorrect. Rather, the federal court must determine that the state court decision is an objectively unreasonable application of federal law. *Williams*, 529 U.S. at 410–12; *Lorraine*, 291 F.3d at 422.

Keahey has filed his petition *pro se*. The pleadings of a petition drafted by a *pro se* litigant are held to less stringent standards than formal pleadings drafted by lawyers, and will be liberally construed. *Urbina v. Thoms*, 270 F.3d 292, 295 (6th Cir. 2001) (citing *Cruz v. Beto*, 405 U.S. 319 (1972); *Haines v. Kerner*, 404 U.S. 519 (1972) (per curiam)). No other special treatment is afforded litigants who decide to proceed *pro se*. *McNeil v. United States*, 508 U.S. 106, 113 (1993)

(strict adherence to procedural requirements); *Jourdan v. Jabe*, 951 F.2d 108 (6th Cir. 1991); *Brock v. Hendershott*, 840 F.2d 339, 343 (6th Cir. 1988).

III. PROCEDURAL DEFAULT

The respondent contends that the seventh ground of Keahey's petition, which alleged ineffective assistance of trial counsel, has been procedurally defaulted. The respondent argues that, although the claim was presented to the trial court in his postconviction petition, the claim was not pursued on appeal. (R. 7, PageID #: 141–142.) Keahey responds that the state court of appeals addressed his claims. (R. 10, PageID #: 2334–2335.)

A habeas claim may be procedurally defaulted in two distinct ways. First, by failing to comply with state procedural rules. *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006) (citing *Maupin v. Smith*, 785 F.2d 135, 138 (6th Cir. 1986)). Second, by failing to raise a claim in state court, and to pursue the claim through the state's ordinary review process. *Williams*, 460 F.3d at 806 (citing *O'Sullivan v. Boerckel*, 526 U.S. 838, 848 (1999)). The respondent argues that Keahey's seventh ground was not properly exhausted in state court. (R. 7, PageID #: 141–142.)

A habeas petitioner cannot obtain relief unless he has completely exhausted his available state remedies. *Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Buell v. Mitchell*, 274 F.3d 337, 349 (6th Cir. 2001) (citing *Coleman v. Mitchell*, 244 F.3d 533, 538 (6th Cir. 2001), *cert. denied*, 534 U.S. 977 (2001)). To satisfy the exhaustion requirement, a habeas petitioner "must give the state courts one full

opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan*, 526 U.S. at 845. The exhaustion requirement is satisfied when the highest court in the state has been given a full and fair opportunity to rule on the petitioner's claims. *Rust v. Zent*, 17 F.3d 155, 160 (6th Cir. 1994) (citing *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990)). Where the petitioner failed to present a claim in state court, a habeas court may deem that claim procedurally defaulted because the Ohio state courts would no longer entertain the claim. *Adams v. Bradshaw*, 484 F.Supp.2d 753, 769 (N.D. Ohio 2007) (citing *Buell*, 274 F.3d at 349).

The seventh ground of the petition asserts an ineffective assistance of trial counsel claim that Keahey raised before the trial court in his petition for post-conviction relief. (R. 7, RX 38.) When his post-conviction petition was denied, Keahey appealed the denial to the state court of appeals. The respondent asserts that the constitutional issues cannot be considered as presented to the state court because Keahey's sole assignment of error was framed as error by the trial court, regarding that court's denial of his post-conviction petition. (R. 7, PageID #: 141–142.) Keahey responds that the state court of appeals addressed the merits of his claims of ineffective assistance of trial counsel. (R. 10, PageID #: 2334–2335, quoting R. 7, RX 46, PageID #: 882; *Keahey*, 2014 WL 5794329, at *6.)

The court finds that the seventh ground is not barred by a failure to exhaust the claims, insofar as the state court of appeals addressed his claims. The requirement of exhaustion is that a state prisoner

"must give the state courts an opportunity to act on his claims before he presents those claims to a federal court in a habeas petition." *O'Sullivan*, 526 U.S. at 842. Exhaustion is not a simple procedural requirement, but rather based in comity, so that where a prisoner challenges his confinement under a state court conviction as a violation of federal law, "the state courts should have the first opportunity to review this claim and provide any necessary relief." *Id.* at 844. Despite the inartful framing of his assignment of error, the state court of appeals was able to review the constitutional claims at issue. Therefore, the seventh ground is not barred by a failure to exhaust the claims at the court of appeals.

However, to satisfy exhaustion, a habeas petitioner must invoke "one complete round of the State's established appellate review process," *O'Sullivan*, 526 U.S. at 845, which means that the highest court in the state must also be given a full and fair opportunity to rule on the claims, *Rust*, 17 F.3d at 160. Keahey's appeal to the state supreme court raised a single proposition of law:

> 1. Whether the appellate court erred when affirming the trial court's denial of appellant's petition for postconviction relief without remanding this case back to the trial court for an evidentiary hearing.

(R. 7, RX 48.) Although presented as a single proposition of law, Keahy's brief in support argued the merits of the underlying claims, including the ineffective assistance of trial counsel claim, which he asserted that the lower courts had ruled on erroneously. Therefore, the court considers the

seventh ground to have been fairly presented to the state courts, and not defaulted. The court will address the merits of that ground below.

IV. JURY INSTRUCTIONS

The first two grounds for relief concern jury instructions. Petitioner contends:

> 1. The state trial court erred to the prejudice of petitioner when denying the defense's request for a self-defense jury instruction which was an affirmative defense to the crime charged denying petitioner's fundamental constitutional rights to present a defense, due process of law, and right to a fair trial guaranteed under the Fifth, Sixth, and the Fourteenth Amendments to the United States Constitution.
>
> 2. The state trial court erred to the prejudice of petitioner and abused its discretion when declining to provide a jury instruction on necessity as an affirmative defense to the crime charged when sufficient evidence was submitted to support such instruction denying petitioner's fundamental constitutional rights to present a defense, due process of law, and right to a fair trial guaranteed under the Fifth, Sixth, and the Fourteenth Amendments to the United States Constitution.

(R. 1-1, PageID #: 24, 34.)

On direct appeal, however, Keahey presented these claims as follows:

> 1. The trial court erred to the prejudice of Appellant and abused its discretion in declining

> to provide jury instructions on self-defense, an affirmative defense to the crime charged.
>
> 2. The trial court erred to the prejudice of Appellant and abused its discretion in declining to provide jury instructions on necessity, an affirmative defense to the crime charged.

(R. 7, RX 16, PageID #: 286.) Keahey did not present his claims as federal claims, arguing instead that the state court abused its discretion, and misapplied state law, in its determination that he was not entitled to jury instructions on self-defense or necessity. (R. 7, RX 16, PageID #: 293–300.) The respondent, however, does not argue that Keahey's federal claims should be barred on the basis that his federal claims were not fairly presented to the state courts. *See generally* R. 7, PageID #: 145–152.

The state court of appeals likewise addressed these two claims as a matter of state law. The appellate court stated:

> In his first assignment of error, appellant asserts that the trial court erred by refusing to instruct the jury as to the affirmative defense of self-defense. In support, appellant argues that the trial court improperly found that his testimony was not credible and refused to give a self-defense instruction on that basis.
>
> In *State v. Lillo*, 6th Dist. Huron No. H-10-001, 2010-Ohio-6221, ¶ 15, this court stated:
>
> > Generally, requested jury instructions should be given if they are a correct statement of the law as applied to the facts in a given case. *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 575 N.E.2d 828

> (1991). A court's instructions to a jury "should be addressed to the actual issues in the case as posited by the evidence and the pleadings." *State v. Guster*, 66 Ohio St.2d 266, 271, 421 N.E.2d 157 (1981). Prejudicial error is found where, in a criminal case, a court refuses to give an instruction that is pertinent to the case, states the law correctly, and is not covered by the general charge. *State v. Sneed*, 63 Ohio St.3d 3, 9, 584 N.E.2d 1160 (1992).

Appellant correctly states that the inquiry into whether sufficient evidence has been presented to raise an affirmative defense is a matter of law that is reviewed de novo. *State v. Belanger*, 190 Ohio App.3d 377, 2010-Ohio-5407, 941 N.E.2d 1265 ¶ 4 (3d Dist.). However, the trial court's ultimate decision to refuse the requested jury instructions will not be overturned on appeal absent a finding of abuse of discretion. *Lillo*, *supra*, citing *State v. Wolons*, 44 Ohio St.3d 64, 68, 541 N.E.2d 443 (1989).

In cases where the requested instruction involves an affirmative defense, the accused must show that he or she "has introduced sufficient evidence which, if believed, would raise a question in the minds of reasonable people concerning the existence of that defense." *State v. Carter*, 4th Dist. Ross No. 1 0CA3169, 2010-Ohio-6316, ¶ 58, citing *State v. Melchior*, 56 Ohio St.2d 15, 381 N.E.2d 195, paragraph one of the syllabus. It is the duty of the defendant to "first present sufficient evidence at trial to warrant such an instruction." *Belanger*, at ¶ 3. Such evidence is

to be viewed in a light most favorable to the defendant. *Id.* Nevertheless, the trial court may "omit any requested instructions that are not correct statements of the law and applicable to the case before it." *Id.*, citing *State v. Scott*, 26 Ohio St.3d 92, 497 N.E.2d 55 (1986).

In Ohio, "self-defense is an affirmative defense that legally excuses admitted criminal conduct." *State v. Edwards*, 1st Dist. Hamilton No. C1 10773, 2013-Ohio-239, ¶ 5. To demonstrate the affirmative defense of self-defense through deadly force, an accused must show by a preponderance of evidence that:

> (1) [they were] not at fault in creating the situation giving rise to the affray, (2) [they] had a bona fide belief that they were in imminent danger of death or great bodily harm and their only means of escape from such danger was the use of such force, and (3) [they] must not have violated any duty to retreat or avoid the danger. *State v. Robbins*, 58 Ohio St.2d 74, 338 N.E.2d 755 (1979), paragraph two of the syllabus.

As to the first element, appellant testified at trial that he decided at the last minute to drive to Joyce's house instead of meeting Kindra and K.K. at the doctor's office, and he did not know that Prince would be dropping off his sons while appellant was there. Appellant also testified that he pulled out a gun and shot at Prince because Prince had a knife in his hand and, based on the events that occurred six weeks earlier, appellant was afraid that Prince would stab him.

Appellant stated that he did not immediately retreat to his vehicle because Prince pulled out a gun and he was afraid he would be shot in the back if he turned to leave.

Before denying appellant's request for a self-defense instruction, the trial court noted that appellant unilaterally decided to pick up Kindra and K.K., and that text messages exchanged between appellant and Kindra established a possible motive for appellant to attack Prince. The trial court also stated that appellant had a means of escape, which he failed to utilize. Other trial testimony established that no witnesses saw Prince with a gun, no gun was ever recovered, and the only knife that was found at the scene was closed and lying on the ground.

It is undisputed that appellant and Kindra had agreed to meet at the doctor's office. Appellant's stated motive for changing his mind and going to pick up Kindra and K.K. opened the door to the trial court's consideration of other motives, including the content of the text messages exchanged by appellant and Kindra. In addition, appellant testified that he carried a gun that morning despite the fact that, as a convicted felon, he is prohibited from carrying a firearm.

As to the third element, appellant's duty to retreat, undisputed testimony was presented that appellant arrived at Joyce's home in a vehicle, which he parked nearby on the street. Although appellant testified that he was afraid to turn his back on Prince and get into the vehicle, no testimony was presented as to why appellant

could not have retreated in any other direction, or by any other method.

After considering the entire record in a light most favorable to appellant, we find that appellant failed to produce sufficient evidence to meet his burden as to the first and third elements of the affirmative defense of self-defense. A consideration of the second element, which required appellant to show that he reasonably believed he was in imminent danger of death or serious bodily harm, is unnecessary. *State v. Robinson*, 132 Ohio App.3d 830, 726 N.E.2d 581 (1st Dist., 1999).

Based on the foregoing, we conclude that the trial court did not err or otherwise abuse its discretion by refusing to provide the jury with a self-defense instruction. Appellant's first assignment of error is not well-taken.

In his second assignment of error, appellant asserts that the trial court erred by not instructing the jury as to the affirmative defense of necessity, as it relates to his conviction for carrying a weapon while under disability. Citing *State v. Crosby*, 6th Dist. Lucas No. L-03-1158, 2004-Ohio-4674, appellant argues that that he presented sufficient evidence to support such a defense, which "excuses a criminal act when the harm which results from compliance with the law is greater than that which results from a violation of the law."

As set forth above, "a trial court's determination as to whether the evidence produced at trial warrants a particular instruction is reviewed for

an abuse of discretion." *Burns v. Adams*, 4th Dist. Scioto No. 12CA3508, 2014-Ohio-1917, ¶ 52. "A party must demonstrate not merely that the trial court's omission or inclusion of a jury instruction was an error of law or judgment but that the court's attitude was unreasonable, arbitrary or unconscionable." *Freedom Steel v. Rorabaugh*, 11th Dist. Lake No.2007-L-087, 2008-Ohio-1330, ¶ 10.

The defense of necessity is not codified in Ohio law, however, Ohio courts have held that the common-law elements of the defense are:

> (1) the harm must be committed under the pressure of physical or natural force, rather than human force; (2) the harm sought to be avoided is greater than (or at least equal to) that sought to be prevented by the law defining the offense charged; (3) the actor reasonably believes at the moment that his act is necessary and is designed to avoid the greater harm; (4) the actor must be without fault in bringing about the situation; and (5) the harm threatened must be imminent, leaving no alternative by which to avoid the greater harm. *Dayton v. Thornsbury*, 2d Dist. Montgomery Nos. 16744, 16772, 1998 WL 598124 (Sept. 11, 1998).

Traditionally, the defense of necessity requires pressure from physical forces, as opposed to the defense of duress, which involves a human threat. *Id.* In this case, appellant testified at trial that he was forced to carry a gun because he was afraid of Prince, in spite of the fact that he was legally

> forbidden to do so. Accordingly, appellant has not established that the harm in this case resulted from anything other than human action, as opposed to a physical force. In addition, as stated in our determination of appellant's first assignment of error, appellant failed to establish that he was not at fault in creating the situation that led to his decision to fire his gun, wounding Prince and endangering the safety of children and nearby adults.
>
> On consideration of the foregoing, we find that appellant has failed to establish the elements necessary to support a jury instruction on the affirmative defense of necessity. Accordingly, we cannot say that the trial court abused its discretion by refusing to give such an instruction. Appellant's second assignment of error is not well-taken.

(R. 7, RX 20, PageID #: 394–399 *Keahey*, 2014 WL 5421028, at *9–*11.)

The state court of appeals' determination was not based on any decision of the U.S. Supreme Court. Thus, the question for this habeas court is whether the state court's decision was contrary to clearly established federal law as set forth by the Supreme Court. A state court decision is "contrary to" clearly established Supreme Court precedent "if the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases." *Williams*, 529 U.S. at 405. A state court decision is also "contrary to" clearly established Supreme Court precedent "if the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme

Court] and nevertheless arrives at a result different from [Supreme Court] precedent." *Id.* at 406. *See also Price*, 538 U.S. at 640.

The respondent argues that Keahey failed to demonstrate that the state court's rulings were contrary to U.S. Supreme Court precedent. (R. 7, PageID #: 151–152.) This court agrees, although the basis for this court's determination differs from that put forward by the respondent.

Keahey contends that "the Sixth Circuit has held that the right to assert a self-defense is a fundamental right." (R. 10, PageID #: 2337, citing *Taylor v. Withrow*, 288 F.3d 846 (6th Cir. 2002).) He concedes that "whether the facts of the case warrant a jury instruction on self-defense remains a question for the state courts." (R. 10, PageID #: 2337.) He then argues that the state court's decision cannot survive habeas review, because he presented sufficient evidence to require an instruction on self-defense. In support, Keahey cites *Taylor v. Withrow*, a Sixth Circuit case discussed below, but he does not point to a Supreme Court decision which supports his argument on jury instructions. *Id.*

The Supreme Court, in *California v. Trombetta*, affirmed the general principle that the Due Process Clause of the Fourteenth Amendment requires that criminal defendants are to be afforded "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984). *Trombetta* was concerned with the preservation of evidence, not with self-defense or jury instructions. In *Taylor v. Withrow*, cited by Keahey, the Sixth Circuit found: "A necessary corollary of this holding [*Trombetta*] is the rule that a

defendant in a criminal trial has the right, under appropriate circumstances to have the jury instructed on his or her defense, for the right to present a defense would be meaningless were a trial court completely free to ignore that defense when giving instructions." *Taylor*, 288 F.3d at 852. The Sixth Circuit recognized that there was no Supreme Court decision "unmistakably setting down this precise rule," but found that the lack of an explicit statement was not determinative. *Id.* The court asserted that "in certain circumstances refusing to instruct a jury properly on self-defense can so taint the resulting verdict as to be an error of constitutional dimension." *Id.* (citing cases). Following this line of reasoning, the Sixth Circuit also ruled that "failure to instruct a jury on self-defense when the instruction has been requested and there is sufficient evidence to support such a charge violates a criminal defendant's rights under the due process clause." *Newton v. Million*, 349 F.3d 873, 878 (6th Cir. 2003) (quoting *Taylor*, 288 F.3d at 851).

Taylor and *Newton* were decided in 2002 and 2003. Since that time, the Supreme Court has repeatedly stated that the AEDPA prohibits federal habeas courts from relying on precedent from the federal courts of appeals to conclude that a particular constitutional principle is "clearly established." *See, e.g.*, *Lopez v. Smith*, 135 S.Ct. 1, 2 (2014) (per curiam). The Supreme Court has emphasized that "circuit precedent does not constitute 'clearly established Federal law, as determined by the Supreme Court.'" *Glebe v. Frost*, 135 S. Ct. 429, 431 (2014) (per curiam); *Parker v. Matthews*, 132 S. Ct. 2148, 2155 (2012) (per curiam) (citing *Renico v. Lett*, 559 U.S. 766, 778–779 (2010)). The Court has stated that the petitioner must

demonstrate Supreme Court case law which clearly establishes the legal proposition needed to grant habeas relief. *Lopez*, 135 S.Ct.at 4. The Court recently re-affirmed that circuit court precedent cannot "refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule that this Court has not announced." *Lopez*, 135 S.Ct.at 4 (quoting *Marshall v. Rodgers*, 133 S. Ct. 1446, 1450 (2013) (per curiam)); *see also Shimel v. Warren*, 838 F.3d 685, 695–696 (6th Cir. 2016) (citing *Lopez*).

The Sixth Circuit in *Taylor* also noted that "the holding in *Mathews* has been taken by some courts as setting out a right to a jury instruction on self-defense." *Taylor*, 288 F.3d at 852 (citing *Mathews v. United States*, 485 U.S. 58, 63 (1988)). In the habeas context, *Mathews* does not support such a finding. In *Mathews*, the Supreme Court was sitting in review on direct appeal: "This case requires the Court to decide whether a defendant in a federal criminal prosecution who denies commission of the crime may nonetheless have the jury instructed, where the evidence warrants, on the affirmative defense of entrapment." *Mathews*, 485 U.S. at 59. The Court's decision was based on the federal criminal law of entrapment, and the Court acknowledged that its ruling was not compelled by the Constitution. *Mathews*, 485 U.S. at 66; *see also id.* at 69 (White, J., dissenting). *Mathews* does not support a finding that Keahey's theory on jury instructions is supported by clearly established federal law, as determined by the Supreme Court.

Keahey has not demonstrated that the state court decision was contrary to clearly established federal law, as determined by the Supreme Court of the

United States. The petition should not be granted on the basis of the first ground.

In his arguments concerning the second ground, jury instructions on necessity, Keahey does not discuss any federal law. *See generally* R. 10, PageID #: 2339–2340. His discussion concludes, however, that "for the same reasons set forth regarding self-defense," the state court decision cannot survive habeas review. *Id.* at 2340. Again, Keahey has not demonstrated that the state court decision was contrary to clearly established federal law, as determined by the Supreme Court of the United States. The petition should not be granted on the basis of the second ground.

V. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

The third, fourth, fifth and sixth grounds of the petition are based on an ineffective assistance of appellate counsel theory, and assert:

> 3. The petitioner was denied effective assistance of appellate counsel when counsel failed to raise a claim on direct appeal that petitioner's offenses of improperly discharging a firearm at or into a habitation under R.C. 2923.161(A)(1), and attempted murder under R.C. 2923.02(A), should have been merged for sentencing as allied offenses under R.C. 2941.25(A), violating petitioner's constitutional rights under the Double Jeopardy Clause and right to effective assistance of counsel guaranteed by the Fifth, Sixth, and the Fourteenth Amendments to the United States Constitution.

> 4. The petitioner was denied effective assistance of appellate counsel when counsel failed to raise a claim on direct appeal that petitioner was denied his constitutional right to be present at critical stages of the trial proceedings violating petitioner's rights under the Fifth, Sixth, and the Fourteenth Amendments to the United States Constitution.
>
> 5. The petitioner was denied effective assistance of appellate counsel when counsel failed to raise a sufficiency of evidence claim on direct appeal in regards to Count Eight for improperly discharging a firearm at or into a habitation under R.C. 2923.161(A), violating petitioner's [rights under the] Fifth, Sixth, and the Fourteenth Amendments to the United States Constitution.
>
> 6. The petitioner was denied effective assistance of appellate counsel when counsel failed to raise a claim on direct appeal regarding the trial court's denial of trial counsel's motion for mistrial when the bailiff came into contact with a juror in violation of R.C. 2945.33, violating petitioner's [rights under the] Fifth, Sixth, and the Fourteenth Amendments to the United States Constitution.

(R. 1-1, PageID #: 41, 46, 54, 59.)

Keahey raised these issues in his application to reopen his appeal pursuant to Ohio App. Rule 26(B). (R. 7, RX 27.) The court of appeals denied his application to reopen. (R. 7, RX 30.) The court reviewed the issues presented, and found that Keahey had failed to raise a colorable claim of ineffective

assistance of appellate counsel. (R. 7, RX 30, PageID #: 570.)

Under the Sixth Amendment to the U.S. Constitution, "the right to counsel is the right to effective assistance of counsel." *Missouri v. Frye*, 132 S.Ct. 1399, 1404 (2012); *Joshua v. DeWitt*, 341 F.3d 430, 437 (6th Cir. 2003) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). A criminal appellant is constitutionally entitled to the effective assistance of counsel in his direct appeal, as well as at trial. *Evitts v. Lucey*, 469 U.S. 387 (1985).

The Sixth Circuit discussed the general standard for ineffective assistance of counsel in *Monzo v. Edwards*:

> To establish ineffective assistance of counsel under *Strickland*, the defendant must show that his counsel's performance fell below an objective standard of reasonableness and that his counsel's errors were so serious as to prejudice the defendant. Review of counsel's performance is highly deferential and requires that courts "indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance." To establish prejudice, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Monzo, 281 F.3d at 579 (internal citations omitted). *See generally Strickland v. Washington*, 466 U.S. 668, 689 (1984) (two-part test).

In the habeas context, this court considers petitioner's ineffective assistance claim "within the more limited assessment of whether the state court's application of *Strickland* to the facts of this case was objectively unreasonable." *Washington v. Hofbauer*, 228 F.3d 689, 702 (6th Cir. 2000). The Supreme Court has affirmed that this court must approach the state court's rulings in a highly deferential manner. The Court stated in *Harrington v. Richter* that the "pivotal question" of whether the state court's application of *Strickland* standard was unreasonable is different from simply deciding whether counsel's performance fell below *Strickland*'s standard. *Harrington v. Richter*, 562 U.S. 86, 101, 131 S.Ct. 770, 785 (2011). The focus on habeas review is "not whether counsel's actions were reasonable," rather, the question is "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 105.

Richter instructed that the petitioner must show that the ruling of the state court "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103; *see also Montgomery v. Bobby*, 654 F.3d 668, 676 (6th Cir. 2011) (en banc), *cert. denied*, 132 S.Ct. 2376 (2012) (quoting *Richter*). The Court acknowledged that, under the AEDPA, this standard was "difficult to meet," however, it was "meant to be" so. *Id.* at 102; *see also Montgomery*, 654 F.3d at 676.

A. Allied Offenses

The state court addressed the third ground (failure to raise claim of merger of allied offenses) as follows:

In his second argument, appellant asserts that his appeal should be reopened because appellate counsel failed to argue that his convictions for attempted murder and improper discharge of a firearm at or into a habitation should have been merged at sentencing. In support, appellant argues that the two offenses "occurred on the same day, and from the same incident, and same conduct * * *." We disagree, for the following reasons.

The Ohio Supreme Court has held that "the imposition of multiple sentences for allied offenses of similar import is plain error. *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 31, citing *State v. Yarbrough*, 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶ 96–102. Our determination as to whether offenses are allied offenses of similar import is *de novo*. *State v. Williams*, 134 Ohio St.3d 482, 2012-Ohio-5699, 983 N.E.2d 1245, ¶ 1.

Pursuant to R.C. 2941.45:

> (A) Where the same conduct by [a] defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or

> information may contain counts for all such offenses, and the defendant may be convicted of all of them.

In *State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, 942 N.E.2d 1061, the Ohio Supreme Court held that:

> In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), the question is whether it is possible to commit one offense and commit the other with the same conduct, not whether it is possible to commit one without committing the other. *** If the offenses correspond to such a degree that the conduct of the defendant constituting commission of one offense constitutes commission of the other, then the offenses are of similar import.
>
> If the multiple offenses can be committed by the same conduct, then the court must determine whether the offenses were committed by the same conduct, i.e., "a single act, committed with a single state of mind." ***
>
> If the answer to both questions is yes, then the offenses are allied offenses of similar import and will be merged. Conversely, if the court determines that the commission of one offense will never result in the commission of the other, or if the offenses are committed separately, or if the defendant has a separate animus for each offense, then, according to R.C. 2941.25(B), the offenses will not merge. Id. at ¶ 48–50.

Two offenses are of dissimilar import if they are either: (1) a single act, defined in terms of conduct toward another, that is, committed against multiple victims, or (2) the same offense [that] is, committed toward more than one victim during the same course of conduct. *State v. Clayton*, 9th Dist. Summit No. 26910, 2014-Ohio-2165, ¶ 30. (Citations omitted.) For example, in a case where the setting of one fire resulted in multiple victims, an Ohio court recently held that "separate victims alone established a separate animus for each offense." *State v. Crawley*, 8th Dist. Cuyahoga No. 99636, 2014-Ohio-921, ¶ 41, citing *State v. Rogers*, 2013-Ohio-2124, 994 N.E.2d 499 (8th Dist.), *conflict certified*, 136 Ohio St.3d 1508, 2013-Ohio-4657, 995 N.E.2d 1212.

The crime of attempted murder is defined in R.C. 2903.02(B) in terms of conduct towards another, in that the statute "prohibit[s] a defendant from causing or attempting to cause the death of another." *State v. Hubbard*, 10th Dist. Franklin No. 11AP-945, 2013-Ohio-2735, ¶ 80. The crime of improperly discharging a firearm at or into a habitation is prohibited by R.C. 2923.161(A), which states, in relevant part, that: "No person, without privilege to do so, shall* * *[d]ischarge a firearm at or into an occupied structure that is a permanent or temporary habitation of any individual * * *."

It is undisputed that one of the bullets that appellant fired at the victim, Prince Hampton, also entered the nearby home of Brunell Hendrickson. Accordingly, because there were two separate victims in this case, there was a

> separate animus to support each offense, and they need not be merged at sentencing. Appellant's argument that his appellate counsel was ineffective for failing to raise this issue on appeal is, therefore, meritless. *State v. Tabasso*, 8th Dist. Cuyahoga No. 98248, 2013-Ohio-3721, ¶ 5, citing *Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983).

(R. 7, RX 30, PageID #: 560–563.)

The state court found that appellate counsel was not ineffective because the issue that Keahey asserts counsel should have raised was without merit. Appellate counsel's failure to raise a legal claim which lacks merit cannot be found to violate *Strickland*'s deferential standard.

In his Traverse, Keahey argues that appellate counsel should have focused on elements of the crime(s) that he views as improperly decided by the state court. (R. 10, PageID #: 2344–2345.) In his appellate brief, Keahey's argument was somewhat simpler; basically, that because his conduct, and animus, was specifically directed at Prince, the two offenses should have been merged. (R. 7, RX 27, PageID #: 508–509.) The state court's decision rested on the fact that, under Ohio law, "because there were two separate victims in this case, there was a separate animus to support each offense, and they need not be merged at sentencing." (R. 7, RX 30, PageID #: 563.)

Reviewing the state court's ruling in accordance with the guidance set forth by the U.S. Supreme Court in *Richter*, the court finds that Keahey has failed to demonstrate that ruling of the state court "was so lacking in justification that there was an error well

understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. Keahey has failed to establish that the state court decision involved an unreasonable application of clearly established federal law, as determined by the Supreme Court. The petition should not be granted on the basis of the third ground.

B. Defendant's Presence at Trial

The state court addressed the fourth ground (failure to raise claim of right to be present at trial) as follows:

> In his third argument, appellant asserts that his appeal should be reopened because appellate counsel was ineffective for failing to argue that his constitutional right to be present during "critical stages" of the trial court's proceedings was violated. In support, appellant argues that his appointed trial counsel improperly waived his right to be present during: (1) proceedings regarding the dismissal of a juror, (2) the jury view of the crime scene, (3) arguments regarding jury instructions and "counsel's motion to suppress or limine," and (4) "three separate hearings related to notes from the jury during there [sic] deliberations."
>
> Generally, an accused has a fundamental right to be present at all critical stages of his criminal trial. Crim.R. 43(A). However, "the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence and to that extent only." *Snyder v. Massachusetts*, 291 U.S. 97, 107–108, 54 S.Ct. 330, 78 L.Ed. 674 (1934). An accused's claim that his or her unwaived presence from a

proceeding amounts to prejudice per se was rejected in *State v. Hale*, 119 Ohio St.3d 118, 892 N.E.2d 864, 2008-Ohio-3426, in which the Ohio Supreme Court found that such claims will not succeed absent a showing of prejudice. Id. at ¶ 103.

As to appellant's first claim, a review of the record shows that on the fourth day of appellant's trial, after the case was submitted to a jury, a bailiff had a conversation over the lunch hour with one of the jurors, Ruth Keegan. Upon being notified of the conversation, the trial court interviewed both the bailiff and Keegan concerning the content of their conversation. Both individuals stated that they were acquainted because their children played sports together. The bailiff also indicated that he made favorable comments to Keegan about the integrity of the trial judge.

After interviewing the bailiff and Keegan, the trial court and counsel for appellate and the state interviewed each juror individually. Defense counsel waived appellant's presence during those interviews. None of the jurors stated that they heard the bailiff speak about the trial judge. Several jurors stated that they knew Keegan and the bailiff were talking about their children. None of the jurors said that their view of appellant or the case was tainted in any way by the conversation. After the interviews were concluded, Keegan was dismissed as a juror and was replaced by an alternate.

Upon consideration, we find that the record does not show a violation of due process that rises to

the level of preventing appellant from having a fair trial. Accordingly, appellant's claim that he was prejudiced by appellate counsel's failure to raise this issue on appeal is without merit.

As to appellant's second claim, R.C. 2945.16 provides:

> When it is proper for the jurors to have a view of the place at which a material fact occurred, the trial court may order them to be conducted in a body *** to such place, which shall be shown to them by a person designated by the court. *** The accused has the right to attend such view by the jury, but may waive such right.

The record shows that appellant's attorney waived appellant's, and his own, presence at the jury view. The issue of whether trial counsel was ineffective for not personally attending the jury view was addressed by this court in *State v. Keahey*, 6th Dist. Erie No. E-13-055, 2014-Ohio-4971. In that case, we found appellant presented no evidence that he was prejudiced by trial counsel's failure to attend the jury view. Similarly, in this instance, the trial court's record shows that appellant and his trial counsel had input concerning the nature and scope of the jury view. Beyond that, the record contains no evidence that appellant was materially prejudiced by not attending the jury view and personally apprising the jury of "points of interest." Without such a showing, appellant cannot establish that his due process rights were violated and his second claim is without merit.

State v. Were, 118 Ohio St.3d 448, 2008-Ohio-2762, 890 N.E.2d 263, ¶ 98.

As to appellant's third claim, we note initially that appellant was present during discussions regarding proposed jury instructions. Appellant was not present when defense counsel made a successful verbal motion to limit evidence at trial regarding appellant's involvement with drugs. However, a review of the record shows that counsel sought to exclude such evidence so that appellant would not look like a "big drug dealer" to the jury. Accordingly, appellant has not demonstrated prejudice in these instances, and his claim to the contrary is without merit.

As to appellant's fourth claim, the record shows that defense counsel waived appellant's presence each time the jury sent out a note. However, a thorough review of each of those instances reveals no prejudice to appellant, for the following reasons: (1) in its first note, the jury asked why they were not allowed to consider Count 1 of the indictment, which was not even before the jury for consideration, (2) in its second note, the jury asked for lunch, (3) in its third note, the jury asked to review police and hospital reports, to which the court replied that the jury should rely on trial testimony evidence that was already submitted in reaching its decision, and (4) the jury's final communication was to state that it had reached a verdict.

On consideration of the foregoing, we find that appellant has failed to demonstrate that he suffered material prejudice as a result of his

> absence during the above proceedings. Appellant's claim that his appellate counsel was ineffective for not making such an argument is, therefore, meritless.

(R. 7, RX 30, PageID #: 563–567.)

The state court found that Keahey had failed to demonstrate that he suffered any material prejudice through his absence. *See generally Snyder v. Massachusetts*, 291 U.S. 97 (1934). Thus, the court rejected Keahey's arguments that he had suffered prejudice. *See* R. 7, RX 29, PageID #: 543–545. Appellate counsel's failure to raise a legal claim which lacks merit cannot be found to violate *Strickland*'s deferential standard.

Reviewing the state court's ruling in accordance with the guidance set forth by the U.S. Supreme Court in *Richter*, the court finds that Keahey has failed to demonstrate that ruling of the state court "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. Keahey has failed to establish that the state court decision involved an unreasonable application of clearly established federal law, as determined by the Supreme Court. The petition should not be granted on the basis of the fourth ground.

C. Sufficiency of the Evidence

The state court addressed the fifth ground (failure to raise claim of sufficiency of the evidence) as follows:

> . . . appellant asserts that his appointed appellate counsel was ineffective for failing to argue that insufficient evidence was presented to support his

conviction for improper discharge of a firearm at or into a habitation. In support, appellant argues that his Crim.R. 29 motion for acquittal should have been granted because he "had no intent, or awareness, that his conduct would have resulted in the shooting of Brunell Hendrickson's residence."

It is axiomatic that "a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt." *State v. Bridgeman*, 55 Ohio St.2d 261, 381 N.E.2d 184 (1978), syllabus. The term "sufficiency" of the evidence presents a question of law as to whether the evidence is legally adequate to support a jury verdict as to all elements of the crime. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). The relevant inquiry in such cases is "whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

As stated above, R.C. 2923.161(A) provides, in relevant part, that: "No person, without privilege to do so, shall knowingly * * *[d]ischarge a firearm at or into an occupied structure that is a permanent or temporary habitation of any individual * * *." Pursuant to R.C. 2901.22(B), "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably

> cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."
>
> Appellant argues that insufficient evidence was presented to support his conviction because he did not "knowingly" shoot into Hendrickson's house. However, it is undisputed that appellant deliberately shot at Hampton in a residential neighborhood. Accordingly, after considering all of the circumstances presented in this case, we conclude that there was sufficient evidence presented to support the element of "knowingly" and, therefore, an acquittal pursuant to Crim.R. 29 would have been inappropriate as to the crime of improper discharge of a firearm into an occupied structure. Because the trial court's decision was not erroneous, appellant's claim that appellate counsel was ineffective for failing to raise the issue on appeal is not well-taken and his fifth argument in favor of reopening his appeal is meritless.

(R. 7, RX 30, PageID #: 568–570.)

Reviewing the state court's ruling in accordance with the guidance set forth in *Richter*, the court finds that Keahey has failed to demonstrate that ruling of the state court "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. Keahey has failed to establish that the state court decision involved an unreasonable application of clearly established federal law, as determined by the

Supreme Court. The petition should not be granted on the basis of the fifth ground.

D. Motion for Mistrial

The state court addressed the sixth ground (failure to raise claim that trial court erred in denying mistrial) as follows:

> . . . appellant asserts that his appellate counsel was ineffective for failing to challenge the trial court's denial of a mistrial after the court bailiff "came into contact with a juror in violation of R.C. 2945.33." In support, appellant argues that a violation of R.C. 2945.33 "will be presumed prejudicial and grounds for a mistrial."
>
> In reviewing the denial of a mistrial, an appellate court will give deference to the decision of the trial court, which was in the best position to determine whether such an extreme remedy was warranted. *State v. Carter*, 6th Dist. Lucas No. L-13-1255, 2014-Ohio-5212, ¶ 16; *State v. Glover*, 35 Ohio St.3d 18, 19, 517 N.E.2d 900 (1988). Accordingly, "a trial court's denial of a motion for mistrial will not be reversed absent an abuse of discretion." *Id.*, citing *State v. Rossbach*, 6th Dist. Lucas No. L-09-1300, 2011-Ohio-281 ¶ 39.
>
> Improper communication between a bailiff and jurors in a criminal trial may be grounds for a mistrial pursuant to R.C. 2945.33 which states, in relevant part, that:
>
> > [the bailiff] shall not permit a communication to be made to [the jury], nor make any himself except to ask if they have agreed upon a verdict, unless he does so by order of the court. Such officer shall not

> communicate to any person, before the verdict is delivered, any matter in relation to their deliberation.

However, communications that are outside the bounds expressed in R.C. 2945.33 are not presumed to be prejudicial if they do not rise to the level of misconduct. *State v. Glenn*, 1st Dist. Hamilton No. C-090205, 2011-Ohio-829, ¶ 86. In this case, as set forth above, communications were confined to comments between the bailiff and one juror, concerning their children who, years earlier, played sports together. The record also shows that the bailiff made favorable statements about the trial court judge to that one juror. When the communications were discovered by the court, the bailiff, the affected juror, and all the other jurors were interviewed by the court and counsel for both parties. In addition, the court administrator, assistant administrator, and court magistrate were interviewed. Thereafter, the court determined that none of the jurors were influenced by the communication. Nevertheless, the juror who spoke directly to the bailiff was dismissed from the jury and replaced by an alternate.

Upon consideration, we find that: (1) the communication between the bailiff and the one juror, Ruth Keegan, was outside the bounds of presumed prejudicial comments as expressed in R.C. 2945.33, and (2) no prejudice to appellant resulted from those communications. Accordingly, appellant's fourth argument is meritless.

(R. 7, RX 30, PageID #: 567–568.)

Reviewing the state court's ruling in accordance with the guidance set forth in *Richter*, the court finds that Keahey has failed to demonstrate that ruling of the state court "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. Keahey has failed to establish that the state court decision involved an unreasonable application of clearly established federal law, as determined by the Supreme Court. The petition should not be granted on the basis of the sixth ground.

VI. INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

The court now returns to the merits of the seventh ground of the petition, which alleges ineffective assistance of trial counsel, as follows:

> The petitioner was denied effective assistance of trial counsel when counsel failed to investigate and subpoena certain defense witnesses to testify at trial, failed to request forensic testing on the knife found at the scene for DNA or fingerprints, failed to secure the petitioner's presence at the jury view, and failed to move for recusal of the judge based on an actual conflict of interest violating the petitioner's [rights under the] Fifth, Sixth, and the Fourteenth Amendments to the United States Constitution.

The claims in the seventh ground were raised before the trial court in Keahey's petition for post-conviction relief, and subsequently addressed by the court of

appeals. (R. 7, RX 38, 46.) The state court of appeals addressed his claims by first setting out the proper standards for assessing a claim of ineffective assistance. (R. 7, RX 46, PageID #: 884–885; *Keahey*, 2014 WL 5794329, at *7 (citing *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989) (syllabus); and *Strickland v. Washington*, 466 U.S. 668 (1984).)

The appellate court then addressed his specific claims:

> Appellant argues that his defense counsel was ineffective for failing to properly investigate the issue of which witnesses to call at trial. Specifically, appellant claims that counsel should have called Prince and William Myers as defense witnesses.
>
> "[C]omplaints of uncalled witnesses are not favored, because the presentation of testimonial evidence is a matter of trial strategy and because allegations of what a witness would have testified are largely speculative." *State v. Philips*, 5th Dist. Stark No.2010 CA 00338, 2011-Ohio-6569, ¶ 26, quoting *Buckelew v. United States*, 575 F.2d 515, 521 (5th Cir.1978). Generally, trial counsel is entitled to a strong presumption that decisions regarding investigation and the calling of trial witnesses "fall within the wide range of reasonable professional assistance." *Shuster*, 5th Dist. Morgan No. 14 AP 0003, 2014-Ohio-4144, at ¶ 20, citing *State v. Sallie*, 81 Ohio St.3d 573, 675, 693 N.E.2d 267 (1998). The decision of whether or not to call a particular defense witness "falls within the rubric of trial strategy and will not be second-guessed by a reviewing court." *State v.*

Were, 118 Ohio St.3d 448, 2008-Ohio-2762, 980 N.E.2d 263, ¶ 222, quoting *State v. Treesh*, 90 Ohio St.3d 460, 490, 739 N.E.2d 749 (2001).

The record shows that defense counsel conducted an in-depth cross-examination of each of the witnesses named by appellant with the exception of Prince and Myers, who did not testify at trial. As to those two individuals, appellant's assertion that Prince would have admitted owning the knife on Joyce's driveway and carrying a gun on June 20, 2011, is self-serving and speculative at best. Defense counsel's decision not to call Myers to testify for the defense was addressed during the trial, when defense counsel told the court he would not be calling Myers to the stand because he is a "loose cannon."

Upon consideration of the foregoing, we agree with the trial court that defense counsel adequately demonstrated "his knowledge/investigation of the facts of the case" during the course of the trial. Appellant's arguments to the contrary are without merit.

Appellant further claims that counsel was ineffective because he did not insist on testing the knife for Prince's DNA. Appellant argues that the presence of Prince's DNA on the knife would have bolstered his claim that Prince threatened him with a weapon.

Testimony was presented at trial that Prince attacked appellant with a knife in May 2011. Although no witness saw Prince holding a knife on June 20, 2011, testimony was presented that Prince owns and has been known to carry a knife.

However, even if Prince's DNA were detected on knife through testing, such evidence would do nothing to show that Prince actually threatened appellant with that particular weapon. Accordingly, appellant was not unduly prejudiced by defense counsel's decision not to insist that DNA tests be performed on the knife.

Appellant also claims that defense counsel was ineffective for not presenting expert testimony to show that four of the nine bullets recovered from the crime scene could have been fired by a gun other than his own. Appellant argues that his expert's testimony, along with Myers' testimony, would have supported his claim that Prince fired a gun and he responded by firing at Prince in self-defense.

Appellant's claim of failure to secure expert ballistics testimony was not raised in appellant's petition for post-conviction relief, and the right to assert it in this appeal, has been waived. *See State v. Barb*, 8th Dist. Cuyahoga No. 94054, 2010-Ohio5239, ¶ 25 (Citations omitted.) Nevertheless, since the ultimate question is whether appellant was prejudiced by counsel's alleged ineffectiveness, we will analyze the issue further.

It is well-settled that "'[t]he failure to call an expert and instead rely on cross-examination does not constitute ineffective assistance of counsel.'" *State v. Jones*, 9th Dist. Summit No. 26226, 2012-Ohio-2744, ¶ 18, quoting *State v. Nicholas*, 66 Ohio St.3d 431, 436, 613 N.E.2d 225 (1993). In this case, the record shows that defense counsel

cross-examined the state's witnesses on the issue of whether four of the nine recovered bullets could have been fired from a second gun. Appellant's claim that an expert would have been able to definitively state that bullets were recovered from two different guns is purely speculative. Accordingly, upon consideration, we cannot say that appellant was unduly prejudiced by defense counsel's failure to obtain expert ballistics testimony in this case.

As to appellant's claim that counsel was ineffective for failing to attend the jury view to "point out critical facts to the jury" to support appellant's contention that he did not have a means of safely retreating, which is a critical element of the affirmative defense of self-defense. We disagree, for the following reasons.

R.C. 2945.16 states:

> When it is proper for the jurors to have a view of the place at which a material fact occurred, the trial court may order them to be conducted in a body, under the charge of the sheriff or other officer, to such place, which shall be shown to them by a person designated by the court. While the jurors are absent on such view no person other than such officer and such person so appointed, shall speak to them on any subject connected with the trial. The accused has the right to attend such view by the jury, but may waive this right.

The record shows that, after reviewing the prosecution's plans for the jury view, defense

counsel submitted written "points of interest" of his own for the jury to consider, including the location of Prince's vehicle on Joyce's driveway, and placement of the knife and sandals in relation to the vehicle. Counsel said he did not plan on attending because he submitted issues for the jury's consideration and he had viewed the "area numerous times" in the past. Defense counsel further stated that, after discussing the issue with appellant, appellant did not "really feel the need" to attend the jury view.

"[I]t is well-settled law in Ohio that a petitioner may not raise issues in a petition for post-conviction relief which could have been raised on direct appeal." *State v. Harrison*, 8th Dist. No. 79434, 2002 WL 450130, *2 (Mar. 14, 2002). Issues that can be raised on appeal include claims that a defendant received ineffective assistance of counsel due to his absence during the jury view. *See State v. Stivender*, 2d Dist. Montgomery No. 19094, 2002-Ohio-6864. Accordingly, this issue is barred by the doctrine of res judicata. *Harrison*, *supra*.

However, even if appellant's claim is not barred, post-conviction relief is available only for errors that are based on evidence that is outside the trial court's record. *State v. Turner*, 8th Dist. Cuyahoga No. 91695, 2008-Ohio-6648, ¶ 8. Appellant has failed to present any evidence to show that he has suffered prejudice by his and counsel's absence from the jury view, other than to opine that defense counsel could have educated the jury as to his "retreat theory" if he attended the jury view. *Stivender*, *supra*, at ¶ 11.

> Accordingly appellant has not demonstrated that his trial counsel was ineffective for not attending, or insisting that appellant attend the jury view.

(R. 7, RX 46, PageID #: 885–889; *Keahey*, 2014 WL 5794329, at *7–*10.)

As discussed earlier, the Sixth Amendment right to counsel "is the right to effective assistance of counsel." *Frye*, 132 S.Ct. at 1404 (2012); *Joshua*, 341 F.3d at 437. The general standard for ineffective assistance of counsel was set out in *Monzo v. Edwards*:

> To establish ineffective assistance of counsel under *Strickland*, the defendant must show that his counsel's performance fell below an objective standard of reasonableness and that his counsel's errors were so serious as to prejudice the defendant. Review of counsel's performance is highly deferential and requires that courts "indulge a strong presumption that counsel's conduct falls within a wide range of reasonable professional assistance." To establish prejudice, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Monzo, 281 F.3d at 579 (internal citations omitted). *See generally Strickland*, 466 U.S. at 689 (two-part test).

This court must approach the state court's rulings in a highly deferential manner. *Richter* stated that the "pivotal question" of whether the state court's application of *Strickland* standard was unreasonable

is different from simply deciding whether counsel's performance fell below *Strickland*'s standard. *Richter*, 562 U.S. at 101. The focus is "not whether counsel's actions were reasonable," rather, the question is "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Richter*, 562 U.S. at 105.

The petitioner must show that the ruling of the state court "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103. Although Keahey disputes the state court's determinations[1] as to ineffective assistance based on the uncalled witnesses, and the failure to pursue DNA testing (R. 10, PageID #: 2355–2359), he does not meet this standard.

Recusal of Trial Judge

Keahy's post-conviction petition also alleged "a conflict of interest" between Keahey and the trial judge. (R. 7, RX 38, PageID #: 670.) Keahey argued that the judge should have recused himself because he had been "the head of the Erie County Drug Task Force who helped prosecute" Keahey. (R. 7, RX 40, PageID #: 735.) Keahey asserts that, although the prosecutor recommended a term of eighteen years, the judge sentenced him to twenty-three years. *Id.* This claim was raised in Keahey's petition for post-conviction relief as a separate and distinct claim from

[1] Keahey concedes that the argument concerning the jury view is barred by res judicata. (R. 10, PageID #: 2360.)

his claim(s) of ineffective assistance of trial counsel. *See* R. 7, RX 38 (petition), PageID #: 669–670 (petition); *see also* R. 7, RX 44 (brief on appeal), PageID #: 786; and RX 45 (appellee's brief), PageID #: 862–863.

The trial court denied the petition as to the conflict of interest claim on several grounds, asserting that he (the judge) had not been Head of the Drug Task Force, but merely an assistant prosecutor, and that he had no recollection of the 1998 case raised by Keahey. (R. 7, RX 42, PageID #: 763.) The court found no merit in the argument that a "conflict of interest" existed. *Id.*

The court of appeals addressed the recusal issue as an argument of ineffective assistance of trial counsel. (R. 7, RX 46, PageID #: 889–890; *Keahey*, 2014 WL 5794329, at *10.) The appellate court stated that "the issue of bias on the part of a judge should be raised at the earliest opportunity or the issue is waived," and pointed out that Keahey had not filed a motion to disqualify prior to or during trial, nor had he raised the issue on direct appeal. (R. 7, RX 46, PageID #: 890; *Keahey*, 2014 WL 5794329, at *10.) The court found: "A review of the record does not show bias on the part of the trial judge, and appellant does not offer any evidence from outside the record to demonstrate such bias." *Id.* The court also noted that the trial court was not bound by the prosecutor's recommendation as to the sentence. The court found that Keahey's assignment of error was not well-taken. The state court of appeals relied solely on state law in its decision. (R. 7, RX 46, PageID #: 889–890; *Keahey*, 2014 WL 5794329, at *10.)

Thus, the issue for this habeas court is whether the state court decision was contrary to clearly established federal law, as determined by the U.S. Supreme Court. The Supreme Court has stated that due process guarantees "an absence of actual bias" on the part of a judge. *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1905 (2016) (citing *In re Murchison*, 349 U.S. 133, 136 (1955)). The Court in *Williams* held that "under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant's case." *Williams*, 136 S. Ct. at 1905. The personal involvement referenced was "a direct, personal role" in the defendant's current prosecution. *Id.* at 1906. It did not refer to involvement in past cases.

In *Williams*, the Supreme Court of Pennsylvania vacated postconviction relief which had been granted to a prisoner sentenced to death. "One of the justices on the State Supreme Court had been the district attorney who gave his official approval to seek the death penalty in the prisoner's case." *Williams*, 136 S. Ct. at 1905. The judge in question denied the prisoner's motion for recusal, and participated in the decision to deny relief. *Id.* The Court found this violated due process.

Here, there was no evidence, or any indication, that the trial judge had any personal involvement in an earlier stage of Keahey's 2011–2012 prosecution, which is the subject of his habeas petition. Keahey's unsupported allegation is that the judge had previously acted as prosecutor in an earlier 1998 case. Keahey has failed to demonstrate that the state court's ruling was contrary to clearly established federal law,

as determined by the Supreme Court. The petition should not be granted on the basis of the seventh ground.

VII. CONCLUSION

Keahey has failed to establish that the state court's decisions on the third, fourth, fifth or sixth grounds involved an unreasonable application of clearly established federal law, as determined by the Supreme Court. In addition, Keahey has failed to demonstrate that the state court's rulings on the first, second, or seventh grounds were contrary to clearly established federal law, as determined by the Supreme Court. It is recommended that the petition be DENIED.

s/ David A. Ruiz
David A. Ruiz
United States Magistrate Judge

Date: April 17, 2018

OBJECTIONS

Any objections to this Report and Recommendation must be filed with the Clerk of Courts within fourteen (14) days of mailing of this notice. Failure to file objections within the specified time WAIVES the right to appeal the Magistrate Judge's recommendation. *See Thomas v. Arn*, 474 U.S. 140 (1985); *see also United States v. Walter*s, 638 F.2d 947 (6th Cir. 1981).

APPENDIX G

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

October 5, 2015

Clerk
Court of Appeals of Ohio, Erie County
Erie County Courthouse
Sandusky, OH 44870

Re: Demetreus A. Keahey
v. Ohio
No. 14-9902
(Your No. E-13-009)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

/s/ Scott S. Harris
Scott S. Harris, Clerk

APPENDIX H

The Supreme Court of Ohio

FILED
APR-8 2015
CLERK OF COURT
SUPREME COURT
OF OHIO

State of Ohio v. Demetreus A. Keahey	Case No. 2014-1995 E N T R Y

Upon consideration of the jurisdictional memoranda filed in this case, the court declines to accept jurisdiction of the appeal pursuant to S.Ct.Prac.R. 7.08(B)(4).

(Erie County Court of Appeals; No. E-13-009)

/s/ Maureen O'Connor
Maureen O'Connor
Chief Justice

The Official Case Announcement can be found at http://www.supremecourt.ohio.gov/ROD/docs/.

APPENDIX I

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
ERIE COUNTY

State of Ohio
Appellee

v.

Demetreus A. Keahey
Appellant

Court of Appeals
No. E-13-009
Trial Court
No. 2011-CR-275

DECISION AND JUDGMENT

Decided: **OCT 24 2014**

* * * * *

Kevin J. Baxter, Erie County Prosecuting Attorney, and Mary Ann Barylski, and Frank Zeleznikar, Assistant Prosecuting Attorneys, for appellee.

Brian J. Darling, for appellant.

* * * * *

OSOWIK, J.

{¶ 1} This is an appeal from a judgment of the Erie County Court of Common Pleas, following a jury trial, in which appellant, Demetreus Keahey, was convicted of one count of felonious assault, one count of attempted murder, one count of having a weapon while under disability, and one count of improperly discharging a firearm at or into a habitation or school safety zone. After holding a sentencing hearing, the trial court sentenced appellant to serve a total of 23 years in prison. On appeal, appellant sets forth the following five assignments of error:

> I. The trial court erred to the prejudice of appellant and abused its discretion in declining to provide jury instructions on self-defense, an affirmative defense to the crime charged.
>
> II. The trial court erred to the prejudice of appellant and abused its discretion in declining to provide jury instructions on necessity, an affirmative defense to the crime charged.
>
> III. The trial court violated the defendant's Sixth Amendment right and abused its discretion in making findings of fact.
>
> IV. The trial court erred to defendant's prejudice in denying defendant's motion for a mistrial.
>
> V. The trial court's errors, when taken together, deprived appellant of the [sic] fair trial as guaranteed by the Fourteenth Amendment of the United States Constitution and Article I, Section Sixteen of the Ohio Constitution [sic] due Process Clauses.

{¶ 2} Appellant and Kindra McGill are the parents of a daughter, K.K. In addition, Kindra is the former girlfriend of Prince Hampton, who is the father of her two boys. P.H. and D.H. Because of several factors, including Kindra's affiliation with both appellant and Prince, an incident arose at the home of Kindra and appellant on May 7, 2011, during which Prince pulled a knife and stabbed appellant in the back. Appellant was hospitalized for several days with a collapsed lung. Neither Kindra nor appellant named Prince as the person who stabbed appellant. Consequently, no one was charged with a crime in that instance. However, on June 15, 2011, text messages were exchanged between appellant and Kindra, in which the two discussed Kindra's reluctance to name Prince as appellant's attacker, and also appellant's desire to retaliate against Prince for the stabbing.

{¶ 3} At some point after May 7, 2011, Kindra and her children began living with Kindra's mother, Joyce McGill, at 2015 Aspen Run Road in Sandusky, Ohio. On the morning of June 20, 2011, appellant drove to the Aspen Run Road house with the stated intent of picking up K.K. and Kindra so he could take them to the doctor's office for K.K.'s scheduled appointment. Appellant arrived early, parked his vehicle on the street in front of the house, and walked inside. After a brief conversation with Joyce appellant went back outside, where he saw a vehicle pulling into the driveway. In the vehicle were Prince, Kindra's two boys, and A.C., the young son of Prince's then-girlfriend.

{¶ 4} When Prince exited the vehicle, appellant drew a gun and fired several shots at Prince. One bullet hit Prince in the arm, and another went through

his pants pocket, hitting him in the leg. That same bullet shredded a roll of paper money that was in Prince's pocket, causing confetti-like pieces of the bills to scatter on the ground.

{¶ 5} After appellant began firing at him, Prince ran down the street. At that point, appellant got into his car and drove away. While witnesses' accounts varied, it is undisputed that someone shouted "you are a dead nigga" as appellant's vehicle drove down the street. Prince collapsed several blocks from McGill's house. Neighbors called 911, medical assistance was dispatched to the scene, and Prince was taken to the hospital. Police arrived on the scene in response to neighbors' calls, where they discovered that one bullet had gone through the door of Prince's vehicle, and another one had gone through the outside wall and into the living room of McGill's neighbor, Brunell Hendrickson. Still another bullet was found under Prince's vehicle, and several more were later found on the ground in the surrounding area. In addition, a pair of flip-flop sandals and a closed pocket knife were found on the driveway near Prince's vehicle.

{¶ 6} After the altercation appellant fled to Erie, Pennsylvania. On July 25, 2011, while appellant was still in Pennsylvania, the Erie County Grand Jury indicted him on one count of drug possession (in an unrelated case), one count of felonious assault on Prince Hampton, in violation of R.C. 2903.11(A)(2), one count of attempted murder of Prince Hampton, in violation of R.C. 2903.02(A), three separate counts of felonious assault on P.H, D.H. and A.C., one count of having a weapon while under disability, in violation of R.C. 2923.13(A)(3), and one count of improperly

discharging a firearm at or into a habitation or school safety zone, in violation of R.C. 2923.161(A).

{¶ 7} A jury trial was held on September 4, 5, 6, 7 and 10, 2012. Trial testimony was presented on behalf of the state by Joyce and Kindra McGill, Brunell Hendrickson, Jeremy Pruitt, Robert and Evelyn Brown, Eric Jensen, and various members of the Sandusky Police Department.

{¶ 8} Joyce testified that she did not see Prince with a knife or a gun on June 20, 2011. She stated that Kindra and appellant had planned to meet at the doctor's office that morning, however, appellant came to her house instead. Joyce said that she was in the doorway of the home when Prince drove up, and she saw Prince get out of the vehicle, and run to the front of the car, while the car was still running. Joyce also said that appellant "pulled out a gun and he started shooting." She then ran out of the house and yelled at appellant to stop, because her grandchildren were still in the car. After Prince and appellant left she closed the car door, picked up a pair of sandals from the grass and placed them in front of the car, and went inside to shower and change her clothes. She said that Kindra removed the children from the car. Joyce testified that later, at the police station, she stated that appellant walked down the driveway to the sidewalk after Prince ran away.

{¶ 9} Kindra testified that she heard it was Prince who stabbed appellant in May 2011, and she stated that Prince and appellant were angry at each other as a result of Prince's then-girlfriend stirring up trouble. Kindra also testified that appellant was supposed to meet her and children at the doctor's office on June 20,

2011, however, he came to her mother's home instead. She stated that Prince was 30 minutes late dropping off her sons at Joyce's house. Kindra further stated that she did not witness the incident, however, after hearing shots fired, she went outside and removed the children from the car. She did not recall seeing a knife or a hole in the car door. She did remember seeing the sandals on the ground.

{¶ 10} When questioned concerning the text messages sent between her and appellant on June 15, 2011, Kindra testified that they did not discuss appellant's intent to retaliate against Prince for the stabbing. Rather, she was expressing her desire to not be put in the middle of appellant's dispute with Prince because she and Prince had children together.

{¶ 11} On cross-examination, Kindra testified that she had gall bladder surgery two weeks before the shooting, but she was able to drive K.K. to the doctor's office without appellant's assistance. Kindra stated that she never saw appellant on June 20. She recalled seeing Prince with a knife and a gun on past occasions, but she denied knowing whether he habitually carries a weapon. She also stated that Joyce does not like appellant because he dated her older half sister in the past.

{¶ 12} On redirect, Kindra testified that she did not know whether appellant had a gun on June 20, however, she knew he was not allowed to have a gun. On recross, Kindra stated that her mother likes Prince, and has allowed him to see her children in the past without her knowledge,

{¶ 13} Brunell Hendrickson testified that she was in the kitchen of her home on East Oldgate Road on

June 20, 2011, at approximately 8:55 a.m., when she heard six gunshots coming from nearby Aspen Run Road. She immediately called 911 to report the shooting. Seconds later, she heard two women screaming, followed by the sound of a car accelerating as it drove down Aspen Run toward her street. Brunell stated she then heard two more gunshots, and the last shot came through the wall of her house and landed in her living room. Brunell testified that, after the bullet came into her home, she laid down on the kitchen floor and called 911 again.

{¶ 14} Brunell said that she saw "a black man running down across the lots of the houses directly in front of [her]" before she heard the last shots. She described the accelerating car as "grayish looking," and identified appellant as the driver.

{¶ 15} On cross-examination. Brunell testified that she is angry at appellant for shooting a gun at her house, because she has a heart condition and should not be subjected to stress. Although she denied seeing appellant shoot a gun, she stated that she is familiar with appellant's face, she saw him driving the gray car, and she was sure he was the shooter. She did not remember seeing Prince with a gun.

{¶ 16} Jeremy Pruitt, Joyce's next door neighbor, testified that he heard three "pops" between 8:30 and 9:30 a.m. on June 20, 2011. As he picked up the phone to call 911, he saw appellant, wearing jeans, a hoodie and a hat, walking down the street "to get into a vehicle." He also stated that another man was running down the street, and that he saw pieces of money on the ground at the end of his own driveway. On cross-examination, Pruitt testified that he did not

see a knife. He further testified that he heard more shots after the first three, for a total of "10 or 12 shots," but he did not hear any more shots after appellant drove off. He could not see whether the man who was running had a weapon. On re-cross, Pruitt testified that he may have told police he saw a man in a white shirt running away from a man in a hoodie.

{¶ 17} Robert Brown, a resident of South Oldgate Road, testified that on June 20, 2011, a man ran up to his house, bleeding, stating that he had been shot and asking for assistance. While Brown and a neighbor, William Myers, tried to get the man to lay down, he heard someone yell "nigger, you're dead." He stated that police arrived shortly after his wife called 911.

{¶ 18} Brown stated there was a "big bullet hole" in the man's arm. He did not see a wound in the man's leg. He could not identify appellant as the driver of the car. Evelyn Brown, Robert's wife, testified that she heard shots on June 20, 2011, and saw a man running down the street. She then heard more shots, followed by someone driving past her home at a high rate of speed.

{¶ 19} Eric Jensen testified that he lives across the street on Aspen Run Road, "caddy-corner," from Joyce McGill's home. Jensen stated that he saw a "black guy in a white T-shirt" being chased by a "another black guy with * * * a hoodie on" who appeared to raise his arm and shoot at the man in the white shirt. Jensen said that, shortly after hearing the shot, he saw a car "take off." On cross-examination, Jensen testified that he does not know appellant, and he did not see Prince holding a knife. On redirect, Jensen said that he did

not remember telling police he heard a woman screaming.

{¶ 20} Members of the Sandusky Police Department who testified at trial were Lieutenants Richard Braun and Danny Lewis, Detectives Ken Nixon and Gary Wichman, Officer Christopher Denny, and Assistant Chief John Orzech. Also testifying were Todd Wharton and Scott Desloover.

{¶ 21} Braun testified that he was dispatched to Aspen Run Road on June 20, 2011. However, before he got to that address, he saw a gunshot victim on the ground on Laurel Lane near South Oldgate. The man had a wound on his left arm and leg. Braun said the gunshot victim, whom he identified as Prince, was taken to the hospital. Braun then went to Joyce's house, where he found shell casings on the ground, and a bullet hole in the door of a car parked in the driveway. He also observed sandals and a knife on the ground near the car, a place in the yard where "the dirt was kicked up," and a blood trail leading away from the driveway toward the injured man on Laurel Lane.

{¶ 22} On cross-examination, Braun testified that he spoke to a witness, William Myers, who said he heard Prince and appellant yelling at each other. When the state objected to Braun's statement as hearsay, the defense indicated that Meyers, although present, would not be asked to testify because he is a "loose-canon." The trial court limited Braun's testimony to saying that he spoke to Myers, who reported hearing "a number" of shots. On redirect, Braun testified that the knife appeared to be closed in pictures taken at the scene.

{¶ 23} Following Braun's testimony, a conversation occurred between defense counsel, the prosecution and the trial court concerning appellant's claim of self-defense. The trial court warned defense counsel to research the issue thoroughly because, in order to assert self-defense, appellant had to admit shooting Prince and, in addition, appellant must present sufficient evidence to support self-defense to get the instruction. Testimony then resumed.

{¶ 24} Nixon testified at trial that he went with Prince to the hospital after finding him lying on the ground at 2020 South Oldgate. He identified a shirt and blue shorts that had bullet holes as the ones Prince was wearing when he was shot. Nixon said that Prince had bullet wounds in his left arm and left thigh. He stated that Prince had $1,265 in his pocket, and that some of the bills were "shredded" by a bullet, leaving pieces of money scattered on the ground. Nixon stated that Prince did not identify the person who shot him.

{¶ 25} Denny testified that he interviewed Jensen and Prewitt, who each said they heard three shots and then saw a black male in a hoodie chasing another black male who was wearing a white T-shirt.

{¶ 26} Wichman testified that appellant has a prior felony narcotics conviction that prohibits him from possessing a firearm. He also testified that there is "bad blood" between appellant and Prince, due to an incident to May 2011 when Prince stabbed appellant. Wichman also testified that he interviewed Brunell Hendrickson, who was "in hysterics" after a bullet came through her living room wall. He then went to Joyce McGill's house, where he saw blood on the back

of a nearby car, "confetti" on the driveway, and a bullet hole in a vehicle that was parked in the driveway. Also, he saw a closed pocket knife on the driveway. Wichman stated that the knife had a short "locking" blade. He also stated that Prince was more interested in the whereabouts of his money than in telling police who shot him.

{¶ 27} Wichman testified that appellant had a "retreat zone" that would have allowed him to get into his car without following Prince down the street. He further testified that, if appellant had retreated, he would not have fired the shot that went into Brunell's home. Wichman also testified that it was possible that Prince could have pointed a gun at appellant from the area where the pieces of money were found. However, he stated that no guns were ever found.

{¶ 28} Lewis briefly testified that he arrested appellant on an unrelated drug offense on October 7, 2001, which resulted in a felony conviction. Wharton, a forensic scientist in the Firearms and Toolmark Section of the Ohio Bureau of Criminal Identification and Investigation ("BCI"), testified that the weapon which fired at least five rounds at Prince was a semi-automatic, 9mm handgun. He further testified that it is possible all the bullets fired at Prince were from the same gun, however, the four remaining casings were too damaged to be certain. On cross-examination, Wharton testified that all nine bullets were 9mm Luger-type projectiles, but it was impossible to identify the shooter from looking at the bullets. He also testified that there are too many variables to say exactly how far a particular bullet would travel.

{¶ 29} Desloover, a Verizon Wireless employee, testified that he provided a record of the texts between appellant and Kindra, in response to a search warrant. The records of the texts were then admitted into evidence.

{¶ 30} Orzech testified that he was a Sandusky Police detective on June 20, 2011, and he responded to a call for police assistance at 1033 East Oldgate, the home of Brunell Hendricks. From a photograph, he identified a bullet hole in home's living room wall. He stated that the bullet taken from Brunell's home and a fragment found in Joyce's driveway were both 9mm Luger caliber, and both were fired from a barrel that had five lands and five grooves, and a right-hand twist. Orzech stated that he found a pair of gloves, a pair of sandals and a closed knife in Joyce's driveway. He also stated that a groove in the lawn could have been caused by a cartridge that skipped through the grass. He identified confetti-like pieces of money in the grass as coming from the roll of bills that was in Prince's pocket.

{¶ 31} Orzech stated that, in his opinion, the incident began in Joyce's driveway where four cartridge cases were found, and proceeded down the street where another shot was fired that struck Prince, causing the money to come out of his pocket. As Prince continued running, another shot was fired, which hit Brunell's house. Orzech testified that, according to his scenario, appellant would have been able to get into his vehicle and safely retreat when Prince started running. If that would have happened, the shot that entered Brunell's home would not have been fired.

{¶ 32} On cross-examination, Orzech testified that the bullet hole in Prince's vehicle was angled such that the shot would have come from the rear of the vehicle. Orzech disputed the defense's argument that more than one gun could have been used, based on the fact that all the casings could have come from the same firearm. He also testified that police searched the entire neighborhood but did not find a gun. Orzech stated that police could not establish that the knife on Joyce's driveway was involved in the incident. He also stated that the bullet that entered Prince's vehicle must have been fired while Prince was outside the car because it entered through the outside of the door and lodged inside the car. He had no opinion as to how the door may have been opened and later shut by Joyce.

{¶ 33} At the close of Orzech's testimony, the state rested. Defense counsel made a motion for acquittal pursuant to Crim.R. 29, which the trial court denied. Thereafter, the trial court and appellant engaged in the following exchange concerning the issue of a self-defense instruction:

> Court: And the other concern that the Court brought up to the Bench was the fact that you are asserting a self-defense apparently. The Court's picking that up.
>
> And there's [the] requirement of confession and then avoidance. In other words, you got [sic] to admit you did the crime and then say I'm avoid [sic] the liability for that crime because I have a defense. The court wants your client to know, and I'm sure you've already told him. Mr. Keahey, the court wants you to know if you choose to take the stand, just because you choose to take the stand,

> and if, in fact, you do admit to the crime, I don't know if you're going to do that or not, that does not automatically mean you're going to get the self-defense instruction to the jury. There's other criteria, other evidence that has to be proven, if you will, or set forth in order * * * to sustain the request for that jury instruction. So I don't want you under any mistaken belief that just because you admit, confess, if you will, that you avoid by getting that self, self-defense instruction. That's not automatic at all.
>
> * * *
>
> I'm sure you've had an opportunity to talk to your counsel. I'm going to give you a little bit more time to talk to him before we bring the jury in, but I definitely want you to understand just because you take the stand and just because you admit it does not mean your're going to get that instruction, okay? It doesn't mean you won't, but it does not mean that you will. Understand that?
>
> Appellant: Yes, sir.

{¶ 34} Defendant, who testified on his own behalf at trial, said that Joyce did not like him because he dated her older daughter, Angela, before he met Kindra. He also stated that he and Kindra "got along great" after K.K. was born. Appellant said that Prince stabbed him in May 2011 after the two men argued about how appellant treated Prince's children. Appellant said that he moved out of the apartment he shared with Kindra after the stabbing, because he "feared for his life."

{¶ 35} As to the events that occurred on June 20, 2011, appellant testified that he initially said he would

meet Kindra and K.K. at the doctor's office. However, he changed his mind and went to Joyce's house because he did not want Kindra driving a car so soon after she had surgery, and because he wanted them to go "as a family." Appellant said that he arrived before 9 a.m. and went inside, however, he left the house when Joyce started to "pick on him" for not taking off his shoes. As he was walking toward his car, Prince drove into the driveway "real fast," causing appellant to back up against the house. When Prince hopped out of the car "with a knife," appellant "pulled out the gun" and fired at Prince. Appellant said that when he headed toward his car, he heard a shot. When he turned around, he saw Prince holding a gun. Appellant responded by firing several rounds at Prince as Prince ran away. Appellant said that he got into his car and drove off after Prince ran away.

{¶ 36} Appellant said that he would have "been dead" if he had not shot at Prince. Appellant also said that, as he drove off, he heard Prince say "nigga, you dead." Appellant testified that he went to Pennsylvania after the shooting, and did not return until three months later when he turned himself into Sandusky Police.

{¶ 37} On cross-examination by the prosecution, appellant testified that he was imprisoned in 2002 for 17 months following a drug conviction. Consequently, he is prohibited from possessing a firearm. Appellant also stated that he did not name Prince as the person who stabbed him in May 2011 because he was afraid he would be killed in retaliation. Appellant said he did not get into his car and leave when he first saw Prince at Joyce's house because Prince was driving fast, and he was scared. He said he "got rid of" the gun on his

way back to Sandusky from Pennsylvania, because the police in Sandusky considered him "armed and dangerous" and he did not want to be "shot on sight."

{¶ 38} Appellant further testified that he could not run to his car before Prince ran away because he would have been shot in the back. He said he did not stop shooting, even though there were children in the car, because he was trying to protect himself. He admitted bringing a firearm to Joyce's house, even though he is not permitted to carry a weapon. Appellant stated that Prince initiated the altercation by jumping out of the car and coming toward him with a knife. Appellant also stated that it was Prince, not appellant, who said "you're dead nigga." Appellant agreed with the prosecutor's statement that "Prince pulls a knife, you pulled the gun, and you shot."

{¶ 39} At the close of appellant's testimony, the defense rested. The state presented no rebuttal evidence. The trial court and the parties then discussed proposed jury instructions, during which defense counsel renewed his request for an instruction on self-defense. In addition, defense counsel asked for an instruction as to necessity in regard to the charge of having a weapon while under disability. After hearing arguments from the defense and the prosecution, the trial court stated:

> In looking at the facts of the case, * * * the defendant, if you will, was at fault in creating the situation based on the testimony and text messages that were sent. He was supposed to go to the doctor's, and, instead, he came to the house. He brought a firearm with him to the house.

> The victim, one of the victims, Prince Hampton, ran from the defendant. The defendant chased him. The defendant had a means of escape, his own vehicle, which was parked across the street.
> * * *
> The Court doesn't find that the defendant—the Court finds he did create the—he did create the fault. He was at fault in creating the situation that gave rise to it. Whether or not he had a bona fide belief that he was in imminent danger of death or great bodily harm and there was no other means of escape, the Court finds there was a means of escape and also that he did violate his duty to retreat, and he had every opportunity to retreat. So the court finds that the defense of self-defense, that instruction will not be given.

{¶ 40} The trial court noted the defense's objection to its ruling. Thereafter, closing arguments were presented by the state and the defense, after which jury instructions were given and the jury retired to deliberate. On September 10, 2012, the jury returned a verdict of guilty to one count of felonious assault and one count of attempted murder of Prince, one count of having a weapon while under disability, and one count of improperly discharging a firearm at or into a habitation or school safety zone. Not-guilty verdicts were returned as to felonious assault on P.H., D.J., and A.C. The remaining charge of drug possession was later dismissed. On October 4, 2012, the trial court sentenced appellant to serve a total of 23 years in prison.

{¶ 41} On October 19, 2012, a timely notice of appeal was filed. On December 4, 2012, this court

found that the judgment of conviction was not a final, appealable order, and remanded the matter to the trial court. On December 17, 2012, the trial court filed a nunc pro tunc judgment entry in response to our mandate, and the appeal was reinstated.

{¶ 42} In his first assignment of error, appellant asserts that the trial court erred by refusing to instruct the jury as to the affirmative defense of self-defense. In support, appellant argues that the trial court improperly found that his testimony was not credible and refused to give a self-defense instruction on that basis.

{¶ 43} In *State v. Lillo*, 6th Dist. Huron No. H-10-001, 2010-Ohio-6221, ¶ 15, this court stated:

> Generally, requested jury instructions should be given if they are a correct statement of the law as applied to the facts in a given case. *Murphy v. Carrollton Mfg. Co.*, 61 Ohio St.3d 585, 575 N.E.2d 828 (1991). A court's instructions to a jury "should be addressed to the actual issues in the case as posited by the evidence and the pleadings." *State v. Guster*, 66 Ohio St.2d 266, 271, 421 N.E.2d 157 (1981). Prejudicial error is found where, in a criminal case, a court refuses to give an instruction that is pertinent to the case, states the law correctly, and is not covered by the general charge. *State v. Sneed*, 63 Ohio St.3d 3, 9, 584 N.E.2d 1160 (1992).

{¶ 44} Appellant correctly states that the inquiry into whether sufficient evidence has been presented to raise an affirmative defense is a matter of law that is reviewed de novo. *State v. Belanger*, 190 Ohio App.3d 377, 2010-Ohio-5407, 941 N.E.2d 1265 ¶ 4 (3d Dist.).

However, the trial court's ultimate decision to refuse the requested jury instructions will not be overturned on appeal absent a finding of abuse of discretion. *Lillo*, supra, citing *State v. Wolons*, 44 Ohio St.3d 64, 68, 541 N.E.2d 443 (1989).

{¶ 45} In cases where the requested instruction involves an affirmative defense, the accused must show that he or she "has introduced sufficient evidence which, if believed, would raise a question in the minds of reasonable people concerning the existence of that defense." *State v. Carter*, 4th Dist. Ross No. 10CA3169, 2010-Ohio-6316, ¶ 58, citing *State v. Melchior*, 56 Ohio St.2d 15, 381 N.E.2d 195, paragraph one of the syllabus. It is the duty of the defendant to "first present sufficient evidence at trial to warrant such an instruction." *Belanger*, at ¶ 3. Such evidence is to be viewed in a light most favorable to the defendant. *Id.* Nevertheless, the trial court may "omit any requested instructions that are not correct statements of the law and applicable to the case before it." *Id.*, citing *State v. Scott*, 26 Ohio St.3d 92, 497 N.E.2d 55 (1986).

{¶ 46} In Ohio, "self-defense is an affirmative defense that legally excuses admitted criminal conduct." *State v. Edwards*, 1st Dist. Hamilton No. C110773, 2013-Ohio-239, ¶ 5. To demonstrate the affirmative defense of self-defense through deadly force, an accused must show by a preponderance of evidence that:

> (1) [they were] not at fault in creating the situation giving rise to the affray, (2) [they] had a bona fide belief that they were in imminent danger of death or great bodily harm and their

> only means of escape from such danger was the use of such force, and (3) [they] must not have violated any duty to retreat or avoid the danger. *State v. Robbins*, 58 Ohio St.2d 74, 338 N.E.2d 755 (1979), paragraph two of the syllabus.

{¶ 47} As to the first element, appellant testified at trial that he decided at the last minute to drive to Joyce's house instead of meeting Kindra and K.K. at the doctor's office, and he did not know that Prince would be dropping off his sons while appellant was there. Appellant also testified that he pulled out a gun and shot at Prince because Prince had a knife in his hand and, based on the events that occurred six weeks earlier, appellant was afraid that Prince would stab him. Appellant stated that he did not immediately retreat to his vehicle because Prince pulled out a gun and he was afraid he would be shot in the back if he turned to leave.

{¶ 48} Before denying appellant's request for a self-defense instruction, the trial court noted that appellant unilaterally decided to pick up Kindra and K.K., and that text messages exchanged between appellant and Kindra established a possible motive for appellant to attack Prince. The trial court also stated that appellant had a means of escape, which he failed to utilize. Other trial testimony established that no witnesses saw Prince with a gun, no gun was ever recovered, and the only knife that was found at the scene was closed and lying on the ground.

{¶ 49} It is undisputed that appellant and Kindra had agreed to meet at the doctor's office. Appellant's stated motive for changing his mind and going to pick up Kindra and K.K. opened the door to the trial court's

consideration of other motives, including the content of the text messages exchanged by appellant and Kindra. In addition, appellant testified that he carried a gun that morning despite the fact that, as a convicted felon, he is prohibited from carrying a fire arm.

{¶ 50} As to the third element, appellant's duty to retreat, undisputed testimony was presented that appellant arrived at Joyce's home in a vehicle, which he parked nearby on the street. Although appellant testified that he was afraid to turn his back on Prince and get into the vehicle, no testimony was presented as to why appellant could not have retreated in any other direction, or by any other method.

{¶ 51} After considering the entire record in a light most favorable to appellant, we find that appellant failed to produce sufficient evidence to meet his burden as to the first and third elements of the affirmative defense of self-defense. A consideration of the second element, which required appellant to show that he reasonably believed he was in imminent danger of death or serious bodily harm, is unnecessary. State v. Robinson, 132 Ohio App.3d 830, 726 N.E.2d 581 (1st Dist., 1999).

{¶ 52} Based on the foregoing, we conclude that the trial court did not err or otherwise abuse its discretion by refusing to provide the jury with a self-defense instruction. Appellant's first assignment of error is not well-taken.

{¶ 53} In his second assignment of error, appellant asserts that the trial court erred by not instructing the jury as to the affirmative defense of necessity, as it relates to his conviction for carrying a weapon while

under disability. Citing State v. Crosby, 6th Dist. Lucas No. L-03-1158, 2004-Ohio-4674, appellant argues that that he presented sufficient evidence to support such a defense, which "excuses a criminal act when the harm which results from compliance with the law is greater than that which results from a violation of the law."

{¶ 54} As set forth above, "a trial court's determination as to whether the evidence produced at trial warrants a particular instruction is reviewed for an abuse of discretion." Burns v. Adams, 4th Dist. Scioto No. 12CA3508, 2014-Ohio-1917, ¶ 52. "A party must demonstrate not merely that the trial court's omission or inclusion of a jury instruction was an error of law or judgment but that the court's attitude was unreasonable, arbitrary or unconscionable." Freedom Steel v. Rorabaugh, 11th Dist. Lake No. 2007-L-087, 2008-Ohio-1330, ¶ 10.

{¶ 55} The defense of necessity is not codified in Ohio law, however, Ohio courts have held that the common-law elements of the defense are:

> (1) the harm must be committed under the pressure of physical or natural force, rather than human force; (2) the harm sought to be avoided is greater than (or at least equal to) that sought to be prevented by the law defining the offense charged; (3) the actor reasonably believes at the moment that his act is necessary and is designed to avoid the greater harm; (4) the actor must be without fault in bringing about the situation; and (5) the harm threatened must be imminent, leaving no alternative by which to avoid the greater harm. Dayton v. Thornsbury, 2d Dist.

Montgomery Nos. 16744, 16772, 1998 WL 598124 (Sept. 11, 1998).

{¶ 56} Traditionally, the defense of necessity requires pressure from physical forces, as opposed to the defense of duress, which involves a human threat. Id. In this case, appellant testified at trial that he was forced to carry a gun because he was afraid of Prince, in spite of the fact that he was legally forbidden to do so. Accordingly, appellant has not established that the harm in this case resulted from anything other than human action, as opposed to a physical force. In addition, as stated in our determination of appellant's first assignment of error, appellant failed to establish that he was not at fault in creating the situation that led to his decision to fire his gun, wounding Prince and endangering the safety of children and nearby adults.

{¶ 57} On consideration of the foregoing, we find that appellant has failed to establish the elements necessary to support a jury instruction on the affirmative defense of necessity. Accordingly, we cannot say that the trial court abused its discretion by refusing to give such an instruction. Appellant's second assignment of error is not well-taken.

{¶ 58} In his third assignment of error, appellant asserts that the trial court abused its discretion by making findings of fact. Specifically, appellant argues that the trial court usurped the function of the jury by "finding" that he came to Joyce's house instead of going to a doctor's appointment, he had a gun, Prince ran away from appellant, appellant chased Prince, appellant "had a means of escape," appellant "could have avoided Prince," appellant threatened Prince,

Prince had a knife, appellant "created the situation," and appellant "had a means of escape."

{¶ 59} In this case, the "findings of fact" that appellant disputes were made by the trial court in the context of determining whether appellant met his burden to go forward with evidence of the affirmative defenses of self-defense and necessity. Consequently, rather than making findings that bear directly on appellant's guilt or innocence, the trial court was discharging its duty to make preliminary determinations as to whether the requested jury instructions were warranted. Appellant's third assignment of error is, therefore, not well-taken.

{¶ 60} In his fourth assignment of error, appellant asserts that the trial court erred by denying his request for a mistrial. In support, appellant argues that the prosecutor prejudiced the jury by stating that appellant was "scary" when no such facts were in evidence. We disagree, for the following reasons.

{¶ 61} The trial court's decision to grant or deny a mistrial will not be overturned on appeal absent a finding of abuse of discretion. *Burns v. Adams*, 4th Dist. Scioto No. 12CA3508, 2014-Ohio-1917, ¶ 53, citing *State v. Sage*, 31 Ohio St.3d 173, 182, 510 N.E.2d 343 (1987). "A mistrial should only be granted where the party seeking the same demonstrates that he or she suffered material prejudice so that a fair trial is no longer possible." *Id.*, citing *Quellos v. Quellos*, 96 Ohio App.3d 31, 643 N.E.2d 1173 (8th Dist.1994), citing *State v. Franklin*, 62 Ohio St.3d 118, 580 N.E.2d 1 (1991). "The trial court is in the best position to determine whether the circumstances warrant the declaration of a mistrial." *State v. Simmons*, 1st Dist.

Hamilton No. C-130126, 2014-Ohio-3695, ¶ 66, citing *State v. Ahmed*, 103 Ohio St.3d 27, 2004-Ohio-4190, 813 N.E.2d 637, ¶ 92.

{¶ 62} The record shows that, during cross-examination, appellant stood up several times while answering the prosecutor's questions. At one point, the following exchange occurred:

Question: Sit down, please.

Answer: I can't even stand?

Question: You're scaring me.

Court: Wait a minute. Approach.

{¶ 63} Outside the hearing of the jury, the following took place:

Prosecutor: I don't like the way he gets up and goes like this.

Court: Okay, but you can't do that.

Prosecutor: I know.

Court: You can approach and you can ask me to have him sit down.

You can't do that.

Prosecutor: I know.

Court: I don't want the jury being tainted.

Defense: Yeah, I —

Court: Okay? I'll take care of it.

Defense: I'd almost ask for a mistrial for that.

Court: No, there's no mistrial there. Your request for a mistrial is denied. I'll give a curative.

> Ladies and gentlemen of the jury the comment by the prosecutor is stricken. You're not to consider that. Continue, State of Ohio.

{¶ 64} On consideration of the foregoing, and in light of the trial court's curative instruction, we find that appellant has not demonstrated that he suffered material prejudice such that a fair trial was no longer possible. Accordingly, we cannot find that the trial court abused its discretion by denying the motion for mistrial. Appellant's fourth assignment of error is not well-taken.

{¶ 65} In his fifth assignment of error, appellant asserts that the trial court's errors, taken together, deprived him of his right to a fair trial under the constitutions of the state of Ohio and the United States. Appellant argues that the only effective remedy in this case is for this court to order the reversal of his conviction.

{¶ 66} Before considering the effect of alleged "cumulative error," it is incumbent on this court to find that the trial court committed multiple errors. *State v. Wharton*, 4th Dist. Ross No. 09CA3132, 2010-Ohio-4775, ¶ 46, citing *State v. Harrington*, 4th Dist. Scioto No. 05CA3038, ¶ 57. Having determined that no such errors exist on the part of the trial court, we find that the principle of cumulative error is inapplicable in this case. Appellant's fifth assignment of error is, therefore, not well-taken.

{¶ 67} The judgment of the Erie County Court of Common Pleas is hereby affirmed. Appellant is ordered to pay the costs of the appeal pursuant to App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J.	*/s/ Mark L. Pietrykowski* JUDGE
Thomas J. Osowik, J.	*/s/ Thomas J. Osowik* JUDGE
James D. Jensen, J. CONCUR.	*/s/ James D. Jensen* JUDGE

APPENDIX J

IN THE COMMON PLEAS COURT
OF ERIE COUNTY, OHIO

FILED
COMMON PLEAS COURT
ERIE COUNTY, OHIO
2013 AUG-7 PM 2:05
LUVADA S. WILSON
CLERK OF COURTS

STATE OF OHIO,	:	TRIAL COURT
Plaintiff,	:	NO. 2011-CR-275
-vs-	:	COURT OF APPEALS
	:	NO. E-13-009
DEMETREUS A. KEAHEY,	:	
Defendant.	:	TRANSCRIPT OF
	:	JURY TRIAL
	:	(VOLUME II OF V)

– – – – –

TRANSCRIPT of JURY TRIAL had in the above-entitled action on September 4, 5, 6, 7, and 10, 2012, before the HONORABLE ROGER E. BINETTE, Judge, Common Pleas Court of Erie County, Ohio.

– – – – –

APPEARANCES:

Mary Ann Barylski, Esq.
Assistant Prosecuting Attorney

On Behalf of Plaintiff,
State of Ohio

Timothy H. Dempsey, Esq.

On Behalf of Defendant,
Demetreus A. Keahey

* * *

Page 315

A Five.

Q Five?

A Or six, I mean, six.

Q Okay. And on June 20th did defendant come over to your residence on Aspen Run Road?

A Yes, he did.

Q Okay. About what time, if you remember?

A Between 8:30, nine, something like that.

Q All right. Why did he come over; do you know?

A I have no idea.

Q All right.

A His daughter was going to the doctor and Quan, DeQuan was going to go to the doctor, and my daughter said she was going to meet him down there—

Q Okay.

A —at the doctor's office.

Q But instead he showed up at the home?

A Yes, he did.

Q Do you know how long he stayed, if you can—

A In the house or on the—

Q In the house say.

A A few minutes.

Q A few minutes, all right. When—and then he left or—

A No, he went outside—

Page 316

Q Okay.

A —at that time.

Q And what happened when he went outside?

A At that time, um, Prince pulled up in the driveway. He was dropping off DeQuan to go to the doctor's.

Q And then what happened?

A My daughter said to go outside and get Quan, and I went outside and he was walking up the driveway with a gun.

Q Who was walking up the driveway?

A Demetreus.

Q Demetreus. What happened with that after you saw him walking up the driveway with a gun?

A I was shouting, stop, my grandkids are in the car.

Q Okay. Did Demet—did defendant fire that gun?

A Yes.

Q Who did he fire at?

A Prince.

Q Where was Prince?

A He was getting out of the car because he was getting his son, DeQuan, out of the car.

Q Okay. So the children were in the vehicle?

A Yes, there was three of 'em in the vehicle.

Q Was anyone else in the vehicle—well, who all was in the vehicle?

A Prince, my grandson Prince, DeQuan, and some other

Page 317

little boy. I don't know what his name is.

Q Okay. He's not related to you?

A No.

Q If I would say his name was Anrico Cunningham, would that sound familiar?

A I, I don't know.

Q Okay. But there were three children in that vehicle?

A Yes.

Q All right. Explain to me what you observed when you went outside.

A I was standing in the driveway, back door, because my daughter asked me to go get Quan, and he always jumps out of the car when he gets to the house, and that day he didn't jump out of the car. He sat in the car.

Q That day he—I'm sorry, I didn't hear you.

A That day he didn't—normally when he comes home or from someplace, he jumps out of the car. That

day he didn't jump out of the car. He was sitting in the car, and I went to the door to get him, you know.

Q And what did you observe?

A I observed him coming up the—Demetreus coming up the driveway. He had pulled out a gun and was shooting at, um, Prince in the car.

Q Did you hear any words exchanged?

A No, I didn't hear any words.

Page 318

Q Okay. Did you see a gun in Prince Hampton's hands?

A No.

Q Did you see a knife in his hands?

A No.

Q Okay. Was Prince being aggressive or anything?

A I don't have any idea. I just seen him pull up in the driveway. He got out to get his son out of the car, that's all I seen.

Q What did you do when that happened?

A When what happened?

Q When you saw defendant with a gun and start shooting.

A I was yelling.

Q What were you—

A Stop, stop, my grandkids are in the car.

Q Okay. And what happened after that?

A He continued to shoot.

Q Okay. Do you know whether—after he continued to shoot, where did defen—where did Prince Hampton go?

A He went in front of the car and he ran between the bush and the house next door to me, which would be on the right-hand side of the driveway, and then he was running down the, down the street.

Q Okay. Did you—what did defendant do when Prince was running down the street?

A He followed him down the sidewalk.

Page 319

Q Okay. At any time did you observe defendant getting in his car?

A No, I just told him to get out of here.

Q Okay. What did you do after you observed all this?

A I went in the house and tried to call the police.

Q Okay. Did somebody get the children out of the car?

A I think my daughter got 'em out of the car.

Q Okay. Do you remember how many shots would have been fired?

A No. There was a lot of shots, but I don't remember how many.

Q Okay. I'd like to—this is State's Exhibit Number 1. (Inaudible). Okay. If I would say (inaudible). Oh, here. If I would say this was your street, Aspen Run Road—

A Uh huh.

Q —you would have lived right here?

COURT: Do you need to—

A Yes.

COURT: Do you need to get out of the chair to see it closer or not?

Q Can you see?

A I can see, but it's all blurry.

MS. BARYLSKI: Can she approach?

COURT: Yeah, you can step down, ma'am.

A Okay.

Page 320

WHEREUPON, the witness stepped down from the witness stand.

Q Okay. This is Aspen Run Road. Can you step just on the side a little, just so that the jury can see also, okay? It's okay. Would you say that that would be your house here?

A Yes, that's my house.

Q Okay. And this is your driveway?

A Yes.

Q And when—after defendant started shooting, using your finger, what direction did Prince run in?

A Prince had pulled up in the driveway here. He ran around the front of the car, with the car still running, and then he went through the—he went through this grass between this house and there's a bush there and then he cut across here and he went down the street.

Q And defendant followed him?

A Defendant came, Demetreus came down here and was shooting as he was running down the street.

Q Okay. Do you know where defendant had his car parked, by any chance?

A He had his car parked right here.

Q Right in this—right here?

A Yeah, across the street from me.

Page 321

Q Across the street. Your house is here?

A Yes.

Q He had it parked across the street?

A Right here.

Q Okay. And then you're saying that Prince ran in this direction?

A He ran this way, yes.

Q Okay. Then you went in the house, correct?

A Yes, I ran in the house and called 911.

Q Okay. If you'll take your seat. Thank you.

THEREUPON, the witness returned to the witness stand.

Q I'd like to hand you what's been marked State's Exhibit 2A, 2B, 2C, 2D, 2E, 2F, and 2G. I'd like you just to look through these pictures and then we'll talk about 'em. Now, State's Exhibit 2A, whose home, whose home is that?

A That's my home.

Q Okay. Now, when Prince Hampton pulled up—

A Uh huh, yes.

Q —is that Prince Hampton's car?

A That's the car he was driving.

Q That's the car he was driving?

A Yes.

* * *

Page 336

Q —to know what they are?

A I don't know what they are.

Q Okay. Now, you testified that Kindra was going to the doctor for the kids on that morning, June 20th?

A Yes.

Q Did you know that she had called Demetreus—

A No.

Q —earlier that morning to come over?

A No.

Q Isn't it true that Demetreus showed up to drive her to the doctor that morning?

A Not as far as I know. She was gonna take 'em herself.

Q Okay. Well, you mentioned that she had gallbladder surgery recently?

A Uh huh.

Q Wouldn't that—

COURT: Wait a minute.

A Yes.

COURT: Is that a yes or no?

A Sorry.

COURT: That's okay.

Q Wouldn't that inhibit her ability to drive and so that's why—

A No.

Page 337

Q —she called up—

A No.

Q —Demetreus?

A She was allowed to drive at that time.

Q Okay. You testified earlier that you went outside and you saw the defendant with a gun. Isn't it true that you told the police on that day when this happened that you were inside when this incident happened?

A No, I was inside and I came out to the side of the door because my grandson was gonna come out of the car.

Q But on the day this happened you were interviewed by the police; do you remember that?

A Yes.

Q And you told them at that time that you were inside the house—

A I was inside the house.

Q —at the door.

A And he—Prince pulled in the driveway and Demetreus came walking up the driveway and then I was out, I mean, my house isn't that big, and by the time I got out to the, um, side door, he had pulled out a gun and he started shooting.

Q So you were inside when the shooting happened?

A I was inside the door and the out—between the two doors.

Q Okay.

Page 338

A Standing in the—

Q Okay.

A —doorway.

Q And you mentioned that Prince Hampton was in front of the car or went in front of the car?

A He got out of the car and then he ran in front of the car.

Q Okay. And when this was going on, the door was open and the car was still running?

A Yes.

Q And then after they left you closed the door?

A No, not right after. That was like after I had taken a shower and stuff.

Q Okay. And that was before the police showed up?

A Well, the police were on their way—

Q Okay.

A —but they were there by the time I got there and my husband was home—

Q Okay.

A —at the time.

Q Okay. But at some point before the police got there you closed the door of the car?

A No, I closed the door after I had already taken a shower.

Q Okay.

Page 339

A No, no, no. You're right, you're right, before.

Q Before, okay.

A Because the police were already there, yes.

Q Okay. And you mentioned that shoes were left in the drive. These were Prince Hampton's shoes?

A Yes.

Q These sandals?

A Flip flops or whatever, yeah.

Q Okay. And isn't it true that you moved those?

A Yes.

Q And you told the police that you moved those?

A Yes, I did.

Q You told the police that you placed the shoes in their current location?

A Yes, in the picture, yes, I did.

Q Okay. That the shoes were in the grass and you had picked them up prior to the officer's arrival and you moved them?

A Yes.

Q Put them in front of the car?

A Yes.

Q Why did you do that?

A I don't know, it's just—I just—I don't know. I wasn't thinking about, you know, what—to leave everything alone.

Q Okay.

A At the time my nerves were just shot and I wasn't thinking.

Q Okay. So you closed the door and you moved the shoes?

A I just put the shoes by the door of the car.

Q Okay. Did you do anything else with any other items?

A I just turned the, the ignition off of the car, car ignition, because it was running.

Q So you turned the car off, too?

A Yes.

Q Okay. Did you do anything with a knife?

A There wasn't no knife. I didn't see no knife.

Q Okay. Were you going to go with them to the doctor's appointment that morning?

A No.

Q Isn't it true you had just woken up?

A I'd been up for a little bit, yes.

Q Okay. You were still in your robe or pajamas?

A Yes.

Q Isn't it true that you told Demetreus to take off his shoes or leave the house?

A Yeah, everybody takes off their shoes when they come into my house and walking on the carpet.

Q Isn't that kind of a rule in your house, that you

either take off your shoes or you don't come into the house?

A Well, I just told him to leave because I knew Prince was gonna bring DeQuan to the house to, um, drop him off to go to the doctor.

Q Did you see Prince try to run Demetreus down with his car?

A No.

Q Did you see Prince pull out a knife?

A No.

Q Did you see Prince pull out a gun?

A No.

Q Isn't it true that you, when you started yelling, you told them to stop what they were doing?

A I told Demetreus to stop, please stop, my grandkids are in the car.

Q Okay. You told Demetreus to leave and he did?

A Yes.

Q He went over to his car and he got in and he left?

A That was before he went down the street with the gun shooting.

Q You went to the police station a couple hours later?

A The police took me down to the police station.

Q And you talked to them about this incident?

A Yes.

Q You also talked to them about the prior stabbing

* * *

APPENDIX K

IN THE COMMON PLEAS COURT
OF ERIE COUNTY, OHIO

FILED
COMMON PLEAS COURT
ERIE COUNTY, OHIO
2013 AUG-7 PM 2:05
LUVADA S. WILSON
CLERK OF COURTS

STATE OF OHIO,	:	TRIAL COURT
Plaintiff,	:	NO. 2011-CR-275
-vs-	:	COURT OF APPEALS
	:	NO. E-13-009
DEMETREUS A. KEAHEY,	:	
Defendant.	:	TRANSCRIPT OF
	:	JURY TRIAL
	:	(VOLUME II OF V)

– – – – –

TRANSCRIPT of JURY TRIAL had in the above-entitled action on September 4, 5, 6, 7, and 10, 2012, before the HONORABLE ROGER E. BINETTE, Judge, Common Pleas Court of Erie County, Ohio.

– – – – –

APPEARANCES:

Mary Ann Barylski, Esq.
Assistant Prosecuting Attorney

On Behalf of Plaintiff,
State of Ohio

Timothy H. Dempsey, Esq.

On Behalf of Defendant,
Demetreus A. Keahey

* * *

Page 354

A Three.

Q Three. Prince would have been how old?

A Six.

Q And what about, um, do you know how old Anrico Cunningham would have been—

A No.

Q —or approximately? Okay. On June 20th did defendant come over to your home where you were living on Aspen Run Road?

A Um, no. I was in the back room getting my daughter ready for the doctor's appointment.

Q Okay. Did Prince—did, um, defendant come to the home?

A No, not that I know of.

Q Oh, he wasn't at the house?

A I was in the back of the, of the house getting my daughter together to get ready to go to the doctor's.

Q Okay. Was defendant supposed to take you to the doctor?

A No, he was supposed to meet me at the doctor's.

Q He was supposed to meet you at the doctor's?

A Yes.

Q Did you talk to him earlier that day?

A Um, the day before was Father's Day and I talked to him. Um, he knew that Kamora was supposed to get her first

Page 355

year shots, and I talked to him earlier that morning, way earlier that morning, and it was just to confirm what time her appointment was, but after that I didn't hear from him.

Q Okay. How were you going to get to the doctor's?

A My car.

Q Okay. You were going to drive?

A Yes.

Q Okay. Where were your children at?

A Um, at the time Prince and DeQuan was staying with their father and Kamora was staying with me.

Q Okay. And their father being who?

A Prince Hampton.

Q Prince Hampton. Did Prince come to the home that day?

A Yes. He was 30 minutes late coming to drop my son, DeQuan, off.

Q Okay. Were you involved or did you observe an incident that happened outside the home?

A No. I was inside the house getting my daughter ready for her doctor's appointment when I heard a couple gunshots.

Q Did you go outside?

A Yes.

Q And what happened when you went outside?

A When I went outside, I seen that Shawneata Grant's vehicle was in the driveway. Um, I seen, um, like flip

flops, whatever, that were just on the ground. I didn't see Prince nowhere in sight, and I grabbed my children out the car and told them they need to get in the house.

Q What about Shawneata's son?

A Yes, he was in the back seat, and I told him—

Q Okay.

A —to come in the house as well.

Q Didn't you tell the police that you heard a knock on the door and the defendant was at the door that day, that morning?

A No.

Q Where was your mother at?

A Um, at the time my mother was in the bathroom at first and then she was in the living room. Um, by the time that the shots were fired she was in the kitchen.

Q Oh, your mother wasn't outside?

A No.

Q So she didn't see anything?

A No.

Q So she didn't see defendant shoot—

A I don't know what she had seen, but she was in the house when the shots were fired at first.

Q Okay. When you say in the house, where was she at?

A In the kitchen.

Q Okay. Do you know how many shots were fired?

Page 357

A No. I just heard two. I didn't count.

Q Did you see the bullet hole in the car?

A Um, the police had told me it was in the back of the car, but I heard that it was in the driver's side.

Q Did you see the bullet hole?

A No.

Q No, okay. Did you know that Prince was taken to the hospital?

A Not till about almost a half hour to an hour later.

Q Um, did anybody call Anrico's mother?

A I was tryin' to get a hold of her. I don't know her number—

Q Uh huh.

A —and I've called a couple of my friends to ask where I could find where she was at because he was—he wanted to go with his mom.

Q Why were you trying to get a hold of her.

A Because I had her son.

Q Okay. But why would—what concern would that be?

A Because Prince wasn't nowhere in sight, and me and her do not get along, and I did not want to have any type of conflict with her because her son was with me.

Q Did you know that something was gonna go down eventually between these two?

A No.

Page 358

Q Meaning defendant and Prince Hampton?

A No.

Q Okay. What's your—what's your telephone number, your cell phone number?

A I don't have that cell phone number anymore.

Q Okay. But what was your cell phone number?

A 419-366, I think it was 6147.

Q Two one four seven?

A Yeah.

Q It was in whose name?

A It was in my father's name.

Q Okay. Do you remember what defendant's cell phone number was at the time?

A No.

Q If I say it was 216-224-4153 would that be familiar?

A Yeah.

Q Okay.

MS. BARYLSKI: These are these I gave you

(inaudible).

MR. DEMPSEY: Is this the text messages?

MS. BARYLSKI: Yeah.

MR. DEMPSEY: Okay.

MS. BARYLSKI: State's Exhibit 4, Your Honor.

These are—

COURT: Four?

Page 359

MS. BARYLSKI: These are the cell phone records.

COURT: What company?

MS. BARYLSKI: Verizon.

COURT: Okay.

Q I'm going to hand you what's been marked State's Exhibit Number 4. You've only seen these this morning; is that correct?

A Yes.

Q And part of State's Exhibit Number 4 is a search warrant. I'd like to look—I'd like you to look at the number that that search warrant is asking for records for. What's that number?

A 419-366-2147.

Q And whose telephone number is that—

A Mine.

Q —cell phone number?

A Mine.

Q And it was in Homer's name, right?

A Yes.

Q Kindra, I'm going to ask you to read certain messages on this cell phone, text messages that were sent. The very first te—on the bottom, can you read that text message?

A And you can stop coming at me with this Prince shit seriously, and what I said was if I was that type of bitch I would've fuckin' told on his ass right.

Page 360

Q And that's a text message that you sent to Demetreus?

A Yes.

Q I'd like to go to the next text. I'd like you to read down here (indicating) and this is a text that you received from Demetreus. What does that say?

A Keep your same actions when shit go down, that's all I was gonna say.

Q I'd like you to go to the next tabbed text message at the very bottom. Can you read that?

A Right here (indicating)?

Q Here, and I'll just (inaudible).

A Oh, it's not on there. You can quit it like I'm trying to—tryin' to say you should have told. You did what you wanted to and I don't care 'cause ima do what I have to flat out.

Q And that was a text message you received from Demetreus; is that correct?

A Yes.

Q You did what you wanted to and I don't care 'cause I'm going to do what I have to do flat out, correct?

A Yes.

Q I'd like you to go to the next one. I'd like you to read—make sure we got the right one here. I'd like you to read that text message, please.

A About that nigga, if you gonna do something, shut the

Page 361

fuck up talkin' about it, I'm out.

Q And that was you texting Demetreus, correct?

A Yes.

Q I'd like you to read this text message.

A Shouldn't have even been put in the middle because of the situation and how I have kids by him also, that don't have shit to do with me and if you are a real nigga.

Q That's you texting Demetreus, correct?

A Yes.

Q And these texts are on what date?

A June 15th.

Q So this is prior to defendant coming to your area the day you had a doctor's appointment, right?

A Yes.

Q So there were text messages between you and defendant regarding the situation with regards to the stabbing, correct?

A Yes.

Q And one of the text messages indicates that something was gonna go down; is that a fair statement?

A Not to what he wanted to retaliate. It was about what was told to him that I had said.

Q And to your knowledge you don't know whether Demetreus came to your house that morning or not, do you?

A No.

Page 362

Q Do you remember what defendant was wearing that day?

A What day?

Q Huh?

A What day?

Q The day that you were supposed to meet him at the doctor's.

A No, because I didn't see him.

MS. BARYLSKI: I have no further questions.

COURT: Thank you, Cross?

CROSS EXAMINATION BY MR. TIMOTHY DEMPSEY:

Q Good morning, Ms. McGill.

A Good morning.

Q I have a few questions for you about this. Isn't it true that in 2011, earlier in the year you lived with Demetreus on Wilbert Street?

A Yes.

Q Okay. And you testified that you have a daughter with him, Kamora?

A Yes.

Q And prior to your relationship with Demetreus you had been in a relationship with Prince Hampton?

A Yes.

Q How did it end with Prince Hampton?

A Um, not well. He was cheating on me with Shawneata Grant and I basically told him that he had to get out the

Page 363

house. He wasn't helpin' out with the kids.

Q Okay. How does Demetreus get along with the kids?

A Demetreus has stepped up, especially for my youngest son. Um, when Prince wouldn't buy diapers or do anything for him, Demetreus stepped up and would take care of financial things and then also would watch the kids while I was doing nursing clinicals in Elyria.

Q Okay. And this is not just his daughter, but also Prince's kids?

A Yes.

Q Now, you testified that you talked to Demetreus the night before and then that morning?

A Yes.

Q And didn't you also have gallbladder surgery?

A Yes, I had gallbladder surgery, um, about the beginning of June, two weeks or so before that.

Q Okay. Were you under doctor's orders not to drive for a while?

A Yes, because I was on, um, Percocet and Vicodin.

Q Okay. So it was a help to have somebody to come over to drive you to the doctor?

A Um, yes, but I told him that I didn't need him to drive me. I wasn't even taking the Percocets anymore.

Q Okay. But he probably showed up to take you and his daughter and the other kids to the doctor?

Page 364

A Um, my oldest son didn't have to go to the doctor. Um, he just told me that he was going to meet me there.

Q Okay. But he decided to show up anyway?

A I didn't see him at the house.

Q You didn't see him, okay. And you testified that your mom was in the house with you when you heard the gunshots?

A Yes.

Q She wasn't outside?

A No, she was in—she was in the kitchen, because she was—just came into the living room.

Q Okay. Had she just woken up?

A Yes.

Q So she was barely awake when this happened?

A She was in the bathroom. She was—I was up before she was.

Q Okay. Was she still in her pajamas?

A Yes.

Q Okay. Now, do you remember an episode in—on May 7th of 2011 when Demetreus got stabbed?

A Yes.

Q You indicated that you weren't present for that; is that—

A I was in the house. Kamora had just woken up.

Q Okay. Did that happen on Wilbert Street?

A Yes.

Q And that was between Demetreus and Prince?

A Yes.

Q And did you end up taking him to the hospital?

A Yes.

Q Demetreus I mean?

A Oh, yes.

Q And was he—was he stuck pretty bad?

A Yes, he hit an artery.

Q They—he got stuck in an artery?

A Yeah, he got stabbed in the side. He hit an artery, because it was basically squirting out, and I know from nursing experience that he hit something pretty hard and it had (inaudible) medical attention right away.

Q Okay. Could he talk to anybody about what happened?

A At the time he just said that—I had to take him to the hospital. By the time we got towards the

hospital he said that he was lightheaded and I just was telling him to apply pressure to the, to the wound.

Q Okay. Do you know if it was life threatening, the injuries?

A Um, when we got to the hospital, well, we had heard that it could have pierced his liver, and we were just waiting for what the doctor had said, but, um, his lung did collapse.

Page 366

Q Okay. Do you know if Prince Hampton usually carries a knife?

A No, 'cause I, I don't—we really don't—aren't on good speaking terms.

Q Okay. How long were you with Prince Hampton?

A On and off for five and a half years.

Q Okay. And you had two kids with him?

A Yes.

Q Did you live with him during that time?

A Um, we lived together on and off.

Q Okay. During that time did you ever see him carrying a knife?

A Yes.

Q Okay. Did you ever see him with a gun?

A Yes.

Q Have you ever seen any of his tattoos?

A Yes.

Q What tattoos does he have?

MS. BARYLSKI: I'm going to object to this line of questioning.

COURT: Approach.

WHEREUPON, there was a conference between the Court and Counsel, and out of the hearing of the

* * *

Page 373

Q Okay. And then this number shows up again, this 740-463-4405, and that was for it looks like ten minutes. You don't remember who that was?

A Oh, that's my friend, Terron Randleman.

Q Okay, okay. Did you ever have any problems with Prince Hampton when you guys were together?

A Yes.

Q Okay. Is that one of the reasons why you broke up with him?

A Yes. He had, um, two domestic violence charges with me.

Q Okay.

COURT: That's stricken, disregard that.

Q Okay.

COURT: Next question.

Q Do you live in, uh, near the Ford Plant in Avon Lake now or you living here with your mom?

A No, I live here with my mom.

Q Okay. Does your mom know Prince Hampton very well?

A Yes.

Q Okay. Does she know Demetreus very well?

A Yes.

Q Does she have a preference of Prince over Demetreus?

A She has a preference of Prince.

Q Okay. Would she cover up for him or lie for him?

Page 374

A Yes.

MS. BARYLSKI: I object to that, Your Honor.

COURT: Overruled.

MS. BARYLSKI: We cannot—

COURT: Overruled.

MS. BARYLSKI: I'd like to approach on that one, please.

COURT: You can approach.

WHEREUPON, there was a conference between the Court and Counsel, and out of the hearing of the jury, which is as follows:

COURT: What's your basis?

MS. BARYLSKI: You cannot test—you cannot ask questions that a witness would attest to somebody's credibility as to whether they'd be telling the truth or a lie and that's exactly what he did.

COURT: I think, I thought that was only to their testimony, whether their testimony was truthful or lying, not whether

they would be—let me look it up. I thought it was for their truth and (inaudible). Are you talking under 405, proving character? You're not talking about

* * *

Page 385

who stabbed him?

A Because when I got questioned, I didn't know who stabbed him.

Q Okay. Why didn't you go to the police and tell 'em afterwards?

A Because I didn't want to be in the middle of it with Prince.

Q Aren't you acting like in the middle of this now?

A Yes.

Q I'd like to hand you what's been marked State's Exhibit 2C. Can you identify that picture?

A Yes, it's Shawneata Grant's car.

Q Uh huh. Is that the car that was in your driveway that day?

A Yes.

Q What does that picture represent?

A A bullet hole in the driver's door.

Q Uh huh, a bullet hole in the car. Where were your children when that bullet hole was sustained?

A In the backseat of the car.

Q Pardon?

A In the backseat of the car.

Q In the back of the car. But you don't know Demetreus to carry a gun, defendant to carry a gun?

A He's never carried a gun around me.

Page 386

Q There was some texts that indicated he was going to basically take care of business, wasn't he.

A The conversation that we had was talking about what somebody told him about the Prince situation.

Q Yeah, and he—he was—there's some conversations and texts that you had with defendant with regards to the street code or something like that, correct?

A Yes.

Q What is that?

A Um, basically you don't talk, you don't say anything.

Q And you said your mother would protect Prince?

A Yes, because she has in the past.

Q Okay. What about defendant; would your mother protect defendant?

A No. She doesn't like the defendant.

Q Okay. But your mother likes Prince; is that what you're saying?

A Yes.

Q Do you, do you know what your mother observed that day?

A No, my mother—

Q Do you know what your mother observed that day?

A No.

Q Okay. Do you know what the neighbors observed that day?

Page 387

A No.

Q Okay. Do you know what happened that day?

A Of—only of when I heard the gunshots and what the police told me.

Q And where were your children?

A In the backseat of the car.

Q Does that bother you in any way?

A Of course.

Q How does it bother you?

A Because my kids could have got harmed.

Q Pardon?

A My kids could have got harmed.

MS. BARYLSKI: I have no further questions.

COURT: Re, recross?

MR. DEMPSEY: Yes, Your Honor.

RECROSS EXAMINATION BY MR. TIMOTHY DEMPSEY:

Q Kindra, were your kids harmed in any way that day?

A No.

Q Okay. You said that your mom had protected Prince in the past?

A Yes.

Q How had she done that?

A Um, with my domestic violence charges, her and my dad had some issues—

COURT: That's stricken.

Page 388

A —together.

COURT: The domestic violence, testimony at domestic violence from this witness in the past stricken. You can continue along those lines, though.

Q Has, has your mom protected Prince in other ways?

A Um, coming to get the kids and allowing 'em to go with him whenever they want to without me knowing, yes.

Q Without you knowing about it?

A Yes.

Q And you didn't want the kids to go with him?

A Not if me and him had a argument.

Q Okay. The day of this incident on June 20th you talked to the police about what, what you saw, what you heard?

A Yes.

Q And they also talked to you about the stabbing that happened in May, didn't they?

A Yes.

Q And they asked you, did they have problems with each other, and you said, they don't have a beef.

A They've been around each other numerous times of the years that I've been with Demetreus.

Q Okay. And you also mentioned, even after the stabbing, they saw each other on occasion and had no problems

Page 389

with each other.

A Yes.

Q And didn't the detective that you were talking to, didn't he indicate that Prince, Prince Hampton's people are going after Demetreus now?

A Yes.

Q Is that one of the reasons why you didn't say anything about who did the stabbing?

A No.

Q Okay. You said initially you didn't know who did it and then you learned who did it.

A Yes.

Q And it was Prince Hampton, right?

A Yes.

Q And the prosecutor said, why didn't you go to the police about that, and you said it has to do with the street code, don't say anything.

A That's not exact reason why I didn't—it had nothing to do with the street code. It had to do with myself and his family.

Q Whose family?

A Prince Hampton's.

Q Okay. Do you think that they would have done something to you?

A The day that Demetreus got stabbed I had a

* * *

APPENDIX L

IN THE COMMON PLEAS COURT
OF ERIE COUNTY, OHIO

FILED
COMMON PLEAS COURT
ERIE COUNTY, OHIO
2013 AUG-7 PM 2:05
LUVADA S. WILSON
CLERK OF COURTS

STATE OF OHIO,	:	TRIAL COURT
Plaintiff,	:	NO. 2011-CR-275
-vs-	:	COURT OF APPEALS
	:	NO. E-13-009
DEMETREUS A. KEAHEY,	:	
Defendant.	:	TRANSCRIPT OF
	:	JURY TRIAL
	:	(VOLUME II OF V)

– – – – –

TRANSCRIPT of JURY TRIAL had in the above-entitled action on September 4, 5, 6, 7, and 10, 2012, before the HONORABLE ROGER E. BINETTE, Judge, Common Pleas Court of Erie County, Ohio.

– – – – –

APPEARANCES:

Mary Ann Barylski, Esq.
Assistant Prosecuting Attorney

On Behalf of Plaintiff,
State of Ohio

Timothy H. Dempsey, Esq.

On Behalf of Defendant,
Demetreus A. Keahey

* * *

Page 461

Q Right here?

A Yes.

Q Okay. How long have you lived there?

A Six years approximately.

Q Okay. I'd like to go back to June—are you living alone or do you live with your family?

A Um, I live alone right now.

Q Going back to June 20th, 2011, were you living at that residence?

A Yes.

Q Can you tell the jury what occurred that day?

A Um, I was—I had some personal business to take care of, so I was running late for work, then I was starting to get ready to go to work and I heard sounded like firecrackers or some two loud bangs, so I kind of looked out the window. You want me to explain the whole thing or—

Q Yes, please.

A Okay. I looked out the window. I saw, um, it sounded like it was coming, like I said, on that 45 degree angle. I saw a black guy in a white T-shirt running from in between two houses. He kind of—as the road curves, he kind of was hookin' towards the left, then I don't know, a short distance behind him I saw another black guy with a—he had like a hoodie on and he was kind of following behind him. I don't know how—quite how far. It wasn't that—

Page 462

really that close.

Q Okay. Can you show with this pointer about the direction that they were going? All right.

A Okay. If that's the—

Q On State's Exhibit Number 1, okay.

A If that's the house there—

Q Uh huh.

A —they were coming, running from right in between them two houses, if that's the house. I really can't tell from this display you have here. The black guy in the white T-shirt was running that way, like hookin' around the corner there—

Q Uh huh.

A —and another guy was following behind him, I don't really know how far behind, and then, um, so the one guy, it looked like he raised his arm and fired off another shot, and I do believe it was a shot, and really—didn't really see the gun, but I heard a loud noise again, and I—I just really couldn't believe what I was seeing, what was going on. And then after that, the guy in the hoodie, some girl came out, that girl came out and started talking to him, saying something,

I don't know what they were saying, then they turned and kind of was like—now they're like facing towards where I was looking at. So I kind of got out of the window and then, I don't know, a couple seconds or so later

Page 463

I looked back out, and I really didn't see anybody, but I did see like a car take off. I don't know if that was him in the car or not, so I really don't know what happened after that.

Q Okay. Did you hear any screaming or yelling, a woman?

A Not, not really, no. I don't recall that part. I don't—

Q Something about, stop shooting?

A I'm sorry?

Q Yelling, stop shooting?

A Not, not really. I really didn't really hear any—

Q Okay.

A —any, any verbal stuff. I just heard about two loud—or actually it was like—I think it was four loud bangs altogether.

Q Okay. And did you come outside or were you inside and observed all this?

A I was inside.

Q Okay.

A I never did come outside until the rest of the people came outside, then I was like, okay, I think it's safe now to come outside.

Q Okay. Can you identify the person in the hoodie?

A No, I could not.

MS. BARYLSKI: I have no further questions.

COURT: Cross examination?

* * *

APPENDIX M

IN THE COMMON PLEAS COURT
OF ERIE COUNTY, OHIO

FILED
COMMON PLEAS COURT
ERIE COUNTY, OHIO
2013 AUG-7 PM 2:05
LUVADA S. WILSON
CLERK OF COURTS

STATE OF OHIO,	:	TRIAL COURT
Plaintiff,	:	NO. 2011-CR-275
-vs-	:	COURT OF APPEALS
	:	NO. E-13-009
DEMETREUS A. KEAHEY,	:	
Defendant.	:	TRANSCRIPT OF
	:	JURY TRIAL
	:	(VOLUME II OF V)

– – – – –

TRANSCRIPT of JURY TRIAL had in the above-entitled action on September 4, 5, 6, 7, and 10, 2012, before the HONORABLE ROGER E. BINETTE, Judge, Common Pleas Court of Erie County, Ohio.

– – – – –

APPEARANCES:

Mary Ann Barylski, Esq.
Assistant Prosecuting Attorney

On Behalf of Plaintiff,
State of Ohio

Timothy H. Dempsey, Esq.

On Behalf of Defendant,
Demetreus A. Keahey

* * *

Page 491

between the Court and Counsel, and out of the hearing of the jury, which is as follows:

COURT: I think it's—I think it's 7C, Tim.

MS. BARYLSKI: It's in the group of pictures.

COURT: Number 7C, like in cat.

MR. DEMPSEY: Here it is.

COURT: Yeah, 7C, right.

MR. DEMPSEY: Yeah, that's it.

MS. BARYLSKI: Oh, okay.

COURT: Say what number that is.

THEREUPON, the conference ended and the following proceedings were had within the hearing of the jury:

Q Okay. Officer, I want to show you what was already marked as State's Exhibit 7C. Can you see that?

A I can see 8, yeah.

Q Okay. There's an evidence marker number 8. Do you know where that was located on the driveway at the McGill home?

A Not with that close-up, no.

Page 492

Q Okay. Is that where the knife was located?

A That's, that's possible.

Q Okay.

A I do believe the knife was on the driveway not too far from the sidewalk area, but I can't tell from that picture.

Q Okay.

A It's too much of a close-up.

Q Okay. This may be more appropriate for another officer. It's—on the police report it's marked as number 8, black knife, driveway, but from this, you really can't tell what it is?

A No.

Q Okay, fair enough. I'm showing you what's been already marked as State's Exhibit 2D. Can you see that—

A Yes.

Q —document? That's a picture showing some sandals and it looks like—is that a bullet casing?

A Yes.

Q Now explain to the jury what a bullet casing is.

A Okay. When you, when you shoot a gun, the end of the bullet is the projectile that comes out of the gun. On some guns the casing is the part that had the gun

powder in it. If it's a—what they call a semi-automatic, that gets kicked out of the gun and usually gets left there. If it's a

revolver and they don't empty the revolver, the casing stays in the gun.

Q Okay. So with a automatic or semi-automatic weapon that would be kicked out of the gun—

A Yes.

Q —after a shot was fired?

A Yes.

Q Would it indicate to you that that's a place where a shot would have been fired from?

A Not necessarily, because when it kicks out, it goes a ways and it could bounce and do other things, so.

Q Okay.

A You're on concrete there. That doesn't mean that the person was standing right there when it happened.

Q Okay.

A But usually it's gonna eject out the right, to the right. Where it goes from there, it could hit that vehicle, it could bounce off, it could hit the sidewalk or the concrete, go somewhere. So I would say no to your question.

Q Okay. But it's possible that that's a place where a shot was fired?

A Yes.

Q Okay. And these sandals that are next to marker number 5, do you know whose sandals those were?

A I believe they were Prince Hampton's.

Page 494

Q Okay. And this was in the front of the vehicle that was in the driveway at the McGill home?

A Yes.

Q Are you familiar with 9 millimeter guns?

A Yes.

Q How many shots does a 9 millimeter gun usually have in it?

A You can have as many as 16 without having to reload, 15 in a clip and then one that you'd already have loaded in the chamber of the gun.

Q Is that normal?

A If it's me, I'd have 16 in there, but, I mean, somebody on the street, they could have one, two, whatever. I mean, that's up to them.

Q Okay. There were other pieces of evidence that you found at the scene. There were pieces of money that were found?

A Yes.

MS. BARYLSKI: Pieces of money (inaudible) this is what you want.

MS. GROSS: 8B, 8B.

MS. BARYLSKI: Here.

Q Okay. This is Exhibit 8B. Can you see that? Oh, that's not so good. Eight is bleeding through.

MS. GROSS: Yeah, and you got—you're not

Page 495

getting the money either (inaudible).

MR. DEMPSEY: Oh, yeah.

MS. GROSS: Pull it up maybe.

MR. DEMPSEY: That's not showing up too well (inaudible).

MS. BARYLSKI: It's the lights, not—

MR. DEMPSEY: Is it the lights now? I don't know (inaudible) that was.

COURT: No, turn it—turn it on. Turn that light—it's gonna dark it up. Let's see, turn the light on, Lori. Let's see if that helps. Turn that on, see if that helps. No?

MR. DEMPSEY: No, that doesn't—

COURT: Turn 'em off.

Q Can you see that, Officer Braun?

A I can see it, but it's not very clear.

Q Okay. This is Exhibit 8B. Do you remember from when you were there that there were pieces of money there?

A Yes, I do remember that.

Q Okay. And was there also a shell casing near, near that money as well?

A I believe there was.

Q Okay.

A There was a lot of shell casings there.

Q Okay. Did you end up talking to a few people there at

Page 496

the scene?

A Yes.

Q Okay. Did you talk to a William Meyers?

A Yes, I did.

Q Did he indicate to you that the parties yelled at each other?

A Yes, he did.

Q And that he wasn't sure who said the comment to, to each other?

A That's correct.

Q And that statement I'm going to read from the report is: You're a dead nigger.

MS. BARYLSKI: I'm going to object to that hearsay. Mr. Meyers—

COURT: Approach.

MS. BARYLSKI: —is not—

COURT: Approach.

WHEREUPON, there was a conference between the Court and Counsel, and out of the hearing of the jury, which is as follows:

COURT: Your objection is hearsay, that he's going to read what Meyers said to him.

* * *

Page 506

that picture?

A I can in this picture. I couldn't in that up there.

Q And do you know where on the McGill driveway that marker and knife were located?

A I don't, don't recall. I remember finding the knife, but from this picture, no, I don't.

Q Would it have been at the very back of the driveway where it ends at the grass towards the back of the house?

A It appears it is, because it's obviously not toward the sidewalk or the end of the road.

MR. DEMPSEY: Okay. Thank you.

COURT: Thank you.

MR. DEMPSEY: I believe that's all.

COURT: Redirect?

REDIRECT EXAMINATION BY MS. MARY ANN BARYLSKI:

Q Officer Braun, State's Exhibit Number 7C where you identified a knife, was that knife open or closed; do you remember?

A I don't recall.

Q Can you look at it? I mean—

A It looks closed, it looks closed in the picture, but do I remember a hundred percent, no, but—

Q Okay.

A —it looks closed to me.

Q But it does look closed in the picture?

A It does.

Q And generally speaking, when you find evidence and you mark it, you don't disturb it, do you?

A That's correct.

Q Okay. So if this knife was found and marked as Exhibit 8 here or evidence 8, it would—based on police procedure, it would be as it was found here?

A That's correct.

Q And it's closed?

A Yes.

Q The other—one more question, Officer. You indicated there was an exhibit where the shoes and a bullet fragment were found; is that a fair statement?

A Yes.

Q And that was towards the front of the vehicle. The fact that—well, that's not it. If you'll bear with me one moment, please.

MS. GROSS: 2D, maybe 2D.

Q Now, there was a bullet fragment found—something's wrong with this thing. I don't know what's—

MS. GROSS: Here it is.

Q It's—

MS. GROSS: Take that back.

MS. BARYLSKI: But still it's, it's not in focus very well.

Page 508

MS. RICKENBAUGH: Did you widen it out?

MS. BARYLSKI: Yeah.

Q Number two, as you indicated, was a bullet fragment?

A That may be a casing. I know there was a bullet fragment there, but which number is that, I can't say for sure.

Q Okay.

MS. GROSS: That was Exhibit 2C, Mary Ann.

Q Now, this is at the back of the vehicle, correct?

A (No audible response.)

Q Do you remember what that one was, that—was that a bullet fragment or a casing? And that's State's Exhibit Number, excuse me, State's Exhibit Number 2D where the shoes were found.

A I believe that's a bullet casing.

Q Okay. Now, you stated that when you—somebody shoots a gun, it doesn't just—the casing doesn't necessarily just drop down; is that a fair statement?

A Yes.

Q Okay. So that casing doesn't demonstrate necessarily that that person was standing right there when he shot that gun; is that a fair statement?

A That's a fair statement.

Q Could have been anywhere within the radius of that area?

A Yes.

MS. BARYLSKI: I have no more questions.

COURT: Recross?

MR. DEMPSEY: A couple of things, Your Honor.

RECROSS EXAMINATION BY MR. TIMOTHY DEMPSEY:

Q Lieutenant Braun, you indicated that the knife that you—that was found there was the way you found it when you got to the scene?

A Yes.

Q Okay. But it could have been closed by someone prior to you getting there; isn't that possible?

A It's possible.

MS. BARYLSKI: Objection, Your Honor, that's pure conjecture.

COURT: Approach, though.

WHEREUPON, there was a conference between the Court and Counsel, and out of the hearing of the jury, which is as follows:

COURT: It could have been pure conjecture or speculation. However, Mrs. McGill testified that she did move the sandals, she did move things. So because of that, I'll allow it.

Page 510

MR. DEMPSEY: I'm going to ask him—

COURT: So I'm going to allow it based on that.

MS. BARYLSKI: Well, she never said anything about moving the knife, though.

COURT: No, I know she didn't say that. He didn't ask that. He asked if the

knife could be—if the knife could have been closed. Since the witness has testified she's already moved other things, okay, I'll allow you—

MS. BARYLSKI: I'd object to that only on the basis that he never asked her whether she touched the knife or not.

MR. DEMPSEY: I think I did. I think I did ask her that and she said no.

COURT: Okay.

MS. GROSS: The knife—

COURT: Well, here's what I'm gonna do. You ask that question and he can answer it. Normally I only go one two, one two (inaudible). I'll back up and ask about that (inaudible) Mrs. McGill.

MS. BARYLSKI: Why? I mean, if he asked, he's already put something in the jury's mind and she already said—

Page 511

COURT: He—

MS. BARYLSKI: I don't know what I can ask him to clean up what he's trying to put in the jury's mind when she already said, no, she did not—she did not touch it. So you're asking him to make conjecture, that could she have touched it, and he doesn't know. This is the way he found it and he asked Mrs. McGill.

COURT: Well, the question is, could somebody have touched it. Somebody then could have. Does he know (inaudible)

that's a different question, and I guess that's the question you would come back with.

MS. BARYLSKI: Yeah.

COURT: Do you know if anybody touched it. Yes or no. I mean, it's—

MS. BARYLSKI: He's—what I'm saying he's presenting all—he's, he's presenting testimony on conjecture when you already had a witness who said they did not touch the knife.

COURT: Right, that witness said she didn't.

MS. BARYLSKI: No, and—

COURT: (Inaudible).

MS. BARYLSKI: And so now he's trying to either

Page 512

say she was lying based on conjecture or that there was somebody else in the area that closed that knife and there's no evidence that that knife was open in the first place. There is nobody who testified that knife was open, so how can you open a knife when you had no testimony it was open?

COURT: How can you close it?

MS. BARYLSKI: Yeah.

COURT: (Inaudible).

MS. BARYLSKI: But the door was opened and shut. Two people testified that they closed the door—

COURT: Right.

MS. BARYLSKI: —and there's evidence that the door was closed. There's not a bit of evidence that that knife was opened.

COURT: The question is, can you (inaudible) closed it.

MS. BARYLSKI: Anything's possible.

COURT: Exactly. That's not—

MR. DEMPSEY: That's not a ground to deny the question and the answer.

COURT: Yeah.

MS. BARYLSKI: Pardon?

MR. DEMPSEY: That's not a ground to deny the question or the answer.

Page 513

COURT: Yeah. I'll allow it. I'll allow you to get back up and redirect on the issue. Go ahead and ask it.

THEREUPON, the conference ended and the following proceedings were had within the hearing of the jury:

Q Lieutenant Braun, do you want—do you need the question reasked or do you remember it?

A I remember the question.

Q Okay.

A You said was it possible that somebody could have closed the knife. Possible, but I don't think very likely, but that's—

Q Okay. We had prior testimony in the trial that Joyce McGill had moved the sandals and put them where they are. Did you know anything about that?

A No.

Q We had testimony from her that she closed the car door, that the—that she also turned off the car and closed the door. Did you know that she had done that?

A No, but it seems logical because there were three kids in the car, so.

Page 514

Q Okay. Showing you what the State showed you before, Exhibit 2D, you indicated that that was the back of the car. Isn't that the front of the car?

A This is the front of the car. I don't know that I said that was the back of the car.

Q Okay. And that's—the car was pulled in front, front ways, and so it was towards the back of the driveway?

A That's correct.

Q And that's where you found it and then that's—what's shown in that picture is the—a shell casing and the sandals that we know are Prince Hampton's sandals.

A That's correct.

MR. DEMPSEY: Okay. Okay. Thank you. No other questions.

COURT: Thank you. State of Ohio?

MS. BARYLSKI: Just, just a couple.

REDIRECT EXAMINATION BY MS. MARY ANN BARYLSKI:

Q Joyce McGill testified she never even seen a knife, um, so it's more probable than not that that knife was found closed; is that—

A Yes, and also that's a very hard place to even see it in the first place—

Q Okay.

A —in the grass.

Q And nobody else testified about seeing a knife, except

* * *

APPENDIX N

IN THE COMMON PLEAS COURT
OF ERIE COUNTY, OHIO

FILED
COMMON PLEAS COURT
ERIE COUNTY, OHIO
2013 AUG-7 PM 2:05
LUVADA S. WILSON
CLERK OF COURTS

STATE OF OHIO,	:	TRIAL COURT
Plaintiff,	:	NO. 2011-CR-275
-vs-	:	COURT OF APPEALS
	:	NO. E-13-009
DEMETREUS A. KEAHEY,	:	
Defendant.	:	TRANSCRIPT OF
	:	JURY TRIAL
	:	(VOLUME III OF V)

– – – – –

TRANSCRIPT of JURY TRIAL had in the above-entitled action on September 4, 5, 6, 7, and 10, 2012, before the HONORABLE ROGER E. BINETTE, Judge, Common Pleas Court of Erie County, Ohio.

– – – – –

APPEARANCES:

Mary Ann Barylski, Esq.
Assistant Prosecuting Attorney

On Behalf of Plaintiff,
State of Ohio

Timothy H. Dempsey, Esq.

On Behalf of Defendant,
Demetreus A. Keahey

* * *

Page 559

convicted of a narcotics felony conviction.

Q Okay. Do you know who the officer was that was involved in the investigation in case number 2001-CR-465?

A Yes, that's Officer Lewis at the time.

Q Okay. Now, do you know a person by the name of Prince Hampton?

A Yes, I do.

Q The State asked you to find him, correct?

A That's correct.

Q Have you been able to?

A I'm unable to locate Mr. Hampton.

Q Have you had other officers looking for him?

A Yes, several officers in our department were looking for Mr. Hampton.

Q Okay. Would you describe his relationship with the police as not one of brotherly love?

A That's a good way to put it.

Q To your knowledge, based on your investigation of violent offenses in Erie County, and based on your investigation over the years of knowing either Prince Hampton or do you know the defendant?

A Yes, I do.

Q Okay. Do you know if there's bad blood between Prince Hampton and the defendant?

A Yes, I do.

Page 560

Q How do you know this?

A Of a previous incident that happened a month and a half, roughly a month and a half prior to this incident.

Q What happened in that incident?

A There was a disturbance that was reported to us on May 7th of last year. When the officers responded, they learned that there was a subject that was actually injured and was enroute to the hospital in a gray car, and the officer went to the hospital. The gray car was in the ambulance port. Kindra McGill was coming out of the hospital. She had blood on her hands. It was then learned that Demetreus Keahey was stabbed. Initial contact with Mr. Keahey and also the, um, Kindra McGill, neither one would elaborate or give any information on what happened.

Q But you did have a suspect?

A Yes. We received phone tips that it was Prince Hampton.

Q Okay. But no charges were ever filed against Prince Hampton by defendant, were there?

A No, it was reluctant victim. No charges were ever filed.

Q Similar to what's happening in this case with Prince Hampton?

A Identical.

Q Okay. On June 20th, 2011, was there a shooting on

* * *

Page 567

MS. GROSS: I marked the DNA swabs.

COURT: Okay, okay. You do have a 24.

MS. BARYLSKI: Yeah, we have a—

COURT: Okay. Thank you.

Q I'd like to hand you what's been marked State's Exhibit Number 25. Can you identify that, please?

A This is the black pocketknife that was found laying on the edge of the driveway by the grass.

Q And as I stated, when you observed it, was that closed?

A That's correct, that was closed, in the same position as—

Q Do you—can you open that exhibit up, please, and open that pocketknife up?

A (Witness complied.)

Q How long would that blade be?

A Maybe, I don't know, inch and a half, two inches maybe.

Q Is that legal to carry that?

A If it's not concealed, yeah.

Q Okay. But it's a short blade on that?

A It's a short blade.

Q Okay. It's not like a—

A It's not—

Q —long blade or something?

A More importantly on this, that's a locking blade. You can't pull the blade up without pushing this button down.

Page 568

Q Oh, so even—

A It's a lock, it's—

Q —closing it, you have to—

A It's a lock blade. You have to push a button down to lock the blade.

Q Okay. But as I stated, when you found it, it was closed?

A Just like this.

Q And can I have that exhibit, please, for a moment? And this, that pocketknife then was found—in whose driveway was that found?

A That's the end of the driveway at 2015, right there.

Q Okay.

COURT: What exhibit was that?

Q That's nowhere near the car.

COURT: What exhibit was that? What exhibit was that?

MS. BARYLSKI: Oh, I'm sorry, I thought I said—

COURT: You might have.

MS. BARYLSKI: 7C.

COURT: 7C. Thank you.

Q Okay. Now, you were talking about 7D.

A 7D is marked with placard 18, which is another suspected bullet skip in the grass.

Page 569

Q Now, was this home hit do you know, 2009?

A To my knowledge no.

Q Okay. Now, I'd like to hand you what's been marked State's Exhibit 8A. Can you identify that?

A State's Exhibit 8A is bumper of a Jeep that was parked in the driveway at 2009, um—

Q Can you show us where it would have been parked on State's Exhibit Number 1, please?

A This driveway right here, approximately right where that vehicle right there is parked.

Q Okay. And what, what's noticeable on that?

A There's fresh blood on the bumper of this vehicle.

Q Did somebody take—did anybody take some wipes of that blood?

A I believe Lieutenant Orzech did. State's Exhibit 8B is placard 10 with the confetti money or confetti pieces of paper in the driveway that kind of puzzled us initially.

Q Did somebody pick that up?

A Yes. That was located in the driveway right next to the Jeep with the blood on it.

Q That—oh, I have to give it to you yet. State's Exhibit Number 26, can you identify that?

A Yes, this is the pieces of money that we seen, paper scattered around on the driveway near the Jeep.

Q I'd like to hand you what's been marked State's Exhibit

Page 570

19A, 19B, and 19C. What—that exhibit—if you recognize it, explain it, please, and then explain the relationship to item number—State's Exhibit 26.

A During, during the investigation on this, if I remember correctly, Detective Nixon had went to the hospital. I kept in contact with him to check on the status of the victim, Prince Hampton. At that time I learned that Prince was actually shot twice, once in the left arm and then also on the left upper thigh area. I had also learned from Detective Nixon at that time that he had a wad of cash in his left pocket that had a bullet hole through it, so that's when we realized that's where all the confetti was from. It blew out of his pocket and laid on the ground. So we knew at one point he was struck in that driveway.

State's Exhibit 19A is a close-up photo that I took of the money at the hospital showing the, the bullet strike on it. State's Exhibit 19B is additional photograph of the money. State's Exhibit 19C was a picture of all the money laid out at our police department. We laid it out and took another photograph. It shows the identical cuts in all the money where the bullet had struck.

Q To your knowledge, um, to your knowledge do you know, based on your investigation, what that money was for?

A I had discussed that with Mr. Hampton when I was at the hospital. He explained that it was money that was being taken

* * *

Page 599

discussion between Ms. Barylski and Ms. Gross at the State's table.

MS. BARYLSKI: I believe that's it.

COURT: Thank you. Cross examination?

CROSS EXAMINATION BY MR. TIMOTHY DEMPSEY:

Q Good morning, Detective.

A Good morning, Mr. Dempsey.

Q I got a few questions I want to ask you about this.

A Okay.

Q You initially said that you were looking for Prince Hampton, but he was not located at all.

A I just said that?

Q At the very beginning of your testimony.

A Oh, yes. Per the prosecutor, they needed assistance in looking for Prince Hampton.

Q Okay. And then you had other officers looking for Prince Hampton?

A Yes, we did.

Q And I believe you said you had other departments looking for him?

A Um, not necessarily police departments. I think possibly probation.

Q Okay. So is Prince Hampton well known to you?

A I'm, I'm familiar with him.

Q How long have you been a police officer?

A Over 22 years.

Q Okay. And during the course of that, you've come across Prince Hampton often enough?

A I, I'm familiar. As a department, we've come in contact with him often enough.

Q Okay. Have you, have you been involved in any arrests where he was arrested for something?

A No, I have not.

Q Okay. Are you aware of any cases he was involved in?

A Yes, um, I believe that a—some drug related cases that he was involved in, also some domestics, some neighborhood dispute, disturbances, that type of stuff that I'm familiar with.

Q Okay. I'm showing you what was marked as State's Exhibit 28A. Can you see that there?

A Yes, sir.

Q And I believe you testified that that was a picture of the bullet hole in the car that Prince Hampton drove and parked in the McGill's driveway that morning?

A That's correct.

Q Okay. And does that picture indicate that that's an entrance hole where the bullet went in?

A That is correct.

* * *

Page 624

RECROSS EXAMINATION BY MR. TIMOTHY DEMPSEY:

Q Detective, you said that the purpose of someone to shoot is to kill, that's one explanation. Is another explanation that they could be trying to get them away from them?

A You could say that.

Q As in self-defense?

A You could say that.

Q Okay. Now, you said that as part of your investigation you think that Prince got shot near the house, near the car, in his arm first?

A I believe so.

Q Okay.

A I believe that he was shot just because of the blood on the bumper.

Q Okay. And then there was a trail going towards that bumper of that Jeep in the, in the next door neighbor's driveway?

A There is—sometimes when you, when you get an injury, blood doesn't start flowing automatically all the time. I believe we looked at the grass. It's a needle in a haystack to find blood in a cut yard.

Q Uh huh.

A I think the first initial blood I do recall would be on the bumper of the car.

Page 625

Q Okay. And that's the location where you believe that Prince was hit a second time and that was the one that went into his leg?

A In the driveway at 2009 Aspen Run, yeah, he was shot twi—

Q Okay. Because that—

A I believe the second time.

Q It makes sense because that's where the confetti of the money was.

A Absolutely.

Q Okay. Is it also possible that at that location Prince turned, and if he had a gun and he was pointing it at Demetreus—

A Absolutely, that is possible.

Q Okay.

A However, the witnesses didn't say that.

Q Okay.

A Actually Mr. Jensen said he never seen a guy run that fast in his life.

Q Okay.

A Referring to Demetreus, I mean, Prince Hampton.

Q Okay. Was there also a spent shell casing by the confetti money?

A I don't recall a spent shall casing by a—there was one casing that I believe we did not find, um, and I think that

Page 626

it's in that front yard someplace. We looked extensively. Again, needle in a haystack in the grass. We use different kind of techniques to use, metal detectors. You'd be amazed at all the aluminum foil in people's yards, gum wrappers. It picks up on everything.

Q Okay.

A So we, no, we could not find the last—

Q Okay.

A —shell casing.

Q But wasn't there a shell casing by the Jeep?

A I—if I can look at a picture. I can't testify for sure. I know that there was one on the sidewalk marked as Exhibit 1.

Q It might be these.

A If I recall, it was this 9 and 10. Ten was the money and 9 was the blood on the bumper.

Q Okay. Looking at, showing you Exhibit 10A, is that a little bit further away from the Jeep?

A That's correct.

Q Okay.

A That's just, just beyond the Jeep. This is the skirt of the driveway coming into 2009—

Q Okay.

A —2009, and the dirt skip where, not dirt skip, but the dirt thrown on the sidewalk from—

Page 627

Q Okay.

A —the run and then the shell casing was down farther at 1.

Q Okay. Isn't it true that no guns were ever found?

A That's absolutely true.

Q Okay.

MS. BARYLSKI: I'm sorry, what was that question? I didn't hear him.

MR. DEMPSEY: No guns were ever found.

Q Did you cordon off that whole area?

A Yes, we did.

Q Okay. And that whole area being from this driveway all the way over to here? Did you—did you cordon off any of this?

A No, that—that was not.

Q Okay.

COURT: And you're referring to State's Exhibit 1?

Q State's Exhibit 1. At any time did you look at any of the bushes or in any of the backyards or between any of the houses for any weapons?

A We did just a precursory search. I know that there's some officers out there, myself included, we didn't look under every nook and cranny, no.

Q Okay. So it's possible that Prince, if he had a gun,

Page 628

could have ditched it there and you didn't find it?

A When, when a—when a case happens like that, you get the unbiased witnesses, they're the most

valuable, which would be Mr. Jensen across the street. At no time did he ever indicate a second gun. He didn't see a second gun in the other guy's hand, um, so we wouldn't waste a whole lot of time looking for a second gun that was never put there, so no.

MR. DEMPSEY: Okay, okay. Thank you. Nothing further.

COURT: Thank you. You may step down, sir. Thank you very much.

THEREUPON, the witness was excused.

COURT: State of Ohio, next witness?

MS. BARYLSKI: Um, Officer Danny Lewis.

COURT: Bailiff, call the witness.

BAILIFF: Thank you, Your Honor.

COURT: Isn't he a—State? State? Isn't he a Sergeant?

MS. GROSS: Yes.

COURT: Isn't he a Sergeant?

MS. GROSS: Yes.

MS. BARYLSKI: I don't—I'm sorry, I don't

* * *

APPENDIX O

IN THE COMMON PLEAS COURT
OF ERIE COUNTY, OHIO

FILED
COMMON PLEAS COURT
ERIE COUNTY, OHIO
2013 AUG-7 PM 2:05
LUVADA S. WILSON
CLERK OF COURTS

STATE OF OHIO,	:	TRIAL COURT
Plaintiff,	:	NO. 2011-CR-275
-vs-	:	COURT OF APPEALS
	:	NO. E-13-009
DEMETREUS A. KEAHEY,	:	
Defendant.	:	TRANSCRIPT OF
	:	JURY TRIAL
	:	(VOLUME III OF V)

– – – – –

TRANSCRIPT of JURY TRIAL had in the above-entitled action on September 4, 5, 6, 7, and 10, 2012, before the HONORABLE ROGER E. BINETTE, Judge, Common Pleas Court of Erie County, Ohio.

– – – – –

APPEARANCES:

Mary Ann Barylski, Esq.
Assistant Prosecuting Attorney

On Behalf of Plaintiff,
State of Ohio

Timothy H. Dempsey, Esq.

On Behalf of Defendant,
Demetreus A. Keahey

* * *

Page 660

fires or evidence cartridge cases into a database and potentially match them to other crimes and other firearms. The results of that search came back negative.

Q Negative, okay.

MS. BARYLSKI: I have no further questions, Your Honor.

COURT: Thank you. Cross examination?

MR. DEMPSEY: Thank you.

CROSS EXAMINATION BY MR. TIMOTHY DEMPSEY:

Q Good afternoon, Mr. Wharton.

A Good afternoon.

Q Did you complete this report pretty soon after you got the evidence from Sandusky Police?

A The report is dated August 20th. I believe the evidence was submitted on June 30th.

Q Okay. I got a copy of a report. Do you have that in front of you?

A I have, yes.

Q Okay. And that's marked Exhibit, what is that, 29?

A State's Exhibit 30.

Q Thirty, okay. It seemed to me that your report has—you were submitted nine different either bullets, casings, fragments, that kind of stuff.

A That is correct, yes.

Q Okay. And you grouped them into three categories. The

Page 661

first category was this Item 1, 2, 5, 6, and 7, which would probably correspond with A, B, E, F, and G; is that fair?

A That sounds correct, yes.

Q Okay. And your testing results indicated that they were all fired from the same weapon and that was a Federal brand 9 millimeter Luger?

A The—I'm not sure if I understand the question.

Q Okay.

A Are you, are you referring to a firearm or a caliber of weapon?

Q Well, your report says a Federal brand 9 millimeter Luger.

A That is referring to the caliber and the type of cartridge case that was submitted.

Q Okay.

A That is not a weapon. It is true that a Luger is a firearm, but 9 millimeter Luger caliber is a standard caliber that is used in many different manufacturers of firearms. So me—my reference to Federal brand 9 millimeter Luger caliber is referring to the fired cartridge cases only.

Q Okay.

A It's not discussing or talking about any type of weapon—

Q Okay.

A —except for a 9 millimeter, a weapon, a firearm that

Page 662

is chambered to fire a 9 millimeter Luger caliber cartridge.

Q Okay. Is the reference to Federal brand, is that to a weapon or—

A No, that's—that's the brand of ammunition that was in those five—

Q Okay.

A —five cartridge cases.

Q Okay. But that grouping of those five cartridge casings indicated to you that those casings, those bullets were fired from the same firearm?

A The cartridge cases, yes, were fired from the same weapon, correct.

Q Okay. Then you have these Items 8 and 9 that you looked at and it indicates there's some matching, but there wasn't enough positive identification. It was insufficient to match them to the other bullets.

A That is correct. I was able to group the two together where possibly they came from the same weapon. I couldn't rule, I couldn't eliminate or rule them out completely just because of the damage and there just wasn't enough individual characteristics there to come to a positive or negative conclusion.

Q Okay. And then the last grouping is two other items, Items 3 and 4, and when you tested those, you couldn't make any conclusive determination. They didn't match the other groups

Page 663

at all.

A They were never compared to the other bullets because of—there just weren't enough individual characteristics there. They were damaged to the point where I couldn't—I couldn't tell anything from them, except for, you know, they were—they were definitely a projectile at one point in time.

Q Okay. Now, there were no weapons submitted to you; is that correct?

A Not for this submission, yes, that's correct.

Q Okay. Is it possible that some of these cartridge casings or fragments were fired by different weapons?

A I believe you're lumping different parts of my report together. If I may, can I separate the two?

Q Sure.

A The cartridge cases came from the same weapon, positively identified coming from the same weapon. The bullets, the two bullets, State's Exhibit 29H and 29I, had some matching individual barrel engraved striations, meaning they could have been fired from the same weapon. Now, that weapon that

fired the bullets may or may not be different than the cart—the one that fired the cartridge cases, and the reason I say that is because I didn't identify the cartridge cases or the bullet to a weapon.

Q Okay. And then these Items 29H and I, those correspond to your Items 8 and 9 on your list?

Page 664

A That is correct, yes.

Q Okay. And those were fired from one of these three weapons that were listed on the bottom?

A One of these—now, the first page of my report says that it could have been one of these three, but the second page of my report, at the top, it says: Other possibilities may also exist.

Q Okay.

A We're using a database that's put out by the FBI. It's possible that there's some weapon out there that isn't in the database and that's why we have that disclaimer that, you know, until we actually identify it to a weapon, we can't say positively that it came from this type of firearm—

Q Okay.

A —but based on the database, one of these three manufacturers, but there could be something else out there.

Q I was gonna correct myself. When I said weapon, I meant manufacturer. Those are manufacturers of weapons, right?

A That is correct, yes.

Q And is it possible to know how many thousands or millions of those kinds of guns are out there in Ohio?

A No, it's not.

Q Yeah. It's in the thousands, if not the millions?

A I would say so.

Q Okay. Did you ever get to examine a bullet hole in the

* * *

Page 689

Q And based on this picture.

A Yes.

Q And you knowing that it is a fragment that's been damaged beyond—

A Yes, it is.

Q —analysis basically. Okay.

MS. BARYLSKI: I have no further questions.

MR. DEMPSEY: Just a couple of follow-up.

COURT: Redirect, or, I mean, sorry, recross.

RECROSS EXAMINATION BY MR. TIMOTHY DEMPSEY:

Q Mr. Wharton, getting back to my one point, that because there were insufficient matching characteristics among these bullets and fragments that you got, it's possible that there was more than one gun?

A It's a possibility, yes.

Q Okay. And did you send any of these items into that database for firearm identification?

A The cartridge cases only. The bullets, there's too many variables with the computer system. The database, the way it's set up now, that very few, if any, laboratories across the country enter bullets at all. The success rate of matching cartridge cases is much better. So primarily cartridge cases are entered into that database, yes.

Q Is that what you did in this case?

Page 690

A Yes.

Q And it came back there was no identification with any other—it didn't match anything else in your database?

A At the time of my search and the time the results came back, yes, it did not—

Q Okay.

A —have a hit to any other cartridge case.

MR. DEMPSEY: Okay. Thank you.

COURT: Mr. Wharton, the Court has a couple questions. State's Exhibit Number 30, is there an affidavit attached to that document?

A Yes, at the back of it there's what's—what we call in the laboratory our Statement of Qualifications. Is that what you're referring to?

COURT: Uh huh.

A Yes.

COURT: Is that signed by yourself?

A We do not sign these, like the drug chemists in our laboratory sign their affidavit, but it's, it's very similar. It shows my qualifications and educational background.

COURT: Is the information contained therein true and accurate to the best of your knowledge?

A I believe so, yes.

COURT: State of Ohio, any follow-up

* * *

APPENDIX P

IN THE COMMON PLEAS COURT
OF ERIE COUNTY, OHIO

FILED
COMMON PLEAS COURT
ERIE COUNTY, OHIO
2013 AUG-7 PM 2:05
LUVADA S. WILSON
CLERK OF COURTS

STATE OF OHIO,	:	TRIAL COURT
Plaintiff,	:	NO. 2011-CR-275
-vs-	:	COURT OF APPEALS
	:	NO. E-13-009
DEMETREUS A. KEAHEY,	:	
Defendant.	:	TRANSCRIPT OF
	:	JURY TRIAL
	:	(VOLUME IV OF V)

– – – – –

TRANSCRIPT of JURY TRIAL had in the above-entitled action on September 4, 5, 6, 7, and 10, 2012, before the HONORABLE ROGER E. BINETTE, Judge, Common Pleas Court of Erie County, Ohio.

– – – – –

APPEARANCES:

Mary Ann Barylski, Esq.
Assistant Prosecuting Attorney

On Behalf of Plaintiff,
State of Ohio

Timothy H. Dempsey, Esq.

On Behalf of Defendant,
Demetreus A. Keahey

* * *

Page 842

his part to be maintained, called as his first witness

DEMETREUS KEAHEY

who, having been first duly sworn according to law, took the witness stand and testified as follows:

COURT: Have a seat, sir. Spin around here.

MR. KEAHEY: Huh?

COURT: Spin around. I'm going to give you the same instruction I gave the other witnesses, okay? Everything's being recorded over here, so we need a verbal answer to every question.

MR. KEAHEY: Okay.

COURT: Sometimes people shake their head yes or no. That doesn't get picked up.

MR. KEAHEY: Okay.

COURT: Sometimes they say "uh huh". We don't know if that's a yes or no, so verbalize your answer, okay? We need you to speak loud enough that everybody here in the Courtroom can hear your answers. They're just as important as any one other witness in this case.

MR. KEAHEY: Okay.

COURT: Those microphones in front of you will assist you. You don't have to lean it towards it, but just speak towards the mic. Now, you've

Page 843

been here and you've seen them object to things.

MR. KEAHEY: Uh huh.

COURT: So when you hear objection, stop talking until I make a ruling

MR. KEAHEY: Okay.

COURT: —okay? And then if you don't know what my ruling is, you can say, Judge, am I allowed to answer, and I'll let you know yes or no, okay?

MR. KEAHEY: Okay.

COURT: You have one important job here, that's to give us answers to the questions.

MR. KEAHEY: Yes, sir.

COURT: In that regard, you can't ask them any questions. Your whole job is to answer.

MR. KEAHEY: Okay.

COURT: Some—listen to the question. Sometimes it's just a yes or no, such as is the sun out. Yes.

MR. KEAHEY: Uh huh.

COURT: Okay. Sometimes it's explaining, like tell us what you saw, and then you can explain. So listen to what kind of question it is and give us that kind of answer. Now, if you don't understand the question, you certainly can say, did

Page 844

you mean this, or could you explain because I don't understand. We want to make sure we get the right answer with the right question, okay?

MR. KEAHEY: Okay.

COURT: We're going to begin by you stating your full name and then spelling your last name, okay?

MR. KEAHEY: Okay.

COURT: You ready to go, sir?

MR. KEAHEY: Yes, sir.

COURT: Begin with your name, sir.

MR. KEAHEY: Demetreus Keahey, K-E-A-H-E-Y.

COURT: Inquire.

MR. DEMPSEY: Thank you, Your Honor.

DIRECT EXAMINATION BY MR. TIMOTHY DEMPSEY:

Q Demetreus, how old are you?

A I'm 31, sir.

Q Okay. Did you grow up in Sandusky?

A Yes, sir.

Q Where did you go to high school?

A Sandusky, Ohio.

Q Okay. Did you graduate from there?

A No, sir. I received my GED.

Q Okay. And did you get that soon after you would have graduated?

Page 845

A Yes, sir.

Q Okay. There was an indication that you had some problems with the law back in 2001?

A Yes, sir.

Q Okay. And there was evidence presented of a conviction?

A Yes, sir.

Q Okay. And you don't deny that?

A No, sir.

Q And about how old were you when that happened?

A I'd say around 20 years old.

Q Okay. Are you married?

A No, sir.

Q Okay. There was prior testimony that you do have a daughter?

A Yes, sir.

Q And what's her name?

A Kamora Keahey.

Q And, and who's the mother of that child?

A That's Kindra McGill.

Q Okay. And have you lived with your child and Kindra off and on?

A Yes, sir.

Q Okay. What time frames?

A Um, before she was born, while she was born, after she

was born, basically up until when I got stabbed. I chose to move out.

Q Okay. Well, we'll get to that.

A Okay.

Q Do you know Kindra's family?

A Yes, sir.

Q And you know her mom, Joyce?

A Yes, sir.

Q Okay. And how do you get along with her?

A Not too good. She's one of those mother-in-laws that we just never, never hit it off too well for certain reasons.

Q Okay. Does it have anything to do with her other daughter, Angela?

A Yes, that's where it all initiated from. I met Angela when I was I'd say probably about 18. She was in her 20s. We kind of seen each other a few times, like tried to date. It didn't work out, um, you know. She went her separate way. I went my separate way.

I'd say like maybe ten years later that's when I met Kindra. Me and Kindra hit it off. At the time I really didn't know who her family was. Like I, like I said, her last name is McGill. Her older sister is Amsted. I guess her mother had a daughter from a previous relationship with another guy.

And once me and Kindra hit it off and things start moving along, um, she done find out that she was pregnant, so

Page 847

that's when I basically started to meet her family. Once I met her family, that's when I found out that her—she has an older sister by the name of Angela, and I had to break the news to her that I knew who Angela is and that I met her when I was younger and we had dated, um, you know. It wasn't nothing that serious, but I, I mean, I had to tell her. I didn't want to keep it a secret.

Once I told her, she confronted Angela to ask Angela, um, was it true (inaudible). I guess when Angela found out that me and her was dating and that she was pregnant, Angela blew up, like how could you be dating a guy that I used to like, what so have you. Angela went to her mom, got her mom to—

MS. BARYLSKI: I'm going to object to the hearsay in this.

COURT: Sustained. If you could—

Q Okay. You can't testify about what other people said to you.

A Okay.

Q So how do you get along with Kindra and Kamora in 2010, 2011?

A Well, we got, we got along great. I mean, we were a happy family. I mean, everything was going great. I just had a daughter born. I mean, the sky was the limit.

Q Okay.

Page 848

A I mean, we, we was just trying to build. She was in school. I was trying to get back enrolled in college at BG. It was, it was great.

Q Okay. And you're, you're aware that Kindra had other children?

A Yes, she had two boys from a previous relationship with Prince. At the time, I mean, I heard a lot of stories about him. We wasn't all that so close and familiar.

Q Did you know Prince from high school?

A Yeah, he, he was in like a grade or two higher than me, um, that was really—

Q Okay.

A —pretty much when I got to the high school.

Q So you didn't know him that well then?

A No.

Q But you knew who he was?

A Yeah, I heard a lot about him.

Q Okay. How did you get along with Kamora and his kids when you were with Kindra?

A Oh, we got along great. Um, the boys loved me. Um, I didn't, I didn't have a son. I mean, I took a lot of liking to that, being that me and Kindra was together, you know. I accepted the kids, all of 'em, like as if they was mine. I didn't treat 'em no different.

Q Okay. Did this cause problems or friction between you

Page 849

and Prince because you were with his, his sons, his boys?

A Uh, yeah, I mean, that's why everything really started to build up. I mean, he didn't like the fact that I was interacting with his kids a lot. Um, he would—I guess at one, one point in time his son had told him that he was having more fun when he be with me than he, than he does with him, like it's boring when he, when he, when he comes to get them, um, and he just—man, he was blowing up. He was mad. He was confronting her about having me around, and she's tryin' to tell him about, you know, me, we're together, so I'm gonna be around his kids, that, you know, I don't do nothin' to harm the kids, so he shouldn't really have no, no problem with that. He still wasn't liking that. He wasn't—

Q Okay. Did you end up trying to talk to him about that in May of 2011?

A Yes, that's how the incident came about with me getting stabbed. He called and he was going off on Kindra about me interacting with the kids, and she

tryin' to explain to him that, you know, I mean, I live there, the kids live there, like we—

MS. BARYLSKI: Objection, Your Honor, again, to the hearsay.

COURT: Sustained. Ask, ask it in a different manner—

Q Okay.

Page 850

COURT: —or frame it.

Q Okay. Tell us what happened on that May 7th, 2011 date.

A Um, well, basically, um, he, he was on the phone. He was arguing. She was trying to break it down to explain to him—

Q "She" being Kindra?

A Kindra, yes, Kindra. He kind of like, well, got mad, and he's like, well, I'm—I'm gonna be out there, and he, he hung up. Um, when he came out there, I tried to—I wanted to go outside to explain to him like, you know, I mean, it's not that serious, um, you know, like I'm not doin' nothin' to your kids, like why, why is it such a big deal. Um, Kindra's trying to—she's trying to add her, her half in as well. I'm trying to calm her down, like, you know, like we both men. We can, we can talk. I told her just to, you know, relax, you know what I mean?

And as I was telling her that, you know, like she can just go, go back in the house, like it's all right, like we was—I'm gonna just explain to him, she's saying, no, no, no, just this and that, and, um, I finally got her to kind of calm down and start headin' back towards in the house, and when I turned back to him, that's when

he flicked, you know, he had the knife and he flicked it out and he was like, you know, trying to come at me. So I tried to turn around and tried to

run and that's when he stabbed me in the back.

I mean, I mean, the pain and everything, like I kind of like fell to the ground and that's when he jumped towards like on my back and he was stabbing me a few more times. By this time that's when she came running back out and trying to say like, like yelling at him, like what are you doing, like stop and this, this and that, and it kind of broke the tension a little bit and that's when I was able to finally get a chance to get up and run and, you know, eventually get away from him.

Q What did you do next after that?

A I, I, I ran, I ran to the car and told her I needed to get to, to the hospital, and, um, blood was just squirting out and stuff, it was just going everywhere, and, I mean, I was like getting real lightheaded and like, you know, just, I mean, just—I can't even explain the pain, but it—I don't know, I just felt like I was dying.

Q Okay.

A Once I—

Q Do you know what kind of injuries you had?

A Yes, I had a collapsed lung. Um, I almost punctured my liver. Um, he had to actually—the doc had to actually cut me open to stick a tube in there, because I had internal bleeding on the inside, to get the blood up out of there. He had to stitch me up. I was in ICU for like probably like three or four days.

Page 852

Q Okay. And during that time did the police try to come and talk to you about this?

A No, they only came to talk to me when I first got to the emergency room. Um, when the specialist or the surg—the surgical guy, when he actually first got me in there, he had me like put on a mask to try to put me under, they call it put you under, for like medicine to, um, so you can't feel the pain, I guess, um, and that's when the police come in and they tryin' to ask me questions, but the doc's telling 'em that, you know, I need to—he need to get me down so he can start the surgery.

They, they proceeded to try to ask me a few questions like, you know, um, what happened, was I stabbed, and I told 'em, yeah, I was stabbed, and the doc was tryin' to, you know, he was tryin' to work, tryin' to work, and I'm under the medicine, and I really—I really couldn't say too much to 'em.

Q Okay.

A Um, that was about it.

Q How long were you in the hospital?

A About three or four days.

Q Okay.

A Five days.

Q And after you got out, at any time did you contact the police about what happened?

Page 853

A No. Um, while I was in the hos—

Q What, what was the reason?

A While I was in the hospital, um, my family and friends was coming to check on me and see about me and that's when I got word that if I was to tell, that him and his friends was basically gonna—they gonna do something to me. They gonna get me, um, that I better not say nothin'.

Um, at that time, you know, I had to—I had to think about, you know, what I'm gonna do once I get out of there and my, my family as well. So I really—I chose not to really—well, they never came back and talked to me, but I chose not to call them and say nothin' to 'em, but I tried to advise to Kindra that, uh, that she should tell because, you know, she got kids by him and I know he wouldn't do nothin' to her, I mean, you know what I'm sayin'? So I was tryin' to get her to say, say something to the police for me, and she was like, she's like, well, she ain't—she's not gettin' in the middle. She was—she was scared. So she's like, you should have just said something, and, um, that's when the friction started coming between me and her because, um, I felt that, you know, if she tell, like I said, he wouldn't—he wouldn't do nothing to her. They got kids together, I mean, so.

Q Was that the basis for some of those text messages between you and her?

A Yes, sir. Yes, sir.

Page 854

Q Okay. And did you fear for your life—

A Yes, I mean—

Q —as far as Prince Hampton?

A Yeah, I mean, he said he was gonna do something. I mean, I know what him and the Black

Point Mafia, I know what they do. I mean, it's not no secret about him and his guys. I mean, I just didn't really want no problems, I mean, especially about this interacting with, with the kids.

Q Okay.

A I mean, I feel if we had a relationship, I mean, I'm supposed to interact with the boys. I mean, I got to accept them as well. I can't treat my daughter good and, and, and not interact with the boys and they're right there.

Q Okay. After you got out of the hospital, did you move back in with Kindra or did you move out?

A Oh, no. Once I got out the hospital, um, I was—I was afraid. I mean, I didn't—I didn't want to go there. Um, I didn't know if he would try to come back. I mean, he know, he knows where we stays at, where we stay at, and, um, I basically feared for my life. So I moved out, and I moved with, um, moved in with my sister, um.

Q Is that—did you get anything for protection at that point?

A Yeah, at that point that's when I was gettin' the word that they were out looking for me, trying to find me, um.

Page 855

MS. BARYLSKI:	Objection, Your Honor.
COURT:	Basis?
MS. BARYLSKI:	Again, hearsay.
COURT:	I'm going to overrule that one. Go ahead.

A Um, I was basically getting the word that they was out looking for me, that, um, when they catch me, um, I'll know what it is, and I took that as a—that they was gonna kill me. I was scared, so I really wasn't goin' to—I wasn't goin' nowhere.

Q Okay.

A I mean, it just had got to a point where, you know, I still had to go to the doctor to have 'em check on my wounds and to give me medicine for the pain and stuff, um, but I was—I was afraid to go anywhere at that point.

Q So you moved away from Kindra because you didn't want anything to happen to her or the kids that were there and you moved in with your sister?

A Yeah. I mean, I (inaudible) much, um, I knew he wouldn't—he probably wouldn't harm his kids, but he didn't care. I mean, I knew he would try to do something to me, and Kindra was—she afraid of him, so I'm like, well, hell, there ain't nothin' to really stop him. If he, if he come out here, he knows, he knows where she stay at, I mean, but I knew he doesn't know where my sister stay at, and, plus, like I—I

asked her to really say somethin' to the police for me, because I was scared, and she wouldn't, so.

Q Okay.

A I'm just like, well, I mean, I didn't want to be there. I was, I was scared.

Q Yeah.

A So I moved in with my sister, and once I moved in, me and her was kind of feuding a little bit, um.

Q But you still saw her and the kids?

A Yes, yes, she would come by my sister house. Um, we would sit at my sister house and talk and I would, you know, interact with my daughter. I would watch my daughter while she go to work. Um, I was just—at the time, like I said, I was just—I was just scared, and I felt the best thing for me to do was just stay in the house and—

Q Okay, okay. Last question about the May 7th incident. Did you have any weapons on you at that time?

A Oh, no, sir.

Q Okay.

A Um, like I said, I was going through to try to talk to him to explain to him why me, him and the kids actually, you know, why, I mean, why we get along so good.

Q Okay.

A But he didn't—he wasn't—he wasn't tryin' to hear, period.

Page 857

Q Okay. Let's go to June 20th, that's why we're all here. What happened first thing that morning? There was testimony from Kindra that there was a phone call. Did you call her or did she call you?

A Oh, well, earlier that morning, um, June 20th, my daughter had an appointment, her and DeQuan, which is her youngest son by Prince. My daughter was actually getting her first shots for the year. Um, we had been to the doctor other times, but this was her first shots.

Um, so I told her that I would meet her at the doctors, but at this point in time she had stopped staying at her home on Wil—our home on Wilbert Street and kind of start staying with her mother because she didn't want to stay out there by herself neither. She was either scared to stay out there or she just didn't want to stay and she just had had surgery. The doctor orders was for her to not really drive or do too much lifting or moving around.

Um, when the doctor appointment was there, um, I told her I'll meet her there, because I really didn't—me and her mom really didn't get along to well, but, I mean, it really wasn't no big deal, and, plus, I didn't, I didn't know. I just, I just felt that, you know, I'd rather just meet her there so there wasn't nothing happen, um.

Q Did you talk to Kindra that morning?

A Yes, I did.

Page 858

Q Okay. And did you kind of change your mind about just meeting her there and—

A Oh, yeah. Um, at that point, after I brushed my teeth and got myself together, I decided, well, you know, I ain't gotta be no, what can I say, ass about, um, just meetin' her there when I can—when I can just go pick her up as a family. The doctor's is like only a couple, about three, four minutes away from where her mom stays, and she wasn't supposed to be driving anyway, but she the type of person that's gonna do, you know, if that's what she want to do, she gonna drive. So I, I went to pick her up.

Q Okay. You wanted to help her with the kids as well and drive—

A Yeah, we all—we all can just go together.

Q Okay.

A I just feel we can—I can pick 'em up and we can all go together, like we usually do.

Q About what time did you get over to the McGill house on Aspen Run?

A I'd say probably about like in between like 8:30, a little before 9:00, because the appointment was at 9:00.

Q Okay. What happened when you got in the house?

A Well, when I got to the house, um, soon I got in, her mother, like always, tryin' to find somethin' to pick with me, um, she gets to rappin' on and then she start talking about my

Page 859

shoes. I really didn't want to argue with her. I never disrespected her. I didn't want to—I wasn't gonna disrespect her that day neither. So instead of me letting things blow up, I just turned around and was like, well, I'm (inaudible) just leave, and I was just—I was gonna go back to my car and either wait on Kindra or just drive to the thing and just have her come up there because—

Q Okay.

A —her mom—

Q So you were gonna wait for her at the car and have her bring the kids out and you would go in your car—

A Yeah.

Q —to the doctor's appointment?

A Uh huh.

Q Okay. Does Joyce have an issue with people wearing shoes in her house?

A Um, it's an issue, but she doesn't always enforce it. She—I don't—like I said, I really don't go there too many times, but the few times I have been over there, I done seen people with their shoes on, um, sometimes they got their shoes off. I mean, it's just when she wants to enforce it or say something to somebody, that's when she like, take your shoes off. Why you got your shoes on.

Q Okay. So you decided rather than take your shoes off or argue with her, you're just going to leave the house and

Page 860

wait outside, and so you left the house and went outside. What happened next?

A Um, well, as I was coming out the door, um, taking a few steps, um, to come down the driveway, that's when Prince pulled, starts to pull into the driveway. I guess once he sees me, he like accelerate up the driveway real fast, so that's when I like got up against the house so he, so he couldn't hit me. And I'm like, damn, like what the hell is he doing.

COURT: (Inaudible).

A And I was like—I was lookin' at the car, um, and he just, he just hopped out with the knife like, like, here, nigga, and I panicked, and I was like backing up and, you know, I pulled, I pulled out the gun and I fired, and that's when he start running like back up

towards the front of the car and that's when I tried to turn around and start heading back towards my car, um, but before I could even reach the sidewalk area, that's when I heard the shot. And when I, when I turned around to see what, what the hell was going on, he was—that's when he was comin' down the driveway like this with his arm out with a, with a gun, and I just fired that way a couple times and he like, um, he like sidestepped like through the grass. Like this is the house right here. There's like a little area right there. He like sidestepped through the grass, but he was still aiming at me, so I fired a couple more times and, um, as he was runnin' like he, um, he like tripped

Page 861

and like kind of fell, but he, but he bounced back up and, um, and he turned around, was about to fire some more, and that's when I just charged towards him, firing, before he can really get his balance and, you know, like get his shot off to me and to either force me to run or he was gonna get—or he gonna get shot, because he really, he was, you know, in the midst of like going like that.

Q Okay.

A And I must have hit 'em and he took off, and when he start running, that's when I turned back around and got into my car—

Q Okay.

A —and hopped in and drive off.

Q Let me, let me try to focus you on one part of that. At one point there was testimony that he was by a Jeep in the driveway of the home next door to the McGills—

A Uh huh.

Q —and that he stopped there at that Jeep. Do you remember that and what happened there?

A Um, like I said, as he cutting across the yard, like he wasn't so much like at his back, he was like to the side, like aiming like that, and he must have tripped, or maybe I shot him when I shot those few times. Um, still, when he—when he bounced back up, he was like—that's when he was right there like by that Jeep, and I seen him like trying to come back up

so he can shoot, and I, and I just shot, and, um, he like—I must—when I shot them times, I guess I must have hit him, because instead of him really getting that (inaudible) left to shoot, he like fell back a little bit and then he took off running, so, and that's when all the—because I was charging at him, shooting, to make him either force (inaudible) either he was going to run or he was gonna get shot because he didn't have a good chance to really fire his gun because he was coming around like that.

Q Okay.

A And he, he took off. When he, when he took off, that's when I turned around to my car and ran back to get in my car to leave.

Q Okay. Until you turned around and left, were you in fear for your safety?

A Yeah. I mean, I mean, it was—it was happening so fast. It wasn't like it was just a slow motion type thing. Um, like I said, when he was running sideways, like trying to get the shot, if I'd have turned around to go to my car, he (inaudible) would have just shot me in

the back or in the back of the head. I mean, I'd have been dead. I mean, it wasn't—it wasn't like it was, um, like I really had time to turn around and leave. He was just—and it wasn't like he was like running to—like he was running, like leaving the area, and then he was just—he was like just sidestepping so I

couldn't shoot him from, you know what I mean, because when he charged down the driveway towards me, that's when I turned around and seen it—

Q Okay.

A —and I shot.

Q Okay.

A And he like sidestepped, but he was like—

Q Okay. As soon as he got shot and started to run from that Jeep, next, next to the Jeep, next door to the McGill's house, did you take any steps to go after him at that point or did you just go back to your car?

A Can you repeat that for me, sir?

Q After he got shot by the Jeep and left, it sounds like you just went back to your car then?

A Oh, yeah, like—like I said, when he was (inaudible), like turning to shoot, that's when I, I was firing, like charging him, so he couldn't really like get a good shot off, and when I was charging at him, that's when he turned around and started running. So like—so when he started running, that's when I turned around and started running to my car.

Q Okay. So then you got into your car and what happened next?

A Well, my car was like parked like diagonal from the house, so I ran across the street, had to unlock the car, had (inaudible) in the car and I start it up.

Page 864

Q Here's Exhibit 1 and this is an aerial map of Aspen Run, and I believe that's the McGill home right there, the driveway?

A Uh huh.

Q And is it—I think there was testimony that your car was parked across the street here?

A Yeah, just scoot it back just a little bit. About right there, sir.

Q Right about there?

COURT: Here, the button is right there, okay?

A Thank you.

COURT: Just point to it on the map.

A This the McGill's house right there?

Q Right, that's the McGill's house.

A My car was parked probably about like right there because there—

Q Across the street or—

A No, across the street—

Q Across the street?

A —from her house.

Q Okay.

A Uh huh, because you only can park right on this side.

Q Okay. And which—was it facing this way?

A Yes, it was facing that way, because when you—if

you're in The Timbers, um, like it's the quickest exit to get out of there, but I park right there because you can't really, um, they really don't like people pulling in their driveway, because when her father get home or they don't—he don't want to have to—to have somebody come out tryin' to pull the car. He want to be able to pull in his own driveway, so that's why I parked on the side of the street.

Q Okay. And after you got to your car, which way did you go?

A Well, my car was facing this way, so I didn't have no choice. I just went this way.

Q This way?

A Yeah, and I was trying to—

Q Over here?

A And I veered around the corner so I can leave and go this way to get out.

Q Okay. What happened when you got over here?

A Oh, yeah. When I got around the corner right here, um, he was like standing there and he, and he pointed to the car like, like, nigga, you dead, like, like, like, yeah, mother fucker, you dead.

Q Uh huh.

A But I just, I just kept going and that's when I, I just left the area.

Q Okay. After this incident, did you think he was gonna

do something to you?

A Yeah. I mean, he already had—he already had told me right there, like, nigga, you dead, and I knew who his, who his people was and, I mean, like I said, I was already in fear from him. So when I left, let's see, I was, I was panicked, I was scared, I was nervous. I didn't, I really didn't know, you know, what to really do. Um, I drove and, um, I just—I was like, well, I better just get the hell out the way, so that's when I, I left.

Q Okay.

A I left and went to Erie.

Q Okay. Eventually, three months later, you turned yourself in?

A Yes, sir.

Q Did you go right to the police station?

A Yes. When I turned myself in, I went right to the police station.

Q Okay. You were still concerned for your safety at that point, though?

A Yes, uh, that's why I went to Erie from the get-go. I mean, I didn't want to stay around here and his, his friends or him catch me, um, so I stayed in Erie. I was, um, I tried to contact my family, um, to notify them, um, of what, what was goin' on. That's when they said that the police was looking for me, um, that they, that they got me considered armed and

dangerous, and I'm like, what the hell. Why, you know, why they consider me armed and dangerous? And they's like, well, that's, that's is what they saying and, um, they, they lookin' for you. So I'm like just like puzzled, still scared. So I'm like, well, should I need, um, do I need to get a lawyer or whatever? And they was like, yeah, we think you should, we think, we think you should get a lawyer. We gonna try to get some money together to get you a lawyer. Um, so we were tryin' to get the money together to obtain some counsel so I can go down there and talk to 'em, I mean, because I felt like I, I mean, I didn't do nothin' wrong. I mean, I was just trying to protect myself and stop him from—if I, if I wouldn't have had that gun or wouldn't have did that, I'd have been more than likely dead out there.

Q Okay.

A Luckily I did have it.

MR. DEMPSEY: Okay. Thank you. No other questions.

COURT: Cross examination?

CROSS EXAMINATION BY MS. MARY ANN BARYLSKI:

Q Mr. Keahey, in 2002, excuse me, you were found guilty of preparation of crack for sale, attempted escape, trafficking in crack cocaine with an enhancement. You went to prison for 17 months; is that correct?

A Yes, ma'am.

Q You received judicial release, being probation; is that correct?

A Yes, ma'am.

Q Then you violated your probation. You went back to prison, right?

A Yes, I was at CROSSWAEH and, um—

Q All you have to do is say yes.

A Well, yes, ma'am.

Q Two thousand and five, in case number 2005-CR-640, you were found guilty of possession of cocaine and attempted having a weapon under disability, were you not?

A Yes, ma'am.

Q And then in case number 2007-CR-124, you were found guilty of possession of cocaine and trafficking in cocaine, were you not?

A Excuse me, that was when?

Q Pardon?

A And when?

Q In 2007.

A Uh—

Q Possession of cocaine, trafficking in cocaine.

A In 2007 I was convicted you said?

Q Yes.

A Uh, no, that was for the pre—the charges that you just stated, that's what I was convicted for. The charges in

2007 were dismissed on grounds of illegal search and seizure by Judge Tygh Tone.

MS. BARYLSKI: I need a sticker.

MS. GROSS: Thirty-four. It will be 34.

MS. BARYLSKI: Thirty-four?

MS. GROSS: Uh huh.

Q I'd like to hand you what's been marked State's Exhibit Number 34.

A Yes.

MS. BARYLSKI: Oh, I'm sorry, Judge.

Q I'd like to hand you what's been marked State's Exhibit Number 34.

A Yes, ma' am.

Q I'd like you to look that exhibit over.

A Oh, this is when I actually, um, was sentenced on the charge.

Q You were sentenced on and convicted?

A Yes, that's in 2008.

Q Is this in 2008?

A Yes, ma'am.

Q And you were sentenced and convicted for possession of cocaine and trafficking in cocaine; is that correct?

A Yes, ma'am.

Q And then in 2005 you were convicted of possession of cocaine and attempted having a weapon under disability,

correct?

A No, I wasn't convicted in 2005. I think that's when I caught the charges, in 2005, but I, but all the, all the—

Q Okay. Two thousand and eight you were convicted of—

A Can I see the paper, ma'am?

Q Sure.

COURT: Mark it.

MS. BARYLSKI: What number are we on?

MS. GROSS: Thirty-five.

Q I'd like to show you this nunc pro tunc entry, and I'll give it to the Judge first.

COURT: Huh?

MS. BARYLSKI: No. I said, I'll give it to the Judge first.

Q Take a look at that and look what you were convicted of in case number 2005.

A This is, this is stating that I was sentenced in 2008.

Q I'm talking about the case number 2005.

A Oh, yeah, that's when I actually received the charge.

Q You were convicted in case number 2005-CR-640.

A That's when I received the charge, ma'am.

Q Is that correct?

A That's when I received it. You, you, you saying when I received it and got convicted.

Q Is that correct? Were you convicted of attempted

having a weapon under disability?

A Yes, in 2008. I received the charge in 2005, though.

Q And that was reduced down—nevermind. And you were also convicted on that, in that particular case of possession of cocaine, correct?

A Yes, ma'am, 2008.

Q And then case number 2005-CR-640, which you just saw, and case number 2007-CR-124, you received sentences of 18 months on each of those cases and that the cases were run consecutively. So you went back to prison; is that a fair statement?

A Uh, them—those sentences ran concurrent, and, yes, I did went, went back.

Q I'm sorry, what did you say?

A I was sentenced to 18 months on both cases and it's running concurrent and I went back to prison, yes, ma'am.

Q I'm sorry, concurrent, okay.

A Okay. Thank you.

Q And you went back to prison?

A Yes, ma'am.

Q So besides the case that you're admitting to with regards to your disability and not being able to carry a weapon, you already admitted in case number 2001-CR-465 that you were convicted of attempted

escape, preparation of crack cocaine for sale, and trafficking in crack cocaine, correct?

Page 872

A Yeah, I understand that, yes, ma'am.

Q Now, that—you knew, based on that conviction alone, that you were not allowed to have a gun; is that correct?

A Yes. I was explaining that, ma'am.

Q Then under case number 2005-CR-640, you're charged with attempted having a weapon under disability, aren't you?

A Attempted, yes, ma'am.

Q And you went to prison for that?

A Yes, in 2008, yes, ma'am.

Q Well, you went to prison under that case number; is that correct?

A Yes, ma'am.

Q So you've been to prison at least two times?

A Yes, ma'am.

Q And been on probation once and violated; is that correct?

A I actually didn't even get to make probation. I was—

Q You went to—you were on probation. You violated. You were sent back to prison; is that a fair statement?

A If that's how you want to put it.

Q No. I'm just asking a question. Please answer it.

A When I, when I, when I was, I was—

Q I don't—I'm not asking for a reason why you violated your probation.

A I just want to, I want to, I want to explain to you

Page 873

what I'm trying to say.

Q Sir, I'm asking the questions.

COURT: Hang on, hang on, hang on.

WHEREUPON, there was a discussion at the Bench between the Court and the witness as follows:

COURT: Listen to the question (inaudible). Sometimes it's just a yes or no, sometimes it's explaining. If she's asking a yes or no question, you have to answer yes or no. Your counsel can get back up and ask you to explain.

A Okay.

COURT: Okay. Listen to the type of question.

A Okay.

THEREUPON, the discussion ended and the following proceedings were had:

COURT: Go ahead, State.

A Yes, ma'am.

Q Going back to May 7th, 2012, you gave this story about

Page 874

Prince not liking you having contact with—

A The boys.

Q —his children; is that a fair statement?

A Yes, ma'am.

Q And he was upset because you and Kindra were together; is that a fair statement?

A Yes. He didn't care for that too much.

Q So he came over to—or you went over to him or he came over to you? I didn't quite get that with all the—your arms swinging around. Did he come to you or did you go to him?

A Well, I was explaining to you that he came to me.

Q Okay, fine. He came to you—

A Yes, ma'am.

Q —because of these two reasons, right?

A No, it was, it was more so he was mad about things that was taking place, so he came out there and that's when I was trying to—

Q Okay, fine.

A —explain to him.

Q He came to you because he didn't like you being with—

A For other, a lot of reasons.

Q —his children, he didn't like you being with Kindra; is that a fair statement?

A I can't speak for all the reasons that why he don't like me—

Page 875

Q I'm sorry.

A —because he's not here.

Q Just answer the question yes or no.

A I don't—I can't speak for him. I don't, I mean—

Q Okay.

A —you'd have to ask him.

Q All right. Let's stop. You listened to the text messages with regards between you and Kindra?

A Excuse me?

Q You listened to the text messages that were read between you and Kindra?

A Yes, ma'am.

Q That—Officer Wichman, Detective Wichman read them; is that correct?

A Yes, ma'am.

Q Okay. Isn't it a fact that the reason Prince came to you was because you were hitting on Shawneata Grant?

A Oh, no, that was also—

Q Just answer yes or no, please.

A That was another reason.

Q In fact, your message between Kindra and you on 6/15, she states: You should have never been the thirsty grimmey ass nigga you are and been trying to get on with Shawneata. Now shut the fuck up talkin' to me, and you right, I am getting upset. Maybe I thought we could work something out, but you

just showed me that it couldn't ever, plus keep talkin' to the hoe and make her your main bitch.

A She was referring to Cheritta, um, and dating. When she was there, she was—

Q I'm not, I—

A I'm trying to—can I see the text so I can explain it to you? I mean, is that better, ma'am?

Q I just read it to you. Do you remember that text?

A Can I see it?

Q No. Do you—I read it to you. Do you remember that text?

A Yes, in the form I do.

Q In fact, Anrico Cunningham, one of the children that were in that vehicle on June 20th, is—is it Cheritta or Shawneata? It's Miss Grant's child, isn't it?

A Miss Grant is Shawneata.

Q Shawneata, okay.

A Yes. That's not Cheritta. It's two different people you're speaking about.

Q Shawneata.

A Yes, ma'am.

Q Her name is Shawneata. Isn't Anrico Cunningham Shawneata's son?

A Yes, if I'm speaking correctly.

Q And wasn't Anrico Cunningham in that vehicle on June

20th when shots were fired at the McGill house?

A Um, I really don't know, ma'am. Like I said, when it all took place—

Q I—

A —it was happening so fast. I don't know, because I—

Q Okay.

A —couldn't see in the car, that the windows are tinted, ma'am.

Q That's all you have to do is say I don't know. Kindra knew who stabbed you, correct?

A Yes, she did.

Q Yet you wanted the code of the street to be followed; isn't that a fact?

A It wasn't so much of a code to be followed. It was just—

Q It—

A I was in—I was in fear.

Q Just say yes or no, please.

A No, no, it wasn't—

Q You wanted the code of the street to be followed.

A No, it wasn't—no, ma'am, there wasn't a code.

Q And you heard the text messages from Detective Wichman?

A Yes, ma'am.

Q And he read a text that you sent to Kindra that stated

Page 878

basically follow the code of the street.

A No, that was her text to me, ma'am—

Q Okay.

A —if you read that.

Q Follow the code of the street.

A That was her text.

Q You have somebody at the Sandusky Police Department that you trust quite extensively, don't you?

A No, ma'am.

Q Oh, no? What about Dana Newell?

A No. I mean, me and Dana Newell doesn't have any friendship.

Q And that you could have gone to Dana Newell and told them what happened to you on June 20th, 2011, but you didn't do that, did you.

A I was in fear, ma'am. I didn't want to—

Q You didn't do that, did you.

A —say nothing about my life. I was in fear about my life.

Q You could have gone to Dana Newell on June 20th, 2011, but you did not do it, did you.

A I could have been killed if I went and told—

Q I—

A —Dana Newell that.

Q That's not the question I'm asking you. You did not

Page 879

contact Dana Newell, did you.

A No, ma'am, I did not tell. No, I did not, ma'am.

Q One of your best friends, Calvin Harper, was murdered, correct?

A What does that have to do with this case, ma'am?

COURT: Wait, whoa, whoa, whoa.

MR. DEMPSEY: Objection, Your Honor.

COURT: Hang on.

WHEREUPON, there was a discussion at the Bench between the Court and the witness as follows:

COURT: Remember, I said you can't ask questions of them. You just asked, what does this have to do with the case? That's (inaudible). Your job is to answer questions, remember.

A So she can talk about something—

COURT: She can—you have to listen to the question and give an answer. Your whole job is to answer questions.

A Yes, sir.

COURT: You just asked her a question. You can't do that.

A Okay.

Page 880

COURT: Now, listen. Your counsel can get back up and ask you to explain it, but in the meantime, you just have to answer questions, okay?

A Yes, sir.

COURT: You will get your opportunity through your counsel, okay?

A Yes, sir.

COURT: Okay. Go ahead, answer the question.

THEREUPON, the discussion ended and the following proceedings were had:

MR. DEMPSEY: Could I object, Your Honor? Approach?

COURT: Basis? Sure, approach.

WHEREUPON, there was a conference between the Court and Counsel, and out of the hearing of the jury, which is as follows:

MR. DEMPSEY: I don't see how any mention of Calvin Harper and his murder is relevant to this

Page 881

case at all.

COURT: How's it relevant?

MS. BARYLSKI: I am going to ask him questions about did the Sandusky Police, you know, did the Sandusky Police Department solve his murder and protect him basically as far as being a victim in a crime and he was your best friend. Why didn't you think the Sandusky Police Department would protect you, that you should have gone, and Queenie Amison is related to him, is his aunt.

COURT: Okay. Give that to me again. Now, who did the Sandusky Police protect, Calvin Harper (inaudible)?

MS. BARYLSKI: No, the police went and did a very thorough investigation—

COURT: Okay.

MS. BARYLSKI: —and people were convicted. They went to prison. This is a very good friend of yours. You saw what the police did for your good friend. Why do you think—don't you think the police would have done the same thing for you? That's what I'm trying to get out.

MS. GROSS: It goes to trust.

MS. BARYLSKI: It goes to trust.

COURT: It's close. I'll allow you to

Page 882

go, but not real deep into it.

MS. BARYLSKI: Okay. No, I don't, you know, not real deep.

COURT: (Inaudible).

THEREUPON, the conference ended and the following proceedings were had within the hearing of the jury:

Q. Carbin Ham—Carpin—Calvin Harper, I'm sorry, was murdered, correct?

A Yes, ma' am.

Q And he was a—he was a drug dealer in the City of Sandusky, correct?

A I don't know everything about it being a drug deal.

Q Okay, you don't.

A I know he was murdered.

Q All right, that's fine. The Sandusky Police Department went and investigated that case very thoroughly, didn't they?

A I can't say. I can't speak for another officer.

Q The people who shot and killed Calvin Harper are in prison today, aren't they?

A Yes.

Q This being your best friend—

Page 883

A No, that was my cousin.

Q Your cousin.

A My first cousin.

Q Even, even better, your cousin. Queenie is your aunt and that's Calvin's mother; is that correct?

A Yes, ma'am.

Q Do you know that Queenie has a lot of respect for the Sandusky Police Department?

A You have to ask her. I can't speak for her.

Q Okay. But you can speak for other people?

A For who?

Q You could speak for other people, as you've been doing?

A Who did I speak for?

COURT: Here we go.

Q Kindra.

COURT: You can't ask questions.

A I apologize.

COURT: You can't ask questions.

A I apologize.

Q You spoke for Kindra, you spoke for Calvin, you spoke for everybody who—involved in that knifing.

A Calvin was not in a knifing.

Q Now I'm asking you a question. Was—does Queenie respect the Sandusky Police Department?

A I cannot answer that, ma'am.

Page 884

Q Okay. The fact that the Sandusky Police Department did a good job, couldn't you respect that, don't you have enough respect for them to go to them and tell them what happened to you?

A If I was killed before they were able to apprehend Mr. Hampton, then what—how could I explain that?

Q Go—you have two incidences here, two incidences, correct? You were stabbed. You didn't tell the police.

A No, ma'am. Out of fear, I did not.

Q Then you get into a gun, so-called gun fight with Prince Hampton and you run.

A Yes, I was in fear. I got—

Q You don't go to the police, correct?

A I really didn't feel that I did anything wrong by trying to save my life, ma'am. I—

Q You didn't go to the police, did you.

A No, ma'am.

Q Now you're stating that when you—number one, you talked to Kindra at 7:00 in the morning on June 20th; is that correct?

A Yeah, she woke me up in my sleep, ma'am.

Q Uh huh. That she told you that Prince Hampton was going to be bringing those kids over, didn't she.

A No, she did not, ma'am.

Q She told you that he was going to be bringing the kids

Page 885

over because she knew that you wanted to get some revenge. You wanted to retaliate; isn't that a fact?

A No, ma'am, she did not say that.

Q So then you put a gun in your pocket and you go over to the McGill residence in the morning before Prince gets there and you wait, except Mrs. McGill kicked you out of the house, correct?

A No, she did not kick me out the house, ma'am.

Q She asked you to leave, didn't she?

A No, ma'am.

Q Okay. She didn't ask you to leave. You left.

A I turned around and left because I did not want to disrespect her in her home.

Q So you leave and you go down by your car—

A No.

Q —correct?

A I do not—I didn't even have a chance to even get to my car, ma'am.

Q Oh, that's right. He was running you over with a vehicle; is that correct?

A He accelerated fast up the driveway when I was right there by the door. I jumped against the house because I did not want him to hit me. I did not know his intentions. I was scared.

Q And nobody saw this happen; is that correct?

Page 886

A Wasn't nobody outside but me and him.

Q And where was Mrs. McGill?

A She was in the house. She wasn't outside, ma'am.

Q So you didn't see her outside at all, did you.

A Not when everything took place, no, ma'am.

Q So you don't know if she was in the house or not, did you.

A I knew she wasn't outside.

Q But you said you didn't see her.

A When he accelerated up the driveway and I jumped out the way, got up against the house closer so he could not hit me, no, ma'am, she was not outside.

Q Okay. So he accelerates up the driveway, which nobody sees and nobody hears, and then why didn't you walk to your car, straight to your car?

A That's what I did try. Once the car sped a little bit to where I can get off the house, get off the house and start going towards my car, that is when he hopped out with the knife and was like, yeah, nigga, and he was coming at me, and that's when I pulled out the gun and that's when I shot to stop him from coming at me, stabbing me. He already almost killed me already. I wasn't gonna let him just—

Q You know, the evidence doesn't, doesn't correspond with what you say.

MS. BARYLSKI: Do you have the—

Page 887

COURT: The what? (Indicating.)

Q You heard the testimony in this Courtroom, correct?

A Yes, ma'am.

Q And if you were walking down this driveway here—

COURT: State's Exhibit 1?

Q Oh, I'm sorry, State's Exhibit 1, and the car is parked here and he jumps out of the car and you shoot, there's no way the evidence points to being able to demonstrate that you shot at Prince Hampton. You heard the testimony of Detective Prewitt.

A Detective Prewitt, um, yes, I have heard the testimony, but that still doesn't—

COURT: Approach.

MR. DEMPSEY: Objection.

COURT: Approach.

WHEREUPON, there was a conference between the Court and Counsel, and out of the hearing of the jury, which is as follows:

COURT: Detective Prewitt never testified.

MS. BARYLSKI: Oh, I'm sorry.

MR. DEMPSEY: Which (inaudible) are you talking

about?

MS. BARYLSKI: No, no, I meant to say Detective Orzech.

COURT: There you go.

MR. DEMPSEY: Oh, okay.

COURT: Okay.

THEREUPON, the conference ended and the following proceedings were had within the hearing of the jury:

Q. I'm sorry, not Detective Prewitt, Detective Orzech. You heard the testimony of Detective Orzech that you shooting—

A Is it Prewitt or Orzech?

Q —coming down the driveway towards that car, could not have happened.

A Is it Prewitt or Orzech you are referring to?

Q Mr. Orzech.

A Orzech. Yes, I have heard testimony from Mr. Orzech, ma'am.

Q Mr. Prewitt did not—I'm sorry, Mr. Pruitt was just a witness. He was not—but he told you that there's no way you could have shot from the front of that car.

A Because I—

Q You heard that testimony.

A Because I did not shoot from the car.

Q And—

A I never told you that.

Q The evidence that was collected in the area, based on the investigation and the BCI reports, demonstrates there was only one gun.

A No, it does not, ma'am.

Q Well, where's your gun?

A I got rid of it, ma'am, because I was labeled armed and dangerous. They said if I was to be seen or even thought of having a gun, they were to shoot on sight.

Q Oh, shoot on sight?

A That's—and that's the police.

Q Yeah, okay, they shoot on sight.

A If I, if they—

Q Where did you get rid of your gun?

A Before I—when I left Erie to come back here, I got rid of it because I did not want them—

Q I didn't ask—where did you get rid of your gun?

A Oh, well, I threw it in the water because I didn't want nobody else to get a hold of it and do something stupid.

Q Like you?

A I did not—saving your life is stupid?

Page 890

Q Where in the water?

A What do—in the water. I threw—

Q Where in the water? What water?

A It's, it's a whole bunch of lakes coming from Erie to Cleveland, in the middle.

Q You said you disposed of it here.

A No, I said on my way back to Sandusky, Ohio. You have to drive—

Q So you kept it the whole time you were in Pennsylvania?

A I was still scared. I didn't know if they were looking for—if they knew where I was at, they could come get me. I mean, I was scared.

Q You kept that gun the whole time while you were in Pennsylvania; is that correct?

A Uh—

Q Is that a fair statement?

A The whole time, no.

Q Then on the way back you said you got rid of the gun, correct?

A Before I came back, I, I exposed of the gun, yes, I did.

Q Okay. Would it have been a good idea to keep that gun?

A Um, no. I mean, if the police were to see me before I was able to get to the station to talk with them, then if they seen the gun, they could shoot. They, they, they said that to

Page 891

my family. They stated that to my family—

Q Okay.

A —and they stated it in the—

Q The thing here is, there are a lot of gun ca—there were a lot of casings found—

A I believe that they—

Q —in this area by the car, all right?

A Uh huh.

Q Then there was a bullet skip in this area.

A That's what—actually that's where—

Q Then there was the Jeep over here.

A Yes, ma'am, that's where he was at.

Q We have witnesses, who live in this house, who say you were chasing Prince Hampton. You did not go back to your car. You were chasing Prince Hampton and this witness said never saw this guy run so fast, meaning Prince Hampton. Do you remember that testimony?

A Yes, ma'am.

Q Then you have people over here, where Prince Hampton collapsed in their yard, and people were taking care of him. You heard that testimony.

A Yes, ma'am. I seen it.

Q And you heard Mr. Brown, correct?

A Yes.

Q And you heard Mr. Brown say you came riding by and you

Page 892

yelled to Prince Hampton, you're a dead man, nigga.

A Ma'am, if you read the police report—

Q Did you hear—

A —he changed his story.

Q Did you hear that?

A I heard him testify up here—

Q He testified on the stand.

COURT: Wait, one at a time, one at a time.

A Yes, but he—

COURT: Whoa.

A But he changed his story.

COURT: The question is, did you hear that testimony.

A Yes. Yes, ma'am.

Q You heard the testimony.

COURT: Okay. Next question.

A Yes, ma'am.

Q Great. You heard poor Mrs. Brunell Hendrickson here whose home—a very innocent person, apparently is somehow related to you; is that correct?

A Yes, ma'am, that's why I would never try to cause her any harm.

Q And she testified to the same thing. She heard you yell, you're a dead man—

Page 893

MR. DEMPSEY: Objection, Your Honor.

Q —nigga.

COURT: Basis?

MR. DEMPSEY: That's not what she testified to.

COURT: Approach.

WHEREUPON, there was a conference between the Court and Counsel, and out of the hearing of the jury, which is as follows:

MR. DEMPSEY: I don't think she testified to that.

MS. BARYLSKI: Yeah, I have it in my notes.

COURT: Well, she's just—she's gonna ask. If he says, no, that's not what I heard her testify to (inaudible) say no.

MR. DEMPSEY: Okay.

COURT: Overruled.

THEREUPON, the conference ended and the following proceedings were had within the hearing of the jury:

Page 894

COURT: You can answer the question.

Q You heard Mrs. Hendrickson say the same thing, that she heard you yell out those words, correct?

A I don't recall, ma'am.

Q By yelling out, you know, okay, you're here on State's Exhibit 1. You come around and you're going to go this way and then you slow down when Prince Hampton's lying on the ground. That doesn't look like a man that's very afraid if you're yelling out of a vehicle, does it.

A Because I did not, ma'am.

Q Oh, so Mr. Brown is lying?

A If you read the police report—

Q Mr. Brown is lying, yes or no, when he testified on this stand that he heard you say that?

A He changed his story, that's the only thing I can say.

Q So he's lying?

A If you read the police report.

Q Now, there's a casing found right in around in this area.

A Yes, ma'am.

Q The evidence shows, as do witnesses, that Prince Hampton was running through this area and around this way and you were chasing him.

A No, I did not actually chase him. I charged at him when he was trying to turn, when he was trying to shoot. I

Page 895

charged him to stop him from getting a good shot off at me.

Q Sit down, please.

A I can't even stand?

Q You're scaring me.

COURT: Wait a minute. Approach.

WHEREUPON, there was a conference between the Court and Counsel, and out of the hearing of the jury, which is as follows:

MS. BARYLSKI: I don't like the way he gets up and goes like this.

COURT: Okay, but you can't do that.

MS. BARYLSKI: I know.

COURT: You can approach and you can ask me to have him sit down. You can't do that.

MS. BARYLSKI: I know.

COURT: I don't want the jury being tainted.

MR. DEMPSEY: Yeah, I—

COURT: Okay? I'll take care of it.

MR. DEMPSEY: I'd almost ask for a mistrial for that.

COURT: No, there's no mistrial there.

Page 896

Your request for mistrial is denied. I'll give a curative.

THEREUPON, the conference ended and the following proceedings were had within the hearing of the jury:

COURT: Ladies and gentlemen of the jury, the comment by the prosecutor is stricken. You're not to consider that. Continue, State of Ohio.

Q There is evidence by witnesses who state that Mr. Hampton ran this way and you were running after him and a casing was found right around in this area. You heard the testimony; is that correct?

A Are—in a way, yes.

Q Why would you run all the way here when your car was over here?

A Excuse me?

Q Why would you be in this area when your car was over here?

A As I was explaining to you, um, when he came charging down the driveway, shooting, I shot back and that's when he tried to cut through the yard, but he's still aiming towards me, and I shot a few more times. He got around like by the

Page 897

Jeep and that's when he turned around—

COURT: Remain seated.

A Oh. I mean, it's hard for me to—

Q I'm not talking the Jeep area here, sir. I'm talking down here.

A I, I didn't actually go that far. I went, I charged towards the Jeep to make him either have to run—I was just trying to stop him from actually getting his shot off to shoot me. I charged towards him and he—

Q So you were not here?

A In the—

Q You were not in this area?

A I can't say exactly if I was that far or not. I really can't.

Q Well, Mrs. Brunell's—

A I mean, it was, it was all, it was all happening so fast. I can't even exactly say—

Q Mrs. Brunell's home was shot.

A And I apologize. I—if I did that, I don't know.

Q You were shootin' a gun, weren't you?

A Yeah, I was trying to stop him from actually killing me.

Q You were shooting a gun, were you not?

A Yes, ma'am.

Q And you know the consequences of shooting a gun, don't

you?

A To, yeah, to protect yourself.

Q No. The consequences of shooting a bullet at anything is what's going to happen.

A I'm gonna stop him from killing me.

Q So you missed him. Where do you think that bullet went?

A I cannot speak for that, ma'am.

Q Well, you know that it just doesn't drop, don't you?

A I didn't even—I wasn't even for sure if I missed him. To my knowledge I actually had to wound him and that's why he actually—

Q I'm just—I'm not asking you that. If you missed him, you know the bullet does not drop; is that correct?

A At the time, ma'am, I was not thinking like—my, my, my, my main focus was to stop him from actually killing me or getting his shot off to kill me.

Q All the way down here? All the way down here?

A Ma'am, if you scoot—

Q I'm asking you, all the way down here you're going to stop him when you could have gotten in your car here?

A I could not—if I'd have turned around and tried to run to my car, I would have got shot in the back or

the back of the head, and he was not stopping. He was not stopping.

Q Well, no. He was running for his life now, wasn't he.

Page 899

A No, ma'am. At the time he was by the Jeep he turned around and faced me. That didn't—that's when I had—must have shot him in his leg.

Q Sir, I'm not talking about here. I'm talking about over here.

A We're not—

Q What are you doing down here?

A I charged towards him to force him to run or get shot. When he actually took off running, and I knew he was running, that's when I turned around and ran back to my car.

Q After you took a shot in this area?

A That's when I made him either run or get shot.

Q Sir, he was running away from you, wasn't he.

A Not at first, ma'am.

Q He was running away from you when he was down in this area, wasn't he.

A When he was behind the Jeep, no, he was facing me.

Q Sir, answer the question, please.

A I can't, I can't, I can't explain to you because you won't let me.

Q I'm not asking you to explain it. I'm asking you, was he running away from you when you were down in this area?

A I'm, I'm not too for sure, ma'am.

Q And—

A Everything, everything was happening so fast. I

can't—

Q When the witnesses say that Prince Hampton was running for his—they never saw him run so fast, and you were chasing him—

A I never actually chased him.

Q —and you took a shot—

COURT: Listen to the question.

Q And you took a shot in this area, why did you go this far then?

A Ma'am, like I explained to you, when he was sidestepping, trying to still shoot, he kind of fell, and when he—when he was reaching back to shoot, he was around by that Jeep area. That's when I charged him to stop him from really getting a good shot, get his balance and getting a good shot. I charged towards him to either—so either I was going to shoot him or he was going to have to move, and he chose to move, and when I realized that he was actually moving, going away, and he wasn't a threat, I turned around and ran to my car, yes, ma'am. That's the best way I can explain it to you.

Q You had a duty to retreat the first time you could retreat and that should have been in this area.

A No, ma'am, I did not.

Q Instead, three children were in this vehicle and you're shooting?

A Ma'am, I was just trying to protect myself. I was not

trying—

Q Three—

A —to harm anybody.

Q Three children were in that vehicle and you were shooting; is that a fair statement?

A After everything was said and done, yes, ma'am.

Q A woman's home was shot into while you were in this area, a long ways from your car; is that a fair statement?

A I cannot say when her home was shot into.

Q You heard her testify.

A She was in the house, that was her testimony, that she was in the house when she heard the shots.

Q Yeah. Her house got shot—

A As a matter of fact—

Q Her house got shot into, did it not?

A Yes, ma'am.

Q Okay.

A That's what, that's what she said.

Q And if Price Hampton is running, he's not shooting forward, is he. Someone has to be shooting forward and it had to be you; is that correct?

A He was not, he was not running. When, when—like I said, when he chose to actually run, that's when I knew that he wasn't a threat and that's when I turned around to go to my car.

Q You have all these witnesses that came in this Courtroom and testified. You had the Browns, you had Ms. Hendrickson, you had the individual that lives here, and I can't remember his name off the top of my head, um, then you had the next door neighbor here. All indicate you, a man in a hoodie, who had to be you, chasing a person in a white shirt and blue shorts. You heard the testimony; is that correct?

A In a way you're correct, ma'am.

Q You heard the testimony that no one saw a gun or any type of weapon in Prince's hands. You heard that testimony; is that correct?

A Ma'am, they actually said that they heard shots and then—

Q No, I'm asking you the question.

A —that's when they paid attention. They didn't, they didn't even pay attention until they heard the shots, that's what—

COURT: The question is, people have testified they didn't see a weapon in his hands; is that true? Is that what they testified to?

A Yes, ma'am.

Q That's what they testified.

COURT: Next question.

Q You heard the police officer testify, especially Orzech, Assistant Chief Orzech, that based on the investigation

and based on the analysis and the comparison of where evidence was found to the BCI report, one gun was used. You heard that testimony?

A The BCI guy said he didn't—

Q Did you hear that testimony, please?

A He said he was not for sure. He said it could have been another gun.

Q I'm not talking about the BCI person. I'm talking about Assistant Chief Orzech.

A Even he—

Q He testified that—

A That it could have been another gun—

Q He—

A —but he said he didn't know. He said he didn't think so, that was his testimony.

COURT: The question is, Detective Orzech—

A Yes.

COURT: —did he testify to that, not that other guy.

A Yeah, Orzech testified that he said he, he was not for sure. It could have been, but he said he thought that it wasn't, that was, that was his testimony, sir.

Q One gun was used. No other gun was found in the area. You heard that testimony?

A Yes. I don't know what he did. I don't know how he got rid of it or what.

Q There was no gun on Prince Hampton when he went to the hospital; is that a fair statement?

A Yes, they said they did not find a gun.

Q All the casings that were found at the scene in this area here by the McGill home and the one casing found here all were shot from the same gun. You heard that testimony?

A No, ma'am.

Q Okay.

A They said five had similar matches—

COURT: Your ans—you said no. That's fine. Go ahead. Next question.

Q The other evidence that was collected was the spent shells here?

A I can't see where you're pointing.

Q The, the bullet that was in the McGill home?

A No, that's, that's Brunell home, that's what you said the first time.

Q Brunell home, Brunell's home, I'm sorry. There were some, a couple bullets found right in the McGill area, and they were all found by and collected by Orzech; is that correct?

A No, ma'am. He said that it was other officers that, um, found different shell casings.

Q I'm saying collected by Orzech, meaning he picked them

Page 905

up.

A Not personally. He said other people.

COURT: Next question.

Q Yeah, I will. Basically what you're saying is, and you're—and you're stating that you went armed to the McGill house; is that correct? You had a weapon on you?

A Yes, ma'am, I had a weapon.

Q Okay. You were not permitted to carry a weapon; is that correct?

A Yes, you're correct about that.

Q You were not permitted to have a gun?

A Yes, ma'am.

Q What did those children in that vehicle do to you?

A They did not do nothing, that's—I didn't intend to do nothing to them either.

Q But based on your actions, those children were trapped in that vehicle; isn't that a fair statement?

A Based upon his actions. I just saved my life. I didn't—

Q You're more worried about yourself than those children, weren't you.

A Ma'am, when everything took place, I panicked. I mean, I wasn't thinking. All I was trying to do was stop him from getting to me, from actually—

Q Yet Mrs. McGill testifies to none of that and saw none

Page 906

of that.

A Mrs. McGill doesn't care for me. She, she seen more than what she—

Q I'm asking you, did she testify to any of that?

A No, ma'am, she didn't testify.

Q Mrs. McGill does not like you. She said so on the stand—

A She said she—

Q —that's correct.

A She said she hates me.

Q And she does not like Prince Hampton either, does she.

A Yeah, she talks—

Q And she said that on the stand.

A She likes him.

Q But you know something? This case is not only about Prince Hampton; do you realize that?

A Yes, ma'am.

Q This case is also about Brunell Hendrickson; do you realize that?

A Yes, ma'am.

Q That her home was shot into?

A Yes, ma'am.

Q And it's about those three children in that vehicle; is that a fair statement?

A Yes, ma'am.

Page 907

Q The only person who has testified in any way, shape, or form to what you're talking about today in front of this jury is you; is that correct?

A Yes, ma'am. If Prince was here, I mean—

Q There no—

A —pretty sure he would have to, he would have to acknowledge that.

Q There was nobody else that came in this Courtroom that can confirm anything that you stated; is that a fair statement?

A No.

Q So that if they, if they tell, and which they did, the witnesses testified on the stand as to what they observed and it was different than what you are testifying to, how do you explain that?

A Um, the best way I can explain that is that when everything took place, um, it wasn't a lot of commotion with him coming up the driveway trying to run me down, or I suspect he was trying to run me down when I got against the house. When I fired the shot at him and I tried to run to get to my car and he came charging at me down the driveway and he fired, um, and when I fired back the second time when he was going through the drive, I mean, running through the yard, I would say that that's when people might have heard the shots—

Q Okay.

A —when he actually, when he actually—

Page 908

Q But, all right.

A Can I finish explaining? You asked me to explain. Can I finish explaining?

COURT: Let him finish. Go ahead.

A Um, and when they actually heard the shots, I think that's when it grabbed their attention. By the time they came and were looking or paying attention

to what was going on, they probably seen me charging at him to get him to flee, because he was trying to turn around and shoot, and when I charged him to make him either run or get shot, I think that's when people probably really had the good focus, were at their windows like they said. So it seemed, it probably seemed as though I was chasing him, but I was just trying to force him to move, to turn around and run and get away from me.

COURT: Next question.

Q That's not what the witnesses testified to, though, was it.

A Yes, they said that they heard some shots.

Q They—

A Then they—

Q It's not—what all you're talking about is not what the witnesses testified to; is that correct?

A No, that's not correct.

COURT: Next question.

Q You have Mrs. McGill outside and you heard her

Page 909

testimony, correct?

A Yes, I did.

Q You heard Mr. Brown's testimony, correct?

A Mr. Brown stays way around the corner. I don't think he actually seen the—

Q You heard—

COURT: The question is did you—

Q —Mr. Brown's—

COURT: Just a second.

Q —testimony, correct?

COURT: Just a second. That's the question. Did you hear his testimony? It's a yes or no answer.

A Yes, ma'am.

COURT: Next question.

Q You heard Ms. Hendrickson's, Brunell's testimony, correct?

A Yes, ma'am.

Q You heard Jeremy Pruitt's testimony; is that correct?

A Yes, ma'am.

Q You heard the officers' testimony; is that correct?

A Yes, ma'am.

Q And you—there were other witnesses that testified and no one saw Prince Hampton with a gun; is that correct?

A Um, I don't—I think, I think Joyce seen, seen—

Page 910

Q I'm just asking you is that correct.

A. She testified that she did not, correct.

Q No one saw him with a gun. No one saw Prince Hampton with a knife, did they.

A Yes. I did.

Q Pardon?

A I did.

Q Yes, you did.

A That's why I'm up here testifying.

Q But none of the other witnesses testified to him running with a knife or having a knife in his hands either, did they.

A They didn't see the initial—

Q And yet Mrs. McGill was outside and observed everything that went on—

A No.

Q —isn't that what her testimony was? She was looking between the door and the screen door and watching what went on; isn't that correct?

A I don't think she seen it.

Q That she was looking out the door, that she didn't even see and didn't testify to anything about you almost getting hit by a car, did she.

A Because she wasn't right there by the door. When I came to the house, she was like into the kitchen area moving

Page 911

towards the living room, that's when I was walking behind her, because she had let me in the house. She's nagging, saying all type of things about my shoes and stuff. I was not about to disrespect her. I turned and I start going back out the door, that's why she testified to say she didn't know if I was in the—and I was—if I was in the back of the house or if I was sitting down in the kitchen. She said she didn't know.

Q She testified she saw you walking up the driveway towards the vehicle when she looked out and that's—no words were said and Prince was just getting out of the car when you opened fire.

A No.

Q You heard her testimony, didn't you?

A Prince's—when Prince pulled into the driveway—

COURT: The question is, did you hear her testimony.

Q Did you hear her testimony, please?

COURT: That's the question.

A Yes, I heard her testimony.

Q So she's not confirming anything that you have said; is that correct?

A Um, yeah, she confirmed a few things I said.

COURT: Next question.

Q When she saw Prince getting out of the vehicle and you walking up the driveway, no words were said between the two of

Page 912

you; is that her testimony?

A That's her testimony. That's not correct.

Q Therefore, since nothing was said, Prince didn't start anything. You were the one that started it because you took the first shot.

A No, ma'am. He started it when he hopped out the car, threw the—he just hopped out the car and left the door open and came straight at me like this with the knife, like, like, yeah, and that's when I, I fired. I didn't initiate no contact. I have never did a violent crime in my life, that's not—

Q Escape is a violent crime.

A Attempted escape, I was—

Q Attempted escape is a violent crime.

A Attempted escape? I was—

Q Attempted having a weapon under disability.

A A violent act, let me rephrase that, a violent act, a violent act.

Q No, but you are definitely a convicted felon.

A Yes, I was convicted of drugs.

Q Who knows the ropes; is that correct?

A No, not really. If I, if I—

Q Who knows the street code, correct?

A I don't know. I'm, I'm aware that if you tell, what can happen to you.

Page 913

Q You've been to prison, correct?

A Yes, I have been to prison.

Q Twice?

A Yes.

Q You're a tough man, correct?

A I'm not—I don't consider myself tough. I'm a, I'm a—

Q And the reason that Prince Hampton stabbed you was not the reasons that you represented to this jury. It was about another woman, wasn't it.

A No, ma'am.

Q And you could have gone to the police after you were stabbed, even after you got out of the hospital, and you didn't do that, did you.

A I was in fear of my life.

Q You didn't go to the police, did you.

A No, ma'am. Do you know who Black Point Mafia is?

COURT: You cannot ask questions. I've instructed—

Q You did not go to the police.

COURT: Whoa, whoa, wait a minute, wait a minute.

WHEREUPON, there was a discussion at the Bench between the Court

Page 914

and the witness as follows:

COURT: Mr. Keahey, (inaudible) you're testifying on your behalf.

A Uh huh.

COURT: Every time you argue, the jury picks that up. Now, listen to the question and (inaudible). You can't ask them questions, okay? Now, if you want to present your case, you're going to hurt yourself with the jury by the way you're acting, okay? So just listen to the question and answer it and don't ask them questions, okay? Go ahead, sir.

THEREUPON, the discussion ended and the following proceedings were had:

A I apolo—I apolo—I apologize.

Q You didn't go to the police, did you?

A No, ma'am.

Q You stated that he, Prince, pulled out a gun, pulled out a knife, right?

A Yes, ma'am.

Q But you were the one that pulled out the gun. You

Page 915

testified to that, correct?

A Yes, ma'am.

Q And then you started shooting because Prince had a knife, correct?

A Yes, ma'am.

Q Well, with a knife, you could have walked right away, couldn't you have.

A No. When I tried to walk away the first time, did you—I told you what happened. I tried to run away the first time and you see what happened.

Q But you pulled out the kni—Prince pulled out the knife and you pulled out the gun; is that correct?

A Yes, ma'am.

Q And when you pulled out that gun, you knew those children were in that vehicle, didn't you.

A Actually the only thing I was thinking about was stopping him from killing me.

Q Did you know the children were in the vehicle?

A I mean, I really wasn't thinking. I was—

Q I'm just asking you a question. Please answer it. Did you know the children were in the vehicle?

A Um, I guess you can probably say that. I mean, like I said, when he hopped out, the only thing I—

Q Sir, did you know the children were in the vehicle?

A In a way, ma'am, yes.

Page 916

Q Prince pulled out a knife, you pulled out the gun, you started shooting—

A No, I—

Q —and that car was shot, was it not?

A Yeah, from the pictures the car was shot, ma'am.

Q Pardon?

A From the pictures, yes, the car was shot.

Q The car was shot with three children in it.

A It was shot from—the door was wide open. If I would have shot, it would—

Q The car was shot with three children in it; is that correct?

A Yes, ma'am.

Q When you pulled out the gun and Prince pulled out the knife, Prince started running away from you; is that correct?

A He kind of like ran to the front of the car, that's when—

Q Did he start running away from you?

A Yes, ma'am.

Q Because you had a gun.

A Yes.

Q In fact, do you remember Joyce McGill screaming at you to stop shooting?

A When I was on my way—

Q Do you remember Joyce McGill yelling at you to stop

shooting?

A In a sense, when I was going to my car, yes.

Q When you're going to your car. Why would she say stop shooting when you're going to your car? Why didn't she say stop shooting when you were shooting?

A She was just yelling. I don't know exactly what she was saying, but her testimony said that that's what she was saying, so I'll just assume.

Q Because she yelled, stop shooting because my grandkids are in that car, and you continued shooting, didn't you.

A No, ma'am. When she was saying that, I was going to my car. He was already—

Q And you continued shooting and you were going around the car shooting because Prince was running away from you; isn't that correct?

A No, ma'am.

Q You planned this attack and it's evidenced by the text messages; is that correct?

A No, ma'am. It doesn't say that nowhere in those texts.

Q You were going to retaliate because Kindra said, do it already.

A Do it already? No, that's, that's—

Q Do you remember that text message?

A No, ma'am. I remember the text message I did, I did say I'm gonna have to do what I have to do, meaning protect

myself from allowing him to do any harm to me again.

Q You so grown, but you got so many influences in your ear. I don't give a fuck. Anymore I ain't with you or that nigga and honestly I'm tired of talking about that nigga. If you're gonna do something, shut the fuck up talkin' about it, I'm out. Now, that is a text sent to Kindra to you.

A From her to me?

MS. BARYLSKI: I have no further questions.

COURT: Redirect?

MR. DEMPSEY: Just a few follow-up questions, Your Honor.

REDIRECT EXAMINATION BY MR. TIMOTHY DEMPSEY:

Q Demetreus, there was some mention about this judicial release and CROSSWAEHs at the beginning of your testimony?

A Yes, sir.

Q Could you explain what happened with that?

A Um, actually I had received a judicial release from Judge Tygh Tone. Under the conditions for me to be released, I was to go to a halfway house. It's called CROSSWAEH. While I was at CROSSWAEH, I had a few problems. I had went through some AA programs and different programs and, um, it came almost time for me to be released and something was

going on with the paperwork. I was upset about it. Me and a person had a few words. They ended up terminating me from the halfway house and, um, I was sent back to prison to have to finish my time.

Page 919

Q Okay. Now, when this incident happened in June of 2011, you knew at that point you were not allowed to have a weapon?

A Yes, but, I mean, I was in fear of my safety. I mean, what—

Q Well, that's what I was gonna ask you. Why did you get a gun?

A Because I was scared. I mean, they were lookin' for me. I knew wherever they seen me at, I mean, anything, anything possibly can happen. I mean, I mean, I didn't want to die. I wasn't ready to die.

Q And you had been stabbed by Prince a month earlier?

A Yes, sir.

Q Okay. Now, there was some testimony about a street code and that's basically don't tattle on Prince Hampton.

A Yes.

Q And you got word from his people that you shouldn't do that or something worse is gonna happen to you.

A Yes, sir.

Q Okay. And the prosecutor asked, you could have gone to Dana Newell or the Sandusky Police Department and you didn't go and the reason—what was the reason for that?

A Um, well, if I would have told, um, they were gonna try to kill me, um, for tryin' to tell on him and sending him to prison or anything happen to him. I tried to get Kindra to say

something, because I felt that, you know, he wouldn't cause her no harm, but I felt like, um, I mean, I really wanted to tell, but I was tryin' to get her to do it. If I'd of tried to tell, um, they were, they were gonna have to try to find him first, and if, if he found me before they found him, then I was a dead man.

Q Okay.

A I mean, I was—so I didn't tell. I was, I was scared.

Q Okay, okay. You heard Detective Orzech's testimony and the prosecutor went through some of the testimony of the witnesses and she said it differs, all that testimony differs from your testimony. Were there any other witnesses when you and Prince were right there in the driveway?

A No, sir, wasn't nobody outside. It was—

Q Yeah.

A Like I said, I just had came up out the house and that's when he accelerated up the driveway. I mean, it wasn't, it wasn't like it was a lot of noise or a lot of commotion going on. It was like him just fast and up the driveway coming toward me.

Q So the only people that were there were you, Prince, and the three kids in the car?

A Yes, sir.

Q And anybody who saw anything, it was after the shots

Page 921

were fired; isn't that fair to say?

A Yes, sir.

Q Now, there was—the prosecutor asked you about Mr. Brown's testimony, you're, you're a dead nigger, and he apparently said in his testimony that he thought you said that.

A Uh huh.

Q Is it your understanding that this was not how it was portrayed in the police report?

A Um, no. Um, in the actual police report he stated that he heard someone yell, you're dead, nigga, and he didn't know if it was the victim or the person in the car, but I would have no reason to say that to him. Like I said, I was just defending myself, trying to get away. He was saying that directly to me, saying that from what just was happening, you dead, nigga.

Q Okay. And you testified earlier that that's—that statement was made, but it was made by Prince directed to you.

A Yes.

Q It—you didn't make that statement to Prince.

A No, I had no reason to. I was just panicking, trying to get away. I mean—

Q So Mr. Brown is mistaken as to who said it. He's not mistaken as to what was said, but as to who said it.

A Yes.

Q Okay. There was testimony and indications about you

being in this area here.

A Uh huh.

Q And were you ever in this area over here?

COURT: You're referring to State's Exhibit 1?

Q State's Exhibit 1.

COURT: Thank you.

A Um, I don't think so. Like I said, when he was by that Jeep—

Q Which would be?

A —as of right there, that's when he was turning, trying to fire at me. Um, that's when I charged at him to force him to move away, to—

Q And you, you were more here at this point?

A No, I was a little bit—

Q In this area?

A No, I was a little bit up over—

Q Over here?

A Back up into the grass like.

Q Right here?

A You know, like on the sidewalk area, like, yeah, around there—

Q Okay.

A —a little bit.

Q And that's just off the driveway of the McGill's home

in front of the Pruitt home?

A Correct, because I was like steppin' like, like that.

Q Okay. Did you ever shoot at Prince Hampton that day while he was running away from you?

A No. When he, when he turned around to run, that's when I turned around and got to my car.

Q Okay. Now, the—there was testimony that you heard from the BCI agent and also from Detective Orzech.

A Uh huh.

Q The BCI agent said it's possible there were two guns.

A Yes.

Q Detective Orzech said one gun, that's it. The only testimony that we have is your testimony that Prince had a gun that day.

A Yes.

Q There was also testimony from Joyce that in the driveway here she saw Prince in front of the car on that, that morning.

A Yes.

Q Do you remember that testimony?

A Yes.

Q And did you see him in front of the car also?

A Yeah, because he took off running up toward the front of the car, that's when I turned around to try to get to my car, but before I could even get to the sidewalk area, that's

when he came charging down the driveway with a gun this time and that's when I fired.

Q Okay. And that's the area where his sandals were located and the knife?

A Correct.

Q And there was also a bullet casing there, too?

A Correct, from the pictures.

Q Okay. The—you were here for the testimony from the BCI agent when he basically categorized the nine items that he was sent into three different categories?

A Yes, sir.

Q There were bullets that came from the same gun and some that might have, but he wasn't sure, and then two that weren't connected to any—to that first gun?

A Yes, sir.

Q And you heard that testimony and that coincides with what you said about Prince having a gun.

A Yes, sir. If he was here today, he would have to admit to it.

Q Okay. Now, you heard Joyce's testimony and then afterwards you heard Kindra's testimony and didn't she testify that Joyce would lie to protect Prince Hampton?

A Yeah, she—she likes Prince. I don't know why she didn't acknowledge that when she was up here.

Q Okay. And the whole time that this was going on, your

Page 925

focus was on trying to protect yourself and to try to get him, Prince, away from you?

A Correct, sir.

MR. DEMPSEY: Okay. Thank you. No other questions.

COURT: Recross?

RECROSS EXAMINATION BY MS. MARY ANN BARYLSKI:

Q Were you high on drugs that day?

A No, ma'am.

Q You couldn't even make it out at CROSSWAEH, did you.

A Excuse me?

Q You just said that you were terminated from CROSSWAEH, weren't you?

A Yes, from a verbal dispute.

Q CROSSWAEH is a rehabilitation center for drug, for drug problems; is that correct?

A Yes, ma'am.

Q And—

A That was my charges.

Q You stated that you got into a few words with somebody there and you were terminated?

A Yes, ma'am.

Q Okay. You're indicating, when you were here by the Browns in your vehicle, it was Prince who yelled back at you; is that correct?

Page 926

A Yelled back at me?

Q Yes.

A No, he yelled to me. He didn't yell back at me.

Q Yelled to you, okay. Yelled to you.

A Yes, ma'am.

Q But you heard Mr. Brown testify on the stand that you were the one doing the yelling.

A If you look at the police report, he did not say that.

Q Did you hear Mr. Brown testify to that?

A Yes, I did.

Q Did you hear Brunell also testify that she heard you say those same words? Did you hear that testimony?

A Yeah. Do you see where Brunell house at?

Q Sir—

A Way around the corner?

COURT: Yes or no.

Q Just answer the question, please.

A Yes, ma'am.

Q Okay. You have an eyewitness to what happened that day and that eyewitness' testimony does not confirm anything that you've testified to; do you realize that? That—

A Whose testimony that—

Q Ms. McGill. Mrs. McGill was outside. She saw—

A Some of her, some of her testimony actually does. Like I said, when he—

Page 927

Q Did she—

A —was charging at me, I did fire at him.

Q Did—

A Yes, she did acknowledge that.

Q That's not my question. She is not correspond—her testimony does not correspond with your testimony; is that a fair statement?

A No, she—

Q The witnesses, the next door neighbor—

A The next door neighbor?

Q —to the McGills here, where the Jeep was—

A Uh huh.

Q —you heard his testimony. Saw a guy in a white shirt and a guy in a hoodie. The guy in the hoodie was chasing the guy in the white shirt.

A His—

Q No weapon was in the hands of the guy in the white shirt. You heard that testimony.

A No, that is not his correct testimony.

Q You heard the testimony of the neighbor across the street where you had parked your car.

A Uh huh.

Q He saw you running and chasing a guy in a white shirt. You heard that testimony.

A Yes, he assumed that I was chasing—

Page 928

Q Now, none of this is confirming anything that you testified to here in this Courtroom to show that you acted in self-defense; is that a fair statement?

A Um, in a way. Um, like I said, they, they, they saw the ending part.

Q Is any—

A They saw the ending part.

Q Is any of that testimony showing that you acted in self-defense? Answer the question, please.

A Yes. When they seen me firing at him to get him away from me, they, they, they acknowledged that.

Q I've asked you the question. Either say yes or no, please, and I'll—

A You asked me—

Q —ask it again. Any of these people that you heard testify, no one testified to demonstrate that you acted in self-defense; is that—is that fairly accurate?

A No, ma'am.

Q Again, Prince pulls a knife, you pulled the gun, and you shot; is that correct?

A Yes.

MS. BARYLSKI: No further questions.

COURT: You may step down, sir. Thank you very much.

MR. KEAHEY: Thank you.

* * *

APPENDIX Q

IN THE COMMON PLEAS COURT
OF ERIE COUNTY, OHIO

FILED
COMMON PLEAS COURT
ERIE COUNTY, OHIO
2013 AUG-7 PM 2:05
LUVADA S. WILSON
CLERK OF COURTS

STATE OF OHIO,	:	TRIAL COURT
Plaintiff,	:	NO. 2011-CR-275
-vs-	:	COURT OF APPEALS
	:	NO. E-13-009
DEMETREUS A. KEAHEY,	:	
Defendant.	:	TRANSCRIPT OF
	:	JURY TRIAL
	:	(VOLUME IV OF V)

– – – – –

TRANSCRIPT of JURY TRIAL had in the above-entitled action on September 4, 5, 6, 7, and 10, 2012, before the HONORABLE ROGER E. BINETTE, Judge, Common Pleas Court of Erie County, Ohio.

– – – – –

APPEARANCES:

Mary Ann Barylski, Esq.
Assistant Prosecuting Attorney

On Behalf of Plaintiff,
State of Ohio

Timothy H. Dempsey, Esq.

On Behalf of Defendant,
Demetreus A. Keahey

* * *

Page 949

the affirmative defense. It's your request, that, and it looks like you've also argued, just now recently asked for the necessity.

MR. DEMPSEY: Right.

COURT: Okay. So let's deal with, first off, the affirmative defense of self-defense.

MS. BARYLSKI: I know nothing about necessity.

COURT: I just got it.

MR. DEMPSEY: Well, they—

COURT: He just, he just handed it when he turned in the notes, but go ahead.

MR. DEMPSEY: Okay. As far as the self-defense, I believe that the elements that are required under that statute were testified to by the defendant during his examination, and so I believe that that is a proper and necessary charge to the jury in this case. I

think the elements that are stated in, in the proposed instructions accurately reflect what that defense is, and I would ask that that be included.

COURT: Thank you. Now, the necessity request you just made during the lunch hour and that deals with just the weapon under disability offense?

MR. DEMPSEY: Right.

Page 950

CORT: Okay.

MR. DEMPSEY: Actually I, I gave these two cases to the Court and to the State yesterday.

COURT: Okay.

MS. BARYLSKI: I couldn't understand—

COURT: That's true.

MS. BARYLSKI: —why he gave them to me.

MR. DEMPSEY: It's the *Crosby* case. It's a Sixth District case from 2004.

COURT: And that's only to Count 7 I think it is?

MR. DEMPSEY: Right. It doesn't apply—

COURT: Weapon under disability?

MR. DEMPSEY: Right. It wouldn't apply to any other counts.

COURT: Okay.

MR. DEMPSEY: It's just to the weapon under disability.

COURT: Okay. Arguments against both of those affirmative defenses?

MS. BARYLSKI: Number one, I did not know—I looked at this, the Sixth District Court of Appeals case, and I couldn't understand why he was giving it to me because that wasn't an issue. The only issue I knew before this Court was the affirmative

defense of self-defense, which defendant has failed to prove, and even presented sufficient evidence to successfully raise this offense.

He has—you have to take into consideration, number one, all his statements are self-serving. They heard the statements from the victims, not the victims, the witnesses in the State's case.

First of all, he's saying—first of all, the slayer was not at fault in creating the situation giving rise to the affray. Well, he's alleging that Prince Hampton pulled out a knife, but he pulls out the gun. Well, you don't bring a knife to a gun fight. And then all of a sudden some way, some how, there's a gun in Prince Hampton's hands. He had the ability, instead of chasing him, and there is sufficient evidence to show that he chased him based on all the witnesses' testimony, as well as where evidence was found, as well as where gun casings were found, that he went after him.

He had the duty to retreat. He failed to retreat. His car was available. It was right

at the end of the driveway. Instead of going into the neighbor's yard and then even going further down

Page 952

the street where a gun casing was found, where the bullet went into the home of Brunell, he had a—he had a duty to retreat. He failed to retreat. Even if defen—even if Prince Hampton would have had a gun, he still had a—he still had a duty to retreat, and the testimony from the police officers was that Prince Hampton got shot from behind. There was no way he could have been shooting at him and still getting shot, and especially they went over and over on the paper, on the money situation, where there was money all over the ground, and Detective Orzech says there's no way. He had to be shot from behind. So you have him chasing him just based on the evidence that was presented by the State. All you have is his self-serving statements.

Nobody saw a gun. Only one gun and that was in defendant's hands. Nobody saw any type of weapon in the hands of Prince Hampton. Like I said, these are all self-serving statements. This does not prove beyond, you know, sufficient evidence to go to the jury to decide self-defense.

The other thing, too, you don't have self-defense against those children. Those children have nothing to do with him being afraid of Prince

Page 953

Hampton, and yet by the testimony of the officers, that car was shot by defendant and those children were in that vehicle.

Necessity to carry a gun. He could have gone to the police. He failed to report a felony crime. He refused to tell the police at the hospital what, who, who did this. He gives you this big glorified story, well, I was this way and that way. He had a girlfriend that didn't even tell the police. Why? Because it's the code of the street. He didn't want to be the snitch and that's in the text messages.

You don't have a necessity for carrying a gun. He's prohibited from carrying a gun, even under a weapon under disability, and I believe in this case he was the only one. He started the whole thing, because the texts show that he wanted retribution, that was testified to by the State's witnesses, as well as by Detective Wichman, that he was gonna retaliate. He had made a telephone call at 7:00 in the morning to his girlfriend. What was that about? He wasn't supposed to be at that house. Somewhere in there, and it can be inferred, he knew that defendant was—that Hampton was coming.

Page 954

But, more importantly, I have a woman in a home who shot, whose house was shot into, and I have three children in a vehicle and he wants to walk away from all that saying, oh, I was afraid of Prince Hampton. That doesn't

work for those offenses for sure because they didn't do anything. They didn't start anything.

And the necessity carrying a gun and shooting at somebody and it going into somebody's home, there—it just—I would object to both of them because I don't think there's sufficient evidence with regards to self-defense, except defendant's own self-serving statements, which have been contradicted by the State's witnesses.

And necessity to carry a gun, I did not read—I didn't really read this case because of the fact that I didn't know necessity was going to be an issue. All I knew of was the, um, this is why it's not good to have things in proposed jury instructions that aren't in writing.

COURT: Thank you. Lori?

MS. BARYLSKI: I don't even know what this necessity thing says.

THEREUPON, there was a private

Page 955

discussion at the Bench between the Judge and the Judicial Administrator, Lori Rickenbaugh.

COURT: All right. In looking at the case law and the jury instructions, first off, the cases of *Robbins* says that the elements are the defendant is not at fault in creating the situation that gives rise to the affray, that's element number one.

Number two, the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and his only means of escape was such danger was the use of such force.

And, number three, defendant must not have violated any duty to retreat or avoid the danger. Defendant has a duty to retreat, when he has the duty to retreat, if it was his fault in creating the situation giving rise to the incident and he did not have reasonable grounds to believe or an honest belief that he was in imminent danger of death or great bodily harm or that he had reasonable means of escape from the danger other than by use of the deadly force.

Now, in construing the evidence (inaudible)

Page 956

the case law guides that the Court, first off, must look at the evidence in light most favorable to the—to the defendant requesting it. The Court is not to judge the credibility of the—of the evidence, if you will, and that comes out of case law. However, *State v. Jackson*, citing *State v. Robbins*, says the elements are to be cumulative. The defendant has to meet all three of them. You just can't meet two out of three. All three.

Also, in *State v. Melchior*, the evidence has to be sufficient. It cannot be mere speculation or possible doubt.

In looking at the facts of the case, and these are just a few that the Court found, the defendant, if you will, was at fault in creating the situation based on the testimony and the text messages that were sent. He was supposed to go to the doctor's, and, instead, he came to the house. He brought a firearm with him to the house.

The victim, one of the victims, Prince Hampton, ran from the defendant. The defendant chased him. The defendant had a means of escape, his own vehicle, which was parked across the street. He indicated, and his testimony clashes with some of the other testimony, the numerous

others that have testimony, that he left by way of Aspen Run, East Oldgate, around to South Oldgate, and out Laurel because that was the quickest way, when, in fact, going Aspen on East Oldgate he would have completely avoided Prince Hampton by going the other direction. So it wasn't the quickest way out.

He drove by and testimony was he shouted out a threat to Prince Hampton. No witness at all placed a gun with Prince Hampton at all. The knife, when it was found, it was found closed and that's significant because the defendant actually testified everything was happening so fast. So in event the knife, as it was testified, was a lock blade, Prince Hampton would have had to come out of the

car, pull out the knife, unlock the blade, then somehow have a gun in his hand, being chased by the defendant, close the knife and then throw the knife down. Those are just a few of the things.

The Court doesn't find that the defendant—the Court finds he did create the—he did create the fault. He was at fault in creating the situation that gave rise to it. Whether or not he had a bona fide belief that he was in imminent danger of death or great bodily harm and there was

Page 958

no other means of escape, the Court finds there was a means of escape and also that he did violate his duty to retreat, and he had every opportunity to retreat.

So the Court finds that the defense of self-defense, that instruction will not be given. Counsel, I know you're going to object to the Court's ruling, so the Court will note your objection on the record.

MR. DEMPSEY: Thank you.

COURT: Now, as far as necessity goes, that goes to the weapon under disability offense, and the elements to prove that, the defendant must of committed the offense to avoid being harmed; that the harm would have resulted, would have been great or severe than the harm caused by the defendant's conduct; that defendant had reasonably believed at the time his conduct would be necessary and designed to avoid the

immediate harm that would be caused by it; and the defendant did not cause, bring about the situation which would result in the harm caused by, by that, and the harm would have been caused, um, was immediate, imminent, and the defendant had no alternatives to avoid it other than committing the offense.

Page 959

A lot of the reasons I stated for the self-defense, in addition, this offense is weapon under disability. He could have gone to the Court and been relieved of that disability long before this event happened. He had another alternative.

So the Court's going to deny that instruction as well and that your objection, counsel, is noted on the record as well.

MR. DEMPSEY: Thank you.

COURT: Anything further from the State at this time?

MS. BARYLSKI: No. Thank you.

COURT: The defense?

MR. DEMPSEY: No, Your Honor.

COURT: Bring the jury in. We're going into closing arguments.

THEREUPON, the jury entered the Courtroom and the following proceedings were had within the presence of the jury:

BAILIFF: All rise.

COURT: You may be seated. Thank you for being patient with us. We were able to take care

* * *