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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO
Plaintiff

MICHAEL BRELO
Defendant

Case No: CR-13-580457-A

Judge: JOHN P O'DONNELL

INDICT: 2903.03 VOLUNTARY MANSLAUGHTER /FRM3
2903.03 VOLUNTARY MANSLAUGHTER /FRM3

JOURNAL ENTRY

JUDGMENT ENTRY OF THE VERDICT AFTER A BENCH TRIAL. O.S.J.

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HEAR
05/23/2015

IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO

THE STATE OF OHIO	)	**CASE NO. CR 14 580457 A**
	)	
Plaintiff,	)	**JUDGE JOHN P. O'DONNELL**
	)	
vs.	)	
	)	
MICHAEL BRELO	)	**JUDGMENT ENTRY OF THE**
	)	**VERDICT AFTER A BENCH TRIAL**
Defendant.	)	

John P. O'Donnell, J.:

Introduction

In many American places people are angry with, mistrusting and fearful of the police. Citizens think the men and women sworn to protect and serve have violated that oath or never meant it in the first place. Some of these places are long familiar: New York City and Baltimore. Some were unfamiliar until incidents there laid bare the divide between the people and the police: Ferguson, Missouri and North Charleston, South Carolina. Probably not coincidentally these places are mostly African-American communities.

Cleveland, too, is one such place, as the reaction and attention to this case and other recent events has shown. Every week I pass a mound of stuffed animals left in memory of a 12-year-old many believe was murdered by a Cleveland police officer.

This animosity toward the police is fed not just by stories that attract TV watchers and internet clickers, but by police officers' affronts – intended or not – to honest people treated as criminals, by unnecessarily brutal treatment of arrested suspects, by daily slights and disrespect – real and imagined – and by the isolation of the police from the people they serve. These realities in some neighborhoods have nourished attitudes toward the police ranging from wariness to outright hatred, and these feelings existed long before they gained prominence through the proliferation of smartphones, surveillance cameras and other recording devices that let pictures and news of violent police-citizen encounters quickly saturate the internet. Some say the volatile relationship between police and the community is rooted in our great country's original sin.

Whether it is or not, that sin won't be expiated and the suspicion and hostility between the police and the people won't be extirpated by a verdict in a single criminal lawsuit.

If defendant Michael Brelo is not guilty of the voluntary manslaughter of Timothy Russell and Melissa Williams – if the evidence did not show beyond a reasonable doubt that he knowingly caused their deaths in violation of the Constitution – then I will not sacrifice him to a public frustrated by historical mistreatment at the hands of other officers.

At the same time, if the evidence did prove the charges beyond a reasonable doubt then he will be found guilty and punished as any other criminal. His badge and gun offer no special protection here. He and I took similar oaths to support and uphold the Constitution. If the evidence shows that he violated his he can be sure I will honor mine.

But whatever the verdict, it is a conclusion about the evidence in this case only.[1] If he is guilty it doesn't mean the entire Cleveland police department is dysfunctional, incompetent and uncaring. If he is not guilty the verdict does not mean the department covered itself in glory on

[1] As such, it should not be considered a preview of the merits of the separate criminal charges against the five other defendants.

November 29. And guilty or not guilty, the verdict should be no cause for a civilized society to celebrate or riot. Whatever the outcome, two people are still dead and the defendant's life is forever changed.

The facts

Timothy Russell was driving his 1979 Chevrolet Malibu down East 18 Street between St. Clair and Superior Avenues when he was pulled over by Cleveland police patrolman John Jordan on November 29, 2012.[2] It was about 10:30 at night. Jordan got out of his car and called to Russell to turn off the Malibu.[3] Before even approaching Russell's car Jordan saw the front seat passenger, Melissa Williams, turn around and heard her screaming "why the fuck [are you] bothering us?" and "what the fuck did we do this time?"[4] Already weary because Williams was acting "really crazy," Jordan decided not to pursue the stop, which he initiated after Russell turned left without a signal because he had seen Russell do a possible drug deal a few minutes earlier outside the nearby men's homeless shelter.[5]

But before Jordan could act to end the traffic stop, Russell sped away and turned right on Superior, toward downtown, and Jordan, who never saw the car again, returned to his other duties without telling anybody else of the encounter.[6]

Meanwhile, less than two miles away, Cleveland policemen Vasile Nan and Alan Almeida were standing on the sidewalk on St. Clair just across from the police headquarters in the Justice Center.[7] The two were next to Nan's police car discussing computer equipment Nan

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[2] Trial transcript page 169, testimony of John Jordan.
[3] *Id.*, p. 170.
[4] *Id.*, p. 173.
[5] *Id.*, pp. 174, 166-167.
[6] *Id.*, pp. 174-175.
[7] *Id.*, pp. 201-203, testimony of Vasile Nan.

was leaving with Almeida to repair when Russell's Malibu zoomed by and a sound like a gunshot rang out.[8]

Nan and Almeida both thought they had been shot at. Nan jumped into his car, made a U-turn, and began to pursue the Malibu. He immediately broadcast over police radio channel two that somebody in an "old Chevy" had "popped a round as he went by" the Justice Center. It was 10:33.21.[9]

About a minute later Van expanded on his initial call, broadcasting over channel two:

> Car should be on Prospect eastbound. Two black males. Shots fired. I was conferring with mobile support and he popped a round right as he drove by us.[10]

Channel two is the band monitored by police officers on duty in Cleveland's second district on the city's near west side. At the time of Nan's initial radio call, second district patrol officer Michael Brelo and his partner Cynthia Moore were in zone car 217 heading north on West 25 Street near Franklin Avenue.[11] As they continued north, and less than a minute after Nan's initial call, second district officer Dave Siefer, in zone car 243 driven by James Hummel, called out over channel two that "a Chevy just blew by us going" westbound on the Detroit-Superior bridge.[12] Hummel made a U-turn to follow the Malibu and Brelo, who by then was also going east over the bridge, did the same.[13]

And the chase was on.

The pursuit of the Malibu by Cleveland police that night would ultimately last 22 minutes over the same number of miles, involve about 62 police cars and over 100 officers from several

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[8] *Id.*
[9] Defendant's Exhibit L, Cleveland PD chase timeline, p. 1.
[10] *Id.*
[11] State's Exhibits 1078 and 1079, graphic representations of the global positioning system data from zone car 217's automated vehicle locator. These two exhibits begin with zone car 217 on West 30 a block south of Clark, but the frame in exhibit 1079 time-stamped 22:33.22 shows the car northbound on West 25 near Franklin.
[12] Exhibit L, p. 1.
[13] Trial transcript p. 2501, testimony of James Hummel; Exhibit 1079.

law enforcement agencies, and end in a middle school parking lot in East Cleveland with Russell and Williams shot dead by police in the Malibu's front seat.

Starting at Detroit Road and West 25 and continuing until the East Cleveland middle school, Brelo was one of the lead cars following the Malibu.[14] He pursued Russell and Williams as far west as Lorain and West 85, then east on Clark Avenue at up to 69 miles per hour, south as far as Quigley Road and West 14, then north on Interstate 90 (reaching a maximum speed of 105 mph) to the East 72 Street exit, from there through major and minor streets until heading east on Euclid Avenue from East 118 to Wymore Avenue in East Cleveland and into the school parking lot.[15]

Over those 22 miles Russell ignored more than 100 stop signs and red lights.[16] He exceeded 120 mph.[17] He evaded two attempts by a police car to force him to a stop.[18] He sideswiped another police car.[19] He drove over a sidewalk into a pizza shop parking lot and then out of the lot over another part of the sidewalk.[20]

Brelo, who was listening to channel two on car 217's radio[21] during the pursuit, also heard Siefer call out that Williams was "angry" and "pointing a gun out the back window."[22] Nan advised that Williams "had [a] gun" and Siefer immediately added that the "passenger is

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[14] Exhibits 1078 and 1079.
[15] *Id.*
[16] Trial transcript p. 3198, testimony of John Saraya.
[17] *Id.*, p. 2514, testimony of James Hummel.
[18] *Id.*, pp. 1352 and 1357, testimony of Rowland Mitchell.
[19] *Id.*, pp. 2387-2388, testimony of Kevin Fairchild.
[20] *Id.*, pp. 3201-320, testimony of John Saraya.
[21] Trial transcript pp. 1247, 3270 and 3290, testimony of Brandon Kutz and John Saraya. Kutz described how officers from the second district would monitor channel two, and Brelo gave a statement to Saraya where he described hearing calls over channel two. Because he is a second district officer, I infer that he was on channel two during the entire pursuit.
[22] Exhibit L, pp. 3 and 4.

turning back around again pointing a firearm."[23] As the Malibu neared the school another officer observed Williams "possibly loading a weapon."[24]

The pursuit – "dangerous from the start"[25] – neared its climax when Russell turned right on Wymore from Euclid.[26] Wymore runs south past Terrace Road, after which it narrows and becomes a dusty driveway to the parking lot of East Cleveland's Heritage Middle School.[27] As the driveway that Wymore became opens up a driver has two choices: a hard right turn onto a road that serves as the entrance and exit to the school lot or a curving right turn onto a road at a higher elevation that goes behind the school to Beersford Road, which goes down to Terrace and up into Forest Hills Park.[28] Russell opted for the first, leaving him with no way out but the way he came in: down a road that, seen from above, looks like the barrel of a gun.

Russell raced into that gun barrel and swerved around and up onto an island of grass with a streetlight on it. He drove straight at Wilfredo Diaz, a police officer who jumped out of his car to try to arrest Russell when the Malibu appeared stuck on the grass island's curb. As Diaz dove out of the way he fired three shots at the Malibu. Still the car accelerated down the driveway, straight at Brelo and Moore in car 217, about half a football field away, and past at least two other police cars.[29]

At that point nearly a dozen police officers were firing and Brelo, seeing the Malibu coming directly toward him and thinking its occupants were shooting at him, fired several shots

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[23] *Id.*
[24] *Id.*, p. 7.
[25] Trial transcript p. 2514, testimony of James Hummel.
[26] *Id.*, pp. 2405-2408, testimony of Kevin Fairchild, and pp. 2504 and 2505-2506, testimony of James Hummel.
[27] The school previously in that same location was known as Kirk Middle School. The evidence of the topography and layout of the street and parking lot comes from many photographs, some testimony and my own observations on a visit to the scene.
[28] Beersford is in a state of desuetude. Although knowing the answer is of no moment to the verdict here, I have wondered whether Russell knew where he was going and intended to take the high road to circle around the school but mistakenly went down the road that dead-ended into the parking lot.
[29] Trial transcript p. 2412 and 2417, testimony of Kevin Fairchild; Exhibit 1043.

from 217's driver's seat through the windshield. (Moore did the same from the passenger seat.) Still firing, he leapt out of the car to avoid being trapped and killed inside it. He took cover behind zone car 238 about ten feet to his left. By this time the Malibu had stopped – either because the brakes were applied or because it collided with 238 – with the engine still on. At the rear bumper of 238, Brelo feared Russell would accelerate and pin him under the police car so he clambered onto the trunk of 238 either just after or just before he loaded the third of his 17-cartridge magazines into his city-issued Glock.

By then over 100 shots had been fired (though neither Brelo nor any other police officer knew that none of them had come from the Malibu), the car was still running and Russell and Williams appeared to Brelo to still be moving. So Brelo, afraid for his life, stepped onto the Malibu's hood and fired the night's final 15 shots through the windshield. He stopped shooting with two rounds left in the gun then hopped to the ground, reached through the Malibu's shot-out driver's window, turned off the car and tossed the keys to the base of its bullet-riddled windshield.

Eighteen months later the state convinced a grand jury to indict Brelo on two counts of voluntary manslaughter under section 2903.03 of the Ohio Revised Code.

The law

The state is bound by the due process clause of the Fourteenth Amendment to the United States Constitution to prove beyond a reasonable doubt "every fact necessary" to constitute the crimes Brelo is charged with committing. *In re Winship*, 397 U.S. 358, 364 (1970). Every fact necessary means every essential element of a charged offense. *United States v. O'Brien*, 560 U.S. 218, 224 (2010). Within broad constitutional bounds, legislatures have flexibility in defining the elements of a criminal offense, and in determining what facts must be proved

beyond a reasonable doubt the legislature's definition of the elements of the offense is dispositive. *United States v. Gaudin*, 515 U.S. 506, 525 (1995).

The essential elements of voluntary manslaughter as charged in count one under R.C. 2903.03 are that 1) on November 29, 2012, in Cuyahoga County, Brelo, 2) while under the influence of sudden passion or in a sudden fit of rage, either of which 3) was brought on by serious provocation occasioned by the victim 4) that was reasonably sufficient to incite Brelo into using deadly force, 5) did knowingly cause the death of Timothy Russell.[30] For count two the elements are exactly the same except the victim is identified as Melissa Williams.

The standard of proof beyond a reasonable doubt prevents against convictions where charges have not been proved to an "utmost certainty." *Winship*, supra, 364. By impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, the standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself. *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). It is with these precepts in mind that I must determine whether the prosecution has proved the elements of the crimes here beyond a reasonable doubt.

Proof of the essential elements of voluntary manslaughter

Date and place

I find first that there is no doubt the victims' deaths were caused on November 29, 2012,[31] and within Cuyahoga County, the territorial jurisdiction of this court. To have found

[30] The statute itself reads as follows: No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another or the unlawful termination of another's pregnancy.

[31] Ordinarily, precise times and dates are not essential elements of offenses. *State v. Sellards*, 17 Ohio St. 3d 169, 171 (1985). I only mention proof of the date in the interest of thoroughness.

otherwise would badly damage my credibility as a factfinder, as would any further discussion of these uncontroverted facts.

Sudden passion or fit of rage provoked by the victims

The next elements that the state must prove are the related questions of whether Brelo acted 1) while under the influence of sudden passion or in a sudden fit of rage, either of which 2) was brought on by serious provocation occasioned by the victim and 3) was reasonably sufficient to incite Brelo into using deadly force.

Very little was said by the attorneys for either party during the trial about these elements and scant evidence was proffered that was obviously intended to prove them. Yet the existence of these elements can be decided through an examination of all of the evidence, most of which was produced for an ostensible purpose other than to prove or rebut any of these elements. For example, the state emphasized the extraordinary, "memorable" and "bizarre" nature of Brelo's conduct in jumping on the hood and shooting to defeat his claim that he was reasonably responding to a perceived threat of imminent bodily harm, but that evidence can also be used to infer that, by acting so out of conformity with his training, he must have been in a rage. Similarly, the evidence adduced by the defendant to show that he was acting out of fear was meant to demonstrate that he reasonably perceived a threat to his life but could also be taken to demonstrate the absence of rage, which is different from fear. So, even without the parties' guidance on how to construe the evidence, as the factfinder I can use all of the evidence to decide whether these elements were proved beyond a reasonable doubt.

But before doing that I am obligated to consider the prosecutor's assertion that where a defendant is indicted for voluntary manslaughter the element of a sudden passion or sudden fit of rage provoked by the victim is legally presumed to exist.[32]

The state's argument has its genesis in the United States Supreme Court case of *Patterson v. New York*, 432 U.S. 197 (1977). The question in *Patterson* was whether a New York criminal statute that required a murder defendant to prove the affirmative defense of extreme emotional disturbance was constitutional under the due process clause of the Fourteenth Amendment.

Patterson looked through the window of his father-in-law's house and saw his estranged wife in a "state of semi-undress in the presence of John Northrop." *Id.*, 198. He shot Northrop twice in the head and was charged with second degree murder. That statute had two elements: intent to cause the death of another and causing the death. The statute also permitted a person accused of murder – intentionally causing the death of another – to raise an affirmative defense that he "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse."[33] *Id.* The portion of the statute providing for extreme emotional disturbance as an affirmative defense explicitly stated that the proof of extreme emotional distress as a defense to a charge of second degree murder does not preclude a conviction for manslaughter. In turn, the New York criminal code defined manslaughter as the proof of the elements of second degree murder (intent to kill plus causation), but "under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance." *Id.*, 199. The statute also provided:

> The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision.

[32] Trial transcript pp. 70 and 4435, the plaintiff's opening statement and closing argument. This legal argument is the likely reason little obvious attention was paid to the proof of these elements.
[33] "Extreme emotional disturbance" is the equivalent of "sudden passion or sudden fit of rage" in R.C. 2303.03.

Ultimately, Patterson's murder conviction was upheld because the statute under which he was prosecuted required the state to prove only the elements of intent and causation. Putting the burden on the defendant to prove the affirmative defense of mitigating circumstances (extreme emotional disturbance) did not force him to disprove the element of intent and thus did not offend due process.

A year after *Patterson*, the Ohio Supreme Court decided *State v. Muscatello*, 55 Ohio St. 2d 201 (1978). William Muscatello shot and killed Richard Rauscher not long after the two men had a fist fight. He was indicted for aggravated murder, defined by statute as purposely causing the death of another with prior calculation and design. The trial judge instructed the jury on voluntary manslaughter as a lesser included offense of aggravated murder and the defendant was convicted of aggravated murder. Muscatello appealed on the basis that it violated due process to force him to prove the mitigating circumstance of extreme emotional disturbance.

In this context – an indictment for aggravated murder where the defendant sought to reduce his criminal culpability by presenting evidence of extreme emotional disturbance – the Ohio Supreme Court held that "extreme emotional stress, as described in R. C. 2903.03, is not an element of the crime of voluntary manslaughter." *Id.*, at syllabus 1. Instead, the court found that extreme emotional distress is a circumstance, the establishment of which mitigates a defendant's criminal culpability. *Id.*, at syllabus 2.

To this point, the United States Supreme Court and the Ohio Supreme Court had considered which party had the burden of proving extreme emotional disturbance or distress only where it was raised by a defendant as an affirmative defense or mitigating factor in an original prosecution for murder. Neither *Patterson* nor *Muscatello* even touched upon whether emotional

distress was an element that the state must prove beyond a reasonable doubt where the indicted charge was voluntary manslaughter.

Then came *State v. Calhoun*, 10 Ohio App. 3d, 23 (1983), an outlier from the Second District Court of Appeals. Calhoun was indicted for voluntary manslaughter under the predecessor of the current statute, which included the element of provoked "extreme emotional distress." The parties *stipulated* that there was no evidence of extreme emotional distress provoked by the victim that was reasonably sufficient to incite Calhoun into using deadly force. The arguments made at the trial court are unclear from the appellate opinion, but the trial court dismissed the indictment after finding that the voluntary manslaughter statute was unconstitutionally vague because it listed extreme emotional distress as an element contrary to the holding in *Muscatello*.

As inscrutable as that reasoning was, things got strange in the court of appeals.

The appellate court began by cogently remarking that it didn't understand how the holding in *Muscatello* affected the constitutionality of R.C. 2903.03. Keeping in mind that the prosecutor and the defendant stipulated at trial that there was no evidence of provoked extreme emotional distress, the appellate court then pronounced:

> [H]owever, the state admitted this mitigating circumstance (extreme emotional distress) in the indictment . . . [h]ence, the only remaining duty upon the state was to prove that Calhoun "knowingly" caused the death.

Translation: the state could have charged Calhoun with murder but didn't, thereby cutting him a break (it's a less serious crime),[34] but also thereby relieving itself of the burden of proving several of the explicit elements of the manslaughter statute. The court went on to say that "the admission by the state of 'extreme emotional stress' . . . would necessarily inure to the benefit of Calhoun" because his defense was to argue that he killed the victim negligently, not knowingly.

[34] Albeit with a less difficult to prove *mens rea*.

Here I believe the court of appeals confused the mitigating circumstance of emotional distress in a murder prosecution with the statutory element of emotional distress in a voluntary manslaughter prosecution.

Calhoun's peculiar notion that a prosecutor who has the evidence to procure an indictment for murder would forgo the murder charge by asking a grand jury to charge the defendant with the less serious crime of voluntary manslaughter -- despite the prosecutor's ability to have the trial jury charged on the offense of inferior degree of voluntary manslaughter in the murder trial – in exchange for being excused from proving the statutory elements other than knowingly causing the death carried over nearly a decade later to the Ohio Supreme Court's decision in *State v. Rhodes*, 63 Ohio St. 613 (1992).

Rhodes was another defendant charged with murder. He stabbed Annette Akins, with whom he shared an apartment. Conflicting testimony was given during Rhodes's trial about whether he or Akins was the initial aggressor. The evidence showed that Akins had alcohol and drugs in her system and that she had a reputation for violence when she was intoxicated. Rhodes testified that she had thrown a glass figurine at him and had begun to stab at him with a knife, then was stabbed during a struggle over the knife.

The jury was instructed on the charged offense of murder and on voluntary manslaughter as an alternative offense of inferior degree. The trial judge correctly told the jury that being in a sudden passion or fit of rage provoked by the victim was a "mitigating circumstance, which reduces what would otherwise be murder to voluntary manslaughter"[35] and that, if the state proved murder – purposely causing the death of another – beyond a reasonable doubt, then it was the defendant's burden to prove that the victim provoked him into a sudden passion or rage to be found guilty of voluntary manslaughter as an offense of inferior degree.

[35] *Rhodes*, supra, 614.

After the Tenth District Court of Appeals found that instruction to be wrong, the case went to the supreme court on the issue of "whether a defendant on trial for murder bears the burden of establishing by a preponderance of the evidence"[36] the mitigating circumstances of the voluntary manslaughter statute. The "mitigating circumstances" of a murder charge that can permit a defendant otherwise guilty of murder to be found guilty of voluntary manslaughter are most of the elements of voluntary manslaughter: (1) sudden passion in response to serious provocation by the victim sufficient to incite the defendant to use deadly force, or (2) a sudden fit of rage in response to serious provocation by the victim sufficient to incite the defendant to use deadly force. *Id.*, 617. On the way to holding that a murder defendant does bear that burden, the court, citing to *Calhoun*, noted:

> If a defendant is not charged with murder or aggravated murder, but rather is on trial for voluntary manslaughter, neither party is required to establish either of the mitigating circumstances. Rather, the court presumes (to the benefit of the defendant) the existence of one or both of the mitigating circumstances as a result of the prosecutor's decision to try the defendant on the charge of voluntary manslaughter rather than murder. In that situation, the prosecution needs to prove, beyond a reasonable doubt, only that the defendant knowingly caused the death of another, and it is not a defense to voluntary manslaughter that neither party is able to demonstrate the existence of a mitigating circumstance.

This makes little sense. First, as noted above, why would any prosecutor who can prove murder charge with voluntary manslaughter instead, since the worst that can happen is at the trial the defendant produces evidence of a sudden passion or sudden fit of rage and the jury gets to consider voluntary manslaughter as an offense of inferior degree. Second, from where does the presumption arise that a voluntary manslaughter indictment must have come from such a prosecutorial election? Third, by allowing the state to convict for an indicted charge only upon proof that a defendant knowingly caused the death of another the court impermissibly rewrote the voluntary manslaughter statute to delete the rest of its elements. It is as if the rest of the

[36] *Rhodes*, supra, 616.

words in 2303.03 are not even there. If manslaughter – a statutory offense – was meant to be knowingly causing the death of another, without more, wouldn't the statute say that? I understand that proof of what *Rhodes* calls the mitigating circumstances might sometimes be "peculiarly within the knowledge of the accused"[37] so that the mitigating circumstances do have a characteristic of an affirmative defense. But proof of the mitigating circumstances does not excuse or justify the knowing killing of another and thus does not qualify as an affirmative defense.

What the Ohio Supreme Court said in *Rhodes* makes sense where a defendant is charged with murder and seeks to defeat the element of intent, or mitigate his guilt, by proving that he caused the death while in a sudden passion or fit of rage. But I am hard-pressed to believe the court meant that most of the elements of the voluntary manslaughter statute – which contains a lesser culpable mental state than the murder statute – are presumed to exist just because the prosecutor chooses to charge under that statute instead of the murder statute. If the legislature wanted to statutorily prohibit knowingly causing the death of another[38] to allow a prosecutor to charge an offense containing only those two elements it seems to me it would have done so.

Nevertheless, I am constrained to abide by the interpretation of the superior tribunal, and I therefore find, as a matter of law, that Brelo, shooting from the Malibu's hood, acted in a sudden passion or a sudden fit of rage in response to serious provocation by Timothy Russell and Melissa Williams sufficient to incite Brelo to use deadly force.[39]

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[37] R.C. 2901.05(D)(1)(b).

[38] Which, of course, should be illegal.

[39] These are all of the "mitigating circumstances" articulated in *Rhodes*. Considering my conclusion below on Brelo's affirmative defense I will not examine whether the legal presumption that the victims provoked Brelo into using deadly force helps prove the affirmative defense because the serious provocation might only be a threat of harm the victims posed to him.

Knowingly

A conviction for voluntary manslaughter requires proof that Brelo acted "knowingly" to cause the deaths. A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result. R.C. 2901.22(B). I find beyond a reasonable doubt that Brelo knew that, if Russell and Williams were alive, the act of firing 15 bullets at them from the hood of their car would probably cause their deaths. Since Brelo was not charged with murder – purposely causing the death of another, where "purposely" is the equivalent of "intentionally"[40] – it is not necessary to make a finding on whether he acted intending to cause the deaths.

Causation

Besides proving that Brelo shot knowing that death would probably result, the state must also show that his conduct was the actual cause of the deaths of Russell and Williams. Cause is an act that directly produces a death and without which it would not have occurred. Ohio Jury Instructions, §405.01. This "but for" formulation represents the minimum requirement for a finding of causation when a crime is defined in terms of conduct causing a particular result. *Burrage v. United States*, 134 S. Ct. 881, 888 (2014). Causation in the case of a homicide where the victim was shot by one person is not especially difficult to prove. But here the evidence shows that the victims were shot at by 12 people other than Brelo, and a more careful analysis is needed because while there is no question that the deaths were caused by police bullets generally, the state must prove in this case that they were caused by Brelo's bullets specifically. If the evidence demonstrates that the conduct of two or more officers combined to produce the deaths, Brelo can be found to be the "but for" cause so long as the conduct of the others alone

[40] See R.C. §§2903.02 and 2901.22(A).

would not have caused the deaths – "if, so to speak, [Brelo] was the straw that broke the camel's back." *Id.*

Three medical examiners testified at trial. Joseph Felo, M.D. and Andrea Wiens, M.D. gave testimony for the state and Susan G. Roe, M.D. was called to the stand by the defendant.

Timothy Russell had 23 gunshot wounds.[41] The medical examiner who performed his autopsy, Dr. Wiens, numbered the wounds sequentially in cephalocaudal order, not the order they were sustained, so that wound number 1 is on top of Russell's head and wound 15.I is in his abdomen with wounds 2 through 15.H between.[42] Of the 23, both of wounds 1 or 2 to the head, taken alone, would be fatal.[43] The nine wounds labeled as 15.A through 15.I are all penetrating shots to the chest and abdomen for which specific wound paths were mostly not discernible to Dr. Wiens to allow her to associate a particular entrance wound to a particular internal injury.[44] Of these nine, 15.B, from a bullet that pierced the heart and lung, and 15.C, from a bullet that perforated the heart, would each be fatal by itself.[45]

Wound 1 is from a bullet that entered the top of Russell's head less than an inch left of the midline and lacerated, among other structures, the left basal ganglia, which controls movement.[46] Wiens testified that the trajectory of the wound was down to the left and from the back toward the front of Russell's body.[47] Wound 1 was immediately incapacitating to Russell so that he could not move and, by itself, would have killed him "within minutes."[48]

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[41] State's Exhibit 1050, p. 1, report of autopsy; trial transcript p. 1815, testimony of Dr. Andrea Wiens.
[42] *Id.*, pp. 1-6; *id.*, 1905-1906. Williams's wounds were catalogued the same way.
[43] Trial transcript pp. 1834-1835, testimony of Dr. Wiens.
[44] *Id.*, p. 1885.
[45] *Id.*, p. 1891.
[46] Exhibit 1050, pp. 1-2; trial transcript pp. 1820 and 1910, testimony of Dr. Wiens.
[47] Trial transcript pp. 1824-1825, testimony of Dr. Wiens. The front of one's body is referred to as the anterior and the back is called the posterior.
[48] *Id.*, p. 1835.

Wound 2 is another penetrating wound to Russell's head, entering two inches to the right of midline just above the right ear and injuring the brain stem, which controls respiration and heart rate.[49] Dr. Wiens testified that this bullet caused "a nearly immediate death."[50] Like wound 1, the path of this bullet was down from Russell's right to left and from back to front.[51]

Russell incurred the head wounds while sitting on the driver's side of the Malibu's front bench seat. Other than that, his movements are not known and his exact position at the time he was shot in the head is not known. What is known is that after the shooting stopped he was found sitting back in the seat and slumped to his right, resting against and a little behind Williams's left shoulder.[52] Because Russell's head wounds were incapacitating – i.e., he wouldn't be moving after either of them – and because they were so close to each other with such similar trajectories they either came from the same gun in rapid succession or nearly simultaneously from two separate shooters positioned near each other, and that shooter – or those shooters – would have been to his right on the car's passenger side. There is no evidence that Brelo ever shot his gun toward the Malibu from its passenger side.

Wound 15.B is a penetrating wound to Russell's left upper chest.[53] The bullet that caused this wound came in from Russell's left and went right, front to back, where it entered the heart and would have killed Russell within anywhere from "several seconds to a minute."[54] Wound 15.C is a penetrating wound to Russell's right upper chest, about three inches from 15.B but on the other side of midline.[55] Like 15.B, the bullet that caused 15.C hit Russell's heart and,

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[49] *Id.*, p. 1826.
[50] *Id.*
[51] *Id.*, pp. 1826-1827.
[52] State's Exhibit 1197, attachment O-1230.
[53] Exhibit 1150, p. 5.
[54] Trial transcript pp. 1885-1886, testimony of Dr. Wiens.
[55] Exhibit 1150, p. 5.

taken alone, would be fatal.[56] Also like 15.B, after sustaining this injury Russell could have remained alive "for a couple minutes maybe"[57] and could have still operated a car.[58] But unlike 15.B, 15.C came from the right and went left, i.e. the opposite direction.

Brelo stands accused of illegally using deadly force against Russell and Williams from the trunk of zone car 238 and the hood of the Malibu.[59] His final 15 cartridges were spent while on the Malibu's hood. It took 7.392 seconds to fire all of those shots[60] and they all came from the same place. Although Russell could have been positioned relative to Brelo's gun barrel in a way that would have exposed either the top of his head or the right side of his chest or the left side of his chest to a bullet with the trajectory of wound 1 or wound 2 or wound 15.B or wound 15.C, it is highly unlikely, if not impossible, that during that less than 8 seconds Russell was positioned, then repositioned, then repositioned again so that all four wounds came from the same gun in the same place.

I therefore cannot find beyond a reasonable doubt that Brelo took the four gunshots causing the four fatal wounds, any one of which by itself would have caused Russell's death. I do find beyond a reasonable doubt that he caused at least one of them. I find it possible, but not beyond a reasonable doubt, that he caused two of them. I cannot, however, find beyond a reasonable doubt which of the four fatal wounds he caused. It is likely that he is responsible for 15.C, given that shot's downward and right to left trajectory and Brelo's likely spot on the hood more or less between Williams and Russell, which put Brelo slightly to Russell's right. It is less

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[56] *Id.*
[57] Trial transcript p. 1894, testimony of Dr. Wiens.
[58] *Id.*
[59] Trial transcript p. 2704, testimony of the state's use of force expert W. Ken Katsaris.
[60] See, generally, trial transcript pp. 968-975, testimony of the state's audio expert Robert C. Maher, Ph.D. He did not testify to this exact time but I listened to his trial testimony with his May 28, 2014, report in front of me, and the 7.392 second interval is mentioned on page 5 of that report. Although his report is not in evidence, the defendant did not object to my using it as a guide while listening to Maher's testimony (see transcript at pp. 937-938) and my trial notes are drawn both from Maher's testimony and his report.

likely, but possible, that 15.B came from Brelo while on the hood. But whichever one he caused, it is very unlikely that he caused the other, since 15.C and 15.B came from different directions, and impossible that he caused 2, since it is on the opposite side of Russell's head.

Despite not being convinced of which shot it was, I have found beyond a reasonable doubt that Brelo fired a shot that by itself would have caused Russell's death. But proof of voluntary manslaughter requires a finding, beyond a reasonable doubt, either that his shot alone actually caused the death or that it was the "straw that broke the camel's back," to use Justice Scalia's locution, combined with other non-lethal wounds. Dr. Wiens opined that each of the four wounds was fatal if suffered alone and she described all of them as antemortem, i.e. pre-death. Her definition of death appears to be when the heart stops beating.[61] That definition comports with the common law definition of death as the "cessation of life; the ceasing to exist, defined by physicians as a total stoppage of the circulation of the blood, and a cessation of the animal and vital functions consequent thereon, such as respiration, pulsation, etc." *State v. Johnson*, 60 Ohio App. 2d 45, 48 (1977). In other words, any one of the four caused the death, and not necessarily the first to hit Russell, since the time from injury to cessation of life varied depending on the wound.

Ultimately, Dr. Wiens could not offer an opinion on which antemortem wound caused death first,[62] leaving me as the finder of fact to guess at which of the four undoubtedly deadly bullets caused the "cessation of life." Guessing and being convinced beyond a reasonable doubt are incompatible. Brelo's deadly shot would have caused the cessation of life if none of the

[61] Trial transcript p. 1823, testimony of Dr. Wiens.

[62] Given that death occurs on the cessation of respiration (breathing) and pulsation (heartbeat) she did come close to offering such an opinion when she testified that the bullet that entered through wound 2 passed through "the brain stem, which harbors your respiratory centers and your heart rate centers" so that "very soon after this bullet passes through the brain, Timothy Russell is no longer breathing and his heart is not beating anymore." Trial transcript p. 1827.

other three were fired, but they were and that fact precludes finding beyond a reasonable doubt that Russell would have lived "but for" Brelo's single lethal shot.[63]

Because three unequivocally fatal wounds were caused by one, two or three other people besides Brelo, and because I am unable to find beyond a reasonable doubt which shot caused the cessation of Russell's life, I find on count one, the voluntary manslaughter of Timothy Russell, that the essential element of causation has not been proved beyond a reasonable doubt.

Dr. Felo did the autopsy of Melissa Williams.[64] He identified 24 gunshot wounds, six of which, taken in isolation, were fatal.[65] Wound 8 was caused by a bullet that entered just under the collar bone about two inches to the right of midline and into the lung.[66] That wound has a trajectory straight in (i.e., not upward or downward) and from left to right.[67] The projectile that made wound 9 entered Williams's chest on a downward trajectory, went left to right, slashed the lung and pierced the ascending aorta.[68] Gunshot wound 10 was on the right side of Williams's

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[63] One might object that it is enough to find, as I do, that Brelo knowingly fired a shot that would have caused death if his fellow officers hadn't also fired killing shots since he shouldn't get the benefit of serendipitous (to him) legally justified shots by others. There are two difficulties with that argument.
First, the voluntary manslaughter statute criminalizes conduct – the knowing use of deadly force – *and* the conduct's result – death. Think about the following analogy from Justice Scalia's opinion in *Burrage*: "Consider a baseball game in which the visiting team's leadoff batter hits a home run in the top of the first inning. If the visiting team goes on to win by a score of 1 to 0, every person competent in the English language and familiar with the American pastime would agree that the victory resulted from the home run. This is so because it is natural to say that one event is the outcome or consequence of another when the former would not have occurred but for the latter. . . By contrast, it makes little sense to say that an event resulted from or was the outcome of some earlier action if the action merely played a nonessential contributing role in producing the event. If the visiting team wound up winning 5 to 2 rather than 1 to 0, one would be surprised to read in the sports page that the victory resulted from the leadoff batter's early, non-dispositive home run."
If the effect – the baseball team's win in the analogy, Russell's death in this case – would have resulted even without the cause – the first inning home run in the analogy, Brelo's fatal shot in this case – then the result cannot be connected to the conduct beyond a reasonable doubt and the crime isn't proved.
The second problem is that the legal concept of joint and several liability does not extend to criminal responsibility for the death of another.
Nor is it realistic to think that my conclusion will incentivize a group of police officers to fire as many bullets from as many officers as possible at a suspect in the hopes of obscuring the ultimate cause of the suspect's death. The events of November 29, 2012, are *sui generis* and not likely to recur.
[64] Trial transcript p. 2029, testimony of Dr. Joseph Felo.
[65] *Id.*, p. 2070.
[66] *Id.*, p. 2073; State's Exhibit 1051, pp. 5-6, autopsy report of Dr. Felo.
[67] *Id.*
[68] *Id.*, pp. 2077-2078 (transcript) and pp. 6-7 (report).

Williams also had one head wound that can be said, in isolation, to be fatal.[80] Wound 1 is just above her left ear; the bullet came straight in and penetrated the brain's left temporal lobe.[81] If this injury was incurred alone it would have caused "instant unconsciousness" and Williams's heart would have stopped beating within minutes.[82] Yet the parties' experts differ on whether the lethal shot to the head came after Williams was already dead. Dr. Felo classified it as postmortem because it is non-hemorrhagic; Dr. Roe characterizes it as perimortem – meaning the injury happened around the time of death but whether it came before or after the cessation of life can't be determined.[83] Dr. Felo agreed that the term perimortem is an accepted term of art in pathology and it is not just a hedge for a doctor unwilling to opine whether an injury is pre- or postmortem.[84]

Dr. Felo's testimony that wound 1 was sustained after death – after the cessation of "respiration, pulsation, etc."[85] – combined first with his testimony that after the other fatal wounds to the chest Williams would have lived for 12 to 20 seconds,[86] and, second, with the fact that the time from the first shot to the last was about 20 seconds, essentially absolves Brelo of causing her death. The very latest Williams could have sustained wound 1 was during the 20th second of the shooting, i.e. the last shot. Subtracting from that the 12 seconds, at a minimum, it took for her to die from the fatal chest wound, she would have been hit by those bullets no later than eight seconds into all of the shooting, and all of the shots taken by all 13 officers – including Brelo – during those first eight seconds have been deemed by the state as legally justifiable.

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[80] Trial transcript p. 2059, lines 9-10, testimony of Dr. Felo re: wound 1: [H]ad she been alive this wound would have caused death. See also trial transcript p. 4075, testimony of Dr. Roe.
[81] Ex. 1051, pp. 1-2.
[82] Trial transcript, p. 4076, testimony of Dr. Roe.
[83] *Id.*, p. 4074.
[84] *Id.*, p. 2170, testimony of Dr. Felo.
[85] *State v. Johnson*, supra.
[86] Trial transcript pp. 2095-2099, testimony of Dr. Felo.

Even if one arbitrarily cuts off half the minimum time Williams would have lived after the chest wounds from 12 seconds to eight – and still assuming wound 1 was made by the very last bullet fired during the 20 seconds – that excludes all of Brelo's shots during the last 7.392 seconds (when he did the shooting that the state's expert considers not justified) as causes of wounds 8 through 13.

I detail this timeline to illustrate the imprecision inherent in a medical examiner's opinions. I am not critical of Dr. Felo's qualifications and abilities: I believe no pathologist could say exactly when Williams's breathing and heartbeat ceased. But opinions are just that: one person's conclusions about an unknown fact based upon known facts combined with the expert's knowledge gained from education, training and experience. An expert's opinions can be the difference between finding something beyond a reasonable doubt and not. They should be examined carefully. Having considered Dr. Felo's opinion, I believe he's either wrong about the time from the chest injuries until death or he's wrong that wound 1 to the head was postmortem. On the one hand, his estimate of the time from the chest injuries to death is based on years of experience and a rough mathematical calculation about the amount of blood pumped per beat of Williams's heart; on the other hand, his opinion that the head wound was non-hemorrhagic and thus must have occurred after Williams lost pulsation is based on his own examination of the injured area of the head and brain. Yet given the extremely compressed time frame I find that the fatal injury to Williams's head came before her heart stopped pumping and her life had ceased.

That leaves Williams with seven separate fatal wounds. Five of them – 8 through 12 – could have been inflicted by one shooter in one position. But if they were, the high improbability that Williams's body was contorted in such a way that she was exposed to those

five downward shots *and* an upward shot to her lower abdomen *and* a straight-in shot to the left side of her head leads me to conclude beyond a reasonable doubt that Brelo caused at least one fatal wound to Williams's chest (probably wound 10) and maybe all five, but that one or two other officers inflicted two other fatal wounds, namely 13 to the abdomen and 1 to the head. With these killing wounds from one or two people other than the defendant, I cannot find beyond a reasonable doubt that but for Brelo's fatal shot(s) to Williams's chest she would have lived. As with count one, I therefore find on count two, the voluntary manslaughter of Melissa Williams, that the essential element of causation has not been proved beyond a reasonable doubt.

Brelo's affirmative defense

Much of the parties' attention at trial was devoted to Brelo's defense that he was legally justified in using deadly force on Russell and Williams because he had probable cause to believe they threatened him and the other officers with serious bodily harm. This question is not moot by my finding that the state did not prove beyond a reasonable doubt that he caused the deaths because he still may be found guilty of the lesser included offense of felonious assault (defined as knowingly causing serious physical harm).[87] I must therefore decide his claim of legal justification.

R.C. 2901.05(D)(1)(b) defines an affirmative defense as "a defense involving an excuse or justification peculiarly within the knowledge of the accused." The burden of proving an affirmative defense is on the defendant by a preponderance of the evidence. R.C. 2901.05(A). In an earlier entry in this case denying and granting in part Brelo's motion for a verdict of

[87] "Serious physical harm" is defined to include "any physical harm that carries a substantial risk of death." Considering that I found beyond a reasonable doubt that Brelo inflicted at least one of the fatal wounds to the two occupants of the Malibu – even though I could not find beyond a reasonable doubt that he inflicted the wounds that caused the deaths – I have no doubt that he knowingly caused serious physical harm to Russell and Williams based on the fact that they each lived for at least moments with the fatal injuries he caused. Because there is not sufficient evidence to conclude that Brelo caused the deaths he cannot be found guilty of the offenses of inferior degree of reckless homicide or negligent homicide, both of which require proof of causation.

acquittal under Rule 29 of the Ohio Rules of Criminal Procedure I noted my inability to find decisional law explicitly finding that the claim of a police officer in defense of a criminal charge that he was legally justified in using deadly force is an affirmative defense. I have found no additional case law since then, but I remain confident that even if Brelo's claim is not strictly an affirmative defense either at common law or as defined by statute, it is a legal excuse for otherwise criminal conduct and is so akin to an affirmative defense that it should be treated as such. In short, Brelo must prove by a preponderance of the evidence that he was legally justified in using deadly force on Russell and Williams.

A preponderance of the evidence is a lesser burden than proof beyond a reasonable doubt. A preponderance is the greater weight of the evidence and only requires a belief that something is more likely than not. *State v. West*, 2006-Ohio-3518, 167 Ohio App. 3d 598, ¶61 (4th Dist. 2006).

The Fourth Amendment provides that "the right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated." Whenever an officer restrains the freedom of a person to walk away, he has seized that person. *Tennessee v. Garner*, 105 S. Ct. 1694, 1699 (1985). There can be no question that apprehension by the use of deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment. *Id.* A determination of the reasonableness of a seizure requires analyzing the totality of the circumstances. *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014). The question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them. *Graham v. Connor*, 490 U.S. 386, 397 (1989).

Where an officer has probable cause to believe that a suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to effect a

seizure by using deadly force. *Garner*, supra, 1701. A reasonable perception of threat is the minimum requirement before deadly force may be used. *Untalan v. City of Lorain*, 430 F.3d 312, 314 (6th Cir.2008). The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. *Graham.*, supra, 396. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation. *Id.*, 396-397.

I have already listed some of the police officers' observations during the chase that Brelo heard and which bear upon the question of whether Brelo had an objectively reasonable perception that the Malibu and its occupants presented an imminent danger of serious bodily harm to him or the other officers: the initial report from Van that someone in the Malibu "popped off a round"; Siefer's call that the passenger looked "angry" and was "pointing a gun out the back window"; Nan's warning that the passenger "had [a] gun"; Siefer saying that the "passenger is turning back around again pointing a firearm"; and another officer's call that Williams was "possibly loading a weapon."

Brelo was also aware of the length – in both distance and time – of the chase. Although he was driving one of the cars nearest to the Malibu he likely knew that many other cars were in pursuit, yet Russell still would not stop. He knew Russell had gone over 100 miles per hour and ignored dozens of traffic controls.

All of this would make him wonder why the people in the car were so desperate to escape.

By the time the chase was near its end Brelo had been led through parts of Cleveland unfamiliar to him and, at the school, was in a different city altogether. The entrance drive from Wymore to the parking lot was a dusty, dirty area where a driver could only see the car in front of him.[88] As he was on that entrance he heard a radio call of "shots fired" and another radio call that there was no way out.[89] When he pulled to a stop Russell was unexpectedly barreling down the driveway toward him and then slammed into car 238.[90] He thought he saw both people in the Malibu with something black in their hands.[91] Gunfire was "erupting"[92] in front of him, apparently coming from the suspects.[93] The car was still running.

Under the totality of these circumstances he perceived an imminent threat of death or great bodily harm to himself and other officers and decided to use deadly force to seize the Malibu's occupants. The same decision was made by 12 of his fellow police officers, all of whom surely made many of the same observations as Brelo.

I find by a preponderance of the evidence that Brelo's decision to use deadly force against Russell and Williams was based on probable cause to believe that they threatened imminent, serious bodily harm to him and the other officers, not to mention the public. I therefore find that his decision to use force was constitutionally reasonable. It was reasonable despite knowing now that there was no gun in the car and he was mistaken about the origin of the gunshots. It is Brelo's perception of a threat that matters. Excessive force claims, like most other Fourth Amendment issues, are evaluated for objective reasonableness based upon the information an officer had when the conduct occurred. *Saucier v. Katz*, 533 U.S. 194, 207

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[88] Trial transcript p. 1654, testimony of Brian Sabolik; p. 3110, testimony of John Saraya.
[89] *Id.* pp. 3110 and 3112 testimony of John Saraya.
[90] *Id.*, p. 3112.
[91] *Id.*, p. 3113.
[92] *Id.*
[93] *Id.*

(2001). If a police officer's perceptions were objectively reasonable, his use of force is not unconstitutional even if no weapon was seen, or the suspect was later found to be unarmed, or if what the officer mistook for a weapon was something innocuous. *State v. White*, 6th Dist. No. L-10-1194, 2013-Ohio-51, ¶65.

My conclusion that Brelo was justified in deciding to use deadly force should come as no surprise to the parties since the same opinion was testified to by the plaintiff's use of force expert W. Ken Katsaris.[94] The real dispute between the defense and the prosecution is whether Brelo's probable cause to use deadly force continued through to the conclusion of the shooting or disappeared about eight seconds before he stopped shooting when he took an elevated position on the zone car and then the Malibu.

A review of Katsaris's testimony is valuable for perspective on this ultimate issue. In his opinion: William Salupo reasonably perceived a threat justifying at least a shot at the Malibu and both of its occupants; Paul Box reasonably perceived a threat justifying a shotgun blast at Russell and Williams; Christopher Ereg reasonably perceived a threat justifying at least two shots at Russell and Williams; Wilfredo Diaz reasonably perceived a threat justifying at least three shots at Russell and Williams; Brian Sabolik reasonably perceived a threat justifying at least four shots at Russell and Williams; Michael Farley reasonably perceived a threat justifying at least four shots at Russell and Williams; William Demchak reasonably perceived a threat justifying at least four shots at Russell and Williams; Randy Patrick reasonably perceived a threat justifying at least nine shots at Russell and Williams; Michael Rinkus reasonably perceived a threat justifying at least nine shots at Russell and Williams; Erin O'Donnell reasonably perceived a threat justifying at least 11 shots at Russell and Williams; Scott Sistek reasonably perceived a threat

[94] Trial transcript pp. 2692-2693, testimony of W. Ken Katsaris.

justifying at least 12 shots at Russell and Williams; and Cynthia Moore reasonably perceived a threat justifying at least 14 shots at Russell and Williams.[95]

Katsaris holds these opinions regardless of the officers' tactical mistakes – Box was out from cover near the Malibu's driver's side; Ereg, O'Donnell and Rinkus were exposed on the passenger side – or the safety of their own positions. Even officers who were behind cover and thus mostly protected from any shots coming out of the suspects' car were justified, according to Katsaris, in firing as many shots as they did. Moreover, in Katsaris's opinion, Brelo reasonably perceived a threat justifying about 34 shots at the suspects.[96]

So where did Brelo run afoul of the Constitution? As Katsaris put it:

> Because at that point [of going on the trunk of zone car 238 and then on the Malibu's hood] he is taking action that is not trained, not recognized, not safe, and put all the other officers in the vicinity at risk of his becoming a victim and their having to attempt to now engage to save his life.[97]

In other words, because Brelo put his own life in danger.

Katsaris later buttressed that his criticism of Brelo stems from actions he took that were contrary to his training and not from the harm that could befall Russell and Williams from those actions by testifying:

> Q. But then why would it be unreasonable for him to get up and eliminate this threat?
>
> A. For the exact reasons he gave for why he did what he did, which were in my opinion, not objectively reasonable decisions –
>
> Q. What do you mean?
>
> A. -- to make.
> Q. Explain that.
>
> A. Because if you are in fear of your life and you're behind cover, I can't imagine the fear that you're going to have when you put yourself standing on top of a car in the

[95] *Id.*, pp. 2774-2776; State's Exhibit 128, report of forensic scientist Michael Roberts.
[96] Trial transcript p. 2704, testimony of W. Ken Katsaris.
[97] *Id.*, l. 19-23.

middle of, as he called it, a fire fight. That is not trained. It's not appropriate. It's not objective.

And whatever subjective belief he had about his fear at that moment was not objectively reasonable to put himself up in the middle of both crossfire and the potential of being shot either by officers or the suspects which would then jeopardize the other officers who would have to go into a mode of saving the officer that's now down.

You don't put yourself in a position of officer down in the middle of a situation that he was involved in. That's why it's objectively unreasonable. It's not trained. It's not appropriate.

It's taking yourself out from behind cover. And you're putting yourself in crossfire. And you are putting the other officers in jeopardy of having to now, if you get shot, save your life which risks their lives.[98]

Finally, when asked if Brelo would have acted reasonably had he continued for the last eight seconds to fire from behind car 238 instead of the hood of the Malibu he said "I would probably say so."[99]

To me, all of this demonstrates that Katsaris's point is not that Brelo's perception that the people in the car posed a threat of imminent serious bodily harm which he needed to stop was unreasonable, but only that his actions taken to get into a position to stop the threat were unreasonable. Katsaris seems more focused on the location of the shooting than the fact of the shooting. In any event, I am not bound by Katsaris's opinion that Brelo acted unreasonably. And if I reject his opinion I can do so without necessarily relying on the opinion of Ron Martinelli, the defendant's use of force expert. Expert opinions are simply offered to help the finder of fact make informed conclusions about the implications and significance of the known facts.

Those known facts are, first, the car was still running and to Brelo's observation the occupants were still moving. To then, over 22 miles of driveways, sidewalks, parking lots,

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[98] *Id.*, pp. 2706-2707.
[99] Trial transcript p. 2800, l. 9, testimony of W. Ken Katsaris.

streets, roads and highways Russell had shown no intention of giving up. He had just rammed into car 238 but his car was not so tightly wedged against 238, or blocked by 217, to keep him from continuing to use the car as a deadly weapon. The possibility that car 238 could have been pushed by the Malibu to pin Brelo to the ground was not imaginary. Second, up to three other officers were not convinced by then that the threat was over because three other shots were fired during Brelo's final volley of 15 during the last 7.392 seconds. Third, Sabolik – a reasonable police officer praised by the prosecution as having moral strength and courage[100] – expressed a belief that the car's occupants still posed a threat during the last eight seconds.

Additionally, Brelo was acting in conditions difficult for even experienced police officers to imagine. He was in a strange place at night surrounded by gunfire, sirens and flashing lights. He and Moore had fired straight through their own windshield thinking they were about to be shot and killed. He described it as worse than being under attack from rockets and mortars while serving as a Marine in Iraq. These and more are the "totality of the circumstances" happening when he decided to use deadly force. Brelo did not fire too quickly or at a person who was clearly unarmed or unable to run him over. He did not fire at somebody running away.

Finally, Brelo acted in slightly more than the time it takes for a pro golfer's tee shot to fall and less time than it takes to read this sentence. Four weeks was spent in trial examining those 7.392 seconds in every detail. An adversarial trial has proved over the centuries to be an effective way to find the truth. But if there is an ideal place to step into Brelo's shoes and view those less than eight seconds and the 12 that came before them the way he did on the night of the shooting it is not the artificial environment of a courtroom. Still, that is what the law requires. So, I reject the claim that 12 seconds after the shooting began it was patently clear from the perspective of a reasonable police officer in Brelo's position that the threat had been stopped,

[100] Trial transcript p. 4419, closing argument by the state.

and therefore find that Brelo's entire use of deadly force was a constitutionally reasonable response to an objectively reasonably perceived threat of great bodily harm from the occupants of the Malibu, Russell and Williams.

Summary

The state did not prove beyond a reasonable doubt that the defendant Michael Brelo knowingly caused the deaths of Timothy Russell and Melissa Williams because the essential element of causation was not proved for both counts. I therefore find the defendant not guilty of counts one and two as indicted.

The state did prove the lesser included offense of felonious assault on both counts by demonstrating beyond a reasonable doubt that the defendant knowingly caused serious physical harm to both victims. But the defendant proved by a preponderance of the evidence that he is legally excused from liability for those crimes because he caused the serious physical harm to the victims in a constitutionally reasonable effort to end an objectively reasonable perception that he and the others present were threatened by Russell and Williams with imminent serious bodily harm. I therefore also find the defendant not guilty of felonious assault, the lesser included offense on both indicted counts.

IT IS SO ORDERED:

Judge John P. O'Donnell

5/23/2015
Date

SERVICE

A copy of this journal entry was sent by email on May 23, 2015, to the following:

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Judge John P. O'Donnell