State v. Jones

Supreme Court of Ohio

March 31, 2021, Submitted; September 23, 2021, Decided

No. 2020-0368

Reporter

166 Ohio St. 3d 85 *; 2021-Ohio-3311 **; 2021 Ohio LEXIS 1889 ***; 182 N.E.3d 1161

THE STATE OF OHIO, APPELLANT, v. JONES, APPELLEE.

Notice: THIS SLIP OPINION IS SUBJECT TO FORMAL REVISION BEFORE IT IS PUBLISHED IN AN ADVANCE SHEET OF THE OHIO OFFICIAL REPORTS.

Subsequent History: Reconsideration denied by *State v. Jones, 165 Ohio St. 3d 1458, 2021-Ohio-4033, 2021 Ohio LEXIS 2375, 176 N.E.3d 767 (Ohio, Nov. 23, 2021)*

Prior History: APPEAL from the Court of Appeals for Hamilton County, *No. C-170647, 2020-Ohio-281, 151 N.E.3d 1059* **[***1]** .

State v. Jones, 2020-Ohio-281, 2020 Ohio App. LEXIS 335, 151 N.E.3d 1059, 2020 WL 507637 (Ohio Ct. App., Hamilton County, Jan. 31, 2020)

Disposition: Judgment reversed in part and cause remanded to the trial court.

Core Terms

kill, murder, calculation, court of appeals, firearm, shooting, planned, infer, aggravated, aggravated-murder, weapon, pickup, arrived, shot, evidence show, lead opinion, new trial, fistfight, juror, gun, trial court, open door, driver's-side, loaded, pocket, beyond a reasonable doubt, insufficient evidence, light most favorable, reasonable inference, trier of fact

Case Summary

Overview

HOLDINGS: [1]-In an action for aggravated murder under R.C. 2903.01(A), a reasonable jury could have inferred that defendant acted with advance reasoning to formulate purpose to kill the victim based on evidence that defendant planned a fistfight and pocketed a loaded firearm as he got out of his car at his former girlfriend's house and thus, the appellate court erred in reversing defendant's conviction.

Outcome

Reversed in part and remanded.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Murder > Aggravated Murder > Elements

Evidence > Weight & Sufficiency

HN1[] **Aggravated Murder, Elements**

In reviewing whether evidence is sufficient to establish the prior-calculation-and-design element of aggravated murder, a court must consider whether the evidence, when viewed in the light most favorable to the prosecution, supports a finding that a defendant acted with advance reasoning and purpose to kill.

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Evidence > Weight & Sufficiency

HN2[] **Burdens of Proof, Prosecution**

An appellate court's task when reviewing whether sufficient evidence supports a defendant's conviction is well-settled and familiar. The reviewing court asks whether after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Evidence > Inferences & Presumptions > Inferences

HN3[] **Substantial Evidence, Sufficiency of Evidence**

It falls to the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Thus, an appellate court's role is limited. It does not ask whether the evidence should be believed or assess the evidence's credibility or effect in inducing belief. Instead, it asks whether the evidence against a defendant, if believed, supports the conviction.

Criminal Law & Procedure > ... > Murder > Definitions > Deliberation & Premeditation

Criminal Law & Procedure > ... > Murder > Aggravated Murder > Elements

Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution

HN4[] **Definitions, Deliberation & Premeditation**

Aggravated murder under *R.C. 2903.01(A)*, requires the state to prove a defendant caused a victim's death purposely, and with prior calculation and design. In construing this element, the statute's own terms suggest advance reasoning to formulate the purpose to kill. It is not enough for the state to show that the defendant purposely killed the victim. Rather, the state needs to provide evidence of a premeditated decision or a studied consideration of the method and the means to cause a death. There is no bright-line

test for determining whether a defendant's actions show a premeditated decision or studied consideration to kill—each case turns on its own facts.

Criminal Law & Procedure > ... > Murder > Aggravated Murder > Elements

HN5[] **Aggravated Murder, Elements**

A trier of fact's finding of prior calculation and design is warranted when the evidence shows a defendant had the time and opportunity to plan a homicide and the homicide's circumstances show a scheme designed to implement the calculated decision to kill.

Criminal Law & Procedure > ... > Murder > Aggravated Murder > Elements

HN6[] **Aggravated Murder, Elements**

Mere possession of a firearm is not enough to establish prior calculation and design for purposes of a conviction for aggravated murder.

Criminal Law & Procedure > ... > Murder > Definitions > Deliberation & Premeditation

Criminal Law & Procedure > ... > Murder > Aggravated Murder > Elements

HN7[] **Definitions, Deliberation & Premeditation**

Evidence of a defendant pursuing and killing a fleeing or incapacitated victim after an initial confrontation strongly indicates prior calculation and design for purposes of a conviction for aggravated murder.

Criminal Law & Procedure > ... > Murder > Definitions > Deliberation & Premeditation

HN8[] **Definitions, Deliberation & Premeditation**

A defendant can conceive and execute a plan to kill, even if formulated within a few minutes, when there is evidence that the defendant's actions went beyond a momentary impulse and show that he was determined to complete a course of action.

Evidence > Weight & Sufficiency

HN9[] **Evidence, Weight & Sufficiency**

Where reasonable minds can reach different conclusions upon conflicting evidence, determination as to what occurred is a question for the trier of fact. It is not the function of an appellate court to substitute its judgment for that of the factfinder.

Criminal Law & Procedure > Postconviction Proceedings > Motions for New Trial

HN10[] **Postconviction Proceedings, Motions for New Trial**

Unlike a reversal for insufficient evidence, which requires the discharge of the defendant, the remedy for a reversal on manifest-weight grounds is a new trial.

Headnotes/Summary

Headnotes

Criminal law—Aggravated murder—Court of appeals reversed conviction on ground that the evidence was not sufficient to show that defendant acted with prior calculation and design—Judgment reversed.

Counsel: Joseph T. Deters, Hamilton County Prosecuting Attorney, and Ronald W. Springman Jr., Assistant Prosecuting Attorney, for appellant.

Timothy Young, Ohio Public Defender, and Peter Galyardt, Assistant Public Defender, for appellee.

Judges: DEWINE, J. O'CONNOR, C.J., and KENNEDY, J., concur. FISCHER, J., concurs in judgment only. DONNELLY, J., dissents, with an opinion joined by BRUNNER, J. STEWART, J., would dismiss the appeal as having been improvidently accepted.

Opinion by: DEWINE

Opinion

[*85] DEWINE, J., announcing the judgment of the court.

[P1]** Earl Jones shot and killed Kevin Neri. Finding that Jones acted with prior calculation and design, a jury convicted Jones of aggravated murder under **[*86]** *R.C. 2903.01(A)*. The court of appeals reviewed the evidence, drew its own inferences therefrom, and concluded that the evidence was insufficient to show that Jones acted with prior calculation and design. As a result, it reversed the aggravated-murder **[***2]** conviction and discharged Jones from further prosecution for that crime.

[P2]** *HN1*[↑] The court of appeals erred. In reviewing whether evidence is sufficient to establish the prior-calculation-and-design element of aggravated murder, a court must consider whether the evidence, when viewed in the light most favorable to the prosecution, supports a finding that a defendant acted with advance reasoning and purpose to kill. The court of appeals failed to properly apply this standard and instead conducted its own weighing of the evidence. In this case, a reasonable juror could properly find that Jones acted with prior calculation and design. We reverse the court of appeals' judgment to the contrary.

I. Background

A. An ongoing feud culminates in a deadly shooting

[P3]** Earl Jones and Kevin Neri didn't much like each other. The link connecting the two men was Cyerra Prather. Jones had fathered a child with Prather, but their relationship did not last. Prather eventually began dating Neri, who moved into her home.

[P4]** To call the relationship between Neri and Jones combative would be to put it mildly. Jones harassed Neri through text messages and social media, often using racial epithets. And Neri gave as good as **[***3]** he got, including taunting Jones by claiming to be a better father. The two men would argue when Jones came to Prather's house to pick up or drop off their child. More than once, Prather's neighbors reported the disturbance to the police. The situation became so fraught that Prather and her family tried to minimize the contact between the two men, arranging for Neri to be out of the house when Jones came to pick up the child or ensuring the exchanges went as quickly as possible. The two men also developed a habit of regularly scheduling fistfights—often at a time and location away from Prather's home. But the fights amounted to nothing: Neri would wait at the agreed-upon location and Jones would never show.

[P5]** The simmering animosity boiled over on the day of the shooting. That morning, Jones arranged to pick up his child the next day for visitation. And Neri, on learning Jones's intentions, scheduled yet another fight. Jones later changed his plans, and it was agreed that he would pick up the child at 8:00 p.m. that night rather than the next afternoon. He then texted Neri to ask if he would be there that evening. Neri replied that he would be there and the two men agreed to meet at **[***4]** an intersection six houses away from Prather's home.

[P6]** **[*87]** Jones drove to Prather's house and parked his car on the wrong side of the street in a no-parking zone immediately in front of the house. Jones pocketed a loaded gun as he got out of the car, leaving the engine running and the driver's-side door open. Neri was standing on the house's front porch when Jones arrived. The two men began walking toward each other and Neri took off his sweatshirt as he approached. Jones immediately pulled out his gun and shot Neri. Neri tried to flee but Jones fired two more shots as he was running, ultimately bringing Neri to the ground. After shooting Neri, Jones drove to the Hamilton County Sheriff's Department, where he turned himself in. Meanwhile, paramedics transported Neri to the hospital, where he died.

[P7]** Jones was indicted on charges of aggravated murder, murder, felony murder—each with specifications—and carrying a concealed weapon. At trial, Jones claimed that he shot Neri in self-defense, but the jury was unpersuaded and found Jones guilty on all counts in the indictment.

B. The court of appeals reverses Jones's aggravated-murder conviction and discharges him from prosecution on that count

[P8]** Jones **[***5]** appealed to the First District Court of Appeals, raising a number of assignments of error. Relevant to our analysis here, Jones argued that his conviction for aggravated murder was not supported by sufficient evidence, because the evidence adduced at trial did not prove that he had acted with prior calculation and design. *2020-Ohio-281, 151 N.E.3d 1059, ¶ 9*. A majority of the appellate panel agreed, finding that the evidence showed that Jones purposely killed Neri but did not establish that Jones did so after engaging "in a studied consideration of the method, means, or location of the killing." *Id. at ¶ 16*.

[P9]** In reaching its decision, the court of appeals assessed the evidence using the three guideposts for examining prior calculation and design that this court set out in *State v. Taylor, 78 Ohio St.3d 15, 19, 1997- Ohio 243, 676 N.E.2d 82 (1997)*. The *Taylor* framework asks: "(1) Did the accused and victim know each other, and if so, was that relationship strained? (2) Did the accused give thought or preparation to choosing the murder weapon or murder site? and (3) Was the act drawn out or 'an almost instantaneous eruption of events'?" *Id.*, quoting *State v. Jenkins, 48 Ohio App.2d 99, 102, 355 N.E.2d 825 (8th Dist.1976)*.

[P10]** Although the court of appeals found that Jones and Neri had a strained relationship, *2020-Ohio-281, 151 N.E.3d 1059, at ¶ 14*, it concluded that the remaining evidence did not support a finding **[***6]** of prior calculation and design under *Taylor*. First, it determined the text messages between Jones and Neri showed that the men had planned to meet for a fistfight away from Prather's home when Jones was scheduled to pick up his child. Thus, Jones did not expect Neri to be present when he arrived at Prather's home and it "defie[d] logic" for the jury to find that Jones planned to kill Neri at that location "with

witnesses **[*88]** around and his child present." *Id. at ¶ 21*. Second, the court of appeals construed Jones's choice to pocket his loaded firearm as he left his vehicle as indicating only "instantaneous deliberation" and not a design to kill Neri. *Id. at ¶ 23*. It rationalized this conclusion by noting that Jones frequently carried a weapon and had once had a gun stolen from his car. *Id.* Third, the court reasoned a jury could not infer prior calculation and design from the evidence establishing that Jones arrived at Prather's house, shot Neri, and drove away to turn himself in, because the shooting took place in a matter of minutes and showed only Jones's anger in the moment. *Id. at ¶ 24*.

[P11]** As a result of this appraisal of the evidence, the First District reversed Jones's conviction for aggravated murder. *Id. at ¶ 26, 81*. Because the **[***7]** double-jeopardy protection bars retrial when a conviction has been reversed for insufficient evidence, *see State v. Thompkins, 78 Ohio St.3d 380, 387, 1997- Ohio 52, 678 N.E.2d 541 (1997)*, citing *Tibbs v. Florida, 457 U.S. 31, 47, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982)*, the court of appeals discharged Jones from further prosecution on the aggravated-murder count. *Id. at ¶ 81*.

[P12]** One judge wrote in dissent, reasoning that a rational trier of fact could find that the evidence—when viewed in the light most favorable to the prosecution—established that Jones acted with prior calculation and design. In particular, Jones's role in planning the fistfight, his decision to leave his car running and the driver's-side door open, and his choice to bring a firearm with him when exiting his vehicle all supported the jury's verdict. *Id. at ¶ 83-90* (Bergeron, J., concurring in part and dissenting in part).

[P13]** As to the other assignments of error raised by Jones, the majority of the appellate panel concluded that the trial court had made several evidentiary errors and that those errors were not harmless. *2020-Ohio-281, 151 N.E.3d 1059, at ¶ 28-58, 68-80*. Consequently, it reversed Jones's convictions for murder and felony murder and remanded the case for a new trial on these counts. The court of appeals affirmed Jones's conviction for carrying a concealed weapon. *Id. at ¶ 81*.

[P14]** The state appealed the First District's reversal of Jones's aggravated-murder **[***8]** conviction, and we accepted jurisdiction. *159 Ohio St.3d 1413, 2020-Ohio-3275, 147 N.E.3d 655*.

II. Analysis

[P15]** The state raises several propositions of law, all of which can be distilled into a single question: did the state present evidence of prior calculation and design sufficient to support Jones's conviction for aggravated murder under R.C. 2903.01(A)? Reviewing the record and applying the appropriate standard of **[*89]** review, we conclude that the state met its burden and that the First District erred in reversing Jones's aggravated-murder conviction.

A. Sufficiency of the evidence and prior calculation and design

[P16]** ***HN2***[⬆] An appellate court's task when reviewing whether sufficient evidence supports a defendant's conviction is well-settled and familiar. The reviewing court asks whether "'after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.'" *State v. McFarland, 162 Ohio St.3d 36, 2020-Ohio-3343, 164 N.E.3d 316, ¶ 24*, quoting *State v. Jenks, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991)*, paragraph two of the syllabus, *superseded by constitutional amendment on other grounds as stated in State v. Smith, 80 Ohio St.3d 89, 102, 1997- Ohio 355, 684 N.E.2d 668 (1997)*, fn. 4. But it is worth remembering what is not part of the court's role when conducting a sufficiency review. ***HN3***[⬆] It falls to the trier of fact to "'resolve conflicts in the testimony, **[***9]** to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts.'" *McFarland at ¶ 24*, quoting *Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)*. Thus, an appellate court's role is limited. It does not ask whether the evidence should be believed or assess the evidence's "credibility or effect in inducing belief." *State v. Richardson, 150 Ohio St.3d 554, 2016-Ohio-8448, 84 N.E.3d 993, ¶ 13*, citing *Thompkins, 78 Ohio St.3d at 386, 678 N.E.2d 541*. Instead, it asks whether the evidence against a defendant, *if believed*, supports the conviction. *Thompkins at 390* (Cook, J., concurring).

[P17]** Here, the state charged Jones with ***HN4***[⬆] aggravated murder under *R.C. 2903.01(A)*, which requires the state to prove Jones caused Neri's death "purposely, and with prior calculation and design." In

construing this element, we have held that the statute's own terms "suggest[] advance reasoning to formulate the purpose to kill." *State v. Walker, 150 Ohio St.3d 409, 2016-Ohio-8295, 82 N.E.3d 1124, ¶ 18*. It is not enough for the state to show that Jones purposely killed Neri. Rather, the state needs to provide "evidence of a premeditated decision or a studied consideration of the method and the means to cause a death." *Id.* There is no bright-line test for determining whether a defendant's actions show a premeditated decision or studied consideration to kill—each case turns on its own facts. *Id. at ¶ 19*. And the three factors set out in *Taylor* help guide a court's inquiry. *See State v. Franklin, 97 Ohio St.3d 1, 2002-Ohio-5304, 776 N.E.2d 26, ¶ 56* (describing **[***10]** the questions posed in *Taylor* as pertinent considerations when determining the existence of prior calculation and design). But the *Taylor* factors are not dispositive. ***HN5***[⬆] Rather, a trier of fact's finding of prior calculation and design is warranted when the evidence shows a defendant had the time and opportunity to plan a homicide and the homicide's circumstances "'show a scheme designed to implement the calculated decision to kill.'" *State v. Maxwell, 139 Ohio St.3d 12, **[*90]** 2014-Ohio-1019, 9 N.E.3d 930, ¶ 148*, quoting *State v. Cotton, 56 Ohio St.2d 8, 381 N.E.2d 190 (1978)*, paragraph three of the syllabus.

B. A reasonable jury could infer from the evidence presented at trial that Jones acted with advance reasoning to formulate the purpose to kill Neri

[P18]** When these principles are read together, they refine the question facing us in this appeal: could a reasonable juror—believing the state's evidence and drawing all reasonable inferences in the state's favor—find beyond a reasonable doubt that Jones acted with advance reasoning to formulate a purpose to kill Neri? Reviewing the evidence presented at trial in a light most favorable to the state, we conclude that a reasonable juror could make such a finding here. And applying the *Taylor* framework helps make that clear.

[P19]** As to the first *Taylor* guidepost—whether the accused **[***11]** knew the victim and whether their relationship was strained, *78 Ohio St.3d at 19, 676 N.E.2d 81*—the answer is an unequivocal yes. Indeed, "strained" is an understatement.

[P20]** The second inquiry we found relevant in *Taylor* is whether "the accused [gave] thought or preparation to choosing the murder weapon or murder site?" *Id.* A reasonable juror could easily find that Jones considered the murder's location. He rescheduled his planned fistfight with Neri to occur up the street from Prather's house at the same time he was to pick up his child. Next, on his arrival at Prather's house, Jones parked his car immediately in front of the house, on the wrong side of the street in a no-parking zone, leaving the vehicle's engine running and its driver's-side door open. And then Jones took several steps toward Neri before opening fire.

[P21]** Our reasoning in *Taylor* shows why these facts can support a juror's finding of prior calculation and design. *Id.* at 20-21. In that case, Taylor was convicted of aggravated murder for shooting his girlfriend's ex-boyfriend after the two men exchanged words while out at a bar. *Id.* at 15-17. In affirming his conviction, we adopted the court of appeals' assessment that Taylor's decision to wait until after **[***12]** his girlfriend had left the bar and his companion had positioned himself behind the victim before he began shooting were strategic choices that allowed the jury to infer that Taylor had planned to shoot the victim. *Id. at 21*. And, given that inference, there was enough evidence to prove prior calculation and design.

[P22]** So too here. The evidence shows that Jones and Neri planned a confrontation for that evening, that Jones contacted Prather several times to confirm the pick-up time and location, and that when he arrived, Jones parked in a no-parking zone on the wrong side of the road and kept his car running with its door open. Taken together, a jury could reasonably infer from this evidence that **[*91]** Jones (1) knew or expected Neri to be close by when he arrived and (2) made strategic choices that would assist in the perpetration of his crime. These inferences support the jury's finding that Jones planned to kill Neri and that he acted with prior calculation and design.

[P23]** A reasonable juror could also find that Jones gave thought to the choice of the murder weapon. *See Taylor, 78 Ohio St.3d at 19, 676 N.E.2d 82*. Such was the case in *Taylor*, in which we rejected the defendant's argument that the evidence showed only instantaneous deliberation. **[***13]** *Id. at 22*. Instead, we reasoned that the jury could infer an intent to kill from the defendant's choice to bring the firearm into the bar that he knew the victim frequented. *Id.* We came to a similar conclusion in *State v.*

Palmer, 80 Ohio St.3d 543, 568, 1997- Ohio 312, 687 N.E.2d 685 (1997). In that case, the defendant was involved in a car accident. An argument ensued, and the defendant shot and killed the driver of the other vehicle. Despite the speed with which the killing occurred, we held that the evidence, which showed that the defendant had exited his vehicle with a cocked and loaded firearm ready to fire, allowed the jury to infer that the defendant intended to use the weapon. *Id.*

[P24]** The facts here support the same reasoning. Jones and Neri had planned a fistfight for the evening of the shooting and the jury could infer that Jones expected to find Neri nearby—if not at—Prather's house. Then, when Jones arrived at Prather's house, he pocketed a loaded firearm as he got out of his car. ***HN6***[⬆] Jones correctly argues that mere possession of a firearm is not enough to establish prior calculation and design. *See State v. Johnson, 10th Dist. Franklin No. 97APA03-315, 1998 Ohio App. LEXIS 2069, *16 (May 5, 1998)*. But the facts here show more than Jones's simply having a firearm that he regularly carried on his person when he encountered Neri. Rather, the evidence showed an **[***14]** affirmative choice by Jones to bring a loaded gun to a fistfight and, when he arrived, to stuff the gun in his pocket. A jury could infer from these facts that Jones intended to use the gun. And such an inference would support the jury's finding that Jones formed a plan to kill Neri and sought to bring that plan to fruition. *See Palmer at 569*.

[P25]** The third *Taylor* guidepost asks, "[W]as the act drawn out or 'an almost instantaneous eruption of events'?" *Id., 78 Ohio St.3d at 19, 676 N.E.2d 82*, quoting *Jenkins, 48 Ohio App.2d at 102, 355 N.E.2d 825*. ***HN7***[⬆] In the past we have held that evidence of a defendant "[p]ursuing and killing a fleeing or incapacitated victim after an initial confrontation strongly indicates prior calculation and design." *Walker, 150 Ohio St.3d 409, 2016-Ohio-8295, 82 N.E.3d 1124, at ¶ 22*, citing *State v. Conway, 108 Ohio St.3d 214, 2006-Ohio-791, 442 N.E.2d 996, ¶ 45*. Here, the evidence showed that Jones shot Neri once and then continued to fire at him **[*92]** as he ran away. Under the principle restated in *Walker*, these facts support the jury's finding of prior calculation and design.

[P26]** That Jones's decisions and actions occurred over a short time does not preclude a finding of prior calculation and design. ***HN8***[⬆] We have consistently held that a defendant can conceive and execute a plan to kill, even if formulated within a few minutes, when there is evidence that the

defendant's **[***15]** actions "went beyond a momentary impulse and show that he was determined to complete a course of action." *Conway at ¶ 46*; *see also Palmer, 80 Ohio St.3d at 568, 687 N.E.2d 685*. Without a doubt, the events here took place in short order. But no matter how quickly the shooting happened, a juror could reasonably infer from Jones's actions before and during the shooting—including Jones's planning of the fistfight, his communications with Prather confirming the time and location to pick up their child, his decision to pull in front of the house leaving the driver's door open, his decision to pocket a loaded firearm, and his choice to shoot Neri as he fled—that Jones had adopted and carried out a plan to kill. *Id.*

[P27]** This does not mean that the evidence precludes any other inferences. But on a sufficiency review, the evidence need not satisfy so high a burden. ***HN9***[⬆] "Where reasonable minds can reach different conclusions upon conflicting evidence, determination as to what occurred is a question for the trier of fact. It is not the function of an appellate court to substitute its judgment for that of the factfinder." *Jenks, 61 Ohio St.3d at 279, 574 N.E.2d 492*. And therein lies the problem with the court of appeals' judgment. In reversing Jones's conviction, the court of appeals found it illogical **[***16]** to infer that Jones planned to kill Neri at Prather's home because other evidence showed that Jones had planned to meet Neri up the street. It discounted evidence establishing that Jones chose to pocket his firearm as he exited his car because other evidence suggested that Jones might have had other reasons to carry a firearm. And it concluded that the jury could not have inferred prior calculation and design because of the brevity of the shooting. In sum, the court of appeals conducted its own assessment of the evidence and drew the inferences it found most persuasive, rather than crediting the state's evidence and drawing all reasonable inferences in the state's favor. Such an analysis is more like a manifest-weight review than a sufficiency analysis. *See State v. Wilson, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25*. And it was an inappropriate basis to reverse Jones's conviction for insufficient evidence.

C. We remand the case to the trial court for a new trial

[P28]** In addition to finding that there was insufficient evidence to convict Jones of aggravated murder, the court of appeals concluded that Jones was deprived of his right to a fair trial based on several

evidentiary errors and remanded the case for a new trial on the murder and felony-murder **[***17]** charges. The **[*93]** state did not appeal that part of the court of appeals' judgment, and so the decision on those issues stands.

[P29]** The court of appeals' determination that the trial court committed evidentiary errors prejudicial to Jones applies equally to Jones's conviction for aggravated murder. And our decision today reversing the appellate court's sufficiency finding means that Jones can also be retried on the aggravated-murder charge.

[P30]** The court of appeals did not reach an assignment of error arguing that Jones's aggravated-murder conviction was against the manifest weight of the evidence. ***HN10***[↑] But unlike a reversal for insufficient evidence, which requires the discharge of the defendant, the remedy for a reversal on manifest-weight grounds is a new trial. *State v. Fips, 160 Ohio St.3d 348, 2020-Ohio-1449, 157 N.E.3d 680, ¶ 8-10*. Because the court of appeals' resolution of other assignments of error already requires a new trial on the three murder counts, there is no need to remand to the court of appeals for consideration of Jones's manifest-weight challenge.

[P31]** We remand the case to the trial court for a new trial on the aggravated-murder, murder, and felony-murder charges. Jones did not appeal the court of appeals' judgment affirming his conviction for carrying **[***18]** a concealed weapon, so his conviction for that offense is unaffected by our decision today.

III. Conclusion

[P32]** We reverse in part the judgment of the First District Court of Appeals and remand the case to the trial court for a new trial on the aggravated-murder, murder, and felony-murder charges.

Judgment reversed in part and cause remanded to the trial court.

O'CONNOR, C.J., and KENNEDY, J., concur.

FISCHER, J., concurs in judgment only.

DONNELLY, J., dissents, with an opinion joined by BRUNNER, J.

STEWART, J., would dismiss the appeal as having been improvidently accepted.

Dissent by: DONNELLY

Dissent

DONNELLY, J., dissenting.

[P33]** This court should not have accepted jurisdiction over this case. *See Ohio Constitution, Article IV, Section 2(B)(2)(e)*; *State v. Noling, 136 Ohio St.3d 162, 2013-Ohio-1764, 992 N.E.2d 1095, ¶ 63* (O'Donnell, J., dissenting) ("we are not an error-correcting court; rather, our role as the court of last resort is to clarify confusing constitutional questions, resolve uncertainties in the law, and address **[*94]** issues of public or great general interest"). Appellant state of Ohio's propositions of law and the lead opinion's analysis involve nothing more than applying settled law. Correcting a perceived legal error is not something we should do. Moreover, instead of providing guidance to the bench and bar, the lead opinion **[***19]** raises more questions than it answers.

[P34]** It is important to remember that this case involves a death. Kevin Neri was killed, and if it proves to be the case that it was without justifiable cause, his killer should be punished. The state has alleged that appellee, Earl Jones, was the shooter, and if the charge of murder is proved beyond a reasonable doubt on remand, he should be held fully accountable for the crime and sentenced accordingly.

[P35]** First, the lead opinion rightly relies on the well-known, if incredibly deferential, standard that governs a reviewing court's analysis of whether sufficient evidence was presented at trial: a reviewing court must consider whether "'after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.'" *State v. McFarland, 162 Ohio St.3d 36, 2020-Ohio-3343, 164 N.E.3d 316, ¶ 24*, quoting *State v. Jenks, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991)*, paragraph two of the syllabus, *superseded by constitutional amendment on other grounds as stated in State v. Smith, 80 Ohio St.3d 89, 102, 1997- Ohio 355, 684 N.E.2d 668 (1997), fn. 4*. I dissented in *McFarland* because there was a paucity of evidence to

support a finding of the defendant's guilt beyond a reasonable doubt. *Id. at ¶ 54-90*. The same lack of evidence undermines the lead opinion here, despite the remarkably **[***20]** low threshold required.

[P36]** Second, even a giant spotlight shining on the evidence in the state's favor fails to reveal the essential elements of the offense. If intent to kill can be inferred from the facts in this case, what fact can't intent be inferred from? The sad truth is that Jones may indeed have shot Neri, but even so, that does not mean that every action he took supports an inference of "advance reasoning to formulate a purpose to kill." Lead opinion at ¶ 18. As proof of Jones's advance reasoning, the lead opinion points out that Jones had "parked his car immediately in front of the house, on the wrong side of the street in a no-parking zone, leaving the vehicle's engine running and its driver's-side door open," *id.* at ¶ 20. The lead opinion adds that "Jones took several steps toward Neri before opening fire." *Id.* at ¶ 20. Taking several steps toward the house from which he was scheduled to pick up his child is not indicative of an intent to kill—unless you know that he had killed someone. These inferences are just too easy and are hopelessly enmeshed with the allegation that Jones killed Neri. Looking only at the facts, without reference to what happened after, there is insufficient **[***21]** evidence of "advance reasoning" to kill. But now we are left with ample reason for parents in a shared-custody **[*95]** arrangement to be wary of parking on the wrong side of the road or in a no-parking zone—because that act could result in an inference of intent if a crime occurs.

[P37]** Finally, how does the lead opinion square the inference of intent to use a firearm with the right to bear arms? *See Ohio Constitution, Article I, Section 4*; *Second Amendment to the U.S. Constitution*. Does merely carrying a gun—an act that is protected by both the state and federal Constitutions—allow a jury to infer the intention to use a firearm? This inference alone is problematic. According to the Ohio attorney general, in 2020, county sheriffs in Ohio issued 169,232 concealed carry licenses. https://www.ohioattorneygeneral.gov/Files/Reports/ Concealed-Carry-Annual-Reports-(PDF)/2020-CCW-Annual-Report (accessed Sept. 1, 2021) [https://perma.cc/7FEJ-K2S8]. Does this mean that all those Ohioans who just last year received licenses to carry a firearm intend to use their firearm every time they lawfully carry a concealed weapon?

[P38]** We should not have accepted jurisdiction over this case. I did not vote to accept this appeal, *159 Ohio St.3d 1413, 2020-Ohio-3275, 147 N.E.3d 655*, because I did not believe that it presented a significant constitutional **[***22]** question, an uncertainty in the law, or an issue of public or great general interest. In my view, this appeal involved the simple application of settled standards and thus asked this court for error correction, if indeed you perceive the appellate court's decision to be erroneous, which I do not. "Now that I have had the opportunity to review the record with the benefit of full briefing, that conclusion seems all the more clear." *Anderson v. WBNS-TV, Inc, 158 Ohio St.3d 307, 2019-Ohio-5196, 141 N.E.3d 192, ¶ 16* (DeWine, J., concurring in judgment only). We should dismiss this case as having been improvidently accepted. I therefore dissent.

BRUNNER, J., concurs in the foregoing opinion.

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State v. Jones

Supreme Court of Ohio

November 23, 2021, Decided

2020-0368

Reporter

2021 Ohio LEXIS 2375 *; 165 Ohio St. 3d 1458; 2021-Ohio-4033; 176 N.E.3d 767; 2021 WL 5476152

State v. Jones.

Notice: DECISION WITHOUT PUBLISHED OPINION

Prior History: *Hamilton App. No. C-170647, 2020-Ohio-281, 151 N.E.3d 1059*. Reported at __ ***Ohio St.3d ___, 2021-Ohio-3311, ___ N.E.3d ___*** **[*1]** .

State v. Jones, 2021-Ohio-3311, 2021 Ohio LEXIS 1889, 2021 WL 4313514 (Ohio, Sept. 23, 2021)

Core Terms

RECONSIDERATION

Judges: Donnelly, J., dissents.

Opinion

RECONSIDERATION OF PRIOR DECISION

On motion for reconsideration. Motion denied.

Donnelly, J., dissents.

End of Document

State v. Jones

Court of Appeals of Ohio, First Appellate District, Hamilton County

January 31, 2020, Date of Judgment Entry on Appeal

APPEAL NO. C-170647

Reporter

2020-Ohio-281 *; 151 N.E.3d 1059 **; 2020 Ohio App. LEXIS 335 ***; 2020 WL 507637

STATE OF OHIO, Plaintiff-Appellee, vs. EARL JONES, Defendant-Appellant.

Notice: THESE ARE NOT OFFICIAL HEADNOTES OR SYLLABI AND ARE NEITHER APPROVED IN ADVANCE NOR ENDORSED BY THE COURT. PLEASE REVIEW THE CASE IN FULL.

Subsequent History: Discretionary appeal allowed by *State v. Jones, 159 Ohio St. 3d 1413, 2020-Ohio-3275, 2020 Ohio LEXIS 1398, 147 N.E.3d 655 (June 17, 2020)*

Motion granted by ***State v. Jones, 159 Ohio St. 3d 1440, 2020-Ohio-3645, 2020 Ohio LEXIS 1597, 148 N.E.3d 599, 2020 WL 3813238 (July 8, 2020)***

Motion denied by *State v. Jones, 160 Ohio St. 3d 1515, 2020-Ohio-6834, 2020 Ohio LEXIS 2968, 159 N.E.3d 1186, 2020 WL 7759474 (Dec. 30, 2020)*

Reversed by, in part, Remanded by *State v. Jones, 2021-Ohio-3311, 2021 Ohio LEXIS 1889 (Ohio, Sept. 23, 2021)*

Prior History: [*1]** Criminal Appeal From: Hamilton County Court of Common Pleas. TRIAL NO. B-1602671.

Disposition: Affirmed in Part, Reversed in Part, and Cause Remanded.

Core Terms

gun, calculation, posts, trial court, murder, shooting, kill, defense counsel, complete defense, assigned error, state of mind, photographs, argues, weapon, constitutional right, harmless, self-defense, prejudicial, aggravated, fight, violence, arrived, street, shot, reasonable doubt, circumstances, contends, planning, armed, drugs

Case Summary

Overview

HOLDINGS: [1]-Defendant's conviction for aggravated murder under *R.C. 2903.01(A)* was not supported by sufficient evidence of "prior calculation and design" because defendant did not engage in a studied consideration of the method, means, or location of the killing, he did not choose the time or location of the shooting, there was no evidence that defendant knew the victim would be at the location of the shooting, and the act was an almost instantaneous eruption of events; [2]-The trial court abused its discretion in admitting the photographs because the brief implication during cross-examination by defense counsel, that perhaps could be interpreted to imply that defendant was a "stellar guy" with good "gun safety and child-rearing skills," did not put defendant's character into issue such that irrelevant and unnecessarily prejudicial photographs could come into evidence.

Outcome

Defendant's aggravated-murder conviction was reversed, he was discharged from further prosecution on that underlying count, and the cause was remanded for a new trial on the remaining murder counts. The conviction for carrying a concealed weapon was affirmed.

LexisNexis® Headnotes

Criminal Law & Procedure > ... > Standards of Review > Substantial Evidence > Sufficiency of Evidence

Evidence > Burdens of Proof > Proof Beyond Reasonable Doubt

HN1[] **Substantial Evidence, Sufficiency of Evidence**

To determine whether a conviction is supported by sufficient evidence, the relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.

Criminal Law & Procedure > ... > Murder > Definitions > Deliberation & Premeditation

Criminal Law & Procedure > ... > Murder > Aggravated Murder > Elements

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Purpose

HN2[] **Definitions, Deliberation & Premeditation**

Aggravated murder under *R.C. 2903.01(A)* states that no person shall purposely, and with prior calculation and design, cause the death of another. Prior calculation and design is a more stringent element than the deliberate and premeditated malice which was required under prior law. As noted by the Ohio Supreme Court, the phrase "prior calculation and design" was employed to indicate studied care in planning or analyzing the means of the crime as well as a scheme encompassing the death of the victim. All prior calculation and design offenses will necessarily include purposeful homicides; not all purposeful homicides have an element of prior calculation and design.

Criminal Law & Procedure > ... > Murder > Definitions > Deliberation & Premeditation

HN3[] **Definitions, Deliberation & Premeditation**

Evidence of an act committed on the spur of the moment or after momentary consideration is not evidence of a studied consideration of the method and the means to cause a death.

Criminal Law & Procedure > ... > Murder > Definitions > Deliberation & Premeditation

HN4[] **Definitions, Deliberation & Premeditation**

The Ohio Supreme Court has repeatedly held that it is not possible to formulate a bright-line test that emphatically distinguishes between the presence or absence of prior calculation and design. Instead, each case turns on the particular facts and evidence presented at trial. In determining whether prior calculation and design exists, courts are guided by three factors: (1) whether the accused and the victim knew each other, and if so, whether that relationship was strained; (2) whether the accused gave thought or preparation to choosing the murder weapon or murder site; and (3) whether the act was drawn out or an almost instantaneous.

Criminal Law & Procedure > ... > Murder > Aggravated Murder > Elements

HN5[] **Aggravated Murder, Elements**

A strained relationship alone is not enough to support a conviction for aggravated murder. Rather, the existence of a strained relationship must be considered in light of the other Taylor factors.

Criminal Law & Procedure > ... > Murder > Definitions > Deliberation & Premeditation

HN6[] **Definitions, Deliberation & Premeditation**

Even a planned contingency to kill is not evidence of a preconceived plan to kill.

Criminal Law & Procedure > ... > Murder > Definitions > Deliberation & Premeditation

HN7[] **Definitions, Deliberation & Premeditation**

Ohio courts have consistently held that mere possession of a weapon is not, without more, evidence of prior calculation and design.

Criminal Law & Procedure > ... > Murder > Definitions > Deliberation & Premeditation

Evidence > Inferences & Presumptions > Inferences

Criminal Law & Procedure > ... > Murder > Aggravated Murder > Elements

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Purpose

HN8[] **Definitions, Deliberation & Premeditation**

Aggravated murder is a purposeful killing that also requires proof of prior calculation and design: forethought, planning, choice of weapon, choice of means, and the execution of the plan. The element of prior calculation and design requires evidence that supports more than the inference of purpose. Inferring prior calculation and design from an inference of purpose is mere speculation.

Criminal Law & Procedure > ... > Standards of Review > Abuse of Discretion > Evidence

HN9[] **Abuse of Discretion, Evidence**

The admission of evidence is within the sound discretion of the trial court. To find an abuse of discretion, the court must find that the trial court's decision was unreasonable, arbitrary, or unconscionable.

Evidence > Admissibility > Conduct Evidence > Prior Acts, Crimes & Wrongs

HN10[] **Conduct Evidence, Prior Acts, Crimes & Wrongs**

Evid.R. 404(B) precludes evidence of other acts to prove the character of a person in order to show action in conformity therewith. The Ohio Supreme Court has held that the introduction of other-weapons evidence—i.e., irrelevant evidence of weapons unrelated to the charges-falls within the scope of *Evid.R. 404(B)*. Therefore, other-weapons evidence must be excluded when it leads only to inferences about the defendant's dangerous character.

Evidence > Admissibility > Procedural Matters > Curative Admissibility

HN11[] **Procedural Matters, Curative Admissibility**

The doctrine of opening the door is to prevent prejudice and is not to be subverted into a rule for injection of prejudice. The introduction of otherwise inadmissible evidence under the shield of this doctrine is permitted only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Evidence

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Harmless Error

HN12[] **Harmless & Invited Error, Evidence**

Crim.R. 52(A) requires an appellate court to determine whether an error was harmless. *Crim.R. 52(A)* If the appellate court determines that the error did not affect the defendant's substantial rights, then the error is harmless and shall be discarded. The Ohio Supreme Court has set out a three-part test to determine the effect of the errors: (1) there must be prejudice to the defendant as a result of the admission of the improper evidence at trial; (2) an appellate court must declare a belief that the error was not harmless beyond a reasonable doubt; and (3) in determining whether the error is harmless beyond a reasonable doubt, the court must excise the improper evidence from the record and then look to the remaining evidence. The reviewing court's role upon review of a case is not to sit as the supreme trier of fact, but rather to assess the impact of this erroneously admitted testimony on the jury.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Evidence

HN13[] **Harmless & Invited Error, Evidence**

The harmless-error analysis usually turns on the consideration of the strength of the remaining evidence. In general, evidentiary errors by the trial court are harmless if such evidence would not tend to negate overwhelming proof of defendant's guilt.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Evidence

Criminal Law & Procedure > Defenses > Self-Defense

HN14[] **Harmless & Invited Error, Evidence**

The Ohio Supreme Court has consistently recognized self-defense as a justification for admitted conduct. In other words, a defendant claiming self-defense admits the facts claimed by the prosecution and then relies on independent facts or circumstances which the defendant claims exempt him from liability. Self-defense seeks to relieve the defendant from culpability rather than to negate an element of the offense charged. Therefore, when a defendant asserts the affirmative defense of self-defense, an appellate court cannot determine whether the errors are harmless simply by looking at the strength of the remaining evidence. In such a case, the impact of the offending evidence on the verdict becomes a bigger focus. Blatant prejudice may override even a strong case and require a new trial.

Criminal Law & Procedure > Appeals > Prosecutorial Misconduct

Criminal Law & Procedure > Appeals > Reversible Error

HN15[] **Appeals, Prosecutorial Misconduct**

The Ohio Supreme Court has noted that the actions of a prosecutor may combine with an evidentiary error to cause greater impact.

Criminal Law & Procedure > Appeals > Reversible Error > Cumulative Errors

HN16[] **Reversible Error, Cumulative Errors**

Although violations of the Ohio Rules of Evidence during trial, singularly, may not rise to the level of prejudicial error, a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

HN17[] **Fundamental Rights, Criminal Process**

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense. A criminal defendant's constitutional right to present a complete defense includes the right to offer the testimony of witnesses and to present the defendant's version of the facts. However, the accused does not have an unfettered right to offer testimony that is inadmissible under standard rules of evidence. A defendant's right to present a defense is violated only when the court prevents him from introducing evidence essential to his defense.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process

Criminal Law & Procedure > Trials > Defendant's Rights

HN18[] **Fundamental Rights, Criminal Process**

In determining whether a defendant's constitutional right to present a complete defense was violated, an appellate court must first determine whether there was a valid reason to limit the excluded evidence. The exclusion of defense evidence violates a defendant's constitutional right to present a defense only where it is arbitrary or disproportionate, that is, where important defense evidence is excluded without serving any legitimate interests or in a manner that is disproportionate to the ends that the rationale for exclusion is asserted to promote.

Evidence > Relevance > Relevant Evidence

HN19[] **Relevance, Relevant Evidence**

Evidence is relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. *Evid.R. 401*. In determining relevance, a court looks to the elements of the offense charged and whether the evidence tends to prove or disprove any material element.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

HN20[] **Fundamental Rights, Criminal Process**

Errors regarding the right to present a complete defense will only amount to a constitutional violation if they deprived the defendant of a fair trial. In order to determine if the trial was fair, an appellate court must examine whether the defendant had a meaningful opportunity to present a complete defense. In determining whether the opportunity was meaningful, the United States Supreme Court has examined whether a defendant's defense was far less persuasive than it might have been had the excluded evidence been admitted. Specifically, the Supreme Court has examined whether the excluded evidence was critical, vital, or central to the defense.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process

HN21[] **Fundamental Rights, Criminal Process**

In determining whether a defendant's constitutional right to present a complete defense was violated, an appellate court must examine the excluded errors in the context of the entire case. When there are multiple errors, the appellate court need not examine each individual error in isolation. Erroneous evidentiary rulings can, in combination, rise to the level of a due process violation.

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Evidence

HN22[] **Harmless & Invited Error, Evidence**

To determine the impact of the erroneous exclusion of evidence, courts typically engage in some sort of harmless-error analysis.

Constitutional Law > Bill of Rights > Fundamental Rights > Criminal Process

Criminal Law & Procedure > ... > Standards of Review > Harmless & Invited Error > Evidence

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Fair Trial

HN23[] **Fundamental Rights, Criminal Process**

The fact that a defendant was able to present some evidence of his defense is not dispositive of whether the error was harmless. A "meaningful" opportunity to present a complete defense must be full and fair, not arbitrarily and significantly curtailed.

Criminal Law & Procedure > Defenses > Self-Defense

HN24[] **Defenses, Self-Defense**

To prove self-defense, a defendant has to establish that he had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of

such force. Because Ohio has adopted a subjective standard for determining whether a defendant acted in self-defense, the defendant's state of mind is crucial to this defense.

Criminal Law & Procedure > Trials > Witnesses

Evidence > ... > Hearsay > Exceptions > State of Mind

HN25[] **Trials, Witnesses**

Testimony by corroborating witnesses concerning specific instances of violent conduct by the victim is admissible to prove the accused's state of mind at the time of an offense.

Criminal Law & Procedure > Trials > Defendant's Rights > Right to Testify

HN26[] **Defendant's Rights, Right to Testify**

Clearly, the most important witness for the defense in many criminal cases is the defendant himself.

Headnotes/Summary

Headnotes

AGGRAVATED MURDER — EVIDENCE — SUFFICIENCY — SELF-DEFENSE — CONSTITUTIONAL LAW/CRIMINAL — CUMULATIVE ERROR

Syllabus

Defendant's conviction for aggravated murder was not supported by sufficient evidence of "prior calculation and design" where defendant did not engage in a studied consideration of the method, means, or location of the killing: defendant did not choose the time or location of the shooting, there is no evidence that defendant knew the victim would be at the location of the shooting, and the act was an almost instantaneous eruption of events. [*But see* DISSENT: The state presented sufficient evidence of

"prior calculation and design" where, construing the evidence in the light most favorable to the prosecution, the evidence supported the conclusion that defendant engaged in a pattern of activity that involved ascertaining the whereabouts of the victim, strategically parking his vehicle, exiting from it with gun in hand, and firing multiple times at the victim.]

The defense did not open the door for, and the trial court erred in admitting into evidence, **[***2]** other-weapons photographs where defense counsel made only a brief implication during cross-examination and no unfair prejudice to the state resulted from defense counsel's question.

Where defendant pursued a theory of self-defense in a murder trial, the trial court's exclusion of evidence as to defendant's state of mind at the time of the offense violated defendant's right to present a complete defense: (1) the trial court erred in excluding as hearsay defendant's testimony that his father and aunt told him about an incident where the victim made threatening statements against defendant while possessing a gun; and (2) the trial court erred in arbitrarily excluding social media posts by the victim pertaining to violence and guns where it allowed the state to capitalize on the improper ruling in its closing argument. [*But see* DISSENT: While the trial court erred in admitting the photo of the guns and ammunition, precluding defendant's testimony regarding threats from the victim, and inconsistently handling admission of the social media posts, the errors were ultimately harmless when viewed within the context of the entire trial and the conclusion that sufficient evidence of "prior calculation **[***3]** and design" existed.]

The cumulative effect of the errors in the trial court's evidentiary rulings deprived defendant of a fair trial where the evidence unfairly hampered defendant's credibility and made defendant's claim of self-defense far less persuasive. [*But see* DISSENT: Where the evidence supported the conviction for aggravated murder other evidentiary errors committed at trial were harmless.]

Counsel: Joseph T. Deters, Hamilton County Prosecuting Attorney, and Scott M. Heenan, Assistant Prosecuting Attorney, for Plaintiff-Appellee.

Timothy Young, Ohio State Public Defender, and Peter Galyardt, Assistant State Public Defender, for Defendant-Appellant.

Judges: CROUSE, Judge. ZAYAS, P.J., concurs. BERGERON, J., concurs in part and dissents in part.

Opinion by: CROUSE

Opinion

[1064] CROUSE, Judge**.

[*P1] Defendant-appellant Earl Jones appeals his convictions for aggravated murder and carrying a concealed weapon. In his appeal, Jones raises nine assignments of error for our review. For the reasons set forth below, we affirm in part and reverse in part the judgment of the trial court.

Facts and Procedure

[*P2] In 2012, defendant-appellant Earl Jones fathered a child with Cyerra Prather. Jones and Prather dated for the next three years and eventually **[***4]** ended their relationship in October 2015. Approximately **[**1065]** two months later, in December 2015, Prather began dating Kevin Neri. From January 2016 to May 2016, Neri lived with Prather and her family.

[*P3] There was instant animosity between Jones and Neri. Jones regularly referred to Neri through racial epithets and directed vulgar insults at both Neri and Prather. Because of the relationship between Jones and Neri, Prather's family took various steps to reduce the chances for confrontation. For example, Prather's mother acted as an intermediary for the pick-up and drop-off of Jones and Prather's son. Prather's mother would drop their son off at Jones's apartment and she would meet Jones outside when he returned their son to Prather's house. In addition, Prather's family attempted to make transfers of the child quick. Prather's family wanted to reduce the time Jones had to wait at Prather's house and reduce the chances of Jones and Neri seeing each other.

[*P4] Jones and Neri also had a history of arranging fist fights that never occurred. Jones would tell Neri to meet him at a specific location, Neri would go to that location, and Jones would not be there. A similar set of circumstances occurred **[***5]** on May 16, 2016. Throughout the morning and early afternoon of May 16, Jones and Neri exchanged several taunting and derogatory text messages. During the exchange,

Neri asked Jones if Jones wanted to fight. Jones replied in the affirmative, stating that he would be in the area the following day to pick up his and Prather's son.

[*P5] Around 4:00 p.m., Jones asked Prather if he could get their son that night instead of the following day. Prather agreed and Jones asked that Prather bring their son to his apartment. Prather stated that her sister would drop the child off at Jones's apartment. However, Prather's sister refused when she found out that Jones had posted half-naked pictures of Prather on social media earlier in the day. Prather instead offered Jones to pick their son up from her house at 8:00 p.m. Jones agreed and immediately texted Neri to reschedule the previously-arranged fight to occur at the same time Jones would be at Prather's house. Neri agreed to meet Jones at the end of the street.

[*P6] At 7:29 p.m., Jones messaged Prather to ask when he should leave. Prather responded, "I thought you were gonna be here by 8." Jones replied, "Making sure you'll still be home by 8." At 7:55 **[***6]** p.m., Jones again messaged Prather stating, "Im stopping by my friend ruths house first he lives around the corner from you." Jones then called Prather at 8:09 p.m. to confirm that he had left his friend's house and was on his way to Prather's house.

[*P7] Jones arrived at Prather's house around 8:10 p.m. Jones parked his car on the right side of the street in front of Prather's mailbox, an area designated as a no-parking zone. According to the state's witnesses, Neri was outside standing in the yard when Jones arrived. Jones pocketed a loaded firearm and got out of the car, leaving the engine running and the driver's side door open. The two men began walking towards each other. Jones then pulled the firearm out of his pocket and shot Neri three times. Jones immediately returned to his car, called 9-1-1 to report the shooting, and turned himself in to the local sheriff's station.

[*P8] Jones was subsequently indicted on one count of aggravated murder in violation of *R.C. 2903.01(A)*, one count of murder in violation of *R.C. 2903.02(A)*, one count of felony murder in violation of *R.C. 2903.02(B)*, and one count of carrying a concealed weapon in violation of *R.C. 2923.12(A)(2)*. Despite his claims of self- **[**1066]** defense, a jury found Jones guilty of all counts and the **[***7]** trial court sentenced him to life imprisonment without the possibility of parole. Jones timely filed this appeal and raised the following assignments of error:

1. Earl Jones's Conviction for Aggravated Murder Under *R.C. 2903.01(A)* is Not Supported by Sufficient Evidence, and the Trial Court Erred When it Denied his *Crim.R. 29* Motion.

2. Earl Jones's Conviction for Aggravated Murder is Not Supported by the Manifest Weight of the Evidence.

3. The Trial Court Violated Earl Jones's Constitutional Right to Present a Complete Defense.

4. The Trial Court Erred When it Admitted Photographs That Were Both Misleading and Substantially More Prejudicial than Probative.

5. Earl Jones's Defense Counsel Was Constitutionally Ineffective.

6. The Trial Court Erred When it Denied Earl Jones's Mistrial Request.

7. The Trial Court Erred When it Admitted Prejudicial Photographs.

8. The Trial Court Erred When it Sentenced Earl Jones to Life Without the Possibility of Parole Despite the Fact that the Record Clearly and Convincingly Did Not Support Such a Punitive Sentence, and *R.C. 2953.08(D)(3)* is Unconstitutional if it Prohibits Appellate Review of Earl's Sentence.

9. The Cumulative Effect of the First, Second, Third, Fourth, Fifth, Sixth, and Seventh Assignments **[***8]** of Error Denied Earl Jones a Fair Trial.

We find the first, third, fourth, seventh, and ninth assignments of error dispositive of this appeal, and therefore, the other five assignments of error are rendered moot.

Law and Analysis

I. Sufficiency of the Evidence

[*P9] In his first assignment of error, Jones argues that his conviction for aggravated murder was based upon insufficient evidence. Jones contends that he did not act with the requisite "prior calculation and design."

[*P10] *HN1*[] To determine whether a conviction is supported by sufficient evidence, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks, 61 Ohio St.3d 259, 274, 574 N.E.2d 492 (1991)*.

[*P11] *HN2*[] Jones was convicted of aggravated murder under *R.C. 2903.01(A)*, which states: "No person shall purposely, and with prior calculation and design, cause the death of another." "'[P]rior calculation and design' is a more stringent element than the 'deliberate and premeditated malice' which was required under prior law." *State v. Cotton, 56 Ohio St.2d 8, 381 N.E.2d 190 (1978)*, paragraph one of the syllabus. As noted by the Ohio Supreme Court in *State v. Taylor, 78 Ohio St.3d 15, 19, 1997- Ohio 243, 676 N.E.2d 82 (1997)*, "the phrase 'prior calculation and design' [was employed] **[***9]** to indicate studied care in planning or analyzing the means of the crime as well as a scheme encompassing the death of the victim." "All prior calculation and design offenses will necessarily include purposeful homicides; not all purposeful homicides have an element of prior calculation and design." *State v. Walker, 150 Ohio St.3d 409, 2016-Ohio-8295, 82 N.E.3d 1124, ¶ 18*.

[*P12] In this case, the state does not argue that Jones, with prior calculation and design, decided to shoot Neri after **[**1067]** Jones pulled up in his car and saw Neri in the front yard. And the evidence would be insufficient to prove prior calculation and design under those circumstances. *See id.* (*HN3*[] "Evidence of an act committed on the spur of the moment or after momentary consideration is not evidence of * * * a studied consideration of the method and the means to cause a death."). Rather, the state contends that Jones went to Prather's home with prior calculation and design to kill Neri, having formed the intent to kill earlier that day.

[*P13] *HN4*[] The Ohio Supreme Court has repeatedly held that "it is not possible to formulate a bright-line test that emphatically distinguishes between the presence or absence of 'prior calculation and design.' Instead, each case turns on the particular facts and evidence presented **[***10]** at trial." *Taylor at 20*. In determining whether prior calculation and design exists, courts are guided by three factors: "(1) Did the accused and victim know each other, and if so, was that relationship strained? (2) Did the accused give thought or preparation to choosing the murder weapon or murder site? and (3) Was the act drawn out or

'an almost instantaneous eruption of events'?" *Id. at 19*, quoting *State v. Jenkins, 48 Ohio App.2d 99, 102, 355 N.E.2d 825 (8th Dist. 1976)*.

[*P14] In light of the *Taylor* factors, we find that the evidence does not support the jury's determination of prior calculation and design. It is undisputed that Jones and Neri knew each other and that the relationship was severely strained. However, ***HN5***[⬆] a strained relationship alone is not enough to support a conviction for aggravated murder. Rather, the existence of a strained relationship must be considered in light of the other *Taylor* factors.

[*P15] In support of its argument that Jones went to Prather's house with the prior calculation and design to kill Neri, the state points to evidence that Jones engaged in what Prather described at trial as "weird" behavior of repeatedly verifying when he was to pick up his son. The state contends that parking his car on the "wrong" side of the street, leaving the car engine running, **[***11]** and pocketing a loaded firearm that he had in the car is evidence of prior calculation and design. In addition, the state emphasizes the fact that Jones shot Neri three times while advancing on him, including after Neri tried to flee. The state lastly points to the testimony of one of the witnesses who claimed that Jones smiled at Prather after he shot Neri.

[*P16] While we believe the state presented sufficient evidence that Jones purposefully killed Neri, the state's theory of prior calculation and design is unsupported by the evidence. There is simply no evidence that Jones planned Neri's murder before he arrived at Prather's residence, i.e., that he engaged in a studied consideration of the method, means, or location of the killing.

[*P17] The plan that existed the night of May 16 was a fistfight up the street, not a murder at Prather's house. The uncontroverted evidence showed it was Neri who initially challenged Jones to a fistfight. The extraction report of Jones's cell phone recounts the following conversation on the morning and early afternoon of the shooting:

> Neri: So are you tryna hit or no?
>
> Jones: I'll be there tomorrow
>
> * * *
>
> Neri: Don't flake lil boy
>
> Jones: I'll be there about 4 30

* * *

[*12]** Neri: Come a lil early. I'm sure you don't want MY son to watch you get your ass beat

[1068]** Jones: I got work lil boy man meet me somewhere low key just you its going to be just me were going to settle this boi I dont want my son there or your lil friends just you and me

* * *

Neri: Meet me at the end of cyerras street tomorrow

Jones: Ill be there around 4 30 lil boy

[*P18] Approximately three and a half hours later, Jones messaged Prather asking to pick their son up that night instead of the following day. The following conversation took place:

Jones: Im off tomorrow can I pick the baby up and have him stay then ill take him to baseball tomorrow and drop him off after baseball

* * *

Prather: You can come around 8

Jones: What do you have going on today?

Jones: Like could you drop him off

Prather: At 8?

Jones: Or whenever your done doing what your doing

Prather: My sister will drop him off at 8

[*P19] The next contact between Jones and Prather occurred approximately an hour and a half later. Prather informed Jones that her sister could not drop their son off at Jones's residence, but instead Jones could pick him up at her house at 8:00 p.m. Jones accepted the invitation and then messaged Neri to reschedule the previously-arranged **[***13]** fight. Specifically, Jones asked Neri if he was going to be at Prather's residence that night at 8:00 p.m. and Neri responded, "You meet Neil [sic] the street." Jones replied, "Just meet me at the top of the street."

[*P20] The only other contact between Jones and Prather is the "weird" behavior to which the state alludes. At 7:29 p.m., approximately two hours after their previous conversation, Jones asked Prather,

"When should I leave?" Prather responded, "I thought you were gonna be here by 8." Jones replied, "Making sure you'll still be home by 8." At 7:55 p.m., Jones again messaged Prather stating, "Im stopping by my friend ruths house first he lives around the corner from you." Jones then called Prather at 8:09 p.m. to confirm that he had left his friend's house and was on his way to Prather's house.

[*P21] Based on the uncontroverted text messages and call log, it is clear that Jones did not choose the time or location of the shooting. In fact, the record is completely devoid of any evidence that Jones knew Neri would be at Prather's residence when he arrived. Instead, the text messages demonstrate Jones's deliberate avoidance of Neri. Jones initially asked for his son to be dropped off at **[***14]** his apartment. When Prather's sister refused, Prather offered Jones to pick their son up at Prather's house at 8:00 p.m.—i.e., Prather's chosen time. Jones agreed and immediately rescheduled the fight with Neri to occur earlier than originally planned—i.e., at the same time he was supposed to get his son. Per Neri's earlier suggestion, Jones told Neri to meet him at the end of Prather's street. It defies logic to conclude that Jones's plan was to shoot Neri in the front yard of his ex-girlfriend's house with witnesses around and his child present. This is especially true given Jones's earlier statements that he wanted to meet Neri "somewhere low key" and that he did not want his son or Neri's friends there.

[*P22] The dissent argues that arranging for a fight up the street rendered it likely that Neri would be nearby, suggesting that the jury could infer that Jones's plan was to shoot Neri if he ran into him that night. ***HN6***[⬆] However, even a planned contingency to kill is not evidence **[**1069]** of a preconceived plan to kill. *See* *State v. Noggle, 140 Ohio App.3d 733, 749, 2000- Ohio 1927, 749 N.E.2d 309 (3d Dist.2000)* (holding that "merely being prepared to kill if the situation calls for it does not amount to prior calculation and design"), citing *State v. Reed, 65 Ohio St.2d 117, 418 N.E.2d 1359 (1981)* ("The statements appellant made to a classmate **[***15]** that he would kill any police officer who got in his way of a crime he might commit do not show that appellant designed a scheme in order to implement a calculated decision to kill.").

[*P23] The parties do not dispute that Jones had a loaded firearm in the car. ***HN7***[⬆] However, Ohio courts have consistently held that "mere possession of a weapon is not, without more, evidence of prior calculation and design." *State v. Hill, 8th Dist. Cuyahoga No. 98366, 2013-Ohio-578*; *see* *State v.*

Johnson, 10th Dist. Franklin No. 97APA03-315, 1998 Ohio App. LEXIS 2069, 1998 WL 226441 (May 5, 1998). This is especially true where the evidence demonstrated that Jones frequently carried a weapon. According to Prather, Jones owned guns and always talked about the right to carry a gun. In addition, Jones introduced a police report into evidence wherein Jones reported a handgun stolen from the center console of his car. The fact that Jones, upon seeing Neri standing in the front yard, pocketed the firearm and exited from the vehicle, even when viewed in the light most favorable to the prosecution, does not demonstrate more than instantaneous deliberation.

[*P24] With respect to the third factor, the state points to evidence that Jones walked towards Neri, pulled the weapon out of his pocket, shot Neri three times, got back in his car, and **[***16]** drove away. Even viewed in a light most favorable to the prosecution, this demonstrates only Jones's anger at the moment. The uncontroverted evidence indicates that the time between Jones arriving at Prather's house and driving to the police station was a span of one to two minutes. The extraction report of Jones's cell phone details that Jones called Prather at 8:09:11 p.m. to confirm that he was on his way to her house. The call lasted for one minute and 15 seconds, placing Jones's arrival at Prather's house a little after 8:10 p.m. Jones first attempted to call 9-1-1 at 8:12:38 p.m. Although a jury could reasonably infer that Jones purposely decided to shoot Neri in that span of time, the length of time is insufficient to infer prior calculation and design.

[*P25] ***HN8***[⬆] "Aggravated murder is a purposeful killing that *also* requires proof of prior calculation and design: forethought, planning, choice of weapon, choice of means, and the execution of the plan." *Walker, 150 Ohio St.3d 409, 2016-Ohio-8295, 82 N.E.3d 1124, at ¶ 28*. "The element of prior calculation and design requires evidence that supports more than the inference of purpose. Inferring prior calculation and design from an inference of purpose is mere speculation." *Id. at ¶ 26*. Finding prior calculation **[***17]** and design on the facts of this case will blur the line between planned killings and purposeful killings to the point where there will no longer be a difference between the two. This is not the type of case envisioned by the General Assembly when it adopted the more stringent requirement of "prior calculation and design."

[*P26] Even when all the evidence is viewed in a light most favorable to the prosecution, the jury could not have reasonably found the required element of prior calculation and design. In this case, there was sufficient evidence that Jones had the purpose to kill, but not a plan to kill. Therefore, the evidence was insufficient to support a conviction for aggravated murder.

[*P27] **[**1070]** Jones's first assignment of error is sustained.

II. Evidentiary Errors

[*P28] In several assignments of error, Jones contends that the trial court committed four major evidentiary errors that deprived him of his constitutional right to a fair trial. In his third assignment of error, Jones argues that the trial court violated his constitutional right to present a complete defense when it erroneously excluded favorable "state-of-mind" evidence, including (1) social media postings by Neri, (2) statements from Jones's **[***18]** relatives describing threats made by Neri against Jones, and (3) the race of Jones's extended family members. In his fourth and seventh assignments of error, Jones argues that the trial court erred when it admitted irrelevant and prejudicial photographs of guns and ammunition found in Jones's bedroom. In his ninth assignment of error, Jones argues that the cumulative effect of these errors denied him a fair trial. Thus, Jones argues that that the exclusion of certain evidence and the inclusion of other evidence, either alone or in combination, violated his constitutional right to a fair trial.

1. Admission of Photographs

[*P29] We begin with Jones's fourth and seventh assignments of error, in which Jones argues that the trial court erred when it admitted prejudicial photographs of guns and ammunition found in Jones's bedroom during a search. Jones contends the photographs were irrelevant, or if relevant, more prejudicial than probative and improper under *Evid.R. 404(B)*. Because these assignments of error raise similar issues, we will address them together.

[*P30] ***HN9***[⬆] The admission of evidence is within the sound discretion of the trial court. *State v. Sage, 31 Ohio St.3d 173, 31 Ohio B. 375, 510 N.E.2d 343 (1987)*, paragraph two of the syllabus. To find

an abuse of discretion, we must **[***19]** find that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore, 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140 (1983)*.

[*P31] Prior to trial, Jones filed a motion in limine to exclude photographs of guns and ammunition interspersed among children's toys and other child-specific items located throughout Jones's bedroom on the day of the shooting. The trial court correctly granted the motion because the photographs were irrelevant to the charges against Jones, and prejudicially portrayed Jones as a violent person and a bad father.

[*P32] ***HN10***[⬆] *Evid.R. 404(B)* precludes evidence of other acts "to prove the character of a person in order to show action in conformity therewith." The Ohio Supreme Court has held that the introduction of other-weapons evidence—i.e., irrelevant evidence of weapons unrelated to the charges—falls within the scope of *Evid.R. 404(B)*. *State v. Thomas, 152 Ohio St.3d 15, 2017-Ohio-8011, 92 N.E.3d 821*. Therefore, other-weapons evidence must be excluded when it leads only to inferences about the defendant's dangerous character. *Id. at ¶ 41*; *see, e.g., State v. Carusone, 1st Dist. Hamilton No. C-010681, 2003-Ohio-1018* (holding that the trial court erred in admitting "other acts" evidence that defendant had "always carried a gun" and that he had previously fired a gun at other people on other occasions); *State v. Crosby, 186 Ohio App.3d 453, 2010-Ohio-1584, 928 N.E.2d 795, ¶ 16 (8th Dist.)* (evidence of another gun the defendant was known to have carried "does **[***20]** not link defendant to the gun used to shoot the victim, and was therefore improperly admitted").

[*P33] Jones argues that the trial court erred in finding that defense counsel "opened the door" to the introduction of the photographs during his cross-examination **[**1071]** of Detective Stockmeier when the following exchange took place:

> Defense counsel: Is this area where I am pointing, that is the safe that is the subject in the photo, right?
>
> Stockmeier: Yes, sir.
>
> Defense counsel: Where was it located in the closet?
>
> Stockmeier: That's up on a shelf that is mounted to the wall.
>
> Defense counsel: All right. We are about the same height. So approximately our eye height?

Stockmeier: Yeah.

Defense counsel: So if you had a small child, that would be a good place to put it?

Stockmeier: Sure.

[*P34] After this exchange, the state argued that admission of the photographs was necessary to rebut defense counsel's "touting [of Jones's] gun safety and child-rearing skills." Based on defense counsel's questions, the court determined that counsel "implied" that "[Jones] was this * * * stellar guy, that was protecting his kid." Specifically, the court ruled that defense counsel "opened the door to character."

[*P35] However, whether Jones **[***21]** was "parent of the year" is not probative of the issue of whether he purposely murdered Neri or justifiably acted in self-defense. "Opening the door is one thing. But what comes through the door is another." *United States v. Winston, 447 F.2d 1236, 1240, 145 U.S. App. D.C. 67 (D.C.Cir.1971)*.

> ***HN11***[] [T]he doctrine [of opening the door] is to prevent prejudice and is not to be subverted into a rule for injection of prejudice. * * * The introduction of otherwise inadmissible evidence under the shield of this doctrine is permitted only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence.

(Internal quotations omitted.) *State v. Bronner, 9th Dist. Summit No. 20753, 2002-Ohio-4248, ¶ 73*. *Accord United States v. Beno, 324 F.2d 582, 588-589 (2d Cir.1963)* ("[I]t makes little sense to insist that once incompetent evidence is erroneously admitted, the error must of necessity be compounded by 'opening the door' so wide that rebutting collateral, inflammatory and highly prejudicial evidence may enter the minds of the jurors.").

[*P36] We disagree that such a brief implication during cross-examination, that perhaps could be interpreted to imply that Jones was a "stellar guy" with good "gun safety and child-rearing skills," put Jones's character into issue such that irrelevant and unnecessarily prejudicial photographs could come into evidence. No unfair **[***22]** prejudice to the state resulted from defense counsel's brief question during cross-examination. Thus, the trial court abused its discretion in admitting the photographs.

[*P37] ***HN12***[⬆] *Crim.R. 52(A)* requires us to next determine whether this error was harmless. *See Crim.R. 52(A)* ("Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."). "If a court determines that the error did not affect the defendant's substantial rights, then the error is harmless and shall be discarded." *State v. Morris, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, ¶ 23*.

[*P38] In *Morris*, the Ohio Supreme Court set out a three-part test to determine the effect of the errors: (1) "[T]here must be prejudice to the defendant as a result of the admission of the improper evidence at trial"; (2) "an appellate court must declare a belief that the error was not harmless beyond a reasonable doubt"; and (3) "in determining whether * * * the error is harmless beyond **[**1072]** a reasonable doubt, the court must excise the improper evidence from the record and then look to the remaining evidence." *Id. at ¶ 27-29*. The *Morris* court cautioned that "our role upon review of [the] case is not to sit as the supreme trier of fact, but rather to assess the impact of this erroneously admitted testimony **[***23]** on the jury." *Id. at ¶ 29*.

[*P39] ***HN13***[⬆] As this court observed in *State v. Benson, 1st Dist. Hamilton No. C-180128, 2019-Ohio-3255, ¶ 24*, "[t]he [harmless-error] analysis usually turns on the consideration of the strength of the remaining evidence." In general, evidentiary errors by the trial court are harmless if "such evidence would not tend to negate overwhelming proof of defendant's guilt." *State v. Gilmore, 28 Ohio St.3d 190, 193, 28 Ohio B. 278, 503 N.E.2d 147 (1986)*.

[*P40] However, Jones presented a theory of self-defense at trial. ***HN14***[⬆] The Ohio Supreme Court has consistently recognized self-defense as a "justification for admitted conduct." *State v. Poole, 33 Ohio St.2d 18, 19, 294 N.E.2d 888 (1973)*; *State v. Martin, 21 Ohio St.3d 91, 94, 21 Ohio B. 386, 488 N.E.2d 166 (1987)*. In other words, a defendant claiming self-defense "admits the facts claimed by the prosecution and then relies on independent facts or circumstances which the defendant claims exempt him from liability." *Martin at 94*. "Self-defense seeks to relieve the defendant from culpability rather than to negate an element of the offense charged." *Id.*

[*P41] Therefore, when a defendant asserts the affirmative defense of self-defense, an appellate court cannot determine whether the errors are harmless simply by looking at the strength of the remaining evidence. In such a case, the impact of the offending evidence on the verdict becomes a bigger focus. As stated in *Morris*, "blatant prejudice may override even a strong case and require **[***24]** a new trial." *Morris, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, at ¶ 32*.

[*P42] We have already found that there was insufficient evidence to support a conviction for aggravated murder. Thus, it is impossible to say that the other evidence against Jones was overwhelming. The evidence certainly was sufficient for the jury to find that Jones purposely killed Neri. And Jones did not dispute the existence of those elements. Instead, Jones sought to justify his actions on the ground that he acted in self-defense.

[*P43] Under these circumstances, Jones's credibility was crucial to his defense. Jones testified about his version of the facts and his belief that he needed to act in self-defense. Indeed, it would have been very difficult to prove Jones's state of mind at the time of the shooting without Jones's testimony. The state does not deny that it sought to introduce the photographs in order to negate Jones's claim that he feared Neri was armed and dangerous. In its appellate brief, the state contends that "these photos were introduced to show that Jones' alleged concerns about Neri were a sham."

[*P44] In addition to the prejudicial nature of the evidence, the state capitalized on the trial court's improper rulings in its closing argument. ***HN15***[↑] As both the Ohio Supreme **[***25]** Court and this court have noted, "the actions of a prosecutor may combine with an evidentiary error to cause greater impact." *Morris, 141 Ohio St.3d 399, 2014-Ohio-5052, 24 N.E.3d 1153, at ¶ 31*; *State v. Hall, 1st Dist. Hamilton No. C-170699, 2019-Ohio-2985, ¶ 27*. We are specifically concerned with the following remarks:

> [Jones] had no honest fear of [Neri]. * * * He is so scared of little Wayne **[**1073]** being around [Neri] and his guns, yet when you get the exhibits back in the jury room take a look at Exhibit Number 22. Take a look at Exhibit Number 22. Take a look at the shotgun that he just has laying out on the wall. If he is a good dad—remind yourself, if he is a good dad, he doesn't want to have his kid

> around guns, be in danger, but the shotgun is laying out against the wall, the shells and the .38 rounds are on the—in the bedroom on the mattress with the toys and the child's sheets on it. But he doesn't want Wayne to be around [Neri], because he has got guns. It's a little contradictory.

Based on these statements, there is no question that the state highlighted the improper evidence for the jury. There is also no question that the improper evidence prejudiced Jones. It is clear that the other-weapons photographs unfairly hampered Jones's credibility. The photographs undermined Jones's character by prejudicially portraying **[***26]** him as a violent person and a bad father, and ultimately, undermined Jones's theory of defense.

[*P45] However, we need not answer whether this error alone was not harmless beyond a reasonable doubt because we examine this error in conjunction with the additional evidentiary errors discussed in the next section. ***HN16***[] "Although violations of the Rules of Evidence during trial, singularly, may not rise to the level of prejudicial error, a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial." *State v. DeMarco, 31 Ohio St.3d 191, 31 Ohio B. 390, 509 N.E.2d 1256 (1987)*, paragraph two of the syllabus.

2. Exclusion of "State-of-Mind" Evidence

[*P46] In Jones's third assignment of error, he argues that the trial court violated his constitutional right to present a complete defense when it excluded certain "state-of-mind" evidence.

[*P47] ***HN17***[] "Whether rooted directly in the *Due Process Clause of the Fourteenth Amendment* * * * or in the Compulsory Process or *Confrontation clauses of the Sixth Amendment*, * * * the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986)*, citing *Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973)*, *Washington v. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)*, *Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)*, and *California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)*. A criminal defendant's constitutional right to present a complete defense includes the right to offer the testimony of witnesses and to present the defendant's version of **[***27]** the facts. *Washington at 19*. However, "[t]he

accused does not have an unfettered right to offer testimony that is * * * inadmissible under standard rules of evidence." *Taylor v. Illinois, 484 U.S. 400, 410, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988)*. A defendant's right to present a defense is violated only when the court prevents him from introducing evidence essential to his defense. *Crane at 690*.

[*P48] ***HN18***[⬆] In determining whether a defendant's constitutional right to present a complete defense was violated, we must first determine whether there was a valid reason to limit the excluded evidence. *See Montana v. Egelhoff, 518 U.S. 37, 53, 116 S. Ct. 2013, 135 L. Ed. 2d 361 (1996)* (explaining that the Court's holding in *Crane*, which concluded that the exclusion of certain evidence violated the defendant's constitutional rights, "rested not on a theory that all 'competent, reliable evidence' must be admitted, but rather on the **[**1074]** ground that the Supreme Court of Kentucky's sole rationale for the exclusion . . . was wrong.").

> [T]he exclusion of defense evidence violates a defendant's constitutional right to present a defense only where it is "arbitrary" or "disproportionate," that is, where "important defense evidence" is excluded without serving "any legitimate interests" or in a manner that is "disproportionate to the ends that [the rationale for exclusion is] asserted to promote." **[***28]

United States v. Reichert, 747 F.3d 445, 453 (6th Cir.2014), quoting *Holmes v. South Carolina, 547 U.S. 319, 324-326, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006)*.

a. Threats against Jones.

[*P49] Jones argues that, in order to show his state of mind at the time of the offense, he should have been permitted to testify that his father and aunt told him about an incident where Neri made threatening statements against Jones while possessing a gun. Jones contends that the trial court erred in holding that such statements were hearsay, and therefore, Jones could not testify about them.

[*P50] During direct examination, defense counsel asked Jones, "[D]id you ever have any other information that gave you reason to believe that [Neri] might be armed?" The state objected on hearsay grounds. At sidebar, defense counsel proffered that Jones's father told Jones of an incident where Neri

threatened Jones while armed with a weapon. Defense counsel further proffered that Jones's aunt "will testify that [Neri] came looking for [Jones] at the apartment while armed with a weapon." When the court asked if Jones's father was testifying, defense counsel replied, "Yes, ma'am." In response, the court ruled in the following manner: "[Y]ou can ask, were you told something? Who told you? My father. My aunt. And leave it at that. And they can testify to what it was." Defense **[***29]** counsel never called Jones's father or aunt to testify.

[*P51] We agree with Jones that his testimony about the threat was not hearsay because it was not offered to prove the truth of the matter asserted. *Evid.R. 801(C)*. Rather, the testimony was offered to provide a basis for Jones's state of mind and his alleged fear that Neri was armed and dangerous. In *State v. Wetherall, 1st Dist. Hamilton No. C-000113, 2002-Ohio-1613, 2002 WL 440700, *7 (Mar. 22, 2002)*, this court held that testimony by the accused concerning specific instances of violent conduct by the victim is admissible to prove the accused's state of mind at the time of his offense. *See State v. Roth, 1st Dist. Hamilton No. C-030303, 2004-Ohio-374* ("[A] defendant must be allowed to present evidence of a victim's propensity for violence when the defendant is putting forth the affirmative defense of self-defense."); *State v. Levett, 1st Dist. Hamilton No. C-040537, 2006-Ohio-2222*. When evidence of specific instances of violent conduct are offered to show the accused's state of mind, the proponent of the evidence need only show that the accused had prior knowledge of the conduct. *2002 Ohio 1613, Wetherall at *7*.

[*P52] Therefore, Jones should have been allowed to testify about any known prior instances of Neri's violent behavior to demonstrate his state of mind at the time of the shooting. The trial court's rationale for excluding the testimony, i.e., that it was hearsay, was erroneous.

b. Social media postings [*30]** .

[*P53] Jones argues that he should have been permitted to introduce into evidence social media postings by Neri to show Jones's state of mind at the time of the offense, particularly to show that Jones **[**1075]** had reason to fear that Neri was reaching for a gun.

[*P54] During trial, Jones sought to admit numerous Twitter posts by Neri involving violence, guns, and drugs to show why Jones believed Neri was armed with a weapon at the time of the shooting. The state objected on relevancy grounds to the admission of any posts by Neri. After further discussions at side bar, the state maintained its objection to any posts concerning drugs and drug dealing, but withdrew its objection to any posts concerning guns and violence.

[*P55] For the sake of clarity, the court asked the state to read into the record the exhibit numbers of those posts to which it maintained an objection. Specifically, the state objected to nine exhibits, which included the following Twitter posts:

> Send them boys from O-Block to come shoot up yo whole block
>
> Rather be a dope boy, I really love sellin shit
>
> Them 12 bricks they can make you rich
>
> Nigga that's a hand gun, we bringing out the choppa
>
> When I get too bored I go out back with this rifle and hunt **[***31]** small creatures while I smoke
>
> People lie that's why I just take actions over words eventually I'll stop caring or trying
>
> If anyone in that car live, just tell that nigga I owe him
>
> [A]sking me to pull up with a sack without even asking for the price
>
> Mfs think I'm a lick or sumn
>
> Ain't no salary cap in the dope game
>
> They bouta put me in population with the nigga that got Manny shot and left him to die. Putting him down on sight
>
> [I]t's a surface wound
>
> I gotta talk myself out of smoking my whole blunt on break
>
> Good dope sell itself

The state argued, and the trial court agreed, that "[t]here is nothing in any of those tweets * * * that lends itself to an essential element of self-defense." Therefore, the court excluded the Twitter posts.

[*P56] In the same fashion, the court asked the state to read into the record the exhibit numbers of those posts to which it withdrew an objection. Specifically, the state did not object to nine exhibits, which included the following Twitter posts:

> [Picture of Prather's car with bullet holes.]
>
> I'm zoned cause dude pulled up next to me with tha strap if his lap. Soon as he upped it I hit skkrt and he start dumping his whole clip.
>
> 6 head shots I'll erode a nigga
>
> I gotcho life **[***32]** right here on my hip
>
> Took off soon as them bands hit my lap
>
> My uzi it weighed a ton
>
> [W]hen I got out to look at the car, I found this [bullet] stuck to my hip
>
> [M]fs started bussing at me last night
>
> Niggas swear they shooters but don't even know how to hold a strap
>
> Always keep a black tool cause bullies aren't bulletproof

Based on the state's decision to withdraw its objection, the court stated that it felt it had no choice but to admit those posts into evidence.

[*P57] As discussed above, evidence concerning specific instances of violent conduct by the victim, of which the accused had prior knowledge, is admissible to prove the accused's state of mind at the time of his offense. *Wetherall, 1st Dist. Hamilton No. C-000113, 2002 Ohio App. LEXIS 1297, 2002 WL 440700, at *7*. Here, the court arbitrarily admitted certain Twitter posts pertaining to guns **[**1076]** and violence, while arbitrarily excluding other Twitter posts pertaining to guns and violence. For example, the court excluded posts such as "Send them boys from O-Block to come shoot up yo whole block"; "Nigga that's a hand gun, we bringing out the choppa"; and "They bouta put me in population with the nigga that got Manny shot and left him to die. Putting him down on sight." As discussed in more detail **[***33]** later, Jones particularly takes issue with the court's exclusion of the May 12 post, "If anyone in that car live, just tell that nigga I owe him." Jones contends that this post was relevant to his state of mind because it was

"an apparent vengeful threat suggestive of lethal violence against someone" and because it was the most recent Tweet, posted only four days before the shooting.

[*P58] We agree with Jones that the trial court's reliance on the state's delineation of admissible and inadmissible evidence resulted in an arbitrary and unreasonable ruling. It is clear from the record that the trial court excluded the introduction of any exhibits to which the state objected, and permitted the introduction of any exhibits to which the state did not object. Based on the arbitrary nature of the ruling, we find that the trial court erred in excluding posts pertaining to guns and violence.

[*P59] The exclusion of the Twitter posts pertaining to drugs and drug dealing is a closer call. Jones contends that the Twitter posts were relevant because guns are commonly equated with illegal drug sales, and his defense was based on Neri's violent nature and Jones's fear that Neri was going to shoot him. However, **[***34]** the trial court expressed concern that Jones was attempting to simply besmirch Neri's character by labeling him as a drug dealer, and stated that the admission of evidence that Neri might have sold drugs was irrelevant.

[*P60] It is true, as Jones argues, that Ohio courts have frequently found that drug dealing and guns go hand in hand. *See, e.g.*, *State v Nevins, 2d Dist. Montgomery No. 24070, 2011-Ohio-389, ¶ 43* ("We also note that Officer Riegel testified that in his experience as a police officer in the narcotics division, it was common to find guns on or near individuals involved in illegal drug sale or manufacture in order to protect them because they are frequently robbed for the drugs or money."); *State v. Harry, 12th Dist. Butler No. CA2008-01-0013, 2008-Ohio-6380, ¶ 52* (noting as common fact that "drugs and weapons are often found within close proximity to one another"). However, we cannot say that the trial court's exclusion of the Twitter posts about drugs and drug dealing amounted to an unreasonable or arbitrary ruling.

[*P61] At trial, Jones did not base his defense on the fact that Neri was allegedly involved with drugs. Jones did not argue that the shooting occurred as the result of a drug deal gone wrong. Jones also did not claim that Neri appeared intoxicated on the night **[***35]** of the shooting. Moreover, the record shows

that Prather had already testified that Neri sold marijuana. Therefore, the court did not abuse its discretion in excluding the Twitter posts pertaining solely to drugs and drug dealing.

c. Race of Jones's family members.

[*P62] Jones argues that he should have been permitted to testify about the race of his relatives to explain his motives in using racial epithets towards Neri.

[*P63] During direct examination, defense counsel asked Jones, "You saw the language that you are using here?" Jones replied,

> Yeah. I mean, we have all seen it. It is definitely inappropriate. Honestly, I think inappropriate is not a good enough **[**1077]** word for it. It's degrading, disrespectful. And, I mean, I have people of color in my family.
>
> * * *
>
> I feel like my language has definitely disrespected people in my family, you know, and I'm ashamed of it.

The state objected and the trial court sustained the objection, asking defense counsel to "direct a question at his own feelings versus his family."

[*P64] We find that the trial court properly concluded that the statements were irrelevant. ***HN19***[⬆] Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the **[***36]** determination of the action more probable or less probable than it would be without the evidence." *Evid.R. 401*. In determining relevance, we look to the elements of the offense charged and whether the evidence tends to prove or disprove any material element. *State v. Gardner, 59 Ohio St.2d 14, 20, 391 N.E.2d 337 (1979)*.

[*P65] Testimony concerning the race of Jones's relatives was not relevant to show Jones's state of mind as an element of the crimes charged. The fact that the race of his relatives may have motivated Jones to choose one word over another had no bearing on whether he purposely murdered Neri or justifiably acted in self-defense. Rather, Jones's statements were calculated to create sympathy for him.

[*P66] Moreover, the record shows that Jones did testify about his motives in using racial epithets towards Neri. The court allowed into evidence the following testimony:

> Defense counsel: It is more than disrespectful, pretty hateful language?
>
> Jones: I agree.
>
> Defense counsel: The purposes of that is what?
>
> Jones: Just they are insults. I wanted to hurt somebody with my words.
>
> Defense counsel: Okay. Why did you choose the word nigger?
>
> Jones: It's the lowest blow that you can make. You can't—I mean, in my mind I don't think you can get no lower than that. And, I mean, **[***37]** what we all know about life, and I knew that word was going to stick.

[*P67] Under these circumstances, the trial court's decision to exclude testimony about the race of Jones's family members was neither arbitrary nor wrong.

3. Jones's Right to Present a Complete Defense Was Violated

[*P68] Having determined that the trial court erred in excluding Jones's testimony about an incident where Neri made a threat against Jones while possessing a gun and certain Twitter posts by Neri about guns and violence, we must now determine whether the exclusion of this evidence violated Jones's constitutional right to present a complete defense.

[*P69] *HN20*[] The errors will only amount to a constitutional violation if they deprived Jones of a fair trial. In order to determine if the trial was fair, this court must examine whether the defendant had "a meaningful opportunity to present a complete defense." *Trombetta, 467 U.S. at 485, 104 S.Ct. 2528, 81 L.Ed.2d 413*. In determining whether the opportunity was "meaningful," the United States Supreme Court has examined whether a defendant's "defense was far less persuasive than it might have been" had the excluded evidence been admitted. *See Chambers, 410 U.S. at 294, 93 S.Ct. 1038, 35 L.Ed.2d 297*. Specifically, the Supreme Court has examined whether the excluded evidence was "critical," "vital," **[***38]** or "central" to the defense. *Id. at 302* (finding that the defendant's constitutional right to present a **[**1078]** complete defense was violated because the excluded evidence was "critical" to his

defense); *Washington, 388 U.S. at 16, 87 S.Ct. 1920, 18 L.Ed.2d 1019* (finding that the excluded evidence would have been not only relevant and material, but "vital to the defense"); *Crane, 476 U.S. at 690, 106 S.Ct. 2142, 90 L.Ed.2d 636* (finding that the blanket exclusion of evidence concerning the circumstances of the defendant's confession violated his constitutional right to present a complete defense because the "evidence is central to the defendant's claim of innocence").

[*P70] ***HN21***[⬆] Thus, in determining whether Jones's constitutional right to present a complete defense was violated, we must examine the excluded errors in the context of the entire case. When there are multiple errors, we need not examine each individual error in isolation. *See Chambers at 298* ("We need not decide, however, whether this error alone [limitation of cross-examination of a key witness] would occasion reversal since Chambers' claimed denial of due process rests on the ultimate impact of that error when viewed in conjunction with the trial court's refusal to permit him to call other witnesses."). "[E]rroneous evidentiary rulings can, in combination, rise to the level **[***39]** of a due process violation." *Engelhoff, 518 U.S. at 53, 116 S.Ct. 2013, 135 L.Ed.2d 361*.

[*P71] ***HN22***[⬆] To determine the impact of the erroneous exclusion of evidence, courts typically engage in some sort of harmless-error analysis. For instance, in *Crane*, the state argued that "any error was harmless since the very evidence excluded by the trial court's ruling ultimately came in through other witnesses." *Crane at 691*. Although the Court declined to address the merits of the state's harmless-error argument, it agreed that the erroneous ruling was subject to a harmless-error analysis and remanded the case to the state court to conduct such an analysis.

[*P72] Like in *Crane*, the state here argues that any error was harmless because the trial court allowed Jones to admit other state-of-mind evidence. For example, when asked why he shot and killed Neri, Jones replied, "I thought that [Neri] was going to kill me that day." The court then allowed into evidence nine Twitter posts by Neri concerning violence and firearms. When asked about those posts, Jones stated that they concerned him because "[i]t indicates * * * that [Neri] is involved with guns and potentially violent." The court also allowed Jones to testify concerning two specific instances of violent conduct by Neri prior **[***40]** to the shooting. In the first instance, Jones testified that, two weeks prior to the shooting, Neri "[stood] up out of the driveway" and "yell[ed] for [him]" as he drove past. In the second instance,

Jones testified that, three days prior to the shooting, he drove past Neri while Neri "had his shirt off, arms raised in the air, with a gun on his hip."

[*P73] *HN23*[↑] But the fact that a defendant was able to present some evidence of his defense is not dispositive of whether the error was harmless. *See, e.g.*, *McDonald v. United States, 904 A.2d 377, 381 (D.C.Cir.2006)* ("Because McDonald's testimony about his injuries would have been neither unduly repetitive nor irrelevant, we are constrained to conclude that the trial judge abused her discretion in precluding it. Moreover, the error resulted in an unconstitutional deprivation of McDonald's right to present a complete defense."); *State v. Ciacchi, 8th Dist. Cuyahoga No. 92705, 2010-Ohio-1975, ¶ 18, 25* ("Although Ciacchi was able to provide limited testimony about the victim propositioning him and was able to cross-examine the victim, he was not afforded **[**1079]** his right to present a complete defense" because "he was precluded from testifying in detail about what the victim stated to him on the street and while at her apartment."); *O'Neal v. Balcarcel, 933 F.3d 618, 627 (6th Cir.2019)* (exclusion of a third-party jailhouse confession to **[***41]** the murder, while in part cumulative to other evidence already admitted at trial, "very well could have been the straw that broke the camel's back in establishing a reasonable doubt as to [defendant's] guilt"); *Hawkins v. United States, 358 U.S. 74, 80, 79 S.Ct. 136, 3 L.Ed.2d 125 (1958)* (declining to find an error harmless even though it was "in part cumulative" when it pertained to "a sharply contested issue of fact which, on the evidence in the record, the jury could have resolved either way depending largely" on which party it believed). A "meaningful" opportunity to present a complete defense "must be full and fair, not arbitrarily and significantly curtailed." *McDonald at 381*.

[*P74] *HN24*[↑] To prove self-defense, Jones had to establish that he had "a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force." *State v. Robbins, 58 Ohio St.2d 74, 388 N.E.2d 755 (1979)*, paragraph two of the syllabus.[1] Because Ohio has adopted a subjective standard for determining whether a defendant acted in self-defense, "[t]he defendant's state of mind is crucial to this defense." *State v. Purcell, 107 Ohio App.3d 501, 505, 669 N.E.2d 60 (1st Dist.1995)*; *State v. Koss, 49 Ohio St.3d 213, 215, 551 N.E.2d 970 (1990)*. In fact, the sole contested issue at trial was Jones's state of mind at the time of the shooting.

[1] We recognize that *R.C. 2901.05* was revised during the pendency of this action, and self-defense is no longer an affirmative defense in Ohio.

[*P75] With regard to the exclusion of Jones's testimony that Neri was looking for **[***42]** him with a gun, Jones argues that this was a threat that Jones believed was directly aimed at him. Furthermore, this was the third incident that Jones claims made him believe Neri was armed and dangerous. The state, and the dissent, counter that Jones was not prevented from presenting a complete defense because the court stated it would allow the testimony through Jones's father and aunt.

[*P76] Certainly, pursuant to *Wetherall*, ***HN25***[⬆] testimony by corroborating witnesses concerning specific instances of violent conduct by the victim is admissible to prove the accused's state of mind at the time of an offense. *Wetherall, 1st Dist. Hamilton No. C-000113, 2002 Ohio App. LEXIS 1297, 2002 WL 440700, at *7*. Thus, Jones's father and aunt could have testified about the statements. But this does not negate the fact that it was error to preclude Jones himself from testifying about the statements. ***HN26***[⬆] Clearly, "the most important witness for the defense in many criminal cases is the defendant himself." *Rock v. Arkansas, 483 U.S. 44, 52, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987)*.

[*P77] With regard to the Twitter posts, Jones argues that they were relevant to his state of mind because they were "suggestive of lethal violence against someone." Although Jones was permitted to enter several of Neri's Twitter posts into evidence regarding guns **[***43]** and violence, the court arbitrarily excluded a Twitter post from May 12, just four days before the shooting. This may not have been significant in light of the other Twitter posts that were admitted, except for the fact that the state capitalized on the trial court's improper ruling in its closing argument. We are specifically concerned with the following remarks by the prosecutor during closing argument:

> **[**1080]** There was no honest belief on the part of the defendant that he was in immediate or imminent danger. He wants you to believe that [he] saw all of those tweets and posts from Kevin and he was scared. First of all, take a look at all of this. They are from December, January, March. Not from May 13, 14, 15, not from that day, two days, a week, or even a month before this happened.

But one of the improperly-excluded posts was from May 12, four days before the shooting.

[*P78] Jones's testimony about a particular incident of Neri looking for him with a gun on his hip and the May 12 Twitter post were critical, vital, and central to Jones's affirmative defense of self-defense

because they evidenced his state of mind at the time of the shooting. The erroneous exclusion of this evidence made Jones's **[***44]** defense far less persuasive than it might have been had the excluded evidence been admitted. Because we cannot say the exclusion of this evidence was harmless beyond a reasonable doubt, the trial court's improper exclusion of Jones's state of mind evidence violated his constitutional right to present a complete defense.

4. Cumulative Error

[*P79] We also agree with Jones's ninth assignment of error that the cumulative effect of the evidentiary errors denied Jones a fair trial. The jury's determination of guilt rested solely on whether it believed Jones. The exclusion of the state-of-mind evidence and the inclusion of prejudicial character evidence, which was emphasized by the state during closing argument, made Jones's testimony and theory of the defense "far less persuasive." We cannot be sure that these evidentiary errors did not tip the scale against Jones on the close and vital issue of his state of mind. Under these circumstances, we cannot say, beyond a reasonable doubt, that the cumulative effect of the errors was harmless.

[*P80] Accordingly, Jones's third, fourth, seventh and ninth assignments of error are sustained.

Summary

[*P81] In sum, we sustain Jones's first, third, fourth, seventh, and ninth **[***45]** assignments of error. Assignments of error two, five, six, and eight, which concern alleged errors that occurred during trial and at sentencing, are thereby rendered moot. Consequently, we reverse Jones's aggravated-murder conviction under *R.C. 2903.01(A)*, discharge Jones from further prosecution on that underlying count, and remand the cause for a new trial on the remaining murder counts under *R.C. 2903.02(A)* and *2903.02(B)*. Because Jones has failed to raise any assignments of error challenging his conviction for carrying a concealed weapon under *R.C. 2923.12(A)(2)*, we affirm that conviction. *See App.R. 16(A)*; *see also State v. Perez, 1st Dist. Hamilton Nos. C-040363, C-040364 and C-040365, 2005-Ohio-1326, ¶ 21-23*.

Judgment accordingly.

ZAYAS, P.J., concurs.

BERGERON, J., concurs in part and dissents in part.

Concur by: BERGERON (In Part)

Dissent by: BERGERON (In Part)

Dissent

BERGERON, J., concurring in part and dissenting in part.

[*P82] I agree with aspects of the majority's opinion and with its affirmance of Mr. Jones's conviction for carrying a concealed weapon, but I respectfully disagree with the conclusion that Mr. Jones's conviction for aggravated murder was not supported by sufficient evidence demonstrating prior calculation and design and with its decision to remand for a new trial.

[1081]** A.

[*P83] I'll start with the **[***46]** prior calculation and design issue. While this is certainly a close case, Mr. Jones's appellate brief relies heavily on the defense's version of the facts and contradicting evidence to support his claim that his conviction for aggravated murder lacked sufficient evidence. That is not, however, the lens through which we should view this question. A challenge to the sufficiency of the evidence asks whether "the evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Thompkins, 78 Ohio St.3d 380, 386, 1997- Ohio 52, 678 N.E.2d 541 (1997)*. As a reviewing court, we must determine whether "after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Bedell, 2018-Ohio-721, 107 N.E.3d 160, ¶ 11 (1st Dist.)*, quoting *State v. Jenks, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991)*, paragraph two of the syllabus. Thus, sufficiency of the evidence is a "test of adequacy." *Thompkins at 386*. Most importantly, a review of the sufficiency of the evidence "[does] not consider its credibility or effect in inducing belief." *State v. Richardson, 150 Ohio St.3d 554,*

2016-Ohio-8448, 84 N.E.3d 993, ¶ 13, citing *Thompkins at 386-387*. Proceeding under this framework, I would find that the state met its burden here.

[*P84] We are guided in this endeavor by the Ohio Supreme Court's three-part test described in *State v. Taylor, 78 Ohio St.3d 15, 1997- Ohio 243, 676 N.E.2d 82 (1997)*. Heavily fact-dependent, this inquiry asks us to consider: **[***47]** (1) whether the accused and victim knew each other, and the nature of the relationship; (2) whether the accused gave thought or preparation to choosing the murder weapon or murder site; and (3) whether the act was drawn out or an almost instantaneous eruption of events. *Id. at 19* (describing *State v. Jenkins, 48 Ohio App.2d 99, 355 N.E.2d 825 (8th Dist.1976))*. While this three-part test (like many such inquiries) leaves something to be desired, as I filter the facts at hand through the *Taylor* criteria, I walk away convinced that the state satisfied its burden. Although Mr. Jones frequently carried a gun, the fact that he exited the vehicle, gun in hand, could have allowed the jury to reasonably infer that he carried the gun with intent to use it. *See Taylor at 22* ("The jury could reasonably have inferred that appellant may have carried the gun with an intention to use it. The jury could have drawn that inference from all the circumstances surrounding the shooting * * *."). Indeed, there is a marked difference between carrying a gun holstered on one's person versus walking around with that same gun out, in hand, presumably at the ready.

[*P85] Evidence presented at trial further indicated that Mr. Neri was standing in front of the house when Mr. Jones arrived. Mr. Jones then parked **[***48]** directly in front of the house and left his car running with the door open. Moreover, testimony showed that Mr. Jones exited his car and deliberately took steps towards Mr. Neri, raised the gun which he was already holding and fired, paused in between shots to speak to Mr. Neri, and even fired shots as Mr. Neri was fleeing. Similar factors supported the jury's finding of prior calculation and design in *Taylor*, despite the fact that the events there unfolded very quickly. *Id. at 21-22* (appellant's decision to strategically position himself and friends before the shooting and continue shooting once the victim was on the ground provided sufficient evidence of prior calculation and design, despite short duration of the encounter).

[*P86] **[**1082]** And we certainly cannot divorce the background context from what happened in those two minutes or so when the shooting occurred. We had a long-simmering feud between Mr. Jones and Mr.

Neri that seemed to be escalating. *See id. at 21* (emphasizing the "strained relationship" between the accused and the victim). Evidence presented at trial established that the two men were constantly threatening and planning fights, and that the two desired a fight for months leading up to the murder. **[***49]** Indeed, Mr. Jones was trying to arrange a fight with Mr. Neri *that very day*. Mr. Jones protests, insisting that he intended to ensure that Mr. Neri was at another location at the time he arrived to pick up his son, but the jury certainly could have seen that differently. The location for their planned brawl sat just a stone's throw from the house, rendering it likely that Mr. Neri would be nearby in any event.

[*P87] We also know that Mr. Jones was apprehensive about actually fighting Mr. Neri based on the disparity in their sizes. It's also probably fair to conclude that he knew that he could not run from Mr. Neri forever. Ms. Prather's conduct suggests that she knew the fight needed to happen, and just wanted it over with. But when that day of reckoning arrived, Mr. Jones brought a gun rather than just his fists.

[*P88] Here the jury could have reasonably found, based on the evidence presented, that Mr. Jones formulated a plan to kill Mr. Neri that involved ascertaining his whereabouts under the guise of planning the fight. Then, upon arriving at the house and seeing Mr. Neri out front, Mr. Jones strategically parked (to ensure a quick getaway) and jumped out of the car, gun in hand, approaching **[***50]** Mr. Neri and firing upon him even as he fled.

[*P89] Is Mr. Jones's alternative explanation for all of these events plausible and is some of this evidence disputed? Sure. But we must construe the evidence in a light most favorable to the state, consistent with the jury's verdict and in line with *Taylor*.

[*P90] In sum, the finding of prior calculation and design is "justified '[w]here evidence adduced at trial reveals the presence of sufficient time and opportunity for the planning of an act of homicide to constitute prior calculation, and the circumstances surrounding the homicide show a scheme designed to implement the calculated decision to kill.'" *State v. Phelps, 1st Dist. Hamilton No. C-100096, 2011-Ohio-3144, ¶ 26*, quoting *State v. Cotton, 56 Ohio St.2d 8, 381 N.E.2d 190 (1978)*, paragraph three of the syllabus (more than "instantaneous deliberation" when factors demonstrated a "scheme designed to implement the

calculated decision to kill."). Our duty here is not to evaluate who we should believe more, but rather, if believing all the evidence that the prosecution presented, could a rational jury find all the elements proven beyond a reasonable doubt. For all the foregoing reasons, I would find that the prosecution met that burden based on the record at hand.

B.

[*P91] When I consider the evidentiary issues that the majority **[***51]** discusses, I agree that: (1) the trial court erred in admitting the photo of the guns and ammunition in Mr. Jones's bedroom; (2) the trial court erred in precluding Mr. Jones from testifying about the threats from Mr. Neri; and (3) the trial court inconsistently handled admissibility of the social media posts.

[*P92] But I part company with the majority on the harmless error aspect of its analysis, and here's why. Instrumental to the conclusion that the court deprived Mr. Jones of his ability to present a defense **[**1083]** was the court's barring him from testifying about the threats from Mr. Neri. But when we look at the transcript, defense counsel proffered that Mr. Jones's father and aunt would testify that Mr. Neri came searching for Mr. Jones armed with a weapon, points they later conveyed to Mr. Jones.

[*P93] The trial court handled this by inquiring whether those witnesses (who encountered the threats first-hand) would testify, asking "[i]s his father testifying?" Counsel responded, "Yes, ma'am," prompting the court to conclude, "[t]hen he can say it." After further back-and-forth, the trial court reiterated that the father and aunt "can testify to what" happened.

[*P94] Was this how this issue should have **[***52]** been resolved? No. But did counsel have a path—one he professed he was going to go down—to get evidence of these threats into the record? Yes.

[*P95] For reasons beyond the confines of the record, counsel did not pursue that path and did not summon the father and aunt to testify. Maybe that was a wise strategic decision, maybe not. But I find myself unable to conclude that the court unduly deprived the defendant of his right to present a defense on this record.

[*P96] Similarly, with respect to the social media posts, I share the majority's difficulty in discerning the distinction between the admitted and excluded posts, but ultimately I conclude that the excluded posts would have, at best, provided cumulative evidence of the admitted ones. In other words, nothing so dramatic and impactful occurred in them that the jury did not already have before it in the admissible tweets.

[*P97] However, I am troubled by the timing issue regarding the May post (given that the state seized upon that in closing) and the gun photograph. *See State v. Lavender, 1st Dist. Hamilton No. C-180003, 2019-Ohio-5352, ¶ 151-154* (Bergeron, J., dissenting). Nevertheless, I view the harmless error conclusion differently than the majority based on my conclusion about prior calculation and design and the threats. **[***53]** After thoroughly reviewing the record, I cannot say that these two evidentiary issues justify a new trial based on how I would resolve the other aspects of this appeal.

[*P98] Therefore, I respectfully concur in part and dissent in part.

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THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

ENTERED
NOV 22 2017

date: 11/16/2017
code: GJEI
judge: 269

D120129078

Judge: LESLIE GHIZ

NO: B 1602671

STATE OF OHIO
VS.
EARL JONES

JUDGMENT ENTRY: SENTENCE: INCARCERATION

Defendant was present in open Court with Counsel **WILLIAM R GALLAGHER** on the **16th** day of **November 2017** for sentence.
The court informed the defendant that, as the defendant well knew, after defendant entering a plea of not guilty and after trial by jury, the defendant has been found guilty of the offense(s) of:

count 1: AGGRAVATED MURDER WITH SPECIFICATIONS (SPECIAL FELONY), 2903-01A/ORCN,SF

count 4: CARRYING CONCEALED WEAPONS, 2923-12A2/ORCN,F4

count 2: MURDER WITH SPECIFICATIONS (SPECIAL FELONY), 2903-02A/ORCN,SF, MERGED WITH COUNT #1

count 3: MURDER WITH SPECIFICATIONS (SPECIAL FELONY), 2903-02B/ORCN,SF, MERGED WITH COUNT #1

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's behalf, or present any information in mitigation of punishment.

Defendant is sentenced to be imprisoned as follows:

count 1: CONFINEMENT: LIFE IN THE DEPARTMENT OF CORRECTIONS CONFINEMENT ON SPECIFICATION#2: 3 Yrs DEPARTMENT OF CORRECTIONS TO BE SERVED CONSECUTIVELY AND PRIOR TO THE SENTENCE IMPOSED IN UNDERLYING OFFENSE IN COUNT #1.

count 4: CONFINEMENT: 18 Mos DEPARTMENT OF CORRECTIONS

SPECIFICATION #1 TO COUNT #1 IS MERGED WITH SPECIFICATION #2 TO COUNT #1 FOR THE PURPOSE OF SENTENCING.

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 11/16/2017
code: GJEI
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Judge: LESLIE GHIZ

NO: B 1602671

STATE OF OHIO
VS.
EARL JONES

JUDGMENT ENTRY: SENTENCE: INCARCERATION

COUNT #2 WITH SPECIFICATIONS AND COUNT #3 WITH SPECIFICATIONS ARE MERGED COUNT #1 WITH SPECIFICATION FOR THE PURPOSE OF SENTENCING.

COUNT #4 IS TO BE SERVED CONCURRENTLY WITH COUNT #1.

THE DEFENDANT IS TO RECEIVE CREDIT FOR FIVE HUNDRED FIFTY (550) DAYS TIME SERVED.

COSTS REMITTED.

AS TO COUNT #4 THE DEFENDANT HAS BEEN ADVISED THE HE/SHE MAY BE ELIGIBLE TO EARN DAYS OF CREDIT UNDER THE CIRCUMSTANCES SPECIFIED IN R.C. 2967-193; THE DEFENDANT WAS FURTHER ADVISED THAT DAYS OF CREDIT ARE NOT AUTOMATIC, BUT MUST BE EARNED IN THE MANNER SPECIFIED IN THAT SECTION.

FURTHER, IN ACCORDANCE WITH RC 2901.07, THE DEFENDANT IS REQUIRED TO SUBMIT A DNA SPECIMEN WHICH WILL BE COLLECTED AT THE PRISON, JAIL, CORRECTIONAL OR DETENTION FACILITY TO WHICH THE DEFENDANT HAS BEEN SENTENCED. IF THE SENTENCE INCLUDES ANY PERIOD OF PROBATION OR COMMUNITY CONTROL, OR IF AT ANY TIME THE DEFENDANT IS ON PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, THE DEFENDANT WILL BE REQUIRED, AS A CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, TO SUBMIT A DNA SPECIMEN TO THE PROBATION DEPARTMENT, ADULT PAROLE AUTHORITY, OR OTHER AUTHORITY AS DESIGNATED BY LAW. IF THE DEFENDANT FAILS OR REFUSES TO SUBMIT TO THE REQUIRED DNA SPECIMEN COLLECTION PROCEDURE, THE DEFENDANT WILL BE SUBJECT TO ARREST AND PUNISHMENT FOR VIOLATING THIS CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL.

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: **11/16/2017**
code: **GJEI**
judge: **269**

Judge: **LESLIE GHIZ**

NO: **B 1602671**

STATE OF OHIO
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AS TO COUNT #1 THE DEFENDANT IS NOT SUBJECT TO THE POST RELEASE CONTROL PROVISIONS OF OHIO LAW AS THIS IS A LIFE SENTENCE. PAROLE ELIGIBILITY FOR THIS OFFENDER IS GOVERNED BY OHIO REVISED CODE §2967.13(A)(1) AND THE DEFENDANT IS SO ADVISED.

AS PART OF THE SENTENCE IN THIS CASE IN COUNT #4, THE DEFENDANT MAY BE SUPERVISED BY THE ADULT PAROLE AUTHORITY AFTER DEFENDANT LEAVES PRISON, WHICH IS REFERRED TO AS POST-RELEASE CONTROL, FOR UP TO THREE (3) YEARS AS DETERMINED BY THE ADULT PAROLE AUTHORITY.

IF THE DEFENDANT VIOLATES POST-RELEASE CONTROL SUPERVISION OR ANY CONDITION THEREOF, THE ADULT PAROLE AUTHORITY MAY IMPOSE A PRISON TERM, AS PART OF THE SENTENCE, OF UP TO NINE (9) MONTHS, WITH A MAXIMUM FOR REPEATED VIOLATIONS OF FIFTY PERCENT (50%) OF THE STATED PRISON TERM. IF THE DEFENDANT COMMITS A NEW FELONY WHILE SUBJECT TO POST-RELEASE CONTROL, THE DEFENDANT MAY BE SENT TO PRISON FOR THE REMAINING POST-RELEASE CONTROL PERIOD OR TWELVE (12) MONTHS, WHICHEVER IS GREATER. THIS PRISON TERM SHALL BE SERVED CONSECUTIVELY TO ANY PRISON TERM IMPOSED FOR THE NEW FELONY OF WHICH THE DEFENDANT IS CONVICTED.

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

ENTERED
DEC 21 2017

date: **12/15/2017**
code: **GJEI**
judge: **269**

Judge: **LESLIE GHIZ**

NO: **B 1602671**

STATE OF OHIO
VS.
EARL JONES

JUDGMENT ENTRY: SENTENCE: INCARCERATION
*****NUNC PRO TUNC 11/16/2017*****

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count 1: AGGRAVATED MURDER WITH SPECIFICATIONS (SPECIAL FELONY), 2903-01A/ORCN,SF

count 4: CARRYING CONCEALED WEAPONS, 2923-12A2/ORCN,F4

count 2: MURDER WITH SPECIFICATIONS (SPECIAL FELONY), 2903-02A/ORCN,SF, MERGED WITH COUNT #1.

count 3: MURDER WITH SPECIFICATIONS (SPECIAL FELONY), 2903-02B/ORCN,SF, MERGED WITH COUNT #1.

The Court afforded defendant's counsel an opportunity to speak on behalf of the defendant. The Court addressed the defendant personally and asked if the defendant wished to make a statement in the defendant's behalf, or present any information in mitigation of punishment.

Defendant is sentenced to be imprisoned as follows:
count 1: CONFINEMENT: LIFE IN THE DEPARTMENT OF CORRECTIONS WITHOUT THE POSSIBILITY OF PARDLE.

CONFINEMENT ON SPECIFICATION#2: 3 Yrs DEPARTMENT OF CORRECTIONS TO BE SERVED CONSECUTIVELY AND PRIOR TO THE SENTENCE IMPOSED IN UNDERLYING OFFENSE IN COUNT #1.

count 4: CONFINEMENT: 18 Mos DEPARTMENT OF CORRECTIONS

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

date: 12/15/2017
code: GJEI
judge: 269

Judge: LESLIE GHIZ

NO: B 1602671

STATE OF OHIO
VS.
EARL JONES

JUDGMENT ENTRY: SENTENCE: INCARCERATION
NUNC PRO TUNC 11/16/2017

SPECIFICATION #1 TO COUNT #1 IS MERGED WITH SPECIFICATION #2 TO COUNT #1 FOR THE PURPOSE OF SENTENCING.

COUNT #2 WITH SPECIFICATIONS AND COUNT #3 WITH SPECIFICATIONS ARE MERGED WITH COUNT #1 WITH SPECIFICATIONS FOR THE PURPOSE OF SENTENCING.

COUNT #4 IS TO BE SERVED CONCURRENTLY WITH COUNT #1.

THE DEFENDANT IS TO RECEIVE CREDIT FOR FIVE HUNDRED FIFTY (550) DAYS TIME SERVED.

COSTS REMITTED.

AS TO COUNT #4, THE DEFENDANT HAS BEEN ADVISED THE HE/SHE MAY BE ELIGIBLE TO EARN DAYS OF CREDIT UNDER THE CIRCUMSTANCES SPECIFIED IN R.C. 2967-193; THE DEFENDANT WAS FURTHER ADVISED THAT DAYS OF CREDIT ARE NOT AUTOMATIC, BUT MUST BE EARNED IN THE MANNER SPECIFIED IN THAT SECTION.

FURTHER, IN ACCORDANCE WITH RC 2901.07, THE DEFENDANT IS REQUIRED TO SUBMIT A DNA SPECIMEN WHICH WILL BE COLLECTED AT THE PRISON, JAIL, CORRECTIONAL OR DETENTION FACILITY TO WHICH THE DEFENDANT HAS BEEN SENTENCED. IF THE SENTENCE INCLUDES ANY PERIOD OF PROBATION OR COMMUNITY CONTROL, OR IF AT ANY TIME THE DEFENDANT IS ON PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, THE DEFENDANT WILL BE REQUIRED, AS A CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL, TO SUBMIT A DNA SPECIMEN TO THE PROBATION DEPARTMENT, ADULT PAROLE AUTHORITY, OR OTHER AUTHORITY AS DESIGNATED BY LAW. IF THE DEFENDANT FAILS OR REFUSES TO SUBMIT TO THE REQUIRED DNA SPECIMEN COLLECTION PROCEDURE, THE DEFENDANT WILL BE SUBJECT TO ARREST AND PUNISHMENT FOR VIOLATING THIS

THE STATE OF OHIO, HAMILTON COUNTY
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CONDITION OF PROBATION, COMMUNITY CONTROL, PAROLE, TRANSITIONAL CONTROL OR POST-RELEASE CONTROL.

AS TO COUNT #1, THE DEFENDANT IS NOT SUBJECT TO THE POST RELEASE CONTROL PROVISIONS OF OHIO LAW AS THIS IS A LIFE SENTENCE. PAROLE ELIGIBILITY FOR THIS OFFENDER IS GOVERNED BY OHIO REVISED CODE §2967.13(A)(1) AND THE DEFENDANT IS SO ADVISED.

AS PART OF THE SENTENCE IN THIS CASE IN COUNT #4, THE DEFENDANT MAY BE SUPERVISED BY THE ADULT PAROLE AUTHORITY AFTER DEFENDANT LEAVES PRISON, WHICH IS REFERRED TO AS POST-RELEASE CONTROL, FOR UP TO THREE (3) YEARS AS DETERMINED BY THE ADULT PAROLE AUTHORITY.

IF THE DEFENDANT VIOLATES POST-RELEASE CONTROL SUPERVISION OR ANY CONDITION THEREOF, THE ADULT PAROLE AUTHORITY MAY IMPOSE A PRISON TERM, AS PART OF THE SENTENCE, OF UP TO NINE (9) MONTHS, WITH A MAXIMUM FOR REPEATED VIOLATIONS OF FIFTY PERCENT (50%) OF THE STATED PRISON TERM. IF THE DEFENDANT COMMITS A NEW FELONY WHILE SUBJECT TO POST-RELEASE CONTROL, THE DEFENDANT MAY BE SENT TO PRISON FOR THE REMAINING POST-RELEASE CONTROL PERIOD OR TWELVE (12) MONTHS, WHICHEVER IS GREATER. THIS PRISON TERM SHALL BE SERVED CONSECUTIVELY TO ANY PRISON TERM IMPOSED FOR THE NEW FELONY OF WHICH THE DEFENDANT IS CONVICTED.

****NUNC PRO TUNC 11/16/2017*****

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

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

February 9, 2022

Mr. Peter Galyardt
Office of the Ohio Public Defender
250 East Broad Street
Suite 1400
Columbus, OH 43215

Re: Earl Jones
v. Ohio
Application No. 21A399

Dear Mr. Galyardt:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kavanaugh, who on February 9, 2022, extended the time to and including April 22, 2022.

This letter has been sent to those designated on the attached notification list.

Sincerely,

Scott S. Harris, Clerk

by

Lisa Nesbitt
Case Analyst

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

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

NOTIFICATION LIST

Mr. Peter Galyardt
Office of the Ohio Public Defender
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Columbus, OH 43215

Clerk
Supreme Court of Ohio
65 South Front Street
Columbus, OH 43215-3431