IN THE SUPREME COURT OF THE STATE OF DELAWARE

OMARI E. CLARK, Defendant-Below, Appellant, v. STATE OF DELAWARE, Plaintiff-Below, Appellee.	)	No. 651,2011 COURT BELOW: In the Superior Court of the State of Delaware, In and For New Castle County, I.D 1006026385

APPELLANT'S OPENING BRIEF

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DATED: August 15, 2012

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NATURE OF THE PROCEEDINGS

Omari E. Clark was arrested by members of the Wilmington Police Department on July 1, 2010. (Docket entries; A-1-10)

The charges included Murder in the First Degree and allied charges. (A-11, 12)

The arraignment occurred on September 28, 2010 where a plea of "not guilty was entered on all charges. (D.E., A-1)

Trial began on May 17, 2011 and concluded on May 25, 2011 and at which time the defendant was acquitted of Murder in the First Degree, but found guilty on several allied charges. (D.E., A-5)

A Motion for a New Trial was filed on May 27, 2011. (A-13 - 21)

Denial of said Motion occurred on August 25, 2011. (A-22 - 24)

A Notice of Appeal was timely filed on December 1, 2011.

A referral was made of the indigent defendant's appeal and which resulted in the filing of application by the defendant to proceed on his appeal pro se. The matter was remanded to the Trial Court for the purpose of conducting the necessary inquiry and effect the appropriate ruling. (A-25 - 29)

Present appellant's counsel, and who was appellant's trial counsel, entered his appearance as appellant counsel so that the ill-equipped defendant would have the best chance possible (given the circumstances) of presenting the issue necessary to be presented in support of his appeal.

SUMMARY OF ARGUMENT

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ITS REFUSAL TO PERMIT AN INSTRUCTION ON SELF-DEFENSE (11 DEL.C. §464) AS A POTENTIAL DEFENSE FOR JURY CONSIDERATION IN THE CONTEXT OF MURDER IN THE SECOND DEGREE AND/OR MANSLAUGHTER.

II. THE TRIAL COURT DIRECTLY COMMENTED ON THE EVIDENCE, HOWEVER INADVERTENTLY, THEREBY COMMITTING LEGAL ERROR.

STATEMENT OF FACTS

The defendant, Omari Clark (hereinafter "Clark"), was 24 years of age at the time of the incident and was the father of a two-year old daughter, Za'mani. (TA-6, 8; A-30)[1] Clark's mother resided at 1323 West 5th Street (hereinafter referred to as "1323"). (TA-8; A-31) As a consequence, he was familiar with the address which ultimately became the crime scene located at 1307 West 5th Street (hereinafter "1307"). (A-9; A-31)

Shortly before the incident occurred, he had driven to 1307, and parked in front of that residence so that he could retrieve his daughter. (TA-107, 108; A-32) At some point after knocking on the door, his paramour, "Nish", who was in 1307 with Za'mani came out of the house. (TA-18; A-33) Shortly thereafter an altercation took place involving the decedent, "Brower" and as a result of which a physical exchange occurred between Clark and Brower. (TA-20; A-34) During that confrontation, Clark was struck in the back of the head with a chair. (TA-20; A-34)(TB; 188, 189; A-54) Given the fact that the defendant was confronted with a number of angry persons, and that he was alone and helpless, he ran to his mother's home nearby. (TA-21; A-33) Before leaving 1323, he retrieved a knife, as protection, because he had to make his way back to his car which was parked near 1307. (TA-22; A-34) After successfully departing that particular block of Fifth Street, he quickly returned to the area because "... I came back

[1] "TA" refers to the trial transcript of May 20, 2011.

because that's where Nish and my daughter were.". (TA-11, 25; A-35 36; TA-32, 33, 34; A-37).

After stopping the car, Clark emerged from the car while holding the knife. (TA-27; A-38) Contemporaneously, Brower charged out of his house onto his porch. (TA-27; A-38) Brower wielded an object in his hand which Clark thought was a baseball bat. (TA-13; A-39; TA-28; A-38) Brower charged at Clark. (TA-28; A-38; TA-13 ;A-39)(TB-150; A-40)[2] Brower, while traveling down the front steps, smashed the "bat"[3] against a structure to his house causing it to break, but continued running at Clark. (TA-13, 28; A-39, 38)(TC-94, 95; A-41, 42)[4] Clark explains that he did not run because by that time Brower was "right next to me". (TA-28; A-38) "He started backing up a little bit... he started backing up a little bit, the baby dad." (TB-150; A-40) In response to Brower's aggressive actions, Clark stabbed Brower one time below Brower's rib cage. (TA-29, 30; A-38) As Clark explained it, the location of the wound was more a function of chance than by deliberate design. (TA-29; A-38)

Clark provided additional detail as to the defined movements of Brower that caused Clark to be in fear for his physical wellbeing/life in the words:

> "He came out with a bat in his hand, held over top of his head, came down the steps, slung the bat in a downward motion toward

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[2] "TB" refers to the transcript of the trial on May 19, 2011.
[3] In the unlit area that was described, in the late night hours, and in the excitement that abounded, Clark thought Brower wielded a bat which, as it turns out, was described as a wooden cane or walking stick that was approximately four to five feet in length. (TB-146, 147; A-43, 44)
[4] "TC" refers to the transcript of the trial on May 18, 2011.

me and just started whaling the bat at me.".[5] (TA-13; A-39)

Simultaneously, Brower was "yelling" at Clark. (TA-13; A-39) As they were situated in close physical juxtaposition to each other with Brower swinging the bat, Clark ducked down and thrust the knife forward toward Brower. (TA-13; A-39) By the time he took that defensive action, Brower had swung the bat at Clark's head approximately three separate times. (TA-13; A-39)

Clark then fled in his car. (TA-195; A-54a)

Further support of the defendant's position that he genuinely believed sans a reckless or negligent formation of the belief, that he was in serious danger was found in the form of the testimony of Shaunte Brown who was an eyewitness to the events. While standing nearby, she saw Brower, situated on the porch of 1307, with a long wooden object in his hand while saying, "I got this" and at which time he swung the weapon at Clark. (TB-84, 85; A-45) Angry words between Brower and Clark had immediately preceded the act of the initial and potentially deadly aggression by Brower against Clark. (TB-84, 85; A-45) She corroborated Clark's version of events, although not using the word "whaling" in describing multiple Brower swings with the weapon which actually struck Clark. (TB-85; A-45) Furthermore, she observed Clark's efforts to avoid further attack by "ducking" and attempting to back away. (TB-86; A-45) Simultaneously, and although it appears that Brower had lost his footing, as Brower

[5] "Whale on" is defined in the New Urban Dictionary as "to assault, maul, or generally pummel another with great vigor and enthusiasm. To deliver a beating."

continued to proceed by "going forward", Clark responded. (TB-87; A-46)

Further support for the genuineness of Clark's subjective belief that he was in peril was furnished by evidence that he had previously been informed about a Brower family attack on another individual while using (coincidentally?) a crutch and a stick as cudgels. (TB-61, 62; A-47)

As a result of the wound, Brower expired. (TC-162; A-48)

I. THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ITS REFUSAL TO PERMIT AN INSTRUCTION ON SELF-DEFENSE (11 DEL.C. §464) AS A POTENTIAL DEFENSE FOR JURY CONSIDERATION IN THE CONTEXT OF MURDER IN THE SECOND DEGREE AND/OR MANSLAUGHTER.

A. Question presented.

Did the Trial Court commit reversible error by its refusal to permit an instruction on self-defense (11 Del.C. §464) as a potential defense for jury consideration in the context of Murder in the Second Degree and/or Manslaughter?

The defendant sought instructions for self-defense and for lesser included offenses of Murder in the Second Degree, Manslaughter and Criminal Negligence. (TA-71, 72; A-49, TA-75-78; A-50)(TD-2 - 12, A-51-53)[6]

B. Standard of Review.

The Supreme Court reviews, de novo, the denial of a requested jury instruction. Weber v. State, 38 A.3d 271 (Del.2012); Dennis v. State, 41 A.3d 391 (Del.2012); Robertson v. State, 41 A.3d 406 (Del.2012).

B. Merits of the Argument.

When a Trial Court is presented with a request to provide jury instructions, "a Trial Court must look at the relevant statutory provisions governing the availability of instructions...". Wright v. State, 953 A.2d 144 (Del.2008). In order to discharge that duty, the trial judge would have had to have considered the statute, 11 Del.C. §461 and which reads:

"In any prosecution for an offense, justification,

[6] "TD" refers to the trial transcript of May 23, 2011.

as defined in §462-71 of this Title, is a defense. (emphasis supplied)

Where statutory language is plain and unambiguous, the Court's duty is to give effect to its plain and obvious meaning. State v. Schnabel, 279 P.3d 1237 (Ha.2012).

Murder in the Second Degree and Manslaughter are both "offenses" within the meaning of the statute. The Trial Court, however, refused to provide an instruction of justification, a/k/a "self-defense" in refusing to acknowledge the mandate of §461.

The Trial Court premised its refusal to provide the requested instruction contained in 11 Del.C. §464 while relying upon limited case law in distant, if not particularly unacclaimed, jurisdictions found in Appellate Court case law in jurisdictions seldom cited by this Court as authoritative sources; viz. Wyoming, Colorado and Washington.

The Trial Court's initial premise, whether explicitly stated or implicit in its decision, was that one cannot avail himself to a self-defense justification; i.e. an intentional act, while, simultaneously, relying on a defense that he was subject to reckless state of mind while performing an intended act; viz., an intentional stabbing motion coupled with a reckless state of mind by ignoring a substantial risk of serious physical injury or death.

Recognizing and acknowledging a split of authority, the defendant maintains that, putting the statutory mandate aside, the more reasonable to view, if not, the majority view, is that

alternative defenses of self-defense and offenses requiring a reckless state of mind may be contemporaneously presented without offending either logic or law or both.

The defendant debunks the notion that the presentation of inconsistent defenses is prohibited. Significant Delaware decisions support contradiction of the Trial Court's reasoning. In State v. Cooke, 909 A.2d 596 (2006), a defendant offered the negating offense of arguing that he was not guilty while contemporaneously maintaining that the jury could find him guilty but mentally ill. In Zimmerman v. State, 628 A.2d 62 (Del.1993), this Court held:

> "We hold that a criminal defendant is entitled to assert an ultimate defense even if it is inconsistent."

This was in the context of the defendant arguing that he was not guilty or that, alternatively, his activity was excusable under the "claim of right" defense afforded by 11 Del.C. §847.

In Mohammed v. State, 829 A.2d 137 (Del.2003), this Court described the proposition of the appropriate advancement of inconsistent defenses as "settled law". This pronouncement developed in the context of a defendant disputing his identification as the perpetrator of the crime alleged while indicating that if he were the perpetrator, the State, nonetheless, could not prove the elements of the crime charged.

In Cruz v. State, 12 A.3d 1132 (Del.2011), the defendant was permitted to advance a theory of self-defense which, if accepted, would have resulted in an acquittal while, at the same

time, adopting a fallback position of extreme emotional distress which would have reduced the charge of Murder to a charge of Manslaughter.

These cases do not represent a recent and progressive reversal of established precepts, but, rather echo a principle of longstanding. See Herhal v. State, 243 A.2d 703, 706 (1968) where the defendant simultaneously presented defenses of intoxication and alibi in response to the Prosecution's accusations.

Having placed aside a premise of a Trial Court's decision, the defendant approaches the conundrum presented by the Court's ruling. (A-56)

While accepting the facial lure of reasoning in which the Court indulged that recklessness, as a defense, cannot co-exist with self-defense, an acknowledgment of intention, further review indicates otherwise.

The case of State v. Gallegos, 22 P.3d 689 (N.M.2001) offers a particularly salient analysis. The Gallegos Court reviewed factual circumstances where the defendant sought to justify the act of shooting another person by self-defense while alleging that the shooting was accidental. The Trial Court noted, "Defendant could not have both intended to shoot the victim and, at the same time, shoot the victim accidentally.".[7] The defendant, Gallegos, sought to have an instruction of self-

[7] Although the instant case arises in the context of not being able to intend to stab and recklessly stab, the logical analysis is completely parallel.

defense offered as a defense to Involuntary Manslaughter and which crime was premised upon a mens rea of Criminal Negligence. The Court noted, "up front", that "several Courts... hold that involuntary manslaughter and self-defense are mutually exclusive". In fact, the Gallegos Court specifically cited a Kansas decision where it would be improper to instruct on self-defense and at the same time to instruct that the act occurred with reckless disregard because it was a "legal impossibility". Even with that observation at hand, the Court announced:

> "We decline to follow this authority. It is entirely plausible that a person could act intentionally in self-defense and, at the same time achieve an unintended result.".

Gallegos witnessed a vicious attack perpetrated, by another, on her spouse. She retrieved a shotgun and discharged it which led to the death of the assailant. At trial, her testimony was that she only meant to fire a warning shot and did not intend to harm the assailant. She tendered self-defense as a potential defense as well as, apparently, offering a defense as to her mental state. The Trial Court denied the application. The underlying "justification" for not allowing her to present a "justification" defense rested upon the shaky foundation that the actor must concede intention in order to advance self-defense as justification.

Gallegos, supra, does not stand alone in recognizing the proposition that a criminal offense defined as having a mental state of less than intention does not preclude the giving of a self-defense jury instruction. See Commonwealth v. Mayfield, 585

A.2d 1069 (Pa.Super.1991); Commonwealth v. McCloskey, 656 A.2d 1369 (Pa.Super.1992); Commonwealth v. McFadden, 587 A.2d 740 (Pa.Super.1991) where the Court indicated that when there is accidental injury or death which occurs within the course of the actor defending himself, a self-defense instruction is appropriately offered; also see Alonzo v. State, 355 S.W.3d 778 (Tex.App.2011). "Moreover, it is not illogical to plead a justification defense to an accusation of a reckless offense." Id.; State v. VanDyke, 69 P.3d 88 (Ha.2003) authorizing a self-defense instruction when the jury is considering a lesser included charge of Reckless Manslaughter; State v. King, 590 A.2d 490 (Conn.App.1991) where, in the context of a death resulting from stabbing the issue was whether or not self-defense was limited to intentional homicide or whether it could be considered with regard to lesser included unintentional offenses where the Court relied on State v. Hall, 569 A.2d 534 (Conn.1990), which determined that a defendant, in a murder prosecution, was entitled to a self-defense jury instruction with respect to the lesser included offense of Manslaughter. The Court confirmed the appropriateness of a self-defense charge as a defense to the commission of Reckless Manslaughter.;[8] State v. Singleton, 974 A.2d 679 (Conn.2009) standing for the proposition that self-defense is a "valid defense to crimes based on reckless conduct

[8] The Connecticut statutory scheme is analogous to Delaware's insofar as the distinction between Murder in the Second Degree (Reckless Manslaughter in the First Degree in Connecticut) and Manslaughter (Reckless Manslaughter in the Second Degree in Connecticut) was the additive of extreme indifference to human life contained in the former, but not in the latter.

as well as intentional conduct"; State v. Ouelette, 37 A.3d 921 (Me.2011) where in the context of a statutory grid similar to Delaware's vis-à-vis self-defense, the State's highest Court indicated that its justification statute, which was even more all-inclusive than Delaware's, justifies instructions "... for any charge that includes an intentional, knowing, or reckless state of mind as one of its elements". It went on to indicate that the failure to provide such charge "... deprives the defendant of a fair trial and amounts to obvious error (citation omitted)". Ouelette, supra, is particularly helpful since it expands upon the effect of an erroneous denial of the self-defense instruction by indicating that the phenomenon of reversible error "... is particularly true when, as here, there are multiple charges stemming from the same single incident, and the jury has received THE INSTRUCTION AS TO ONE OF THE CHARGES..." (emphasis supplied). Id. "The failure to instruct on justification is even more prejudicial when the jury acquits the defendant of the count for which the instruction was given." Id.

Notwithstanding defense counsel's best efforts to the contrary, the Trial Court's mindset precluding giving the requested instruction as sought was not altered by reference to Delaware case law supporting the defendant's position. The proposition advanced by the defendant "don't get no clearer" than the language found in State v. Scott, 1989 WL 90613 (Del.Super.)(Exhibit "A"):

"Obviously, self-defense is available as a defense to a charge of Manslaughter.".

In Fletcher v. State, 2004 WL 1535728 (Del.Supr.)(Exhibit "B"), Fletcher had been charged with Murder in the First Degree and, at trial, the jury had been given instructions on the lesser included offense of Murder in the Second Degree and Manslaughter and, at the same time, while receiving an instruction under 464. In fact, the defendant argued that providing lesser included offense options, in the face of his self-defense defense, constituted error. Without raising the proverbial "eyebrow", this Court upheld the decision below. In a later, post-trial relief context, the Trial Court acknowledged that the trial transcript demonstrated that the jury had been given the lesser included offense of Manslaughter and a justification (464) instruction as well. Fletcher v. State, 2006 WL 1237088 (Del.Super.)(Exhibit "C").

Also see Coles v. State, 959 A.2d 18 (Del.2008), where, without specifically addressing this issue, the justification/murder second degree/manslaughter instructions were given and approved without comment.

The defendant maintains that, given the authority of 11 Del.C. §461, the precise articulation of the Scott, supra, decision and the implicit recognition contained in Coles, supra, and Fletcher, supra, the law in Delaware mandates the granting of the defendant's request.[9]

[9] Admittedly, what will be termed, for the purpose of this exposition, the "Scott Doctrine" was pronounced more than 20 years ago. Is it

A defendant has an unqualified right to a correct statement of the law. Atkins v. State, 523 A.2d 539, 549 (Del.1987); Wright v. State, supra; Claudio v. State, 585 A.2d 1278, 1282 (1991).

Finally, an anomaly of justice springs forth from the position articulated by the State and approved by the Trial Court. By referencing the chart (A-56), one is struck by the counterintuitive notion brought about by the State's interpretation, and Trial Court's adoption, of the disallowance of a justification instruction pertaining to a crime that has a reckless state of mind as an element. If, as is noted in the chart, a person, otherwise, meets the requirement of 464 by evidencing a subjective belief of a mortal threat to his wellbeing, he stabs another person with the intention to kill that person, he can be acquitted. If, on the other hand, and with that same fear motivating the actor, he purposely stabs, but not with an intention to kill, but with an intention to protect himself, but disregards a risk that he may kill, then he is defenseless. This legal anomaly was noted in Gallegos, supra, and encouched in the following language:

> "We hold that a defendant charged with Involuntary Homicide can raise the theory of self-defense.[10] Were we to hold otherwise,

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extinct? One need only look back a mere five months ago, to acknowledge the words of Judge Ridgely when he said, "Here, such a finding would be inconsistent with Robertson's defense or justification, which requires an intention OR RECKLESS MENTAL STATE." (emphasis supplied) to appreciate its continuing vitality. Robertson v. State, supra.

[10] To be sure, the culpable mental state, under New Mexico law, required to demonstrate Involuntary Manslaughter is Criminal Negligence.

> a person charged with First Degree Murder would conceivably be in a better position than a person charged with Involuntary Manslaughter. The former would be acquitted if the evidence established self-defense, while the latter, tendering the same evidence of self-defense, might yet be convicted. Such a result would be untenable."

A purpose of the law is to protect citizens' safety and human life, and it is the personification of absurdity to reward one who is bent on excusable homicide and punish one who does not harbor that malice.

II. THE TRIAL COURT DIRECTLY COMMENTED ON THE EVIDENCE, HOWEVER INADVERTENTLY, THEREBY COMMITTING LEGAL ERROR.

A. Question presented.

Did the Trial Court directly comment on the evidence, however inadvertently, thereby committing legal error?

Defense counsel did not impose any objection or exception to preserve the issue for appeal.

C. Standard of Review.

When the defendant makes no objection to rendered jury instructions, such action represents a waiver unless plain error is found. Grace v. State, 658 A.2d 1011 (Del.1995); Tucker v. State, 564 A.2d 1110, 1118 (Del.1990). In order to gain relief, the defendant must demonstrate that the instruction, as later challenged, and then rendered, constitutes plain error. Plain error will lie "where substantial rights are jeopardized and the fairness of the trial [is] imperiled". Robertson v. State, 596 A.2d 1345 (Del.1991). "Plain error" refers to material defects which are apparent on the face of the record and which are so serious in their character as to deprive the defendant of a substantial right or which demonstrates manifest injustice. Wainwright v. State, 504 A.2d 1096, 1100 (Del.1986).

D. Merits of the Argument.

For more than 200 years, the law of Delaware prohibits trial judges from offering opinions as to facts to be determined by the jury. The foundational language is found in Article V, §19 of the Delaware Constitution:

> "[j]udge shall not charge juries with respect to matters of fact, but may state the questions of fact in issue and declare the law.".

"An improper comment or charge on matters of fact is an expression by the Court, directly or indirectly, that may convey to the jury, the Court's estimation of the truth, falsity or weight of testimony in relation to a matter at issue." (Emphasis supplied) Capital Management Co. v. Brown, 813 A.2d 1094, 1100 (Del.2002), cited with approval in Robertson v. State, supra.

To be sure, a remark made by the Court, during its verbal rendition of the jury instructions clearly violates the prohibition:

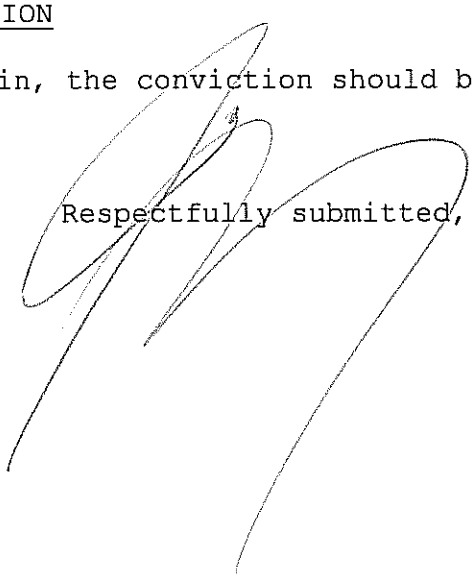
> "Also, to be clear, while the definition of recklessly includes defendant's conscious disregard of a substantial and unjustifiable risk that death will result from his conduct, and so justifiability is involved in that sense, the defense of justification does not apply to reckless conduct because by definition recklessness is not justifiable. [THE DEFENDANT ACTED RECKLESSLY, (SIC) IT'S NOT JUSTIFIED IN TERMS OF MURDER SECOND DEGREE AND MANSLAUGHTER.] If he acted justifiably, then he was not reckless.". (emphasis supplied) (TD-94; A-55)

In determining whether a prohibited commentary justifies reversal, one must be mindful of the proposition that erroneous instructions are presumptively harmful and are a ground for reversal unless it affirmatively appears from the record as a whole that the error was not prejudicial. Sexton v. Commonwealth, 2008 WL 1850587 (Kan.)(Exhibit "D").

CONCLUSION

For the reasons advanced herein, the conviction should be reversed.

Respectfully submitted,



IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE

VS.

OMAIR E CLARK

Alias: See attached list of alias names.

DOB: 12/09/1986
SBI: 00417202

CASE NUMBER:
1006026385

CRIMINAL ACTION NUMBER:
IN10-07-0891
MANSLAUGHTER(F)
LIO:MURDER 1ST
IN10-07-0892
PDWDCF(F)

COMMITMENT

SENTENCE ORDER

NOW THIS 4TH DAY OF NOVEMBER, 2011, IT IS THE ORDER OF THE COURT THAT:

The defendant is adjudged guilty of the offense(s) charged. The defendant is to pay the costs of prosecution and all statutory surcharges.

AS TO IN10-07-0891- : TIS
MANSLAUGHTER

The defendant shall pay his/her restitution as follows: See attached list of payees.

Effective May 25, 2011 the defendant is sentenced as follows:

- The defendant is placed in the custody of the Department of Correction for 25 year(s) at supervision level 5 with credit for 273 day(s) previously served

- Suspended after 17 year(s) at supervision level 5

- Balance of sentence is suspended for 2 year(s) supervision level 3

AS TO IN10-07-0892- : TIS
PDWDCF

- The defendant is placed in the custody of the Department

STATE OF DELAWARE
VS.
OMAIR E CLARK
DOB: 12/09/1986
SBI: 00417202

of Correction for 5 year(s) at supervision level 5

FINANCIAL SUMMARY

STATE OF DELAWARE
VS.
OMAIR E CLARK
DOB: 12/09/1986
SBI: 00417202

CASE NUMBER:
1006026385

SENTENCE CONTINUED:

TOTAL DRUG DIVERSION FEE ORDERED	
TOTAL CIVIL PENALTY ORDERED	
TOTAL DRUG REHAB. TREAT. ED. ORDERED	
TOTAL EXTRADITION ORDERED	
TOTAL FINE AMOUNT ORDERED	
FORENSIC FINE ORDERED	
RESTITUTION ORDERED	47607.40
SHERIFF, NCCO ORDERED	
SHERIFF, KENT ORDERED	
SHERIFF, SUSSEX ORDERED	
PUBLIC DEF, FEE ORDERED	
PROSECUTION FEE ORDERED	100.00
VICTIM'S COM ORDERED	
VIDEOPHONE FEE ORDERED	2.00
DELJIS FEE ORDERED	2.00
SECURITY FEE ORDERED	20.00
TRANSPORTATION SURCHARGE ORDERED	
FUND TO COMBAT VIOLENT CRIMES FEE	
TOTAL	47,731.40

SPECIAL CONDITIONS BY ORDER

STATE OF DELAWARE
VS.
OMAIR E CLARK
DOB: 12/09/1986
SBI: 00417202

CASE NUMBER:
1006026385

The defendant shall pay any monetary assessments ordered during the period of probation pursuant to a schedule of payments which the probation officer will establish.

Defendant shall receive mental health evaluation and comply with all recommendations for counseling and treatment deemed appropriate.

Defendant shall successfully complete anger management, counseling, treatment program.

Obtain and remain gainfully employed.

NOTES

Have no contact with victim's family or properties.

Zero tolerance for contact with victim's family or property, possession of dangerous instruments. Defendant may not possess any edged or sharpened implement, regardless of its length, if he is outside of his home. N

JUDGE FRED S SILVERMAN

RESTITUTION SUMMARY

STATE OF DELAWARE
VS.
OMAIR E CLARK
DOB: 12/09/1986
SBI: 00417202

CASE NUMBER:
1006026385

AS TO IN10-07-0891 :
The defendant shall pay restitution as follows:
$ 25000.00 to VCAP
$ 22607.40 to CHRISTIANA CARE

LIST OF ALIAS NAMES

STATE OF DELAWARE
VS.
OMAIR E CLARK
DOB: 12/09/1986
SBI: 00417202

CASE NUMBER:
1006026385

OMARI E CLARK
OMARI CLARK

Not Reported in A.2d, 1989 WL 90613 (Del.Super.)
(Cite as: 1989 WL 90613 (Del.Super.))

C
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware, Kent County.
STATE of Delaware
v.
Susan J. SCOTT.

Submitted March 29, 1989.
Decided July 19, 1989.

James A. Rambo, Deputy Attorney General, Department of Justice, for State of Delaware.

John Williams, of Schmittinger & Rodriguez, and Richard Ducote, of New Orleans, Louisiana, of counsel.

MEMORANDUM OPINION

BABIARZ, Judge.

*1 On September 20, 1986 defendant Susan J. Scott shot and killed her live-in paramour Frederick E. Bickling. Shortly after the shooting she was arrested and charged with first degree murder and possession of a deadly weapon during the commission of a felony.

The Public Defender's office provided Scott with legal representation, firstly in the person of Joseph A. Gabay, Esquire, and, after Gabay left the office to enter private practice in October of 1987, in the person of Duane D. Werb, Esquire. On May 26, 1988, one week before trial was scheduled to begin, Scott, on Werb's advice, entered a plea of guilty to manslaughter, a lesser included offense of first degree murder. The State agreed to drop the charge of possession of a deadly weapon during the commission of a felony. On August 17, 1988 defendant was sentenced to a term of incarceration of 25 years.

Defendant has moved to withdraw her guilty plea, alleging ineffective assistance of counsel and, alternatively, has moved for a reduction of sentence. The motion for withdrawal of plea is granted; as a consequence, the motion for reduction of sentence is moot.

In order to prevail on her motion for withdrawal of plea, the defendant must establish that her counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, she would not have pleaded guilty. *Hill v. Lockhart,* 474 U.S. 52, 58, 106 S.Ct. 366, 70, 88 L.Ed.2d 203 (1985); *Albury v. State,* Del.Supr., 551 A.2d 53, 58 (1988).

From the outset it was clear that Scott's defense rested on a claim of self defense, as she admits that she shot and killed Bickling. Her claim, which has been referred to as the "battered woman's defense," was and is that she had been repeatedly assaulted by the deceased during the course of their 5-year relationship and that at the time of the shooting she was under the apprehension that another such assault was imminent.

After taking the case over from Gabay, Werb developed some evidence which, if believed by a jury, would tend to support Scott's defense. Nevertheless, Werb urged Scott to plead guilty to manslaughter. It is apparent, however, that Werb's advice was based on three substantial errors of law.

First, at the hearing held on Scott's motions, Werb testified that he was of the opinion that the defendant bore the burden of proving self defense by a preponderance of the evidence. This is incorrect. Under Delaware law the defense need only introduce enough evidence of self defense to raise a reasonable doubt as to defendant's guilt. 11 *Del.C.* § 303; *Fetters v. State,* Del.Supr., 436 A.2d 796 (1981).

EXHIBIT "A"

Second, Werb expressed the view that the so-called "battered woman's defense" was a relatively novel one in the State of Delaware and expressed reservations as to its applicability. 11 *Del.C.* § 464(c) provides that

"the use of deadly force is justifiable ... if the defendant believes that such force is necessary to protect himself against death [or] serious physical injury ..."

***2** This statute sets forth a subjective test for self defense. *Moor v. Licciardello,* Del.Supr., 463 A.2d 268 (1983). The issue raised by a claim of self defense is not whether the use of deadly force was reasonable under the circumstances or whether a reasonable person would have perceived the need for employing deadly force but whether the defendant in fact had such a belief at the time deadly force was used. As noted previously, Scott claims that she had been subjected to serious physical abuse on numerous occasions during the course of her relationship with the decedent and that at the time of the shooting she believed that another such assault was about to commence. It is thus not open to doubt that a colorable claim of self defense was available to Scott. *State v. Garris,* Del.Super., IN86-06-0571, 0572, 1987 WL 17189 (Slip Op. Sept. 4, 1987) (Babiarz, J.); *aff'd Garris v. State,* 550 A.2d 34 (1988) (Moore, J.) [Editor's Note: Order in full text on WESTLAW]. In this regard also Werb was incorrect.

Finally, Werb testified that **self defense** was not a defense to a charge of **manslaughter**. This is significant since manslaughter is a lesser included offense under first degree murder and, given the circumstances of the shooting, it is likely that manslaughter would have been submitted to the jury for consideration as a possible verdict. As Scott admits shooting Bickling, Werb's belief that **self defense** was not available to the lesser included charge of **manslaughter** amounted to a belief that there was no defense to that charge and that conviction was inevitable. In this regard also Werb was wrong. 11 *Del.C.* § 464 is not limited in its applicability only to charges of murder. It applies by its terms to any charge involving the "use of force upon or toward another person". 11 *Del.C.* § 464(a). Obviously **self defense** is available as a defense to a charge of **manslaughter**.

I find that Werb's errors fell below an objective standard of reasonable representation and that as a consequence Scott did not have the effective assistance of counsel in her defense.

I am also satisfied that but for Werb's misconceptions as to the law of self defense Scott would not have pleaded guilty. On an earlier occasion shortly after Werb's entry into the case, the defendant rejected an offer by the State to allow her to plead guilty to manslaughter. The evidence clearly demonstrates that defendant's decision to plead guilty was based upon Werb's advice that she could not prevail on her claim of self defense. As Werb's advice was based on three substantial errors of law I conclude that but for those errors the defendant would not have entered a plea of guilty.

I am mindful that a motion for withdrawal of plea after sentence has been imposed should be granted only with extreme reluctance, particularly where such motion is coupled with an alternative motion for reduction of sentence. The juxtaposition of such motions creates an appearance that the defendant is attempting to sentence bargain with the Court and that the defendant's position is not one of having improvidently admitted guilt but of disappointment with the punishment imposed. In this case, however, the grant of Scott's motion will expose her to trial on charges of first degree murder and possession of a deadly weapon during the commission of a felony which, in the event of a conviction, will result in imprisonment without possibility of probation or parole for the rest of her life. During the hearing, the Court examined the defendant and is satisfied that she fully understands the implications of a grant of her motion to withdraw the guilty plea. In addition, the Court is satisfied that she understands the implications of conviction on any of the potential lesser included offenses under

murder first degree and the weapons charge.

*3 The State has not argued that its case has been prejudiced by the passage of time and, having heard at least a portion of the evidence which might be admitted at a trial on the merits, I am satisfied that this motion is not an attempt to take advantage of the possible disappearance of prosecution witnesses or evidence.

The hearing held on defendant's motion extended over four days and included considerable evidence bearing on the strengths and weaknesses of the prosecution and defense cases. I have deliberately refrained from stating or commenting on that evidence in this opinion in view of the result I reach. The case must be tried to a jury which will deliver the judgment of the community. The Court neither expresses nor implies any opinion on Scott's guilt or innocence.

Defendant's motion for withdrawal of guilty plea is granted. IT IS SO ORDERED.

Del.Super.,1989.
State v. Scott
Not Reported in A.2d, 1989 WL 90613 (Del.Super.)

END OF DOCUMENT

Westlaw

852 A.2d 908, 2004 WL 1535728 (Del.Supr.)
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 852 A.2d 908, 2004 WL 1535728 (Del.Supr.))

H

(The decision of the Court is referenced in the Atlantic Reporter in a 'Table of Decisions Without Published Opinions.')

Supreme Court of Delaware.
Andre FLETCHER, Defendant Below, Appellant,
v.
STATE of Delaware, Plaintiff Below, Appellee.

No. 242, 2003.
Submitted June 8, 2004.
Decided July 2, 2004.

Background: Defendant was convicted following a jury trial in the Superior Court, New Castle County, of murder in the second degree, possession of a firearm during commission of a felony, and possession of a deadly weapon by a person prohibited. Defendant appealed.

Holdings: The Supreme Court, Jacobs, J., held that:
(1) defendant's due process rights were not violated by trial court's refusal to enter order affording defendant equal access to Delaware Criminal Justice Information System (DELJIS) material in state's possession relating to criminal and traffic records of potential jurors;
(2) even if trial court's decision to sustain state's hearsay objections to trial testimony was error, error was harmless; and
(3) evidence warranted instructing jury on lesser-included offenses of murder second degree, and manslaughter.

Affirmed.

West Headnotes

[1] Constitutional Law 92 ⇐4597

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)4 Proceedings and Trial
92k4592 Disclosure and Discovery
92k4597 k. Other Issues and Applications. Most Cited Cases
(Formerly 92k268(5))

Criminal Law 110 ⇐627.6(6)

110 Criminal Law
110XX Trial
110XX(A) Preliminary Proceedings
110k627.5 Discovery Prior to and Incident to Trial
110k627.6 Information or Things, Disclosure of
110k627.6(6) k. Records. Most Cited Cases

Defendant's due process rights were not violated by trial court's refusal to enter order affording defendant equal access to Delaware Criminal Justice Information System (DELJIS) material in state's possession relating to criminal and traffic records of potential jurors in murder prosecution; statute prohibited defense attorney from receiving type of information about jurors that defendant sought, and defendant failed to show that information was not available through other means. U.S.C.A. Const.Amend. 14; 11 Del.C. § 8513(g).

[2] Criminal Law 110 ⇐1170(2)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1170 Exclusion of Evidence
110k1170(2) k. Curing Error by Other Evidence of Same Fact. Most Cited Cases

Even if trial court's decision to sustain state's hearsay objections to trial testimony was error, error was harmless in murder prosecution, where defendant was able to elicit testimony he desired during direct examination of witness.

[3] Homicide 203 ⇐1456

EXHIBIT "B"

852 A.2d 908, 2004 WL 1535728 (Del.Supr.)
(Table, Text in WESTLAW), Unpublished Disposition
(Cite as: 852 A.2d 908, 2004 WL 1535728 (Del.Supr.))

203 Homicide
203XII Instructions
203XII(C) Necessity of Instruction on Other Grade, Degree, or Classification of Offense
203k1456 k. Degree or Classification of Homicide. Most Cited Cases

Homicide 203 ⇐1457

203 Homicide
203XII Instructions
203XII(C) Necessity of Instruction on Other Grade, Degree, or Classification of Offense
203k1457 k. Manslaughter. Most Cited Cases

Instruction on second-degree murder and manslaughter as lesser included offenses of first-degree murder was warranted by evidence which included defendant's videotaped interview with police in which he made statements that the prosecution regarded as an admission that second shot was not fired accidentally. 1 Del.C. § 206(c).

Court Below: Superior Court of the State of Delaware in and for New Castle County, Cr.I.D. No. 0111002808.

Before HOLLAND, BERGER and JACOBS, Justices.

ORDER

***1** This 2nd day of July 2004, it appears to the Court that:

(1) Appellant Andre Fletcher ("Fletcher") appeals his Superior Court conviction of second-degree murder and related charges. The convictions arise out of an incident in which Fletcher admittedly shot Richard Holland,[FN1] but claimed that he acted in self-defense.

FN1. The victim, Richard Holland, is not related to Justice Randy J. Holland of this Court.

(2) Fletcher was convicted of one count each of Murder in the Second Degree, Possession of a Firearm During Commission of a Felony, and Possession of a Deadly Weapon by a Person Prohibited, as a result of a fatal shooting that occurred at 1:50 a.m. on November 3, 2001.

(3) At trial, Fletcher claimed self-defense, and testified as follows: Holland and two other men tried to rob him at gunpoint. After an exchange of words, Holland pulled out a gun and Fletcher (who had extensive training in the martial arts) "charged him." Both men struggled over the weapon, bumped into a van, and the gun went off twice-"as quick as you can blink." On a videotaped police interview, however, Fletcher made statements that the prosecution regarded as an admission by Fletcher that the second shot was not fired accidentally.

(4) The State presented two purported eyewitnesses to the shooting. The first, Jerry Taylor, a friend of the victim (Holland), testified that he had planned to meet Holland at the place and time of the shooting. As Taylor approached Holland, he saw Fletcher walking up to the victim, who was standing alone. Although Taylor did not hear any words being exchanged, he did see the victim's hands go up into the air, and immediately thereafter he (Taylor) heard one gunshot. Taylor ducked behind a car, heard a second shot "like seconds afterward," then saw Holland fall to the ground and Fletcher run down the alley.

(5) The second eyewitness, Marvin Cross, testified that he was sitting in his car listening to music in front of the house of his friend, Ivan Simonet, for whom he (Cross) was waiting. Cross testified that although he was not focusing on the victim, he saw the events out of the corner of his eye. When asked if he was under the influence of drugs or alcohol at that time, Cross responded "no, probably not yet." The gunshots and the flash from the barrel drew his attention to the scene, which was five or six houses up from where Cross was parked. Out of the corner of his eye, Cross saw Fletcher approach the victim. It appeared that Fletcher and Holland exchanged

words, although Cross could not hear the words. Cross saw the victim put his hands out to the sides with palms up, heard the two shots, and then saw the victim fall to the ground and Fletcher running right past his car. The police arrived within a few seconds, but Cross drove off without talking to the police. Shortly thereafter, Cross returned and talked with Simonet about the shooting. A few days later, Cross contacted the Wilmington Police and told detectives the story recited above.

(6) The defense contended that Cross was not, in fact, a witness to the shooting, but, rather, had obtained information about the shooting from Simonet and others in order to "sell" it to the police to seek "a deal" for his wife, who was facing criminal charges. At trial, Fletcher sought to impeach Cross's testimony with evidence that Cross came to the scene only after the shooting and asked Simonet what had happened.

*2 (7) After his conviction, Fletcher was sentenced to a total of 29 years at Level 5 incarceration, followed by one year at Level 4. On appeal, Fletcher claims that (i) his due process rights were violated because he was denied access to the DELJIS criminal history information of the members of the jury pool; (ii) the trial court erred by sustaining hearsay objections to the conversation between Cross and Simonet, and (iii) the trial court erred by instructing the jury on the lesser-included offenses of Murder in the Second Degree and Manslaughter.

[1] (8) Fletcher's due process claim involves a question of law that is reviewed *de novo*.[FN2] That claim arises out of the following facts: immediately before the jury was selected, the State commented on one juror's felony conviction and agreed to inform the defense if any juror had been convicted of a crime involving dishonesty. Fletcher sought a court order affording him equal access to the DELJIS information in the State's possession. The Superior Court denied Fletcher's motion under 11 *Del. C.* § 8513(g). [FN3] That ruling, Fletcher argues, violated his due process rights, by giving the State an unfair advantage in the form of exclusive access to potential jurors' criminal and traffic records. Fletcher claims that under the two-pronged test of *McBride v. State*,[FN4] he was entitled to equal access because (i) the information was not available through other means; and (ii) the State used the information in jury selection, as evidenced by its disclosure to the trial court that one potential juror had a felony theft conviction.

FN2. *State v. Guthman*, 619 A.2d 1175, 1177 (Del.1973).

FN3. 11 *Del. C.* § 8513(g) states:

> g) Notwithstanding any law or court rule to the contrary, the dissemination to the defendant or defense attorney in a criminal case of criminal history record information pertaining to any juror in such case is prohibited. For the purposes of this subsection, "juror" includes any person who has received notice or summons to appear for jury service. This subsection shall not prohibit the disclosure of such information as may be necessary to investigate misconduct by any juror.

FN4. 477 A.2d 174 (Del.1984).

(9) The State responds that Section 8513(g) precludes the defense from obtaining the DELJIS information, and that therefore, the trial court correctly applied the law. Additionally, the State argues, the *McBride* test is not satisfied here because under *McBride*, a defendant is not entitled to the juror information given the limited discovery available in criminal cases; moreover, peremptory challenges are not constitutionally required. In *McBride*, the court ruled that the defendant had failed to show how nondisclosure of the DELJIS information impaired her ability to obtain an impartial jury. So too (the State argues), Fletcher failed to do that here.

(10) Under 11 *Del. C.* § 8513(g), a defense attorney is prohibited from receiving the information

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about jurors that Fletcher seeks here. Nor has Fletcher made the showing required by *McBride.* Therefore, his first claim of error fails.

[2] (11) Fletcher next claims that the trial court erroneously sustained hearsay objections to certain testimony relating to conversations between Cross and Simonet. This Court reviews admissibility of evidence questions under an abuse of discretion standard.[FN5] An abuse of discretion occurs when "a court has ... exceeded the bounds of reason in view of the circumstances, [or] ... so ignored recognized rules of law or practice so as to produce injustice." [FN6]

FN5. *Lilly v. State,* 649 A.2d 1055 (Del.1994).

FN6. *Firestone Tire & Rubber Co. v. Adams,* 541 A.2d 567, 570 (Del.1988).

*3 (12) Fletcher sought to impeach Cross by showing that after the shooting, Cross gathered information from Simonet to "sell" to the Wilmington Police, thereby suggesting that Cross was not an eyewitness. Fletcher's claim of error flows from the following testimony that occurred during Cross' cross-examination:

Q: Okay. Who did you talk to?

A: I can't say, per se. I talked to Ivan [Simonet].

Q: All right. What did Ivan tell you?

A: He didn't have to tell me anything.

Q: I don't know what he had to tell you. You said you talked to him. Did he tell you anything?

The State then objected on the grounds of hearsay. That objection was sustained.

(13) Fletcher also relies upon the following colloquy which occurred during Ivan Simonet's testimony as a defense witness:

Q: All right. Now, did you have a conversation with Marvin Cross about the shooting? You can answer yes or no.

A: Yes.

Q: Okay. Can you tell us what Marvin Cross said to you or asked you about the shooting?

A: Well, when I saw Marvin Cross, he had drove up-

The State also objected to this testimony on hearsay grounds. That objection was also sustained.

(14) Fletcher argues that those rulings constituted error, because the statements were not hearsay, as they were not being offered for the truth of their contents. Rather (Fletcher claims) the statements were offered to impeach Cross by showing that Cross was not a witness to the shooting. The State responds that the statements were "clearly [offered] for the truth" of their contents and that the trial court properly sustained the objection. Moreover, the State argues, admitting the statements might have caused jury confusion, because the jury might believe that the statements were offered as proof of a fact about the actual shooting.

(15) Assuming without deciding that the trial court's exclusion of the testimony was error, the error was harmless, because during the direct examination of Simonet, Fletcher was able to elicit the very testimony he desired:

Q: What did you tell Marvin about the shooting?

A: That a friend of ours-we call him Fontaine-had been shot.

Q: And why did you tell Marvin that?

A: Because he drove up and asked.

Q: And he asked you what happened after the shooting occurred? He asked you what happened?

A: Yes.

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For these reasons, Fletcher's second claim of error also fails.

[3] (16) Fletcher's third claim is that the trial court erred by instructing the jury on the lesser-included offenses of Murder Second Degree and Manslaughter (in addition to the indicted offense of Murder First Degree). This Court reviews *de novo* a claim that the trial court erred as a matter of law in instructing the jury.[FN7]

FN7. *Lewis v. State,* 626 A.2d 1350, 1354 (Del.1993).

(17) Fletcher asserts that because he presented evidence of self-defense, an instruction on a lesser degree of homicide was incompatible with the State's contention that the murder was intentional. Furthermore, Fletcher urges, there was insufficient evidence to support a finding of recklessness, which is required to convict for both of the lesser-included offenses. The State responds that an ample basis for instructing on the lesser-included offense is found in Fletcher's videotaped interview with police, which was presented as evidence at the trial. We agree.

*4 (18) The standard for instructing a jury on lesser-included offenses is 11 *Del. C.* § 206(c), which states "[t]he court is not obligated to charge the jury with respect to an included offense unless there is a rational basis in the evidence for a verdict acquitting the defendant of the offense charged and convicting the defendant of the included offense." [FN8] Having reviewed the record, we conclude that there is a rational basis in the videotaped interview evidence for the trial court to have instructed the jury on the lesser-included offenses. Accordingly, this claim lacks merit as well.

FN8. 11 Del. C. § 206(c).

NOW, THEREFORE, IT IS ORDERED that the decision of the Superior Court is AFFIRMED.

Del.Supr.,2004.
Fletcher v. State

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END OF DOCUMENT

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Not Reported in A.2d, 2006 WL 1237088 (Del.Super.)
(Cite as: 2006 WL 1237088 (Del.Super.))

H
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of Delaware,
New Castle County.
Andre FLETCHER,
v.
STATE of Delaware, Defendant.

No. 0111002808.
Submitted: Nov. 4, 2006.
Decided: May 9, 2006.

Upon Defendant's Pro Se Motion for Postconviction Relief-**DENIED**.
Mark H. Conner, Esquire, Deputy Attorney General, Department of Justice, Wilmington, Delaware, Counsel for the State of Delaware.

James Brendan O'Neill, Assistant Public Defender, Office of the Public Defender, Wilmington, Delaware, Trial Counsel for the Defendant.

William T. Deely, Assistant Public Defender, Office of the Public Defender, Wilmington, Delaware, Trial Counsel for the Defendant.

Andre Fletcher, Smyrna, Delaware, Defendant pro se.

OPINION

JURDEN, J.

***1** Andre Fletcher (hereinafter the "Defendant") filed the instant Motion for Postconviction Relief alleging ineffective assistance of counsel. For the reasons that follow, the Defendant's Motion is DENIED.

I. Factual and Procedural Background

On December 17, 2001, a Grand Jury indicted the Defendant on the following charges: Murder First Degree, Possession of a Firearm During the Commission of a Felony, and Possession of a Deadly Weapon by a Person Prohibited.[FN1] The charges arose from a November 3, 2001 incident during which the Defendant fatally shot Richard Holland at the intersection of 29th and Tatnall Streets in Wilmington.[FN2] On December 19, 2002, a Jury convicted the Defendant of the lesser-included offense of Murder Second Degree and Possession of a Firearm During the Commission of a Felony. At the conclusion of the jury trial, the Trial Judge found the Defendant guilty of Possession of a Deadly Weapon by a Person Prohibited.[FN3] On May 2, 2003, the Court sentenced the Defendant (a) on the count of Murder Second Degree to twenty years at Level V; (b) on the count of Possession of a Firearm During the Commission of a Felony to seven years at Level V, suspended after six years for one year at Level IV; and (c) on the count of Possession of a Deadly Weapon by a Person Prohibited to three years at Level V.[FN4] On September 10, 2003, the Court corrected the Defendant's sentence for Possession of a Deadly Weapon by a Person Prohibited to five years at Level V, suspended after three years.[FN5]

FN1. *See* Indictment True Bill, *State v. Fletcher*, No. 0111002808 (Dec. 17, 2001) (D.I.2).

FN2. *Id.*

FN3. *See* Sentencing Order, *State v. Fletcher*, No. 0111002808 (May 2, 2003) (D.I.31).

FN4. *Id.*

FN5. *See* Corrected Sentence Order, *State v. Fletcher*, No. 0111002808 (Sept. 10, 2003) (D.I.46).

The Defendant timely appealed his conviction and on July 2, 2004 the Supreme Court affirmed this Court's decision.[FN6] The Defendant filed the

EXHIBIT "C"

instant Motion on November 4, 2005.

FN6. *See Fletcher v. State,* 2004 WL 1535728 (Del.Supr.).

II. Summary of the Defendant's Allegations

In his Motion for Postconviction Relief, the Defendant asserts ineffective assistance of counsel as his ground for relief, alleging that trial counsel: (1) failed to hire a firearms expert to testify at trial that the weapon may have had a hair trigger, (2) failed to hire an expert to testify as to which of the two shots fired by the Defendant was fatal, (3) failed to conduct a pre-trial investigation into the Defendant's **self-defense** claim by failing to obtain police testimony and other evidence that 29th Street is a "high crime area" where "thugs ... put ... guns" under cars, in trees or bushes, (4) failed to request an acquittal based on the Defendant's accident/ **self-defense** claim, and (5) failed to "obtain a jury instruction under 11 *Del. C.* § 441(1)," and request a voluntary **manslaughter** instruction or "other instructions for **self-defense**." [FN7] The Defendant proclaims his innocence by reasserting his self-defense claim, and argues that the ineffectiveness of his trial counsel allowed him to be convicted of Murder Second Degree, without proof beyond a reasonable doubt, resulting in his incarceration.[FN8]

FN7. *See* Mem. of Law in Supp. of Movant's Postconviction Mot., *State v. Fletcher,* No. 0111002808 (Nov. 4, 2005) (D.I.48).

FN8. *Id.*

III. The Legal Standard for Ineffective Assistance of Counsel Claims

***2** Before addressing the merits of claims contained in a Superior Court Criminal Rule 61 Motion for Postconviction Relief, the Court must first determine whether any of the procedural bars under Rule 61 are applicable. [FN9] After reviewing the Defendant's present Motion, the Court finds that the claims contained therein are not procedurally barred. The Motion was timely filed [FN10] and alleges only ineffective assistance of counsel claims that have not been previously adjudicated.[FN11] Accordingly, the Court shall address the Defendant's substantive arguments.[FN12]

FN9. *Younger v. State,* 580 A.2d 552, 554 (Del.1990).

FN10. Super. Ct.Crim. R. 61(i)(1) bars motions filed more than three years after the judgment of conviction is final. Effective July 1, 2005, an amendment to this subdivision reduced the three year time limit to one year. The amendment applies to cases where a judgment of conviction became final after July 1, 2005. In this case the three year limitation remains in effect for purposes of postconviction review because the Supreme Court Mandate in the Defendant's direct appeal issued on July 20, 2004.

FN11. Super. Ct.Crim. R. 61(i)(2) bars relief on any ground not asserted in a prior postconviction proceeding, as required by subdivision (b)(2). Likewise, subdivision (i)(3) bars relief on any ground not asserted in the proceedings leading to the judgment of conviction and subdivision (i)(4) bars relief on any ground formerly adjudicated. However, the procedural bars set forth in Rule 61(i)(1)-(4) may be overcome if a defendant establishes a "colorable claim" that there has been a "miscarriage of justice" under Super. Ct.Crim. R. 61(i)(5). *State v. Wilmer,* 2003 WL 751181, at *3 (Del.Super.), *aff'd,* 827 A.2d 30 (Del.2003). A "colorable claim of miscarriage of justice occurs when there is a constitutional violation that undermines the fundamental legality, reliability, integrity, or fairness of the proceedings leading to the judgment of conviction." *Id.* This is a "very narrow" exception to the Rule 61 procedural bars that is "only applicable in very limited circumstances." *Id.* "A claim

> of ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution, by its very nature, qualifies as such an exception." *Id.* Under this exception, "the defendant bears the burden of proving that he has been deprived of a 'substantial constitutional right." ' *Id.*
>
> FN12. The Court does not reach the Defendant's assorted, conclusory constitutional arguments offered, at the conclusion of his Motion, apparently to justify consideration under the Rule 61(i)(4) and (i)(5) exceptions, because the Defendant's ineffective assistance of counsel claims are sufficient to overcome the procedural bars set forth under Rule 61. *See supra* notes 11-12.

Under the standard set forth in *Strickland v. Washington,* a defendant claiming ineffective assistance of counsel must establish two factors in order to prevail: (1) counsel's representation fell below an "objective standard of reasonableness," and (2) counsel's actions were prejudicial to his defense, creating a reasonable probability that but for counsel's error, the result of the proceeding would have been different.[FN13] The *Strickland* standard is highly demanding.[FN14] Under the first prong there is a "strong presumption that the representation was professionally reasonable" and, under the second prong, a defendant must affirmatively prove prejudice.[FN15]

> FN13. *Strickland v. Washington,* 446 U.S. 668, 693-94 (1984); *State v. Flonnory,* 2003 WL 22455188, at *1 (Del.Super.).
>
> FN14. *Flonnory,* 2003 WL 22455188, at *1, *citing Wilmer,* 2003 WL 751181, at *4.
>
> FN15. *Flonnory,* at *1, *citing Albury v. State,* 551 A.2d 53, 59-60 (Del.1988).

The record in this case clearly demonstrates that the instant Motion is without merit. As explained below, the Defendant fails to satisfy either prong of the *Strickland* test. The Defendant has not shown Trial Counsels' representation was unreasonable or that their actions prejudiced his defense.

Initially, the Defendant claims Trial Counsels' representation was ineffective because they failed to hire firearms and weapons/forensic medicine experts to support his accident/self-defense claim and cast doubt on the State's Case in Chief.[FN16] The Court finds both of these claim are without merit.

> FN16. Mem. of Law, D.I. 48, at 5.

In support of his claim that Trial Counsel rendered ineffective assistance by failing to hire a firearms expert, the Defendant offers only a conclusory assumption that a firearms expert could or would have provided an admissible, exculpatory opinion to aid his defense. However, this conclusion overlooks a key fact that Mr. O'Neill points out in his affidavit: no gun was in evidence in this case.[FN17] Consequently, no gun existed that an expert could test for a hair trigger.[FN18] The State made no attempt to introduce a gun into evidence.[FN19] Thus, the Court finds that "the strong presumption of professionally reasonable representation leads to the conclusion" that Trial Counsels' assessment that a firearms expert was not necessary to the defense was reasonable.[FN20] Furthermore, given the fact that the gun was unavailable to both the State and the Defendant in this case (because of the Defendant's actions), the Court finds this conclusory claim insufficient to satisfy the Defendant's "burden of substantiating specific allegations of actual prejudice on this issue." [FN21]

> FN17. *See* Aff. of O'Neil at ¶ 5, *State v. Fletcher,* No. 0111002808 (Jan. 6, 2006) (D.I.49). The Court notes that this is largely because of the Defendant's own actions. Apparently, after the shooting, the Defendant left the gun in the apartment of a friend, who later threw the gun in a nearby dumpster. However, the police did

not find the gun because the dumpsters near the apartment had been emptied prior to their search.

FN18. *See* Aff. of O'Neil, D.I. 49, at ¶ 5.

FN19. *Id.*

FN20. *Andrus v. State,* 2004 WL 691922, at *3 (Del.Supr.).

FN21. *Andrus,* 2004 WL 691922, at *3 (Del.Supr.).

Similarly, the Defendant argues that Trial Counsel provided ineffective assistance by failing to hire a weapons/forensic medicine expert, claiming that such an expert would resolve the "legal question" of which of his two shots was fatal.[FN22] Apparently, this claim arises from the Chief Medical Examiner's testimony at trial.[FN23] During direct examination, Dr. Sekula-Perlman (a forensic pathologist) indicated she was unable to tell which of the two gunshots came first or which killed the victim . [FN24] However, as Mr. O'Neill notes, Dr. Sekula-Perlman also testified that victim suffered from "two very serious" gunshot wounds, one in his chest and the other in his back. [FN25] The record further reflects that she testified that both wounds "contributed equally" to killing the victim, whose cause of death she ultimately determined to be the result of multiple gunshot wounds.[FN26]

FN22. Mem. of Law, D.I. 48, at 5.

FN23. *See* Aff. of O'Neil, D.I. 49, at ¶ 6; Mem. of Law, D.I. 48, at 5.

FN24. Tr. Trial at 77-78, 84, 87, *State v. Fletcher,* No. 0111002808 (Dec. 11, 2002) (D.I.39).

FN25. *See* Aff. of O'Neil, D.I. 49, at ¶ 6; Tr. Trial, D.I. 39, at 82-85.

FN26. *Id.* at 84-85, 96.

*3 Mr. O'Neill explains in his affidavit that given Dr. Sekula-Perlman's testimony, it "seems likely that a second opinion about the sequence of the gunshots and their effect on the victim would be speculative" and, even if a differing expert opinion could be found it, "would have no bearing on [the Defendant's] hybrid claim of accident/self-defense." [FN27] The Court agrees with this assessment and finds Trial Counsels' determination that a weapons/forensic medicine expert was unnecessary to the Defendant's case reasonable. Furthermore, detecting no conflict between the Chief Medical Examiner's findings and the Defendant's own trial testimony that two shots were fired "as quick as you can blink," [FN28] the Court finds that the Defendant's conclusory claim does not affirmatively prove prejudice sufficient to meet the second prong of the *Strickland* standard.

FN27. *See* Aff. of O'Neil, D.I. 49, at ¶ 6.

FN28. Tr. Trial at 189, *State v. Fletcher,* No. 0111002808 (Dec. 17, 2002) (D.I.41).

Next, the Defendant claims that Trial Counsel provided ineffective assistance by failing to conduct a pre-trial investigation into his self-defense claims. In support of this allegation, he maintains Trial Counsel failed to obtain (1) police testimony that 29th Street is a high crime area where "thugs" hide guns to avoid possession charges or (2) an investigator to find evidence supporting his view that an armed victim in such an area was "up to no good, attempting to rob ... or kill" the Defendant. [FN29]

FN29. Mem. of Law, D.I. 48, at 1, 5-6.

These conclusory assertions contradict the record and Mr. O'Neill's affidavit, and therefore the Court finds them without merit. Mr. O'Neill's affidavit documents eleven (11) pre-trial visits with the Defendant, during which they discussed, among other things, discovery, witnesses, and the particulars of the Defendant's hybrid accident/self-defense claim.[FN30] Mr. O'Neill further details how both he and Mr. Deely attempted to follow-up on every lead

relating to potential defense witnesses provided by the Defendant.[FN31] Pursuant to the Defendant's instructions, they even enlisted the Defendant's mother to assist in the locating and contacting witnesses. [FN32] Unfortunately, most of the Defendant's potential witnesses could not be contacted, and those who were contacted provided no information helpful to the Defendant's case. [FN33]

FN30. *See* Aff. of O'Neil, D.I. 49, at ¶ 4, Exhibit 1.

FN31. *Id.* at ¶ 7.

FN32. *Id.*

FN33. *Id.*

In addition, the record shows that Trial Counsel elicited testimony at trial about the volume and nature of criminal activity in the area of 29th Street. Specifically, over the State's objection, the following exchanges took place between Mr. Deely and Patrolman Robert Cassidy during cross examination:

Q: You were on routine patrol that night?

A: Yes.

Q: From that area of 29th and Market, 29th and Tatnall, that particular area, that is a pretty high drug and crime area; is that correct?

A: Correct.

Q: So you try to patrol it pretty intensely; is that correct?

A: Correct.

Q: Have you ever been involved with a shooting incident before?

A: Have I ever responded before?

Q: How many?

*4 A: I would say over 50.[FN34]

FN34. Tr. Trial, D.I. 39, at 43.

Q: In your patrol of this area, have you ever made any drug busts?

A: Yea.

Q: You have arrested drug dealers?

A: Yes.

Q: And how many, approximate, arrests of drug dealers have you made?

A: Probably 100.[FN35]

FN35. *Id.* at 56.

Q: In your experience there are times, although not one hundred percent of the time, there are a good number of time when guns are involved; is that correct?

A: At times, yes.

Q: Violence as a result of drug sales; is that correct?

A: Correct.

Q: One of the things that you and officers on the force do when you are involved in drug situations is you pretty much come into it with the assumption there may be weapons there; whether they have been seen or not; is that correct?

A: Yes.[FN36]

FN36. *Id.* at 62.

The Court finds no evidence in the record that Trial Counsels' representation during the pre-trial investigation fell below an objective standard of reasonableness or that any alleged errors by Trial Counsel prejudiced the Defendant.[FN37] The trial transcript refutes the Defendant's conclusory claim that Trial Counsel failed to obtain police testimony.

IV. Conclusion

The Court finds that the Defendant failed to satisfy the *Strickland* standard with regard to any of his ineffective assistance of counsel claims. For the aforementioned reasons, the Defendant's Motion for Postconviction Relief is hereby DENIED.

IT IS SO ORDERED.

Del.Super.,2006.
Fletcher v. State
Not Reported in A.2d, 2006 WL 1237088 (Del.Super.)

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Westlaw

Not Reported in S.W.3d, 2008 WL 1850587 (Ky.)
(Cite as: 2008 WL 1850587 (Ky.))

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Editor's Note: Additions are indicated by Text and deletions by ~~Text~~.
Only the Westlaw citation is currently available.

Unpublished opinion. See KY ST RCP Rule 76.28(4) before citing.

Supreme Court of Kentucky.
Chester SEXTON, Appellant
v.
COMMONWEALTH of Kentucky, Appellee.

No. 2006-SC-000698-MR.
April 24, 2008.

Background: Defendant was convicted in the Circuit Court, Christian County, Edwin M. White, J., of murder, first-degree robbery, and tampering with physical evidence, and he was sentenced to 50 years. Defendant appealed. The Court of Appeals, 2004 WL 102481, reversed and remanded. On remand defendant was convicted by a jury in the Circuit Court of murder. Defendant appealed.

Holding: The Supreme Court held that trial court's refusal to include self-defense language in the jury instructions for wanton murder, second-degree manslaughter, and reckless homicide constituted reversible error.

Reversed.

West Headnotes

|1| Criminal Law 110 ⚿1173.2(3)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1173 Failure or Refusal to Give Instructions
110k1173.2 Instructions on Particular Points
110k1173.2(3) k. Defenses. Most Cited Cases

Homicide 203 ⚿1473

203 Homicide
203XII Instructions
203XII(E) Excuses and Justifications
203k1471 Self-Defense
203k1473 k. Necessity of Instruction in General. Most Cited Cases

The trial court's refusal to include self-defense language in the jury instructions for wanton murder, second-degree manslaughter, and reckless homicide constituted reversible error; defendant testified that victim attempted to sodomize him at gunpoint.

|2| Criminal Law 110 ⚿2089

110 Criminal Law
110XXXI Counsel
110XXXI(F) Arguments and Statements by Counsel
110k2088 Matters Not Sustained by Evidence
110k2089 k. In General. Most Cited Cases

On remand, prosecutor could not argue facts not in evidence concerning the victim's prison record in closing argument.

On Appeal from Christian Circuit Court, No. 98-CR-00454; Edwin M. White, Judge.Shelly R. Fears, Assistant Public Advocate, Department of Public Advocacy, Frankfort, KY, Counsel for Appellant.

Jack Conway, Attorney General of Kentucky, David W. Barr, Assistant Attorney General, Office of Attorney General, Office of Criminal Appeals, Frankfort, KY, Counsel for Appellee.

EXHIBIT "D"

MEMORANDUM OPINION OF THE COURT

***1** Chester Sexton appeals as a matter of right from a judgment convicting him on retrial of the murder of David Pepper. Sexton received a sentence of fifty years' imprisonment. We must reverse the judgment because we agree with Sexton that the trial court committed reversible error by refusing to include the defense of self-defense in its wanton murder, second-degree manslaughter, and reckless homicide instructions to the jury.

I. *FACTS.*

Sexton gave the following version of the events of his camping trip in the woods with Pepper that culminated in Pepper's murder. During an evening of heavy drinking, Pepper began "feeling on" Sexton; and Sexton struck Pepper. Pepper then grabbed a gun from his Jeep and threatened to sodomize Sexton in the same way Pepper had himself been sodomized in prison. The two fought. Pepper held a gun to Sexton's head and pulled down Sexton's shorts. Sexton believed that Pepper was trying to penetrate him from behind. Sexton then offered to perform oral sex on Pepper to avoid penetration. Pepper then allowed Sexton to stand, continuing to demand oral sex while holding the gun. Managing to escape, Sexton fled to Pepper's Jeep and started it.

Sexton admitted that he struck Pepper with the Jeep, explaining that he did so to protect himself from threatened forcible sexual assault. He also testified that after running over Pepper and stopping the Jeep in the woods, he returned to the camp to find Pepper moving on the ground. He and Pepper struggled over a gun, and the gun discharged into Pepper's chest.

According to the medical examiner, Pepper died either from the effects of the gunshot wound to the chest or from the crushing injury to the chest. A grand jury indicted Sexton for Pepper's murder. Later, another grand jury indicted Sexton for robbery and for allegedly forcefully taking Pepper's Jeep in the incident resulting in Pepper's death and for tampering with physical evidence for allegedly burning Pepper's corpse.[FN1] The trial court joined the indictments for trial, and a jury convicted Sexton of all three charges. The trial court sentenced Sexton to fifty years' imprisonment for murder, ten years for robbery, and five years for tampering with physical evidence, with all sentences to run concurrently.

> FN1. A copy of the second indictment (Indictment No. 00-CR-00067) does not appear in the record provided to this court in the instant appeal. However, we have gleaned the relevant charges in this second indictment from our prior decision reversing and remanding for retrial, as well as other information contained in the record provided to us in this appeal.

In Sexton's earlier matter-of-right appeal, we reversed the convictions and remanded the case to the trial court "for proceedings not inconsistent with this opinion." [FN2] We held that the trial court's failure to conduct a competency hearing was one reason underlying our reversal. We stated that had that been the only error, the case could have been remanded simply for a competency hearing with the convictions left standing if Sexton were retrospectively found competent to stand trial. But we also required that the case be retried for other errors, including the trial court's refusal to instruct on imperfect self-defense.

> FN2. *Sexton v. Commonwealth,* No.2001-SC-000852-MR, 2004 WL 102481 at * 6 (Ky. January 22, 2004).

On remand, the trial court conducted a competency hearing and found Sexton competent to stand trial. On the day the new trial began, the trial court announced that it would only retry Sexton on the homicide charges because, in its interpretation of our opinion, the robbery and tampering with physical evidence convictions had not been reversed. On retrial, the trial court refused to include Sexton's requested language "that he was not privileged to act in self-defense" within the instructions for wanton

murder, second-degree manslaughter, and reckless homicide; although, it did include this requested language within the instructions for intentional murder and first-degree manslaughter. The trial court overruled Sexton's objection to the prosecutor's arguing in its closing facts not in evidence regarding the date and length of Pepper's prison term.

***2** On appeal, Sexton argues that the murder conviction must be reversed because the trial court erroneously (1) refused to include a self-defense instruction to wanton murder, second-degree manslaughter, and reckless homicide; (2) ignored the law of the case by failing to retry Sexton on the robbery and tampering with physical evidence charges; and (3) allowed the Commonwealth to argue facts not in evidence in its closing argument.

II. *ANALYSIS.*

A. *Trial Court Erred by Omitting Self-Defense Instruction.*

[1] We agree with Sexton that his conviction on retrial must be reversed because of the trial court's refusal to add the language "that he was not privileged to act in self-protection" to the wanton murder instruction (Instruction 1AA), the second-degree manslaughter instruction, and the reckless homicide instruction. This issue was preserved for our review by Sexton's objection to the trial court's failure to include appropriate self-defense language in these instructions.[FN3] The trial court should have instructed the jury on self-defense, which we have made clear is available to homicide offenses requiring a wanton or reckless mental state if the evidence warrants it.[FN4] Sexton's testimony regarding Pepper's alleged attempts to sodomize him at gunpoint was sufficient evidence to warrant an instruction on self-defense. Given this evidence, the trial court erred by not instructing the jury on self-defense as to the non-intentional homicide offenses.

FN3. RCr 9.54(2).

FN4. *See, e.g., Allen v. Commonwealth,* 5 S.W.3d 137, 139 (Ky.1999) (jury must be instructed on self-defense for wanton murder if there is evidentiary support for this defense); *Estep v. Commonwealth,* 64 S.W.3d 805, 811 (Ky.2002) (jury must be instructed by including language "that he was not privileged to act in self-protection" as an element of reckless homicide if there is evidentiary support for this defense).

The Commonwealth argues that the trial court's instructions complied with those contained in former Justice Cooper's jury instruction manual.[FN5] But this manual is not binding authority. And we do not come to the same understanding of Cooper on this point as does the Commonwealth. Cooper includes the self-defense language in brackets in the intentional murder model,[FN6] explaining that this language should only be used if the evidence reasonably supports it. Although Cooper's model instruction on wanton murder does not explicitly set forth the self-protection defense within its model wanton murder instruction,[FN7] it cites *Allen* in its COMMENT on wanton murder instructions. *Allen* explicitly provides for the availability of this defense to wanton murder.[FN8] So a close reading of Cooper's manual indicates that the self-defense language must be included in instructions for homicide offenses with wanton or reckless states of mind so long as the evidence warrants it.

FN5. WILLIAM S. COOPER & DONALD P. CETRULO, KENTUCKY INSTRUCTIONS TO JURIES *CRIMINAL* §§ 3.21, 3.23, 3.24 (5th ed.2006).

FN6. *See id.* at § 3.21.

FN7. *See id.* at § 3.23.

FN8. *See id.* at § 3.23, COMMENT on p. 3-34.

The Commonwealth argues that even if the trial court erred in not including the self-defense language in the instructions as to the elements of wanton murder and the other non-intentional homicide

offenses, any deficiency was cured by Instruction 1E. But Instruction 1E sets out an imperfect self-protection defense [FN9]-not the self-defense instruction that Sexton requested [FN10] and that the trial court apparently found was supported under the evidence for intentional homicide. We also note that the jury could have convicted Sexton of wanton murder under Instruction 1AA without ever being directed to consider imperfect self-defense under Instruction 1E. Instruction 1AA provided that the jury could find Sexton guilty of wanton murder if and only if the evidence showed beyond a reasonable doubt that he killed Pepper by shooting him or running him over with the jeep and:

> FN9. Instruction 1E was entitled Wanton Belief Qualifications and instructed the jury as to what lesser included offense occurred if Sexton had otherwise been guilty of murder and/or manslaughter but had been "mistaken in his belief that it was necessary to use deadly physical force against David Pepper in self-protection against death or deviate sexual intercourse, or in his belief in the degree of force necessary to protect himself from it."
>
> FN10. According to *BLACK'S LAW DICTIONARY* (8th ed.2004), *imperfect self-defense* is defined as "[t]he use of force by one who makes an honest but unreasonable mistake that force is necessary to repel an attack" and can result in a lesser charge in many jurisdictions (including Kentucky). *Perfect self-defense* is defined as "[t]he use of force by one who accurately appraises the necessity and the amount of force to repel an attack." *Id.*

*3 B. That in so doing, he was wantonly engaging in conduct which created a grave risk of death to another and thereby caused the death of David Pepper under circumstances manifesting an extreme indifference to human life.

If you find Chester Sexton guilty under this Instruction, you will say so by your verdict and no more. Go to Verdict Form II and then return to the Courtroom.

Verdict Form II then simply asked the jury to find Sexton guilty or not guilty of wanton murder. The jury indicated that it found him guilty of wanton murder by the foreperson's signature.

Furthermore, in Instruction One on Self-Protection,[FN11] the trial court crossed out the reference to Wanton Murder (Instruction 1 AA), which erroneously instructed the jury that this defense was not available to wanton murder.

> FN11. Instruction One appeared as follows: "Even though Chester Sexton might otherwise be guilty of an offense described in Instructions 1A, ~~1AA~~ or 1B, if at the time Chester Sexton killed David Pepper, he believed that Pepper then and there was about to use deadly physical force or was threatening the use [of] physical force in order to engage in deviate sexual intercourse, Chester Sexton was privileged to use deadly physical force against David Pepper as he believed necessary in order to protect himself against it. You are further instructed that Chester Sexton had no duty to retreat from David Pepper before using deadly force to protect himself."

We recognize that possibly some of the error could have been negated by the trial court's reading of its instructions to the jury. But the trial court told the jury that any references to self-defense as available to wanton or reckless offenses were "typos." So the communication to the jury was that self-defense was not a defense to wanton or reckless homicide offenses. This was error.

Mindful of the dismal prospect of a possible third trial of this case, we must reverse, nevertheless, because of this error.[FN12] The trial court is directed on remand to include the language "that he

was not privileged to act in self-protection" in the jury instructions for homicide charges requiring a wanton or reckless mental state if there is evidence supporting such a defense.

> FN12. *Allen,* 5 S.W.3d at 139 (holding that "failure to give an instruction on self-protection as a defense to the wanton murder charge was reversible error" where evidence warranted the instruction, especially as trial court had given instruction on self-protection as defense to intentional murder charge).

B. *Law of the Case Issue Not Necessary to Resolve.*

Because we reverse the murder conviction on the basis of erroneous jury instructions, we need not address whether any error in the trial court's refusing to retry Sexton on robbery and tampering with physical evidence charges contained in Indictment No. 00-CR-00067 affected the validity of the murder conviction, which is the only conviction now on appeal to this Court. While the trial court stated on the record that it believed the robbery and tampering with physical evidence convictions not to be disturbed by the earlier opinion of this Court on the first appeal, we note that our earlier opinion expressly reversed and remanded all of Sexton's convictions without affirming any part of the trial court's judgment. And we note that following the new competency hearing, the trial court did not enter a new judgment purporting to reinstate the robbery and tampering with physical evidence convictions in 00-CR-00067. But the robbery and tampering with physical evidence charges are simply not now before us.

C. *Closing Argument Should Not Refer to Facts Not in Evidence.*

[2] Sexton contends that the prosecution engaged in egregious misconduct by arguing facts not in evidence regarding the victim's prison record in closing argument. The specific language he objects to is that "in 1980 [David Pepper] went to prison for three years" and that Pepper "made a mistake, way back, and now they're trying to portray him as this monster when he turned his life around." This argument responded to Sexton's testimony that Pepper threatened to sodomize him as Pepper had been sodomized in prison and a reference during the defense's opening statement to Pepper's having spent time in prison.

*4 Despite arguing facts not in evidence, these statements by the prosecutor in closing were not the type of egregious misconduct that we consider to render the entire trial fundamentally unfair [FN13] since it was responding to defense references to the victim's prison stint. So we would not have reversed on this ground standing alone. But on remand, we remind the trial court and the Commonwealth that arguing facts not in evidence in closing argument is improper.

> FN13. *See Stopher v. Commonwealth,* 57 S.W.3d 787, 805 (Ky.2001) (recognizing that prosecution is entitled to some latitude on closing argument and stating that convictions may be reversed only if misconduct renders trial "fundamentally unfair.").

II. *CONCLUSION.*

For the foregoing reasons, we reverse the judgment of the Christian Circuit Court and remand for further proceedings in accordance with this opinion.

All sitting. All concur.

Ky.,2008.
Sexton v. Com.
Not Reported in S.W.3d, 2008 WL 1850587 (Ky.)

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