No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

MARK A. HILL – PETITIONER

vs.

STATE OF OHIO – RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

TENTH DISTRICT COURT OF APPEALS OF OHIO

PETITION FOR WRIT OF CERTIORARI

Mark A. Hill A766-443
Pickaway Correctional Institution
11781 State Route 762
Orient, OH 43146

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 19AP-711 (C.P.C. No. 18CR-5181)
Mark A. Hill,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

MEMORANDUM DECISION

Rendered on September 2, 2021

[*G. Gary Tyack*], Prosecuting Attorney, and *Kimberly M. Bond*, for appellee.

Mark A. Hill, pro se.

ON APPLICATION FOR REOPENING

BEATTY BLUNT, J.

{¶ 1} On April 8, 2021, defendant-appellant, Mark A. Hill, filed a pro se application pursuant to App.R. 26(B) seeking to reopen his appeal resolved in this court's decision in *State v. Hill*, 10th Dist. No. 19AP-711, 2021-Ohio-132, claiming ineffective assistance of appellate counsel. On May 4, 2021, plaintiff-appellee, State of Ohio, filed a memorandum in opposition to Hill's application. On June 4, 2021, Hill filed a motion to strike the memorandum in opposition filed by the state, which we hereby deny. Because Hill has failed to demonstrate a genuine issue that he has a colorable claim that his appellate counsel's performance was deficient and that he was prejudiced by the deficient performance, we deny his application to reopen.

I. Factual and Procedural Background

{¶ 2} We incorporate the recitation of the facts giving rise to Hill's indictment and his trial from the direct appeal:

> On October 18, 2018, appellant was indicted on one count of aggravated burglary, in violation of R.C. 2911.11, a first-degree felony, and one count of felonious assault, in violation of R.C. 2903.11, a second-degree felony. Each count included a repeat-violent-offender ("RVO") specification pursuant to R.C. 2941.149(A). The indictment alleged that each of the foregoing offenses occurred on or about August 25, 2018. Appellant entered a not guilty plea to the charges and requested a jury trial.
>
> On August 20, 2019, a jury trial commenced. At trial, the following evidence was adduced. In 2016, appellant Mark A. Hill began dating Brittany Hamm ("Ms. Hamm"), a woman who had been struggling with heroin addiction since 2013. (Aug. 20, 2019 Tr. Vol. I at 41, 57.) Ms. Hamm's grandmother, Rita Hamm ("Mrs. Hamm"), knew appellant through his association with Ms. Hamm and, for a brief period of time, Mrs. Hamm allowed appellant to live in her home. (Tr. Vol. I at 57, 59.)
>
> In August 2016, after appellant had moved out, Mrs. Hamm permitted Martie Jacobs ("Jacobs"), a long-time family friend and the victim in this case, to move into her home. (Tr. Vol. I at 35-37; Aug. 21, 2019 Vol. II at 7, 11.) Jacobs lived in the front bedroom of the home. (Tr. Vol. I at 40; Tr. Vol. II at 13-14.) Jacobs suffered from severe arthritis and degenerative disc disease stemming from a back injury he had sustained when he was younger. (Tr. Vol. II at 5, 9.) Due to his physical impairments, Jacobs had stopped working in 2011 or 2012. (Tr. Vol. II at 9.) At trial, Mrs. Hamm testified that Jacobs, then 53 years old, was frail due to his physical disabilities. (Tr. Vol. I at 51.) Mrs. Hamm and Jacobs both testified that Jacobs did odd jobs for Mrs. Hamm and he contributed to buying groceries by using his food stamps. (Tr. Vol. I at 38; Tr. Vol. II at 12.)
>
> Mrs. Hamm permitted Ms. Hamm to come to her home despite that Ms. Hamm would lie to her and had stolen her property. (Tr. Vol. I at 42-43.) On August 25, 2018, Ms. Hamm went to Mrs. Hamm's home to shower and get something to eat. (Tr. Vol. I at 44.) While Ms. Hamm was in the garage smoking a cigarette and talking on her phone, Mrs. Hamm heard her yell

that Jacobs had hit her in the face. (Tr. Vol. I at 46.) Ms. Hamm was crying. *Id.* Neither Mrs. Hamm nor Ms. Hamm called the police, and Mrs. Hamm testified that Ms. Hamm did not have any noticeable injuries. (Tr. Vol. I at 46-47, 48, 52.)

Earlier that afternoon, Jacobs had been at a neighbor's house drinking and watching pre-season football, and he testified that he had been drinking and was drunk. (Tr. Vol. II at 21, 37-38.) Mrs. Hamm testified, however, that when he returned to the home, he was not slurring his words or otherwise out of control. (Tr. Vol. I at 86.) Both Mrs. Hamm and Jacobs testified that while Ms. Hamm was in the garage, Jacobs was outside on the front porch smoking a cigarette. (Tr. Vol. I at 46; Tr. Vol. II at 22.) Mrs. Hamm further testified that Jacobs denied hitting Ms. Hamm, and she did not see Jacobs hit her. (Tr. Vol. I at 47.)

Jacobs testified that after he had finished his cigarette, he came inside, saw Ms. Hamm, who was in the kitchen, and confronted her about her behavior from two days earlier involving her bringing a man into the home. (Tr. Vol. II at 22-23.) He told her that if she did not stop this type of behavior, he was going to call the police. (Tr. Vol. II at 23.) In response, Ms. Hamm picked up a knife that had been laying on the table and threatened to kill or stab him. *Id.* Jacobs grabbed her hand, took the knife from her, "threw her into the living room on the floor," and "fell down on top of her." (Tr. Vol. II at 23-24.)

Both Mrs. Hamm and Jacobs testified that at this point, Mrs. Hamm intervened in the altercation and pushed Jacobs off Ms. Hamm. (Tr. Vol. I at 49; Tr. Vol. II at 24.) Mrs. Hamm testified that although she did not see a knife during the altercation, she saw a knife on the living room floor. (Tr. Vol. I at 49-50.) It was a knife she kept in her kitchen. (Tr. Vol. I at 82-83; State's Ex. 22.) Jacobs testified the altercation between Ms. Hamm and himself took place in the early evening around 6:00 p.m. (Tr. Vol. II at 24.) Mrs. Hamm testified the altercation occurred around 9:00 p.m. (Tr. Vol. I at 52.) Both Mrs. Hamm and Jacobs testified that after the incident, Jacobs went to his room, shut his door, took his medications and went to bed. (Tr. Vol. I at 51; Tr. Vol. II at 24-25.)

Mrs. Hamm testified that sometime between 10:30 and 11:00 p.m., appellant arrived at the residence. (Tr. Vol. I at 57, 60.) Appellant entered the home from the garage door leading into the kitchen and proceeded straight to Jacobs' bedroom. (Tr.

Vol. I at 60-61.) Appellant had been in Jacobs' bedroom for five to seven minutes when Ms. Hamm came into the kitchen from the garage and entered Jacobs' bedroom. (Tr. Vol. I at 61-62.) A few minutes later, both appellant and Ms. Hamm exited Jacobs' bedroom and went out the front door of the home. (Tr. Vol. I at 62.) Mrs. Hamm did not hear anyone yelling while appellant and Ms. Hamm were in Jacobs' bedroom. *Id.*

Jacobs testified he was in a light sleep when he heard his bedroom door open. (Tr. Vol. II at 26-27.) Turning to look over his shoulder, he saw appellant standing in his room. (Tr. Vol. II at 27.) Jacobs then saw appellant pull a sledgehammer from his pants. (Tr. Vol. II at 29.) Appellant hit Jacobs in the face near his left eye. (Tr. Vol. II at 29-30.) Jacobs fell to his knees on the floor, and appellant hit him again on the other side of his face. (Tr. Vol. II at 30.) After the assault, Jacobs passed out and went in and out of consciousness and did not fully wake up until one day or so later. (Tr. Vol. II at 30-31.)

Mrs. Hamm testified that after appellant and Ms. Hamm had left the house, she saw Jacobs go into the bathroom and soon heard Jacobs yelling for her. (Tr. Vol. I at 65.) She found him lying in a fetal position in the bathroom, with blood all over his face and arms and blood spatter on his pants. (Tr. Vol. I at 65-66.) She also saw blood in the bathroom, in the hallway, and in Jacob's bedroom on the runner carpet. (Tr. Vol. I at 67.) Mrs. Hamm further testified the runner was covered in blood and that she put it in the trash can. (Tr. Vol. I at 68.) She called 911 and Jacobs was transported to the hospital. (Tr. Vol. I at 66.)

At the hospital, Jacobs underwent a 12-hour surgery to reconstruct one eye socket and his jaw. (Tr. Vol. II at 32.) He had to undergo rehabilitation to learn to walk and swallow again, and he still had problems walking which he might never recover from. (Tr. Vol. II at 33.) Jacobs also had to undergo 4 follow-up surgeries to address problems with his tear ducts and pain from one of the steel plates used in the reconstruction surgery. (Tr. Vol. II at 34.) He also had to see an eye specialist and a plastic surgeon. Id. As a result of the assault, a portion of the left side of Jacobs' face is permanently concave. (Tr. Vol. II at 35.)

Appellant testified at trial. According to appellant, at about 10:00 p.m. on August 25, 2018, Ms. Hamm called him to ask him to pick her up at Mrs. Hamm's home. (Tr. Vol. II at 90.) While he was driving to the residence, Ms. Hamm contacted

him again via a video call. (Tr. Vol. II at 91-92.) Ms. Hamm was crying and hysterical and she told appellant that Jacobs had punched her in the eye. (Tr. Vol. II at 92.) Appellant testified he "could tell where she had been punched." *Id.*

According to appellant, when he arrived at the residence, Ms. Hamm was in the garage smoking a cigarette and still crying. (Tr. Vol. II at 93.) After speaking with Ms. Hamm about what had happened, he decided to go inside and talk to Jacobs, telling Ms. Hamm, "[c]ome on, let's go talk to him." (Tr. Vol. II at 94.) Ms. Hamm told appellant Jacobs was in the bedroom, and they both walked to the bedroom. (Tr. Vol. II at 95.) Appellant knocked once on the bedroom door and entered the room. *Id.* Appellant testified that he wanted to let Jacobs know "to keep his damn hands off my girl" and asked him why Jacobs had put his hands on her. *Id.*

In contrast to Jacobs' testimony describing the assault, appellant testified that it was Jacobs who first took a swing at appellant, but appellant dodged the blow. (Tr. Vol. II at 95-96.) Appellant testified that he was shocked by Jacobs' actions and "wasn't expecting to get into no physical confrontation with him, you know." (Tr. Vol. II at 95.) Appellant further testified that in response, he hit Jacobs about four times using only his fist and that Jacobs fell back on the bed. (Tr. Vol. II at 96.) Appellant denied having a sledgehammer or any other kind of hammer with him during the incident. (Tr. Vol. II at 90-91.) He further testified that he did not see any blood or pay any attention to Jacobs' face. (Tr. Vol. II at 96-97.) After reiterating his warning to "[k]eep your fucking hands off my girl," appellant and Ms. Hamm left. (Tr. Vol. II at 97.) Later that night, appellant took photographs of Ms. Hamm's black eye using his phone. (Tr. Vol. II at 98.)

When Columbus Police subsequently investigated the incident, appellant waived his Miranda rights and voluntarily spoke with Detective Kathy Zimmer. (Tr. Vol. I at 119-20.) Appellant showed the police the photographs of Ms. Hamm's face he had taken, copies of which were admitted into evidence at trial. (Tr. Vol. I at 121; Tr. Vol. II at 98; Def. Exs. A1-A5.) Appellant also showed the police text messages between himself and Ms. Hamm. (Tr. Vol. II at 98.)

At the close of the state's case, outside of the presence of the jury, defense counsel moved for acquittal pursuant to Crim.R. 29. (Tr. Vol. II at 138.) After listening to arguments from

> defense counsel and the prosecutor, the trial court denied the motion. (Tr. Vol. II at 138-39.) Subsequently, at the close of the defense's case, and again outside of the presence of the jury, defense counsel renewed his motion for acquittal based on Crim.R. 29. (Tr. Vol. II at 149.) The trial court again denied the motion. *Id.*
>
> At the conclusion of the trial, the jury returned a verdict acquitting appellant of aggravated burglary and finding him guilty of felonious assault, a second-degree felony. The court convicted appellant for the RVO specification on the felonious assault charge. On September 20, 2019, the trial court issued a judgment entry which reflected the verdicts of the jury and the court and imposed an aggregate 12-year term of incarceration.

Hill, 2021-Ohio-132, ¶ 2-18.

{¶ 3} In affirming the judgment of the trial court during Hill's direct appeal, we determined that the evidence "was sufficient to allow the jury to infer that appellant knowingly caused physical harm to [the victim] and/or that appellant knowingly caused or attempted to cause serious physical harm to the victim by means of a deadly weapon as required by R.C. 2903.11(A)(1) and (2). Therefore, the trial court properly overruled appellant's motion for acquittal made pursuant to Crim.R. 29." *Hill* at ¶ 32. We also found that the manifest weight of the evidence supports Hill's conviction for felonious assault. *Id.* at ¶ 33. Finally, we found the trial court did not abuse its discretion in permitting the state to introduce evidence of Hill's prior conviction of felonious assault for purposes of impeachment of Hill's credibility and, that even if there was any error, it was harmless in light of the overwhelming evidence of Hill's guilt. *Id.* at ¶ 48-49.

{¶ 4} On April 27, 2021, the Supreme Court of Ohio declined jurisdiction over Hill's discretionary appeal. *State v. Hill*, 162 Ohio St.3d 1440, 2021-Ohio-1399. Subsequently, Hill filed an application for reconsideration and an application for en banc consideration, which we denied. *State v. Hill*, 10th Dist. No. 19AP-711 (May 13, 2021) (memorandum decision).

{¶ 5} Before us now is Hill's motion to reopen the appeal under App.R. 26(B), filed on the grounds that he received ineffective assistance of counsel during his direct appeal.

II. Analysis

{¶ 6} Under App.R. 26(B), "[a] defendant in a criminal case may apply for reopening of the appeal from the judgment of conviction and sentence, based on a claim of ineffective assistance of appellate counsel." To present the claim, the applicant must state "[o]ne or more assignments of error or arguments in support of assignments of error that previously were not considered on the merits in the case by any appellate court or that were considered on an incomplete record because of appellate counsel's deficient representation." App.R. 26(B)(2)(c). In addition, the applicant must present "[a] sworn statement of the basis for the claim * * * [describing] the manner in which the deficiency prejudicially affected the outcome of the appeal." App.R. 26(B)(2)(d).

{¶ 7} A reviewing court must grant the application "if there is a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5). When reviewing an applicant's claim of ineffective assistance of counsel, a court applies the standard set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984). *State v. Reed*, 74 Ohio St.3d 534, 535 (1996). That is, that (1) counsel's performance was deficient, and (2) this deficient performance prejudiced the defense because "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* at 687, 694. "A defendant does not state a claim for ineffective assistance of counsel unless his attorney acted unreasonably given the facts of the case, and the unreasonable conduct was prejudicial to the defense." *State v. Mills*, 62 Ohio St.3d 357, 370 (1992).

{¶ 8} In the context of an application under App.R. 26(B)(5), the *Strickland* standard requires that the applicant "show that counsel was deficient for failing to raise the issue he now presents and that there was a reasonable probability of success had that issue been presented on appeal." *State v. Lee*, 10th Dist. No. 06AP-226, 2007-Ohio-1594, ¶ 2. "An appellate attorney has wide latitude and the discretion to decide which issues and arguments will prove most useful on appeal. Furthermore, appellate counsel is not required to argue assignments of error that are meritless." *State v. Davis*, 10th Dist. No. 09AP-689, 2011-Ohio-1023, ¶ 8, citing *Lee* at ¶ 3. A court of appeals "should grant an application for reopening if the defendant shows a genuine issue that he has a colorable

claim that his appellate counsel's performance was deficient and that he was prejudiced by the deficient performance." *State v. Simpson*, ___ Ohio St.3d ___, 2020-Ohio-6719, ¶ 22.

{¶ 9} Hill presents four assignments of error in support of his claim that appellate counsel provided ineffective assistance on direct appeal, which we address as follows.

A. First Assignment of Error

> Defense counsel provided ineffective assistance in not objecting to the failure of the trial court to provide a limiting instruction with respect to testimony allowed regarding use of a sledgehammer in commission of the felonious assault offense.

{¶ 10} In his proposed first assignment of error, Hill asserts that his appellate counsel was ineffective for failing to raise a claim of trial counsel ineffectiveness on the basis that trial counsel failed to object to the victim's testimony that Hill hit him with a sledgehammer and failed to object to the trial court's failure to provide a limiting instruction pertaining to the victim's testimony on this point. We find no merit in this proposed assignment of error.

{¶ 11} Hill appears to suggest that the amendment to the indictment should have barred the state from presenting the victim's testimony as to how his serious injuries occurred, or at least required the trial court to provide a limiting instruction to the jury that they were "not to consider the use of a sledgehammer, nor any other weapon, in order to reach a verdict on either offense charged." (App. for Reopening at 5.) This is not so.

{¶ 12} When the case was indicted, both Counts 1 and 2 alleged that Hill committed the offenses with a sledgehammer. (Oct. 18, 2018 Indictment.) The indictment was amended to eliminate the specific reference to the use of a sledgehammer, and the jury charge included no reference to a dangerous weapon or ordnance. (Final Jury Charge at 6.) Thus, because the state indicted Hill in the alternative–i.e., the indictment still alleged that a felonious assault was committed by causing serious physical harm to the victim–the amendment simplified the case by removing one way the state might have tried to prove guilt: committing felonious assault through the use of a deadly weapon–specifically in this case, a sledgehammer. *See* R.C. 2903.11(A)(1) and (2). Furthermore, because Hill's primary defense was premised on a claim of self-defense, removing the reference to the sledgehammer from the indictment and removing the alternative means for the state to

prove guilt also helped the defense as it permitted counsel to have the jury hone in on whether striking the victim with fists was done knowingly under the circumstances.

{¶ 13} The victim's testimony that he believed he was struck with a sledgehammer was properly presented to the jury, leaving the defense to challenge that testimony as an issue of credibility. Defense counsel thoroughly did so on cross-examination. (Tr. Vol. II at 74.) When Hill testified, he denied having used a sledgehammer. *Id.* at 90-91. As we stated in our decision resolving the direct appeal, "the jury was not obligated to accept Hill's testimony as truthful, and instead was entirely free to resolve the inconsistent testimony concerning the details of the assault in favor of believing the victim." (Citations omitted.) *Hill* at ¶ 34. Whether Hill used a sledgehammer or his fists, the jury was free to reject Hill's claim of self-defense and instead find that Hill knowingly caused the victim serious physical harm. Hill's continued complaints that the jury chose to believe the victim rather than appellant is simply a rehashing of the argument made on direct appeal and does not provide a basis for a claim of ineffective assistance of appellate counsel for failing to object to the actions or inactions of trial counsel on this point.

{¶ 14} In short, Hill's appellate counsel was not ineffective for failing to bring this meritless argument, and the proposed first assignment of error is overruled.

B. Second Assignment of Error

> The trial court plainly erred, to the prejudice of appellant, by failing to instruct on the lesser included offense of reckless assault.

{¶ 15} In his proposed second assignment of error, Hill asserts that his appellate counsel was ineffective for failing to argue that the trial court committed plain error by failing to provide a jury instruction on the lesser-included offense of reckless assault. Specifically, Hill argues that in this case, viewing the facts and evidence in the light most favorable to him, the jury should have been given the option to determine whether Hill acted "recklessly" versus "knowingly" in causing serious physical harm to the victim. This claim is utterly without merit.

{¶ 16} As noted previously, and in our prior decision resolving the direct appeal, Hill's primary claim was that he acted in self-defense: he testified that the victim threw the first punch, that he was shocked by this, and he had no choice except to respond by using

his fist to punch the victim four times in the face. (Tr. Vol II at 95-96.) Thus, defense counsel argued to the jury that Hill's conduct in striking the victim was intentional but justified. (Tr. Vol. II at 178.)

{¶ 17} The defense also argued that his conduct did not result in serious physical injury to the victim. Instead, the defense suggested the victim's injuries resulted from a fall in the bathroom. (Tr. Vol. II at 177.) Under the foregoing facts and evidence presented by the defense, an instruction on reckless assault would not only be unsupported but would be entirely inconsistent with Hill's claim of self-defense.

{¶ 18} Hill's appellate counsel was not ineffective for failing to argue a non-existent error. The second proposed assignment of error is overruled.

C. Third Assignment of Error

> Defense counsel provided ineffective assistance of counsel by representing conflicting interests when stipulating to the serious physical harm element of R.C. 2903.11(A)(1).

{¶ 19} In his proposed third assignment of error, Hill contends that his appellate counsel was ineffective for failing to argue that he had received ineffective assistance of trial counsel by trial counsel's stipulation to the serious harm element of the felonious assault charge. We do not agree with this contention.

{¶ 20} "It is a well-established principle that decisions regarding stipulations are matters of trial strategy and tactics." *State v. Roy*, 10th Dist. No. 14AP-986, 2015-Ohio-4959, ¶ 22, citing *State v. Rippy*, 10th Dist. No. 08AP-248, 2008-Ohio-6680, ¶ 16, citing *State v. Edwards*, 119 Ohio App.3d 106 (10th Dist.1997), citing *United States v. Teague*, 953 F.2d 1525 (11th Cir.1992). *Strickland* instructs us that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Strickland* at 689, quoting *Michel v. Louisiana*, 350 U.S. 91, 101 (1955). Thus, to succeed on his claim for ineffective assistance of counsel premised on the stipulation to serious physical harm, Hill must overcome the presumption set forth in *Strickland*.

{¶ 21} In this case, we cannot say that trial council's decision to stipulate that the victim suffered serious physical harm was not within the rubric of reasonable trial strategy.

As discussed previously, the record indicates that Hill's trial attorney pursued a strategy of self-defense. Hill admitted to hitting the victim but testified it was only with his fists, and only four times. Without the stipulation to serious physical harm to the victim and admission of the victim's medical records, the state would have presented a medical expert or experts whose testimony would have provided detailed explanations and analyses of the victim's injuries and potential causes. Such medical expert testimony would only have drawn more attention to the serious nature of the victim's injuries and added weight to the victim's version of how those injuries were specifically caused. By stipulating to the serious physical harm element, the prosecution did not present such testimony. Hill does not explain why his trial attorney's decision to stipulate to the serious harm element of the felonious assault charge and focus on the strategy presented was objectively unreasonable, and he has failed to demonstrate that the outcome of the trial would have been different had the stipulation not been entered, i.e., that the state could not have proven serious physical harm without the stipulation.

{¶ 22} In short, Hill has failed to demonstrate that actions of trial counsel were not part of a sound trial strategy and that the outcome of the trial would have been different otherwise. Because there was no reasonable probability of success had this issue been presented on appeal, Hill's appellate counsel was not deficient for failing to raise it. Accordingly, the third proposed assignment of error is overruled.

D. Fourth Assignment of Error

> The trial court plainly erred and prejudiced appellant by failing to provide the jury with the legal definition of "non-deadly force" self-defense.

{¶ 23} In his proposed fourth assignment of error, Hill asserts that his appellate counsel was ineffective for failing to argue that the trial court committed plain error by providing a jury instruction on both deadly and non-deadly force and for failing to argue that trial counsel was ineffective for failing to object to the instruction on deadly force. There is no merit to this contention.

{¶ 24} Hill does not explain why the facts of this case do not support the trial court's jury instruction, and the instruction on self-defense given by the trial court was an accurate statement of the law. Furthermore, the trial court properly concluded that in this case the

type of force used by Hill was a factual issue for the jury to resolve. (Tr. Vol. II at 148.) This court has previously observed that "[t]he court must give all instructions that are relevant and necessary for the jury to weigh the evidence and discharge its duty as the factfinder." *State v. Mankin*, 10th Dist. No. 19AP-650, 2020-Ohio-5317, ¶ 34. *State v. Joy*, 74 Ohio St.3d 178, 181 (1995), citing *State v. Comen*, 50 Ohio St.3d 206 (1990), paragraph two of the syllabus.

{¶ 25} Moreover, Hill has failed to demonstrate that the outcome of the trial would have been different had the instruction on non-deadly force solely been given. In other words, that otherwise the jury would have believed Hill's claim that he acted in self-defense and used only the force reasonably necessary to respond to the victim's alleged first punch.

{¶ 26} Because there was no reasonable probability of success had this issue been presented on appeal, Hill's appellate counsel was not ineffective for failing to raise this argument. Accordingly, the fourth proposed assignment of error is overruled.

III. Conclusion

{¶ 27} Because there is no "reasonable probability of success" had any of the four proposed issues raised by Hill been asserted on appeal, Hill has failed to show a genuine issue that he has a colorable claim that his appellate counsel's performance was deficient and that he was prejudiced by the deficient performance. Accordingly, all proposed assignments of error are overruled and his application to reopen the appeal under App.R. 26(B) is denied.

Application to reopen denied.

DORRIAN, P.J., and SADLER, J., concur.

APPENDIX B

The Supreme Court of Ohio

State of Ohio

v.

Mark A. Hill

Case No. 2021-1300

ENTRY

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).

(Franklin County Court of Appeals; No. 19AP-711)

Maureen O'Connor
Chief Justice

APPENDIX C

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO
TENTH APPELLATE DISTRICT

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	Case No. 19AP-711
v.	:	REGULAR CALENDAR
MARK A. HILL,	:	(C.P.C. No. 18-CR-5181)
Defendant-Appellant.	:	

DEFENDANT-APPELLANT'S APP.R. 26(B)
APPLICATION FOR REOPENING OF DIRECT APPEAL

MARK A. HILL 766-443
Noble Correctional Institution
15708 McConnelsville Road
Caldwell, Ohio 43724

Defendant-Appellant, *pro se*

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presented on appeal. *Lee* at ¶2, citing *State v. Timmons*, 10th Dist. No. 04AP-840, 2005 Ohio 3991. *State v. Monford* (10th Dist.), 2012 Ohio 5247, P8-P10.

II. ASSIGNMENTS OF ERROR ARGUMENTS

The following assignments of error should have been raised on appeal.

FIRST ASSIGNMENT OF ERROR

DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN NOT OBJECTING TO THE FAILURE OF THE TRIAL COURT TO PROVIDE A LIMITING INSTRUCTION WITH RESPECT TO TESTIMONY ALLOWED REGARDING USE OF A SLEDGEHAMMER IN COMMISSION OF THE FELONIOUS ASSAULT OFFENSE

The U.S. Supreme Court stated that "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

During a break in voir dire, defense counsel agreed with the prosecutor to amend the indicted charges. Specifically, to eliminate the

The prosecutor furthers his "alternative means" argument in his rebuttal summation, again referencing Appellant's physical stature (Tr. Vol. II at 183); then that it had to be a sledgehammer based on Appellant's profession (Tr. Vol. II at 185); and finally, again, that Jacobs had claimed either a fist or a hammer (Tr. Vol. II at 187-189).

The trial court instructs the jury to only consider whether Appellant "knowingly caused serious physical harm to Martie Jacobs," as set forth in R.C. 2903.11(A)(1). (Tr. Vol. II at 198.)

The trial court then gives the following general unanimity instruction: "In order to reach a verdict of either guilty or not guilty on each charge, all 12 of you must agree; that is, your verdict on each count must be unanimous and signed by all 12 jurors joining in it." (Tr. Vol. II at 205.)

Defense counsel did not object to the testimony that the felonious assault offense may have been committed with a 2½ pound sledgehammer, when considering that the dangerous weapon element

2002 Ohio 6966, P15. An [appellant] cannot substantiate a claim of ineffective assistance of counsel based on a strategic or tactical decision of counsel from which the [appellant] cannot show prejudice. *State v. Hughes*, 10th Dist. No. 14AP-360, 2015 Ohio 151, ¶69. The [appellant] 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* at 694.

As a general rule, the failure to object at trial or to request specific jury instructions waives all but plain error with respect to the jury instructions given. *State v. Edwards* (10th Dist.), 2006 Ohio 6987, P16, citing *State v. Harman* (2001), 93 Ohio St.3d 274, 289, 2001 Ohio 1580, 754 N.E.2d 1150.

To constitute plain error, the error must be obvious on the record, palpable, and fundamental such that it should have been apparent to the trial court without objection. See *State v. Tichon* (1995), 102 Ohio App.3d 758, 767, 658 N.E.2d 16. Moreover, plain error does not exist

jury did not consider that Appellant used a 2½ pound sledgehammer to cause injury to Jacobs upon their deliberation. It is a reasonable probability that the outcome would have been different had defense counsel requested the trial court to give a limiting instruction.

SECOND ASSIGNMENT OF ERROR

THE TRIAL COURT PLAINLY ERRED, TO THE PREJUDICE OF APPELLANT, BY FAILING TO INSTRUCT ON THE LESSER INCLUDED OFFENSE OF RECKLESS ASSAULT

The failure of a court to give instructions on lesser included offenses can be prejudicial, reversible error. However, an objection to these instructions must be raised at trial. See *Crim.R. 30(A)*.

Absent plain error, the failure to object to a court's failure to instruct the jury on a lesser included offense is a waiver of the issue on appeal. *State v. Underwood* (1983), 3 Ohio St.3d, 12, 13, 444 N.E.2d 1332. *State v. Jackson* (10th Dist.), 1994 Ohio App. LEXIS 5504, *7.

In deciding whether to provide a lesser-included offense instruction, the trial court must consider both the state's evidence and the defense's evidence, and it must view the evidence in the light most

and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. See *Powell v. Alabama*, 287 U.S., at 68-69. *Strickland v. Washington*, 466 U.S. 668, 688.

In *Cuyler v. Sullivan*, 446 U.S. 335, 345-350, the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Prejudice is presumed only if the defendant demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan*, 446 U.S. at 350 (footnote omitted). *Strickland*, supra, at 692.

Defense counsel actively represented the interests of the State's pursuit to convict Appellant in conflict with his adversarial testing duty.

Even more prejudicial to Appellant was that the stipulation granted Jacobs and the prosecutor unbridled freedom to exaggerate the seriousness of any injury he may have sustained, along with claiming numerous others uncorroborated by the medical records.

For instance, the medical records cover the ten (10) day period from August 25 – September 5, 2018, and were all from Riverside Hospital/Ohio Health. (Tr. Vol. II at 175.)

Yet, Jacobs testified that he was in Riverside Hospital for ten (10) days and then he was at a Mount Carmel Rehab Hospital for seven (7) days, for a total of seventeen (17) days.

Notably, the medical records in evidence cover just ten (10) days and Mount Carmel is not part of Ohio Health. There are seven (7) days unaccounted for and uncorroborated.

According to Jacobs, he calls Rita Hamm, who stands five-one and weighs 97 pounds (Tr. Vol. I at 51), to take him to the rehab hospital

A tracheotomy is performed to open the trachea (windpipe) to provide an artificial breathing vent. How can a person talk when he is unable to breath, that includes call Rita Hamm to take him to rehab?

His claim of needing rehab to learn to walk conflicts with Rita Hamm witnessing Jacobs walk normally from his bedroom to the bathroom immediately after the altercation with Appellant. (Tr. Vol. I at 80, 94.)

Based on the foregoing, defense "counsel's representation fell below an objective standard of reasonableness" and his deficient performance did not function as "the 'counsel' guaranteed by the *Sixth Amendment*" depriving Appellant of a fair trial. See *Strickland* at 687.

FOURTH ASSIGNMENT OF ERROR

THE TRIAL COURT PLAINLY ERRED AND PREJUDICED APPELLANT BY FAILING TO PROVIDE THE JURY WITH THE LEGAL DEFINITION OF "NON-DEADLY FORCE" SELF-DEFENSE

> "A trial court has broad discretion to decide how to fashion jury instructions, but it must 'fully and completely give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder.'" *State v.*

Defense counsel asks only for the instruction on self-defense by using non-deadly force. The trial court said it would instruct on both deadly and non-deadly force because "it seems like there is a dispute of fact about what four punches, which is the admitted nature of the force, what that could mean." (Tr. Vol. II at 148.)

The trial court gives the instruction for self-defense by using deadly force in full, as contained in *OJI-CR 421.21*. (Tr. Vol. II at 200-203.) The trial court does not give the full instruction on self-defense by using non-deadly force as contained in *OJI-CR 421.19*. Instead, it only provides:

> "If you find the defendant did not use deadly force, he had no duty to retreat. If the defendant did not use deadly force, he had to only reasonably believe that some force was necessary to defend himself against the imminent use of unlawful force."
> (Tr. Vol. II at 201.)

In charging the jury, the trial court says "deadly force" ten (10) times and "non-deadly force" only three (3) times.

The trial court initially instructs that if the jury finds Appellant committed a felonious assault, they must next consider whether he acted in self-defense. (Tr. Vol. II at 199.)

and contained only eight (8) pages of arguments. The appellate rule permits up to sixty (60) pages.

Had appellate counsel raised the errors presented herein it is reasonably probable that the outcome of the direct appeal review of this case would have been different, resulting in a reversal of the conviction.

THEREFORE, Appellant hereby moves this Court to reopen the direct appeal of this case and, at the least, permit a full briefing and oral argument on the prejudicial errors herein in the interest of correcting a manifest miscarriage of justice.

Respectfully submitted,

MARK A. HILL A766-443
Noble Correctional Institution
15708 McConnelsville Road
Caldwell, Ohio 43724

Applicant-Appellant, *pro se*

4. The brief by appellate counsel contained only eight (8) pages of arguments in support of the three (3) assignments of error raised.

5. Appellate counsel did not consult with Affiant regarding any of the proposed errors presented in the December 8th letter.

6. As a result of appellate counsel's failure to raise the assignments of error presented in this App.R. 26(B) action, a full and fair opportunity for review of the substantial constitutional violations occurring in the trial proceedings was denied to Affiant. See *Wiggins v. Smith*, 539 U.S. 510, 528, 123 S. Ct. 2527, 156 L.Ed.2d 471 (2003).

7. Had appellate counsel consulted with Affiant, he would have become aware that the transcript of the amendment to indictment proceeding was missing from the transcripts filed with the appeals court on November 7, 2019.

8. Appellate counsel's failure to realize that the transcript was missing caused direct appeal review of this case to be conducted on an incomplete record which prejudicially contributed to the Decision rendered on January 21, 2021. See *In re Holmes*, 104 Ohio St.3d 664, 2004-Ohio-7109, 821 N.E.2d 568, ¶18.

9. Because appellate counsel failed to recognize the incomplete record in his professional capacity, Affiant showed due diligence and requested leave to file a

December 8, 2019

Mr. Brian Rigg
Attorney at Law
720 S. High Street
Columbus, Ohio 43206

Mr. Rigg:

I thought it necessary that I express to you the many prejudicial errors that I feel were present in my jury trial proceedings in Case No. 18-CR-5181, in writing.

I am aware of your professional, legal abilities and vast experience in perfecting appeals in criminal cases, but I am the person who is suffering egregiously and find it imperative to participate in correcting this farce of a prosecution.

I do not intend to offend you nor express doubt, I'm simply being proactive and protective of myself, especially after my previous experience.

Ineffective Assistance of Counsel

1. Failed to request lesser included offense (reckless assault) instruction; manifest injustice; reversible error – *State v. Ulery* (2d Dist.), 2010-Ohio-376, P10 citing *State v. Cook*, 65 Ohio St. 3d 516, 524, 605 N.E.2d 70(1992).
2. Failed to object to expansion of scope/use of statement from Rondale Massey from prior felonious assault case.
3. Prejudicial amendment to indictment.
4. Failed to object to improper/misleading/prejudicial instructions given by the Court to the jury.
5. Failed to conduct presentence investigation; mitigation – *Foust v. Houk*, 655 F.3d 524, 538-39(6th Cir. 2011).
6. Compulsory process violated, failure to honor subpoena (Brittany) – *United States v. Bravata*, 636 Fed. Appx. 277, 292(6th Cir.).

Verdict Against Manifest Weight/Sufficiency of the Evidence

1. Prosecutor failed to prove beyond a reasonable doubt that I did not act in self-defense.
2. Prosecutor admits to definite provocation at sentencing; abandons sledgehammer accusation.
3. Non-deadly force was proven; supported by judge and prosecutor at sentencing when abandoning deadly weapon use.
4. Evidence proves I used such force as circumstances require; judge sentenced me for using like force; acknowledges Jacobs threw punch yet held me to a different standard than the law by stating that I could have 'shoved' or 'slapped' him.

See the following:

State v. Koch, 2019-Ohio-4099, P95-P98
State v. Watts (1st Dist.), 2019-Ohio-4856, P7
State v. Eisenman (10th Dist.), 2018-Ohio-934, P1-P5

Brian J. Rigg
ATTORNEY AT LAW • 720 S. HIGH ST. • COLUMBUS, OH 43206 • 614/ 425-0170 •

December 22, 2019

Mr. Mark A. Hill #A766-443
Noble Correctional Inst.
\15708 McConnelsville Rd
Caldwell, OH 43724

Re: State of Ohio v. Mark A. Hill
Case no. 19 AP 711

Dear Mr. Hill:

Enclosed are the transcripts from your trial. I received your letter and reviewing the trial transcripts in preparation of the brief. I will send you a copy of the brief and the prosecutors.

Sincerely,

Brian J. Rigg

IN THE COMMON PLEAS COURT OF FRANKLIN COUNTY, OHIO

CRIMINAL DIVISION

- - -

STATE OF OHIO,

Plaintiff,

vs. Case No. 18CR-5181

MARK A. HILL,

Defendant.

- - -

AMENDMENT TO INDICTMENT

- - -

APPEARANCES:

David Zeyen
Assistant Franklin County Prosecutor

On behalf of the Plaintiff

Robert B. Barnhart
Assistant Franklin County Public Defender

On behalf of the Defendant

- - -

BEFORE THE HONORABLE RICHARD A. FRYE

August 19, 2019

Carol A. Jung
Registered Merit Reporter
345 South High Street
Columbus, Ohio 43215
614-525-4645

in Count 2. Once again, there's two ways of committing felonious assault. We've stated them both alternatively, which for simplicity's sake, we would move to amend the indictment to delete "and/or." Did knowingly cause or attempt to cause physical harm to Martie Jacobs by means of a deadly weapon or a dangerous ordinance; to wit, a sledge hammer.

It should be noted, Your Honor, part of this is also because the defense previous has agreed to stipulate to the seriousness of harm in this case, and the medical records and the X rays and et cetera, correct?

MR. BARNHART: Correct. So no objection to the deletion.

THE COURT: All right. It will be so ordered.

Does that change anything in the RVO specs, to the extent the court has to deal with it?

MR. ZEYEN: Not at all. In fact, that's what we have to prove is that there was serious physical harm in this case. That's another thing that makes it -- you have to prove serious physical harm in this case and in the previous case, and so that's what makes it actually clearer cut. If you present them with both alternatives in Count 2, for instance, you would have to voir dire them and say, "Well, which alternative did you all agree

out of the presence of the jury.

* * * *

THE COURT: Do you want to offer all your exhibits now, your 1 through 39, Mr. Zeyen?

MR. ZEYEN: Please.

THE COURT: Any objection?

MR. BARNHART: No objection to any of them, Judge.

THE COURT: Defense exhibits are only B1, B2, and B3, the text messages and the call log. Are those being offered?

MR. BARNHART: Yes. And also A1 through A5 that Mr. Hill identified. Some of them are cumulative, but some of them aren't, and it's just easier if they are marked for me to refer to them.

THE COURT: Refresh me. What are those?

MR. BARNHART: Those are the five pictures that he took of Brittany in the car.

THE COURT: Okay. One of them, them, is the duplicate of Plaintiff's Exhibit 33?

MR. BARNHART: A1, yes, it's duplicative.

MR. ZEYEN: That's fine. No objection.

THE COURT: Exhibits A1 through A5, and B1, 2, and 3 are all admitted without objection.

MR. BARNHART: Thank you, Judge.

THE COURT: Anything else we need to address outside the presence of the jury?

MR. ZEYEN: Not from the state.

MR. BARNHART: No, Your Honor. I guess the only thing is, of course, I think with the jury instructions we talked about this, you indicated that you are going to instruct on deadly force, that it's a jury issue for them to consider?

THE COURT: Yes.

MR. BARNHART: At the time, I asked only for the instruction on non-deadly force. I would just note that I asked it to only to be non-deadly force. You indicated you were going to instruct on both, so we worked from there.

THE COURT: It seems like there is a dispute of fact about what four punches, which is the admitted nature of the force, what that could mean, so I think we have to send them both to the jury.

MR. BARNHART: Okay. I just wanted to make that clear. Thank you.

THE COURT: Anything else?

MR. ZEYEN: No.

THE COURT: We've gone through the charge at some length with some care, and I think we've got it in final form.

continuous sequence directly produces injury and without which it would not have occurred. Cause occurs when an injury is the natural and foreseeable result of an act.

"Serious physical harm" means any of the following: One, any physical harm that carries a substantial risk of death. Two, any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity. Three, any physical harm that involves some permanent disfigurement or that involves some temporary serious disfigurement. Four, any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

A person acts "knowingly," regardless of their purpose, when aware that their 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. Since you cannot look into the mind of another, you must determine knowledge from all the facts and circumstances in evidence.

If you find the defendant committed a felonious assault, you must next consider whether Mr. Hill acted in self-defense.

Self-defense. A person is allowed to use deadly or non-deadly force in self-defense. The defendant claims he used self-defense on the occasion at issue in this case. If you find that evidence was presented tending to support a finding that the defendant used deadly or non-deadly force in self-defense, the state must prove beyond a reasonable doubt that the defendant did not act properly in self-defense.

A person acts in self-defense when all of the following apply: One, the defendant was not at fault in creating the situation giving rise to the event in which the use of deadly force occurred. And, two, the defendant had reasonable grounds to believe, and an honest belief, even if mistaken, that he was in imminent danger of death or great bodily harm, and that his only means of escape from such danger was through the use of such force. Three, the defendant did not violate any duty to retreat to avoid or end the danger. And, four, the defendant used reasonable force.

"Deadly force" means any force that carries with it a substantial risk that it will proximately result in the death of a person.

"Substantial risk" means a strong possibility, as contrasted with a remote or even a significant possibility that a certain result may occur or that

If you find that evidence was presented that tends to support a finding that the defendant acted in self-defense by using deadly or non-deadly force, the state must prove beyond a reasonable doubt that the defendant did not properly act in self-defense.

If you find that the state proved beyond a reasonable doubt all the essential elements of the offense of felonious assault, and that the state proved beyond a reasonable doubt that the defendant did not properly act in self-defense, then your verdict on Count 2 must be guilty.

If you find that the state failed to prove beyond a reasonable doubt any one of the elements of the offense of felonious assault, and/or you find that the state failed to prove beyond a reasonable doubt that the defendant did not act in self-defense, then you must find the defendant not guilty.

No discussion of punishment. Your duty as jurors, ladies and gentlemen, is confined to determining whether guilt has been proven on either charge or both of them. If Mr. Hill is found guilty of any charge, it will be the court's duty to determine punishment. Punishment must not be considered or even discussed during your deliberations.

Sympathy or prejudice. Do not allow any

consideration of sympathy for or prejudice against any anyone to influence your deliberations. It's your duty to carefully and impartially weigh the evidence, to decide all disputed facts, to apply the instructions of the court to your findings of fact, and to render your verdicts accordingly.

In fulfilling your duty, your goal must be to arrive at just verdicts. Consider all the evidence, make your findings with intelligence, and without bias, sympathy or prejudice, so that both the state of Ohio and Mr. Hill feel that this case was fairly and impartially tried and decided.

General instructions for deliberation. The court has given you the instructions on the law applicable to this case. I'll now instruct you on how to conduct your deliberations and prepare your verdicts.

When you go into the jury room, your first function will be to select one of you to serve as a foreperson. The person whom you select to preside over deliberations does not have any greater power nor does that person's vote have any more importance than others. He or she merely serves the purpose of helping conduct deliberations in an orderly manner. Each of you is to be afforded reasonable opportunity to express your opinion.

CR 421.19 Self-defense against danger of harm to person--use of non-deadly force R.C. 2901.05 (effective 3/28/19) *[Rev. 8/5/20]*

2 421 OJI CR 421.19 (2020)

1. GENERAL. The defendant is allowed to use non-deadly force in self-defense. The state must prove beyond a reasonable doubt the defendant did not use non-deadly force in self-defense.

2. STATE'S PROOF. To prove that the defendant did not use non-deadly force in self-defense, the state must prove beyond a reasonable doubt at least one of the following:

(A) the defendant was at fault in creating the situation giving rise to *(describe the event in which the use of non-deadly force occurred)*; or

(B) the defendant did not have reasonable grounds to believe that he/she was in (imminent) (immediate) danger of bodily harm; or

(C) the defendant did not have an honest belief, even if mistaken, that he/she was in (imminent) (immediate) danger of bodily harm.

3. NON-DEADLY FORCE. "Non-deadly force" means any force that does not carry with it a substantial risk that it will proximately result in the death of a person.

COMMENT

Drawn from R.C. 2901.01; State v. Hole, 2d Dist. Montgomery No. CA-11473 (Oct. 13, 1989). Absent other circumstances, a punch is "non-deadly force," even if it results in death or great bodily injury or harm. State v. Davis, 10th Dist. Franklin No. 17AP-438, 2018-Ohio-58. On the other hand, use of a weapon or other object that could cause death or great bodily harm, including a small knife, may be considered "deadly force." State v. Brown, 5th Dist. Stark No. 2018CA107, 2019-Ohio-2187.

If there is a factual question about whether the force used was deadly or non-deadly, the court should give the full instruction on deadly force contained in OJI-CR 421.21 as well as non-deadly force. See State v. Triplett, 8th Dist. Cuyahoga No. 97322, 2012-Ohio-3804.

4. DEADLY FORCE (ADDITIONAL). OJI-CR 421.21.

he/she was attacked. State v. Stevenson, 10th Dist. Franklin No. 17AP-512, 2018-Ohio-3140 ; State v. Turner, 171 Ohio App.3d 82, 2007-Ohio-1346 (2d Dist.).

6. TEST FOR REASONABLE GROUNDS AND HONEST BELIEF. In deciding whether the defendant had reasonable grounds to believe and an honest belief that he/she was in (imminent) (immediate) danger of bodily harm, you must put yourself in the position of the defendant, with his/her characteristics, his/her knowledge or lack of knowledge, and under the circumstances and conditions that surrounded him/her at the time. You must consider the conduct of *(insert name of [victim(s)])* and decide whether his/her/their acts and words caused the defendant to reasonably and honestly believe that the defendant was about to receive bodily harm.

COMMENT

Drawn from State v. Koss, 49 Ohio St.3d 213 (1990).

7. SUBSTANTIAL RISK. "Substantial risk" means a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist.

8. WORDS (ADDITIONAL). Words alone do not justify the use of force. Resort to force is not justified by abusive language, verbal threats, or other words, no matter how provocative.

9. EXCESSIVE FORCE (ADDITIONAL). A person is allowed to use force that is reasonably necessary under the circumstances to protect himself/herself from an apparent danger. For you to find the defendant guilty, the state must prove beyond a reasonable doubt that the defendant used more force than reasonably necessary and that the force used was greatly disproportionate to the apparent danger.

10. GREATLY DISPROPORTIONATE (ADDITIONAL). In deciding whether the force used was greatly disproportionate to the apparent danger, you may consider whether the force used shows revenge or a criminal purpose.

This instruction should be given only if the instruction on excessive force is given to the jury.

11. CONCLUSION. f you find that the state proved beyond a reasonable doubt all of the elements of *(insert name of applicable offense[s])* and that the state proved beyond a reasonable doubt that the defendant did not act in self-defense, you must find the defendant guilty according to your findings. If

CR 421.21 Self-defense of person or residence against danger of death or great bodily harm--use of deadly force R.C. 2901.05
(effective 3/28/19) [Rev. 8/5/20]

1. GENERAL. The defendant is allowed to use deadly force in (self-defense) (defense of his/her residence). The state must prove beyond a reasonable doubt that the defendant did not use deadly force in (self-defense) (defense of his/her residence).

2. STATE'S PROOF. To prove that the defendant did not use deadly force in (self-defense) (defense of his/her residence), the state must prove beyond a reasonable doubt at least one of the following:

(A) the defendant was at fault in creating the situation giving rise to *(describe the event in which the use of deadly force occurred)*; or

(B) the defendant did not have reasonable grounds to believe that he/she was in (imminent) (immediate) danger of death or great bodily harm; or

(C) the defendant did not have an honest belief, even if mistaken, that he/she was in (imminent) (immediate) danger of death or great bodily harm; or

(D) the defendant violated a duty to (retreat) (escape) to avoid the danger; or

(E) the defendant did not use reasonable force.

3. DEADLY FORCE. "Deadly force" means any force that carries with it a substantial risk that it will proximately result in the death of a person.

COMMENT

Drawn from R.C. 2901.01; State v. Dale, 2d Dist. Champaign No. 2012 CA 20, 2013-Ohio-2229. "Deadly force" is based on the type or degree of force used, not the result of the force. Absent other circumstances, a punch is "non-deadly force" even if it results in death or great bodily injury or harm. State v. Davis, 10th Dist. Franklin No. 17AP-438, 2018-Ohio-58. On the other hand, use of a weapon or other object that could cause death or great bodily harm, including a small knife, may be considered "deadly force." State v. Brown, 5th Dist. Stark No. 2018CA107, 2019-Ohio-2187.

If there is a factual question about whether the force used was deadly or non-deadly, the court should give the full instruction on deadly force as well as non-deadly force contained in OJI-CR 421.03. See State v. Trapani, 8th Dist. Cuyahoga No. 97522, 2012-Ohio-3804.

his/her characteristics, his/her knowledge or lack of knowledge, and under the circumstances and conditions that surrounded him/her at the time. You must consider the conduct of *(insert name of [victim(s)])* and decide whether his/her/their acts and words caused the defendant to reasonably and honestly believe that the defendant was about to (be killed) (receive great bodily harm).

7. SUBSTANTIAL RISK. "Substantial risk" means a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist.

8. WORDS (ADDITIONAL). Words alone do not justify the use of force. Resort to deadly force is not justified by abusive language, verbal threats, or other words, no matter how provocative.

9. EXCESSIVE FORCE (ADDITIONAL). A person is allowed to use force that is reasonably necessary under the circumstances to protect (himself/herself) (his/her residence) from an apparent danger. For you to find the defendant guilty, the state must prove beyond a reasonable doubt that the defendant used more force than reasonably necessary and that the force used was greatly disproportionate to the apparent danger.

10. GREATLY DISPROPORTIONATE (ADDITIONAL). In deciding whether the force used was greatly disproportionate to the apparent danger, you may consider whether the force used shows revenge or a criminal purpose.

This instruction should be given only if the instruction on excessive force is given to the jury.

13. DUTY TO RETREAT. The defendant had a duty to retreat if he/she

(A) was at fault in creating the situation giving rise to *(describe the event in which the deadly force was used)*; or

(B) did not have reasonable grounds to believe and an honest belief that he/she was in (imminent) (immediate) danger of death or great bodily harm; or

(C) had a reasonable means of escape from that danger other than by the use of deadly force.

COMMENT

Drawn from State v. Reid, 3 Ohio App.2d 215 (3d Dist. 1965).