[Cite as *State v. Brooks*, 2010-Ohio-5886.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23784
v.	:	T.C. NO. 09CR593
FREDERICK D. BROOKS	:	(Criminal appeal from Common Pleas Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 3rd day of December, 2010.

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DONOVAN, P.J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Frederick D. Brooks, filed December 15, 2009. On March 2, 2009, Brooks was indicted on one count of aggravated robbery (deadly weapon), in violation of R.C. 2911.01(A)(1), a felony of the first

degree; one count of aggravated robbery (serious harm), in violation of R.C. 2911.01(A)(3), a felony of the first degree; one count of felonious assault (serious harm), in violation of R.C. 2903.11(A)(1), a felony of the second degree; one count of felonious assault (deadly weapon), in violation of R.C. 2903.11(A)(2), a felony of the second degree; and one count of having weapons while under disability (prior drug conviction), in violation of R.C. 2923.13(A)(3), a felony of the third degree. An attendant firearm specification was attached to each of the aggravated robbery and felonious assault offenses. Following a trial by jury, Brooks was convicted as charged and sentenced to ten years on each aggravated robbery charge, to be served concurrently; to eight years on each felonious assault charge, with the sentence for the R.C.2903.11(A)(1) offense to be served consecutively to the aggravated robbery terms, and the sentence for the R.C. 2903.11(A)(2) offense to be served concurrently with the aggravated robbery terms; and to four years for having weapons while under disability, to be served concurrently with the aggravated robbery terms. The court ordered that the firearm specifications be served concurrently with each other and consecutively and prior to the definite term of imprisonment, for a total sentence of 21 years.

{¶ 2} The events giving rise to this matter began on February 16, 2009, when the victim herein, Joshua Adams, along with his girlfriend, Brittany Young, and Zachary Mallory, drove from St. Mary's, Ohio, to Brooks' home at 2112 Oakridge Drive. Adams, who worked full time at Menard's as the first assistant sales manager, left work at 2:00 p.m., and Young picked him up in her car and took him to the bank and then to pick up Mallory. After driving around St. Mary's for awhile, during which time Adams and Mallory each drank a beer, Mallory used Adams' cell phone to call Brooks, who is also known as "Ace."

Mallory told Brooks that he and Adams wanted to buy an ounce of cocaine. Mallory had previously purchased drugs from Brooks, but Adams did not know him. Adams testified that he had $1200.00 in cash to complete the purchase.

{¶ 3} Mallory and Brooks spoke on the phone repeatedly in the course of the trip to Dayton as Brooks directed the group to his location. Brooks met the group near his home and then lead them to his address. Brooks was with Kionna Scott, and he was driving her car. Upon arrival at Brooks' home, Young pulled her car into the driveway behind Scott's vehicle. Brooks directed Young to park on the street, which she did after Mallory and Adams exited her car. Adams and Mallory entered Brooks' home with him while Young and Scott waited in their cars.

{¶ 4} According to Adams' testimony, once inside, Brooks yelled upstairs to someone, and there was no response. Brooks then went upstairs, and when he returned, he had a black semi-automatic pistol with a silver slide in his hand, which Adams identified at trial as State's Exhibit 66. Adams stated that when Brooks came downstairs, he fired the gun "into the ceiling, into the wall, somewhere," and then he pointed the gun at Adams and said, "'give me your money.'" Adams handed Brooks $1000.00, and as he did so, Brooks fired the gun, striking Adams in the neck. Adams fell down, and then he got up and ran out of the house into the street, and "told my girlfriend to call 911, that I'm going to die. I held my neck and then [Young] came over and bunched a sweater up on my neck and I was still awake when the ambulance got there, but after that, I don't remember nothing."

{¶ 5} Adams was hospitalized for 30 days. Akpofure Peter Ekeh, a physician trained in trauma surgery, testified that he treated Adams at Miami Valley Hospital after he

was placed in intensive care. According to Ekeh, Adams' jugular vein "was almost completely severed and he had massive blood loss * * *." Adams required 16 pints of blood in the course of his initial treatment because he was in "hemorrhagic shock," and he also required an "immediate tracheostomy" due to swelling in his neck. Adams' jugular vein had to be "tied off" in surgery. Ekeh testified that Adams' blood pressure was very low, and that without swift intervention he would have quickly died. Adams suffered "hypoxic injury," which is "an injury that occurs as a result of poor blood supply to an organ." Adams' x-rays indicated the presence of a bullet in his chest which the surgeons were unable to remove. Adams developed seizures while hospitalized, and he required further care from a neurologist after his discharge. At trial, Adams testified that he remains under a doctor's care and that he attends physical therapy twice a week, having lost strength in his hands and range of motion in his shoulder due to the presence of the bullet lodged there.

{¶ 6} Adams identified his bank statements at trial which indicated a purchase, in the amount of $32.07, at Kramer's Guns, in Celina, Ohio. Adams stated that he, Young and his cousin rented a 9 millimeter and a .357 Magnum at Kramer's and purchased ammunition to use on the shooting range there. Adams stated that the unused ammunition was in his car on the date of the shooting.

{¶ 7} Mallory, who was in prison at the time of trial for theft and forgery, testified consistently with Adams regarding the sequence of events of the robbery; Mallory stated that he and Adams were not armed, that there was no response when Brooks yelled upstairs, and that when Brooks returned downstairs, Brooks was carrying a weapon and he demanded that

Adams give him his money. At no time did Mallory hear or see anyone inside the home other than Brooks. Mallory stated that he ran from the home after Adams was shot, and when he turned around, he observed Brooks and Scott drive away in Scott's car.

{¶ 8} Young, with whom Adams has a child, testified that upon arrival at 2112 Oakridge Drive, Brooks "went into the house, turned on the light and waived for [Adams] and [Mallory to go inside.]" While she waited in her car, she heard two shots. She then observed Mallory run out of the house, followed by Adams, who ran to her car in the street and collapsed. While she tended to Adams, Young saw Brooks run from the home, get into Scott's car and leave the scene. Young did not see anyone else leave the home. She did not observe Adams or Mallory with a weapon According to Young, on the date of the shooting, there was some ammunition in the backseat of her car, including some 9 millimeter bullets, from a trip on an earlier date with Adams and his cousin to Kramer's Guns. Young testified that she and her family are avid hunters. While at Kramer's, she, Adams and Adams' cousin rented a .357 Magnum and a 9 millimeter weapon, purchased ammunition for the guns and practiced shooting on the range. When they were finished, Young put the remaining ammunition in her car.

{¶ 9} Scott also testified. At the time of the shooting, she was a nursing student at Wright State University, living in a dormitory there. On the date of the incident, following a conversation on his cell phone, Scott stated that she and Brooks met Adams, Mallory and Young on the street near Oakridge Drive, and that the group followed them to Brooks' home. Scott observed Mallory and Adams follow Brooks into the house while she waited in the car. Scott heard one gun shot, and after a pause, she testified that she heard three

more. She then saw Mallory run out of the house, followed by Adams, who ran to Young's car and fell down. When Scott began to pull away, she observed Brooks waiving for her to stop. Brooks then got into Scott's car and they left the scene. Scott did not observe Brooks' mother, Pauline Williams, at the Oakridge address.

{¶ 10} According to Scott, she and Brooks proceeded directly to the home of Pauline Williams, Brooks' mother, on Grafton Avenue. On the way there, Brooks placed a call to Williams on his cell phone. Williams answered her door wearing a robe and pajama pants. Brooks removed his clothes, and he went upstairs and took a shower at Williams' direction. Brooks then returned downstairs and placed his shoes and clothing in a black trash bag, directing Scott to dispose of the bag in a dumpster. Scott stated that when Brooks came downstairs, he was carrying a black and silver firearm, which she identified as State's Exhibit 66 at trial, and some money that was "balled up and had some blood on it." Scott observed Brooks put the money in his pocket. She left the residence with the clothing, which she placed in a nearby dumpster at the Barrington Apartments.

{¶ 11} Scott then proceeded to the home of a friend, where she watched a report on the local television news regarding the shooting on Oakridge. Scott learned that the police were looking for her car, and she wiped it down with glass cleaner to "make sure there was no blood in there." Scott and her friend then travelled, in the friend's car, to Williams' home to pick up Brooks. When Scott entered the home, she observed that wet money had been placed on a floor vent to "dry it off." Brooks took all but three one hundred dollar bills, and they left the residence so that Scott could retrieve her car to drive to Wright State University. When she discovered that her taillights were not working, Scott asked her

friend to take her and Brooks to Wright State, and on the way they stopped at Meijer to purchase a pair of shoes for Brooks. Brooks spent the night with Scott in her dormitory room, and she walked him to the bus stop the next morning on her way to class. Before he left, Brooks gave Scott a one hundred dollar bill, which she placed inside her lap top computer. When Dayton Police officers later contacted Scott, she initially denied knowledge of the shooting. She subsequently related a version of events to Detective Michael Deborde consistent with her trial testimony, and the officers retrieved the hundred dollar bill from Scott's lap top.

{¶ 12} Officer Zakary Farkas of the Dayton Police Department testified that he was the first to respond to the Oakridge Drive address, having been "about five blocks" from the scene when he received a dispatch regarding the shooting. Farkas stated that he was "less than a minute away, roughly, in a vehicle." Farkas observed Adams in the street in a pool of blood, attended to by Young and Mallory. He did not observe anyone exit the residence or anyone walking away from the scene. After paramedics arrived, Farkas and other officers followed the blood trail left by Adams into the residence, across the living room and into the dining room, where there was another pool of blood. Farkas observed 2 shell casings on the floor in the area. The officers also observed a piece of mail addressed to Brooks in a garbage can in plain view. Farkas issued a broadcast for Brooks.

{¶ 13} Detective Daniel Hall responded to the scene and collected the evidence there after obtaining a search warrant. Hall testified that the living room "was absent of normal furniture." Hall noted that the side door from the kitchen to the outside of the residence was deadbolted from the inside. Hall stated that projectiles from the casings were not recovered

after a search. He testified that there was one visible gunshot mark in "the east wall, relatively close to the back door." Hall and Detective Greg Gaier spoke to Williams on February 17, 2009, at the Oakridge Drive address, and Williams stated she knew nothing about the shooting. Officer Jeffery C. Holmes, a crime scene investigator for the Dayton Police Department, testified that he investigated the scene and collected samples of the blood there. Holmes' observations were consistent with Hall's. He noted one "hole in the wall in that dining room area on the east side of the wall * * * ." Officer Steven Bryant, also a crime scene investigator, testified that he recovered, on April 24, 2009, in the course of his duties with the police department, State's Exhibit 66, a Taurus nine-millimeter pistol, along with a loaded magazine, which was taken to the Miami Valley Regional Crime Laboratory ("Crime Lab"). Chris Monturo, an employee of the Crime Lab, testified that he tested State's Exhibit 66, and that it was operable. Monturo further testified that he compared the casings retrieved from 2112 Oakridge to State's Exhibit 66, and that the casings came from the pistol to a reasonable degree of scientific certainty.

{¶ 14} Detective Michael DeBorde, of the homicide unit of the Dayton Police Department, testified that he was in charge of the investigation, and that Mallory identified Brooks in a photo spread on February 17, 2009, and that Adams also identified Brooks in the hospital on March 3, 2009. Mary Cicco, a forensic scientist with the Crime Lab, provided expert testimony that DNA analyses she performed on the one hundred dollar bill retrieved from Scott's computer and the blood found in the residence at 2112 Oakridge Drive and in the street indicated a match with Adams' DNA.

{¶ 15} Williams testified on behalf of Brooks. According to Williams, she was in

the process of moving from 2112 Oakridge Drive to 1125 Grafton Avenue on the date of the shooting, and that she was "in and out of both houses all that day." While she was upstairs packing at the Oakridge address, Brooks arrived in Scott's car, and he and two males unknown to Williams entered the home. Williams stated, "Fred was downstairs with them. They were conversating. Fred came upstairs. He told me he was coming upstairs basically looking for a packet that went to the TV."

{¶ 16} After Brooks returned downstairs, Williams heard "cussing and hollering." She went downstairs and observed Mallory by the front door and Adams in the dining room with Brooks. Williams testified that Adams had a gun in his hand that he pointed at Brooks and fired. As she "went down in the hallway, in the corner of the hallway on the floor," Williams observed Brooks run to the kitchen, followed by Adams. Williams stated that she did not see Brooks shoot Adams and she did not see Adams fall, but that she heard his body hit the floor. Williams then "observed Fred running out and he was behind Josh, because Josh now has left the dining room and he's headed - - he's into the living room heading toward the front door.

{¶ 17} "I'm behind Fred. I ran out - - well, I crawled out. I crawled out of the hallway into the dining room, that's how I came across the weapon. It was on the floor next to the wall. I grabbed it. * * * I put it in my pocket." According to Williams, the gun she recovered was the weapon Adams had in his hand, a nine-millimeter. Williams stated that she followed Brooks onto the porch and told him to leave. She stated that Brooks got into the car with Scott and left. Williams observed Adams in the street with Young, and she stated that Young indicated that she did not know the address of Brooks' residence for

purposes of a call to 911. Williams stated that she told Young, "Oakridge and Shoop," and that she returned to her home to get her cell phone. When she entered the home, her phone was ringing, and it was Brooks. Williams stated that she left her home via the side door and "started off walking but then I called someone to come and get me." The person Williams called was there in "a couple minutes" and drove her to her residence on Grafton Avenue. Williams did not tell her friend about the shooting or show him the gun in her pocket. Williams testified she was wearing jogging pants and T-shirt.

{¶ 18} Within minutes of Williams' arrival, Brooks and Scott also arrived at the Grafton residence. Williams stated, "Fred came in. Basically, I had to check him because it's like when I ran back into the house, it was so much blood that I did not think it had came from one person. I had to check him. And he had wet his clothes." Williams told Brooks to remove his clothes because "they were pissy" and they had blood on them. Williams stated that she did not know what Brooks did with the clothes after he removed them. She denied that Brooks gave her or Scott any money.

{¶ 19} Williams testified that she did not call the police about the shooting because she initially spoke to attorney Jack Harrison, who advised "us basically to lay low, he would talk to the detectives hisself." Harrison further advised her, according to Williams, "to state that I was not even present." Williams stated that two detectives contacted her at the Oakridge address on February 17, 2009, but she did not recall what she told them about the shooting. She stated that she tried to turn the weapon she retrieved into the Crime Lab in person, but that an officer there "turned me away." Williams testified that she eventually contacted the police regarding the shooting in October, 2009, on the advice of Brooks' trial

counsel. Detective Deborde later took a statement from Williams, and she gave him the weapon that she stated she retrieved from the dining room floor. She identified the weapon as Defense Exhibit D at trial. Williams testified that she told Deborde that she wiped off the gun because she had M&Ms in her pocket that "had got on the weapon." She also testified that she "secured" the weapon by removing the clip and the bullet therein, replacing the clip in the weapon, and putting the safety in place.

{¶ 20} Attorney Jack Harrison testified, and he denied ever meeting or speaking with Williams about the incident. DeBorde returned to the stand and on cross-examination he testified that when Williams gave him the Defense Exhibit D, the safety was on, and that the magazine contained five live rounds when he examined it. DeBorde stated that Williams told him that she did not remove the magazine from the weapon or check the chamber, and that she gave the weapon to DeBorde exactly as she had found it. According to DeBorde, if Adams had fired the weapon as Williams indicated and she then gave it to him in the condition in which she found it, "there should be another bullet that was chambered into that pistol." Chris Monturo returned to the stand and testified that he tested the weapon that Williams turned over to Deborde, and that it was operable. He reiterated that the casings found at the scene were fired from State's Exhibit 66 to the exclusion of all other weapons.

{¶ 21} Finally, Brooks testified. On the date of the offense, Brooks stated that he was on a type of probation known as intervention in lieu of conviction for a prior drug offense. Brooks testified that he helped Williams move to the Grafton Avenue address on the date of the incident. Brooks stated that Scott is "a former friend," and that he borrowed

her car on the day of the shooting because his car was being repaired. Brooks received a call from Mallory, to whom he had previously sold drugs, on the evening of the 16th. According to Brooks, Mallory requested a large amount of drugs, and Brooks decided to conduct the transaction in the privacy of the Oakridge address due to the amount of drugs Mallory requested. Brooks testified that the lights were on at the residence when he arrived. After Mallory and Adams entered the house, Brooks went upstairs to retrieve the heroin. Brooks stated that he told Williams, who was packing clothes, that he "was in the midst of selling the TV because I wasn't going to tell her I was selling drugs in the house." When Brooks returned to the dining room with a quantity of heroin, he learned that Adams wanted to purchase cocaine instead of heroin.

{¶ 22} After realizing that Brooks did not have any cocaine, Adams became "hysterical," according to Brooks, and he pulled out a weapon. Brooks identified Defense Exhibit D as the weapon in Adams' possession. According to Brooks, Adams "is telling me he's going to take everything I had. He's saying he didn't come down to Dayton for nothing." Brooks stated that he had over $500 in his front pockets, and that he threw the money on the floor. When Adams reached for the money, Brooks ran to the basement. Adams told Brooks to come back upstairs and that "he's going to come down to get me." Adams then fired one shot "towards the kitchen wall." Brooks stated he retrieved a weapon that belonged to Williams from a toolbox on a shelf on the stairs, and as he climbed the stairs, he observed Adams pointing his weapon at him. Brooks then fired one shot. According to Brooks, he was trapped at the time and was in fear for his life, believing that Adams would fire his weapon again.

{¶ 23} Brooks stated that Adams fell to the floor, dropped his weapon, and then got up and exited the residence. Brooks followed him out of the house, and Brooks stated that he twice loudly yelled, "'Y'all tried to rob me over this." Brooks testified that he then went back inside and picked up the money and the heroin that were on the dining room floor. After retrieving the items, he left with Scott in her car and went to the Grafton Avenue address where Williams was present. Williams did not show Brooks the weapon in her pocket, according to Brooks. Brooks stated that he removed his clothing and shoes, took a shower, and put his clothes and shoes in a black trash bag. Scott then left to dispose of the clothing, according to Brooks. Scott later returned with a friend in the friend's vehicle, and Brooks left with them, driving to Meijer to buy shoes and then to Scott's dormitory. Brooks testified that he gave Scott one hundred dollars to fix her taillights, and he denied giving Williams any money. Brooks testified that he threw his mother's gun away.

{¶ 24} Brooks asserts three assignments of error. His first assignment of error is as follows:

{¶ 25} "THE TRIAL COURT DENIED THE APPELLANT A FAIR [TRIAL] BY INITIALLY STATING IT WOULD NOT GIVE AN INSTRUCTION ON SELF DEFENSE AND THEN HINDERING THE APPELLANT IN PRESENTING THIS DEFENSE."

{¶ 26} According to Brooks, the trial court "from the outset of the trial informed Appellant's counsel that it would not be giving the jury an instruction on self defense as to any charge. On several occasions the Court sustained objections when the questions posed by Appellant's counsel sought to elicit testimony to support his claim of self defense. It is also apparent from the record that the Appellant did not voir dire the jury on the issue of self

defense because Appellant's counsel knew that the jury would not be instructed on this defense. The Court, however, right before closing argument changed its mind and stated it would give a self defense instruction as to Felonious Assault. This was clearly too late to eliminate the prejudice that had already resulted from the limitations imposed by the Court on the Appellant's attempts to develop this defense. The end result was that the Appellant was denied a fair trial and his right to due process was denied."

{¶ 27} "The United States Supreme Court has held that '[t]he fundamental requisite of due process of law is the opportunity to be heard.' (Internal citations omitted). The court has also held that: 'An elementary and fundamental requirement of due process in any proceeding * * * is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' (Internal citations omitted).

{¶ 28} "Both the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution guarantee due process of law, and thus guarantee 'a reasonable opportunity to be heard after a reasonable notice of such hearing.'" *Ohio Valley Radiology Assocs., Inc. v. Ohio Valley Hospital Assoc.* (1986), 28 Ohio St.3d 118.

{¶ 29} "Self-defense is an affirmative defense which the accused has the burden to prove by a preponderance of the evidence. R.C. 2901.05(A); (citation omitted). 'In order to establish self-defense, a defendant must prove: (1) that the defendant was not at fault in creating the situation giving rise to the affray; (2) that the defendant 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; and (3) that the defendant did not violate any duty to retreat or avoid the danger.'" (citations omitted). *State v. Kleekamp*, Montgomery App. No. 23533, 2010-Ohio-1906, ¶ 52.

{¶ 30} "'A criminal defendant has the right to expect that the trial court will give complete jury instructions on all issues raised by the evidence.' (Citation omitted). Jury instructions should be tailored to fit the facts of the case. (Citation omitted). 'The trial court is not required to instruct the jury on self-defense in every situation in which its presentation is attempted; rather, a trial court need only instruct the jury on self-defense if the defendant "has introduced sufficient evidence, which, if believed, would raise a question in the minds of reasonable [jurors] concerning the existence of such issue."' (Citations omitted). 'Evidence is sufficient where a reasonable doubt of guilt has arisen based upon a claim of self-defense. If the evidence generates only a mere speculation or possible doubt, such evidence is insufficient to raise the affirmative defense, and submission of the issue to the jury will be unwarranted.'" *State v. McGhee*, Montgomery App. No. 23226, 2010-Ohio-977, ¶ 42.

{¶ 31} We initially note that Brooks has not provided us with a transcript of the voir dire portion of his trial, pursuant to App.R. 9. "The duty to provide a transcript for appellate review falls upon the appellant. (Internal citations omitted). An appellate bears the burden of showing prejudicial error by reference to matters in the record." *Shirley v. Kruse,* Greene App. No. 2006-CA-12, 2007-Ohio-193. "When portions of the transcript necessary for resolution of assigned errors are omitted from the record, we have nothing to pass upon and, thus, we have no choice but to presume

the validity of the lower court's proceedings and affirm." Id.

{¶ 32} A review of the record that is before us belies Brooks' assertion that the trial court "at the outset of trial" informed him that it would not instruct the jury on self-defense. Brooks argued in part as follows in his opening statement: "Fred Brooks invited Josh Adams and his friend, [Mallory], to his house, his own house where he lived, with his mother in order to discuss the buying and selling of drugs. Once they arrived, he invited them in, and at that point they had an argument. They wanted more drugs then [sic] * * * he could provide. He only had a very little bit. They understood that he had money. * * * And they attempted to rob him. We believe the evidence will show that they pulled the gun, [Adams] pulled the gun, attempted to threaten - - put [Brooks] in fear of eminent danger, or fear of the loss of his life. He was able to obtain a gun from his house that his mother maintained. He took the gun and he shot, and it unfortunately hit [Adams] in the throat, in the neck, and he was seriously injured. We don't dispute that.

{¶ 33} "We contend that [Brooks] was acting in self defense. I think the evidence will support that. Later, and it was a good while later, his mother brought forward a gun that she found at the scene, a 9mm, she said this is a gun she believes [Adams] had used to threaten and attempt to hurt * * * [Brooks]. This 9mm firearm will match * * * ammunition found in the car that brought * * * Adams to the house, a car driven by * * * Young as they came to deal in drugs.

{¶ 34} "So, although it's very unpleasant, and though it's a shame, it's a pity that these things occurred, we believe you will hear testimony that the robbery actually was attempted to be perpetrated by the so-called victims, * * * [Adams and

Mallory], and that [Brooks] was defending himself in this instance.

{¶ 35} "* * * But the evidence will still show, if you want to listen to [Brooks] at the very end of the trial because we are going to go last, and analyze what he says, and what his other witnesses say, * * * that the actual robbery attempt he did not do, that he had the money, that they attempted to take it from him by force, that they in fact pulled a gun on him and he defended himself, and that's what I think you will find. And based on that, we're going to ask you to acquit * * * Brooks of all charges."

{¶ 36} The following day, prior to the resumption of trial, the court indicated on the record, outside of the presence of the jury, that it would not instruct the jury on self defense, on the authority of *State v. Higgins*, Montgomery App. No. 18974, 2002-Ohio-4679, ¶ 19. ("In order for the jury to find Higgins guilty of [aggravated burglary], it necessarily had to find that he was trespassing when he injured Mathews. This is inconsistent with the defense of self-defense, because it presupposes that Higgins was at fault in creating the situation that gave rise to the altercation. Thus self-defense was not available as a defense"). According to the court, "self defense is not a defense to the charge of aggravated robbery. And the court makes that finding on the basis that one of the elements of aggravated robbery is the commission of a theft offense. * * * a self defense basically admits the facts claimed by the prosecution. Basically, self defense admits that there was, in fact, a theft, but then relies on other independent facts or circumstances to exempt the Defendant from liability. The Court finds that really this is inconsistent. The self defense is inconsistent because it presupposed that, in this case, Mr.

Brooks was, in fact, committing a theft offense and that is inconsistent with self defense. So that's the Court's analysis for saying that the - - or making the finding that self defense is not applicable in this case.

{¶ 37} "The court is also not going to give the instruction on self defense to * * * the other charges of felonious assault for the simple reason that the felonious assaults in this case arrive [sic] out of the aggravated robbery case. * * *"

{¶ 38} In response, Brooks' counsel asserted in part, " * * *Brooks' defense in this case to the charge of aggravated robbery is a denial. He's saying he did not rob these people, they in fact robbed him. So he's admitting no theft offense and he's asserting no self defense toward the robbery; his defense there is a denial. He's not admitting a theft offense, he's never indicated he was. What he's admitting is shooting * * * Adams, * * * in the neck, and that he's claiming he did as self defense, because he himself was about to be shot or a weapon was pointed at him. So we're asking the Court to give the instruction * * * of self defense relative to the charge of felonious assault. * * *

{¶ 39} "* * * In the *Higgins* case, the Defendant, Mr. Higgins, trespassed and he admitted trespassing and he was convicted of aggravated burglary * * * . * * * Brooks admits to no offense here. He denies flatly and his defense for the robbery would be that he didn't do it. His defense for the felonious assault would be that he, in fact, was acting in self defense. * * * ."

{¶ 40} According to Brooks, the trial court prevented Williams from testifying regarding "anything Adams said" in the course of the incident, and that those statements would have corroborated Brooks' testimony that he was robbed at

gunpoint by Adams. Brooks fails to direct our attention to any specific errors in the record regarding Williams' testimony, as required by App.R.16(D) . "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Hearsay is not admissible pursuant to the hearsay rule in Evid.R. 802. Williams testified, over objection, that she heard the men arguing downstairs, and the trial court correctly ruled that she could not testify "as to what was said down there." She further described what she observed in her home, namely that Adams pointed a gun and fired at an unarmed Brooks, and that she subsequently retrieved the gun that Adams fired from her dining room floor. We note that when Williams testified that Brooks "was still saying things" on the porch after the shooting, defense counsel indicated that he wanted to "make a proffer" regarding Brooks' remarks outside, although no such proffer was made.

{¶ 41} Regarding his own testimony, Brooks initially directs our attention to the following exchange wherein he described his ascent from the basement with his mother's gun:

{¶ 42} "Q. Do you see [Adams]?

{¶ 43} "A. I seen him as I'm coming up the basement stairs.

{¶ 44} "Q. Does he still have the gun in his hand?

{¶ 45} "A. Yes.

{¶ 46} "Q. Does he point it at you?

{¶ 47} "A. It's pointed at me - - as I come up the stairs, only half of my body - - I comes up with [the] majority of my head out of the basement (demonstrating).

I see him pointing the gun. That's when I fired.

{¶ 48} "A. I fired once. He's backing up towards the side door. That's when I come out the doorway where the stair - - where the stove is and the refrigerator is, and between the dining room and the kitchen. I fire again.

{¶ 49} "Q. Now, when you chose to get this gun and fire it, were you in your own home?

{¶ 50} "A. Yes.

{¶ 51} "Q. And were you in fact basically trapped?

{¶ 52} "A. Yes.

{¶ 53} "Q. So there was nowhere you could really run, is that so?

{¶ 54} "A. No.

{¶ 55} "MR. FRANCESCHELLI: Objection, Your Honor.

{¶ 56} "THE COURT: Sustained.

{¶ 57} "MR. WILMES: May we approach, Your Honor?

{¶ 58} " * * *

{¶ 59} (At sidebar)

{¶ 60} "THE COURT: We had this discussion.

{¶ 61} "MR. WILMES: Are you talking about new jury instructions?

{¶ 62} "THE COURT: I'm talking about I'm not going to give you that self-defense defense [sic], and this is part of it, and so you're not going there. Pure and simple. I'm not giving you that. * * *

{¶ 63} "MR. WILMES: But we're going to deal with that later on properly.

{¶ 64} "THE COURT: Absolutely, but I'm just telling you - -

{¶ 65} "MR. WILMES: You're stopping me from asking questions that would allow me to prove stuff, so that's - - we're establishing.

{¶ 66} "THE COURT: You can say whatever you want. But I'm not going to read the instruction.

{¶ 67} "MR. WILMES: * * * Can I ask that question?

{¶ 68} "THE COURT: I think you can ask it, but * * * I'm not going to give the instruction. * * *

{¶ 69} " * * *

{¶ 70} "THE COURT*:* * * * For the record, I think his client can testify as to * * * what happened there, so I'll let you do that. But you're not getting the instruction.

{¶ 71} "MR. FRANCESCHELLI: You know that I objected because it was leading or like was suggesting the answers to him.

{¶ 72} "THE COURT: Well, I know. But I'll - - but you've got to know where I'm headed (indiscernible) - -

{¶ 73} "MR. WILMES: Okay. I just want to get over that real quick.

{¶ 74} "THE COURT: Okay, go do that. Go ahead.

{¶ 75} (End sidebar)

{¶ 76} "BY MR. WILMES:

{¶ 77} "Q. You say that Josh had already shot at you once, toward the kitchen and the stairs, is that correct?

{¶ 78} "A. Yes.

{¶ 79} "Q. And was pointing a gun at you again as you ascended the stairs? Is that what you said?

{¶ 80} "Yes.

{¶ 81} "Q. What did you think he might do?

{¶ 82} "MR. FRANCESCHELLI: Objection.

{¶ 83} "THE COURT: Overruled.

{¶ 84} "THE WITNESS: I believe he was going to shoot again.

{¶ 85} "BY MR. WILMES:

{¶ 86} "Q. You believed that he might seriously hurt or kill you?

{¶ 87} "A. Right.

{¶ 88} "Q. Were you in fear for your life?

{¶ 89} "A. Yes. At that time, I was."

{¶ 90} Brooks further directs our attention to a later exchange, after defense counsel asked Brooks if he owned a gun on February 16th, as follows:

{¶ 91} "THE WITNESS: No, I didn't own a gun.

{¶ 92} "BY MR. WILMES: You just knew where your mother kept one?

{¶ 93} "A. Yes.

{¶ 94} "Q. Did you feel you were in an emergency situation?

{¶ 95} "MR. FRANCESCHELLI: Objection

{¶ 96} "THE COURT: Sustained.

{¶ 97} "BY MR. WILMES: Did you think you might get shot?

{¶ 98} "MR. FRANCESCHELLI: Objection.

{¶ 99} "THE COURT: Counsel. Sustained.

{¶ 100} "BY MR. WILMES:

{¶ 101} "Q. Why did you go down in the basement and get the gun?

{¶ 102} “A. MR. FRANCESCHELLI: Objection.

{¶ 103} “THE COURT: Sustained.

{¶ 104} “MR. WILMES: Basis for it?

{¶ 105} “THE COURT: For the reason that we discussed at sidebar.

{¶ 106} “* * *

{¶ 107} “BY MR. WILMES:

{¶ 108} “Q. Were you sorry that [Adams] had been shot?

{¶ 109} “MR. FRANCESCHELLI: Objection.

{¶ 110} “THE COURT: Sustained.”

{¶ 111} We note that on Brooks’ redirect examination, the following exchange occurred:

{¶ 112} “Q. Did you rob [Adams] or anyone else that night?

{¶ 113} “A. No, I didn’t.

{¶ 114} “Q. Did you shoot him?

{¶ 115} “A. Yes, I did shoot him.

{¶ 116} “Q. Why did you shoot him?

{¶ 117} “A. Because I was in - -

{¶ 118} “MR. FRANCESCHELLI: Objection.

{¶ 119} “THE COURT: Overruled.

{¶ 120} “THE WITNESS: So answer?

{¶ 121} “THE COURT: Yeah, you can answer.

{¶ 122} “THE WITNESS: Because I was in fear. I was trying to protect myself.”

{¶ 123} After Brooks' testimony, defense counsel asked to proffer evidence, and he stated, "the chief proffer is the Defense has attempted to ask several questions pursuant to the theory of self defense and have been estopped from doing that. So we believe that Mr. Brooks would be able to explain how he felt in fear for his life, * * * all the tenets that are contained in the instruction for self-defense, which we're apparently not going to receive.

{¶ 124} "That he didn't create the fray. That he had no option to retreat or even duty to retreat, being in his own house. And that he was in a reasonable fear of death or serious physical injury when he took a weapon and used it. There were a series of questions along those lines I would have asked him, and he would have said yes to every one of those and amplified thereon."

{¶ 125} When the trial court, after the testimony of the State's rebuttal witnesses, indicated that it would in fact instruct the jury on self-defense, Brooks moved for a mistrial. Defense counsel asserted, "At the very beginning of the case the Court advised all parties, including defendant, that it would not allow argument or presentation of evidence on the issue of self-defense.

{¶ 126} "Several times during the trial defense counsel was instructed not to go into those areas and now the Court has reversed itself, decided it will allow instruction on self-defense, but the defendant has been irreparable [sic] disadvantaged by the continuous rulings of the Court on that issue.

{¶ 127} "And I'll give a couple of examples here. If I had known that I could argue self-defense, I would have voire dired the jury differently. I would have asked different questions. I would have possibly selected a different panel, a panel who

were sympathetic to the conception of the Castle Doctrine where your home is your castle, a set of jurors who might view the incident of self-defense and give us their opinions on the plausibility of that issue. I wasn't able to do that even at the voir dire.

{¶ 128} "Then when giving the jury the roadmap of what defense evidence was going to show, I wasn't able to argue self-defense or tell them to look for that particularly issue [sic], and I finally * * * would have asked a little more elaborate questions of the defendant, a little different style and presented my case entirely differently had I known that I had the opportunity to and right to assert self-defense.

{¶ 129} " * * * ."

{¶ 130} The motion for mistrial was overruled, and in closing argument, Brooks argued that he acted in self-defense. The trial court then instructed the jury on self-defense.

{¶ 131} Having throughly reviewed the record before us, Brooks testified that he lived at the Oakridge residence, that Adams pointed and fired a weapon at him in the course of a robbery, that Brooks believed that Adams was going to fire the gun again as Brooks ascended the stairs, that he felt trapped in the stairway, that he believed Adams might seriously injure him or kill him, and that he was in fear for his life. On redirect, Brooks testified that he was in fear and trying to protect himself during the alleged robbery. Williams' testimony corroborated that of Brooks. From this evidence, the trial court concluded that Brooks had introduced evidence, which, if believed, would raise a question in the minds of the jury concerning the existence of reasonable doubt of Brooks' guilt of felonious assault,

based upon his claim of self-defense. *Higgins* is distinguishable in that the defendant therein admitted the underlying offense of trespass. Since Brooks was given a meaningful opportunity to present his defense, he has not demonstrated prejudice, and his right to due process was not violated by the trial court.

{¶ 132} There being no merit to Brooks' first assigned error, it is overruled.

{¶ 133} Brooks' second assignment of error is as follows:

{¶ 134} "THE APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 135} According to Brooks, Adams "entered [the] Oakridge [address] armed with the nine millimeter [Williams] retrieved from the dining room floor. There was nine millimeter ammunition in Young's car that matched bullets found [in] Adams['] gun." Brooks relies upon the testimony of Williams and Brooks and asserts that "Adams fired the first shot." Brooks argues, in contrast to his first assigned error, that he "established by a preponderance of the evidence all the elements of self defense," namely that he was not at fault in creating the affray, that Adams attempted to rob him with a gun, that he feared "great bodily harm," that Brooks had no duty to retreat in his own home, and that being under disability, pursuant to R.C. 2923.13, did not prohibit him from acting in self defense.

{¶ 136} "When an appellate court analyzes a conviction under the manifest weight of the evidence standard it must review the entire record, weigh all of the evidence and all the reasonable inferences, consider the credibility of the witnesses and determine whether in resolving conflicts in the evidence, the fact finder clearly lost its way and created such a manifest miscarriage of justice that the conviction

must be reversed and a new trial ordered. (Internal citations omitted). Only in exceptional cases, where the evidence 'weighs heavily against the conviction,' should an appellate court overturn the trial court's judgment." *State v. Dossett*, Montgomery App. No. 20997, 2006-Ohio-3367, ¶ 32.

{¶ 137} The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1997), 10 Ohio St.2d 230, 231. "Because the factfinder * * * has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *State v. Lawson* (Aug. 22, 1997), Montgomery App. No. 16288.

{¶ 138} This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of fact lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

{¶ 139} R.C. 2911.01 provides: "(A) No person, in attempting or committing a theft offense, as defined in section 2913.01 of the Revised Code, or in fleeing immediately after the attempt or offense, shall do any of the following:

{¶ 140} "(1) Have a deadly weapon on or about the offender's person or under the offender's control and either display the weapon, brandish it, indicate that

the offender possess it, or use it;

{¶ 141} " * * *

{¶ 142} "(3) Inflict, or attempt to inflict, serious physical harm."

{¶ 143} R.C. 2903.11 provides, "(A) No person shall knowingly do either of the following:

{¶ 144} "(1) Cause serious physical harm to another * * * ;

{¶ 145} "(2) Cause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance."

{¶ 146} Having reviewed the entire record, weighed all of the evidence and reasonable inferences, and deferring to the jury's assessment of witness credibility, we conclude that Brooks' convictions are not against the manifest weight of the evidence. While Williams and Brooks testified consistently regarding the sequence of events on Oakridge Drive, and Brooks adduced evidence relating to his claim of self-defense, as discussed at length above, the jury was free to discredit Brooks' evidence, and the record reveals ample bases to do so. Adams and Mallory observed Brooks point and fire a weapon at Adams, and Scott observed a weapon in Brooks' possession at Williams' home. All three witnesses identified that weapon as State's Exhibit 66, the source of the shell casings found at the scene.

{¶ 147} While Brooks asserts that the ammunition found in Young's car "matched" the bullets in Defense Exhibit D, Young and Adams explained, and the jury was free to believe, that they put the ammunition in the car after firing weapons at the shooting range at Kramer's Guns. Scott's testimony that she observed

bloody money in Brooks' possession, and that she later observed money drying on a vent when she returned from disposing of Brooks' clothing, suggests that Brooks attempted to wash the blood from the money and further supports Adams' and Mallory's assertions that Adams was robbed. The testimony of Hall, that he recovered a one hundred dollar bill from Scott's computer, and the testimony of Cicco, that the blood on the one hundred dollar bill matched Adams' DNA, corroborated Scott's testimony. That Brooks tried to conceal his involvement in the incident by fleeing the scene and disposing of his clothing suggests that Adams, and not Brooks, was the victim herein. After the alleged robbery, it is illogical that Brooks, were he the victim, would flee the scene with Scott and leave Williams alone at the residence.

{¶ 148} The jury was free to conclude that Williams' testimony that she was present at the scene lacked credibility. Young testified that Brooks turned on the light in the Oakridge residence upon entry, suggesting that no one was home. While Williams produced Defense Exhibit D months after the shooting, and she (and Brooks) identified it as Adams' weapon, Monturo testified that the shell casings recovered from the scene came from State's Exhibit 66 to a reasonable degree of scientific certainty. Adams and Mallory testified that they did not hear or observe anyone but Brooks in the residence, Young testified that she did not observe anyone else at the scene besides Adams, Brooks and Scott, and Scott testified that she did not observe Williams there. Scott testified that Williams was wearing a robe and pajamas when she and Brooks arrived at her home on Grafton minutes after the shooting, suggesting that she had been at the residence during

the incident. Farkas did not observe anyone exit the home upon his immediate arrival, nor did he observe anyone walking from the scene. Williams' testimony, that she directed Brooks to leave the scene, provided her address to Young to help Adams, returned to her house to retrieve her cell phone, began walking from the home before requesting a ride, and arrived at the Grafton Avenue address ahead of Brooks and Scott, defies logic. Hall testified that the side door, through which Williams claimed to have exited, was deadbolted from the inside. He further stated that Williams denied knowledge of the shooting on February 17, 2009. Harrison denied meeting with and advising Williams to deny being present at the incident. Williams' statements to DeBorde regarding the condition of Defense Exhibit D were inconsistent with her trial testimony. Based upon the conflict between the testimony of the State's witnesses and that of Williams, the jury was free to discredit Williams' testimony that she was present at the scene.

{¶ 149} Since Brooks' convictions are not against the manifest weight of the evidence, his second assigned error is overruled.

{¶ 150} Brooks' third assigned error is as follows:

{¶ 151} "THE COURT ERRED WHEN IT DID NOT MERGE THE CONVICTIONS FOR FELONIOUS ASSAULT AND REQUIRE THE APPELLEE TO ELECT WHICH ONE THE APPELLANT WOULD BE SENTENCED UNDER."

{¶ 152} The State concedes, and we agree, that the felonious assaults are allied offenses of similar import, and the trial court should have merged them for sentencing.

{¶ 153} "As we recently noted in *State v. Reid*, Montgomery App.No. 23409,

2010-Ohio-1686, * * * the Supreme Court of Ohio determined, 'our analysis of allied offenses originates in the prohibition against cumulative punishments embodied in the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment, and Section 10, Article I of the Ohio Constitution. *United States v. Halper* (1989), 490 U.S. 435, 440, 109 S.Ct. 1892, 104 L.Ed.2d 487, citing *North Carolina v. Pearce* (1969), 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656. However, both this court and the Supreme Court of the United States have recognized that the Double Jeopardy Clause does not entirely prevent sentencing courts from imposing multiple punishments for the same offense but rather "prevent[s] the sentencing court from prescribing greater punishment than the legislature intended." *State v. Rance* (1999), 85 Ohio St.3d 632, 635, * * * quoting *Missouri v. Hunter* (1983), 459 U.S. 359, 366, 103 S.Ct. 673, 74 L.Ed.2d 535, and citing *State v. Moss* (1982), 69 Ohio St.2d 515, 518, 23 O.O.3d 447, * * * . Thus, in determining whether offenses are allied offenses of similar import, a sentencing court determines whether the legislature intended to permit the imposition of multiple punishments for conduct that constitutes multiple criminal offenses. *State v. Williams,* 124 Ohio St.3d 381, 2010-Ohio-147, at ¶ 12.' *Reid*, ¶ 28." *State v. Scandrick*, Montgomery App. No. 23406, 2010-Ohio-2270, ¶ 43.

{¶ 154} R.C. 2941.25 determines the application of the Double Jeopardy Clause to the issue of multiple punishments and provides:

{¶ 155} "(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or

information may contain counts for all such offenses, but the defendant may be convicted of only one.

{¶ 156} "(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them. "

{¶ 157} " ' "A two-step analysis is required to determine whether two crimes are allied offenses of similar import. E.g. *State v. Blankenship* (1988), 38 Ohio St.3d 116, 117, * * * ; *Rance*, 85 Ohio St.3d at 636, * * * . Recently, in *State v. Cabrales* 118 Ohio St.3d 54, 2008-Ohio-1625, * * * we stated: 'In determining whether offenses are allied offenses of similar import under R.C. 2941.25(A), courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import.' Id. at paragraph one of the syllabus. If the offenses are allied, the court proceeds to the second step and considers whether the offenses were committed separately or with a separate animus. Id. at ¶ 31." *Williams*, at ¶ 16.'

{¶ 158} " 'Courts have sometimes applied R.C. 2941.25 as requiring merging of "convictions." That is conceptually incorrect. When its terms are satisfied, the court must merge multiple offenses of which a defendant is found guilty into a

single conviction. That scenario contemplates multiple charged offenses on which the verdicts returned by the trier of fact pursuant to Crim.R. 31(A) contain a finding of guilt. Following the State's election of which allied offenses should survive, *State v. Whitfield*, 124 Ohio St.3d 319, 2010-Ohio-2, the court must merge the offenses concerned into a single judgment of conviction entered pursuant to Crim.R. 32(C), followed by the court's imposition of a sentence on that conviction pursuant to Crim.R. 32(A). * * * ' *Reid*, ¶ 32-33." *Scandrick*, ¶ 47-48.

{¶ 159} We conclude that Brooks' R.C. 2903.11(A)(1) and (A)(2) felonious offenses, arising from his conduct in shooting Adams, are allied offenses of similar import, committed with the same animus, and they accordingly must be merged pursuant to R.C. 2941.25. See *Scandrick, ¶ 50.*

{¶ 160} Brooks' third assignment of error is sustained, and we reverse and vacate his sentences for felonious assault (deadly weapon) and his sentence for felonious assault (serious harm). The case will be remanded to the trial court to first merge the above offenses and, pursuant to the State's election, to resentence Brooks accordingly.

{¶ 161} Judgment affirmed in part, reversed in part, and the case is remanded for further proceedings consistent with this court's opinion.

. . . . . .

BROGAN, J. and FAIN, J., concur.

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Hon. John D. Schmidt, Visiting Judge
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