[Cite as *State v. Guice*, 2019-Ohio-1324.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 18AP-305
v.	:	(C.P.C. No. 16CR-2068)
Donald C. Guice,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 12, 2019

On brief: *Ron O'Brien*, Prosecuting Attorney, and *Michael P. Walton*, for appellee. **Argued:** *Michael P. Walton*.

On brief: *Todd W. Barstow*, for appellant. **Argued:** *Todd W. Barstow*.

APPEAL from the Franklin County Court of Common Pleas

SADLER, J.

{¶ 1} Defendant-appellant, Donald C. Guice, appeals from a judgment of the Franklin County Court of Common Pleas convicting him of attempted murder with a firearm specification. For the reasons that follow, we affirm.

I. FACTS AND PROCEDURAL HISTORY

{¶ 2} This case arises out of a January 28, 2016 incident where appellant shot Dawan Anderson in the face with a handgun. Prior to the shooting incident, appellant and Anderson had known each other for many years and had been friends. Because Anderson was 30 years younger than appellant, who was 66 years old at the time of the shooting, Anderson helped look after appellant who lived alone and was in poor health. Anderson testified that he spoke with appellant on the telephone every day, he cooked for appellant,

occasionally helped him with house cleaning, and reminded appellant to take his medications.

{¶ 3} At the time of the shooting, appellant worked for a family friend, Donald Porter, in an HVAC business Porter ran from his home just blocks away from appellant's home. At trial, Anderson testified that on January 28, 2016, he took a call on his cell phone from appellant who invited him to a party going on at appellant's home. Anderson had just finished the work day and was still at Porter's home when appellant called, and he told appellant he would be there later.

{¶ 4} Anderson subsequently left Porter's home on 21st Street at Cleveland Avenue and walked to appellant's two-bedroom home on 20th Street at Cleveland Avenue. When Anderson arrived at appellant's home, there were roughly ten people in the kitchen and front room socializing, drinking alcohol, and playing cards and dominos. Anderson testified that appellant had a bottle of gin in his hand, and it was apparent to him that appellant and his guests had been drinking for some time. Anderson testified that appellant slept in the "front room," next to the kitchen and that he had a hospital bed set up in that room. (Tr. Vol. 2 at 161.) He stated the home was crowded with ten people in the front room and kitchen.

{¶ 5} Anderson estimated that he drank one shot of hard liquor and one beer before he began playing cards. According to Anderson, he subsequently received a telephone call from his wife who told him that someone had fired shots into his family's home at Second Street and Cleveland Avenue. Anderson immediately called his brother and asked him for a ride home. Appellant stated that when his brother arrived, he left appellant's home in a hurry leaving his cell phone and his wallet behind.

{¶ 6} After arriving at his home and learning that his family was fine, Anderson was reportedly told by police that he could not enter the home because it was a crime scene and to come back later. Anderson had his brother return him to appellant's home to pick up his cell phone and wallet. Anderson testified when he returned to appellant's home, he was still upset about the shooting at his home, and he just wanted to retrieve his things and leave.

{¶ 7} Anderson testified he grabbed the cell phone and wallet from the kitchen table and headed through the front room toward the door when he was met by appellant

who asked him what was going on. Anderson did not want to speak with appellant at that time and told him so. As Anderson headed toward the door, he was stopped by an unidentified female party guest who also asked him what was going on. Anderson cursed and told her to get out of his way. At that point, appellant confronted Anderson and asked him why he had been rude to the female guest. Anderson told appellant "I'm just trying to leave, Man. She's drunk. I just want to go." (Tr. Vol. 2 at 172.) Anderson further testified "[t]hen me and [appellant] started having words." (Tr. Vol. 2 at 172.)

{¶ 8} According to Anderson, he and appellant argued for a short time before Anderson decided to leave and headed toward the front door. Anderson then heard a lady scream and turned to see appellant pointing a handgun at his face from a distance of four feet. Anderson stated that it was the same handgun he had seen appellant wielding a couple of months earlier. Anderson testified about the events as follows:

> Q. All right. What did you do at that time?
>
> A. I turned around and looked, and I said, "What is you doing with that, Man?"
>
> He was like, "Just go."
>
> I'm like, "What are you tripping about? I'm about to go. Like, put that gun up."
>
> And he's just holding it like this (indicating).
>
> So I'm easing back, because I'm not going to turn my back to him now. I'm easing back towards the door. He's coming up, and he just --
>
> Q. Is he approaching you?
>
> You said he's coming up. Is he approaching you?
>
> A. Yeah. I'm backing up, and so he's walking up, and he's just still like this (indicating), finger on the trigger.
>
> My whole time I'm thinking, I hope this gun don't go off.
>
> And then when he shut his eyes, I went like this (indicating). I said, "He's about to shoot."
>
> And the gun went off twice.

(Tr. Vol. 2 at 175-76.)

{¶ 9} Anderson testified that he was hit in the face by both shots and fell to his knees while holding his jaw, which was broken by one of the gunshots. Anderson then went

out the front door bleeding from his mouth and walked out into the street. He called his mother at some point and then his wife before heading back to Porter's house, where Porter's wife called 911. Anderson gave police a written statement at Porter's home because he was unable to speak clearly, and he was then taken by ambulance to the hospital.[1]

{¶ 10} According to Anderson, he was in the hospital for about one month where medical personnel put him in an induced coma for some time and inserted both a tracheotomy and a feeding tube. Anderson stated that a physician told him one of the projectiles went into his jaw area and exited his cheek, but the other projectile lodged under his tongue and was not removed.

{¶ 11} Appellant testified in his own defense. Appellant acknowledged that prior to the shooting, he and Anderson had a good relationship and that Anderson had provided him with help from time to time and had been a frequent guest in his home. Appellant testified that he suffers from such medical conditions as heart failure, high blood pressure, and COPD, for which he uses an oxygen tank and takes several medications.

{¶ 12} Appellant testified that on the day in question as many as 20 of his friends were at his house for a party, and there was drinking and card playing. Appellant testified that he was not drunk and may have had a single beer on that day. He maintained that Anderson was drunk and that he became "very belligerent." (Tr. Vol. 3 at 309.) According to appellant, Anderson got into an argument with one of his female guests and punched the woman in the face, knocking her to the ground. Appellant testified that the woman got to her feet and was prepared to defend herself when appellant stepped between them and asked Anderson to leave. According to appellant, Anderson turned his anger on him and said "your turn now" before taking a swing at appellant. (Tr. Vol. 3 at 312.) Appellant testified Anderson landed a glancing blow to his shoulder, but appellant was able to back up towards his bed where a handgun had been placed on a small table. Appellant testified he did not know from where the handgun came or to whom it belonged. Appellant stated he feared for his life as he and appellant both went for the gun. According to appellant, the gun fired one time as he and Anderson struggled for control and then Anderson ran out the front door.

[1] Anderson's statement was identified as State's Exhibit G but not admitted into evidence.

{¶ 13} According to appellant, he suffered a heart attack immediately after the incident and was taken by ambulance to the hospital where he stayed for the next five or six days. Appellant testified that after his release from the hospital, he went to stay at his niece's home for three or four days. When appellant subsequently learned that police were looking for him, he turned himself in at the Franklin County Jail.

{¶ 14} On April 15, 2016, a Franklin County Grand Jury indicted appellant for attempted murder with specification, in violation of R.C. 2923.02, a first-degree felony; felonious assault with specification, in violation of R.C. 2903.11, a second-degree felony; and having weapons while under disability, in violation R.C. 2923.13, a third-degree felony. On November 9, 2017, the jury returned a verdict of guilty on the charges of attempted murder with a firearm specification and felonious assault with a firearm specification. On application of the prosecutor, the trial court issued an entry of nolle prosequi as to the charge of having weapons while under disability.

{¶ 15} As a result of the sentencing hearing, the trial court merged the charges of attempted murder and felonious assault and convicted appellant of attempted murder with a firearm specification. The trial court sentenced appellant to a prison term of seven years for attempted murder and a consecutive three-year prison term on the firearm specification, for an aggregate sentence of ten years in prison.

{¶ 16} Though appellant did not timely appeal to this court from the judgment of conviction and sentence, on June 8, 2018, we granted appellant's pro se motion for leave to file a delayed appeal pursuant to App.R. 5(A). *State v. Guice*, 10th Dist. No. 18AP-305 (June 8, 2018) (memorandum decision).

II. ASSIGNMENTS OF ERROR

{¶ 17} Appellant assigns the following as trial court error:

> I. THE TRIAL COURT ERRED AND DEPRIVED APPELLANT OF DUE PROCESS OF LAW AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE SECTION TEN OF THE OHIO CONSTITUTION BY FINDING HIM GUILTY OF ATTEMPTED MURDER AND FELONIOUS ASSAULT AS THOSE VERDICTS WERE NOT SUPPORTED BY SUFFICIENT EVIDENCE AND WERE ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

II. THE TRIAL COURT COMMITTED PLAIN ERROR BY IMPROPERLY INSTRUCTING THE JURY.

III. LEGAL ANALYSIS

A. Appellant's First Assignment of Error

{¶ 18} In appellant's first assignment of error, he argues his conviction of attempted murder was not supported by sufficient evidence and was against the manifest weight of the evidence. We disagree.

{¶ 19} " 'In order to commit the offense of attempted murder as defined in R.C. 2903.02(A), one must engage in conduct that, if successful, would result in *purposely* causing the death of another * * *.' " (Emphasis sic.) *State v. Dean*, 146 Ohio St.3d 106, 2015-Ohio-4347, ¶ 141, quoting *State v. Williams*, 124 Ohio St.3d 381, 2010-Ohio-147, ¶ 25. "A person acts purposely when it is his or her specific intention to cause a certain result." *State v. Hubbard*, 10th Dist. No. 11AP-945, 2013-Ohio-2735, ¶ 19; R.C. 2901.22(A).

{¶ 20} Appellant first contends his convictions are not supported by sufficient evidence. "Sufficiency of the evidence is a legal standard that tests whether the evidence is legally adequate to support a verdict." *State v. Kurtz*, 10th Dist. No. 17AP-382, 2018-Ohio-3942, ¶ 15, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). Whether the evidence is legally sufficient to support a verdict is a question of law, not fact. *Kurtz* at ¶ 15. In determining whether the evidence is legally sufficient to support a conviction, " '[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.' " *State v. Robinson*, 124 Ohio St.3d 76, 2009-Ohio-5937, ¶ 34, quoting *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. "A verdict will not be disturbed unless, after viewing the evidence in a light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact." *State v. Patterson*, 10th Dist. No. 15AP-1117, 2016-Ohio-7130, ¶ 32, citing *State v. Treesh*, 90 Ohio St.3d 460, 484 (2001).

{¶ 21} "In a sufficiency of the evidence inquiry, appellate courts do not assess whether the prosecution's evidence is to be believed but whether, if believed, the evidence supports the conviction." *Kurtz* at ¶ 16, citing *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79-80. "Further, 'the testimony of one witness, if believed by the jury, is

enough to support a conviction.' " *Patterson* at ¶ 33, quoting *State v. Strong*, 10th Dist. No. 09AP-874, 2011-Ohio-1024, ¶ 42. *See also State v. Clark*, 10th Dist. No. 15AP-926, 2016-Ohio-5493, ¶ 25.

{¶ 22} In making his sufficiency argument in this appeal, appellant essentially concedes that Anderson's testimony, if believed, is sufficient to sustain his convictions beyond a reasonable doubt. Appellant does not argue that plaintiff-appellee, State of Ohio, failed to produce evidence to establish all the essential elements of the offenses for which he was convicted. He does not deny shooting Anderson. Rather, appellant argues that his own testimony in support of his claim of self-defense is more believable than the testimony of appellee's witnesses. As such, we must review appellant's argument under the manifest weight of the evidence standard, rather than the sufficiency of the evidence standard. *Kurtz* at ¶ 21.[2]

{¶ 23} "In considering a defendant's claim that a jury verdict is against the manifest weight of the evidence, '[t]he court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.' " *State v. Williams*, 10th Dist. No. 10AP-779, 2011-Ohio-4760, ¶ 20, quoting *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983). "Further, '[t]he discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.' " *Williams* at ¶ 20, quoting *Martin* at 175.

{¶ 24} "Unlike the standard of review for sufficiency of the evidence, 'a reviewing court does not construe the evidence most strongly in favor of the prosecution when using a manifest-weight standard of review.' " *Williams* at ¶ 21, quoting *State v. Woullard*, 158 Ohio App.3d 31, 2004-Ohio-3395, ¶ 81 (2d Dist.). "A manifest weight of the evidence

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[2] *See also State v. Johnson*, 10th Dist. No. 06AP-878, 2007-Ohio-2792, ¶ 31, quoting *State v. Cooper*, 170 Ohio App.3d 418, 2007-Ohio-1186, ¶ 15 (4th Dist.) (" 'Once the state has satisfied the question of legal adequacy * * *, the question of relative persuasiveness' of a self-defense affirmative defense 'must await * * * appellate scrutiny under a manifest weight of the evidence analysis.' "); *State v. Montanez*, 8th Dist. No. 100013, 2014-Ohio-1723, ¶ 41, fn. 5, quoting *State v. Wilson*, 8th Dist. No. 97350, 2012-Ohio-1952, ¶ 39, citing *State v. Dykas*, 185 Ohio App.3d 763, 2010-Ohio-359, ¶ 18 (8th Dist.) (" '[W]hen reviewing a claim by a defendant that evidence supports his claim of self-defense, the manifest-weight standard is the proper standard of review because a defendant claiming self-defense does not seek to negate an element of the offense charged but rather seeks to relieve himself from culpability.' ").

challenge 'questions the believability of the evidence and asks a reviewing court to determine which of the competing inferences is more believable.' " *Williams* at ¶ 21, quoting *Woullard* at ¶ 81. "However, an appellate court 'may not substitute its judgment for that of the trier of fact on the issue of the credibility of the witnesses unless it is patently apparent that the factfinder lost its way.' " *Williams* at ¶ 21, quoting *Woullard* at ¶ 81.

{¶ 25} Appellant argues that the jury lost its way and created a manifest miscarriage of justice by finding him guilty of attempted murder because his testimony in support of his claim of self-defense was more believable than the evidence presented by appellee. We disagree.

{¶ 26} As a general rule, "[s]elf-defense is an affirmative defense that the accused has the burden to prove by a preponderance of the evidence." *Kurtz* at ¶ 22, citing *State v. M.L.D.*, 10th Dist. No. 15AP-614, 2016-Ohio-1238, ¶ 40, citing R.C. 2901.05(A). Pursuant to the decision of the Supreme Court of Ohio in *State v. Robbins*, 58 Ohio St.2d 74 (1979), to establish self-defense through the use of deadly force, a defendant must prove by a preponderance of the evidence (1) he was not at fault in creating the situation giving rise to the affray, (2) he had a bona fide belief he was in imminent danger of death or great bodily harm and his only means of escaping such danger was to use such force, and (3) he must not have violated any duty to retreat or avoid the danger. *State v. Kendricks*, 10th Dist. No. 10AP-114, 2010-Ohio-6041, ¶ 34, citing *Robbins* at paragraph two of the syllabus; R.C. 2901.05(A). *See also State v. Smith*, 10th Dist. No. 04AP-189, 2004-Ohio-6608, ¶ 16. "Because the elements of self-defense are cumulative, '[i]f the defendant fails to prove *any one* of these elements * * * he has failed to demonstrate that he acted in self-defense.' " (Emphasis sic.) *Kendricks* at ¶ 34, quoting *State v. Jackson*, 22 Ohio St.3d 281, 284 (1986). However, as will be discussed more thoroughly in connection with appellant's second assignment of error, "a person who lawfully is in that person's residence has no duty to retreat before using force in self-defense." R.C. 2901.09(B).

{¶ 27} Initially, we note that because police never accessed the crime scene, no physical evidence was collected and no scientific evidence of any kind was presented at trial. And, even though appellant estimated there were as many as 20 of his friends at the party on January 28, 2016, and many of the party guests were in a position to witness the shooting, the only eyewitnesses to the shooting who gave testimony at trial were appellant

and Anderson. At trial, appellant could not recall the name of the female guest who Anderson allegedly punched in the face just prior to the shooting. Thus, the principal issue for the jury to determine in this case was which of the two eyewitnesses gave the more accurate account of the events in question, appellant or Anderson.

{¶ 28} Though appellee claims that photographs of the wounds to Anderson's face corroborate Anderson's claim that appellant fired two shots, not just one, as appellant maintained, in the absence of expert medical or scientific testimony, such evidence is far from conclusive. We do note, however, that the evidence showed appellant was much older than Anderson and that appellant suffered from several physically debilitating conditions. Consequently, appellant's testimony that he accidentally shot Anderson during a physical struggle over the weapon would be difficult for the jury to believe. The accidental shooting theory is also inconsistent with appellant's claim of self-defense.[3]

{¶ 29} Nevertheless, appellant argues on appeal that Anderson's testimony was not worthy of belief due to Anderson's admitted "abandonment of his family after the shooting at his home." (Appellant's Brief at 3.) But even if we were to agree that Anderson abandoned his family on the night in question and that such conduct was probative of Anderson's credibility, " ' "[i]t is the province of the jury to determine where the truth probably lies from conflicting statements, not only of different witnesses but by the same witness." ' " *State v. Jennings*, 10th Dist. No. 09AP-70, 2009-Ohio-6840, ¶ 56, quoting *State v. Haynes*, 10th Dist. No. 03AP-1134, 2005-Ohio-256, ¶ 24, quoting *State v. Lakes*, 120 Ohio App. 213, 217 (4th Dist.1964). "[A] manifest-weight review requires the appellate court to 'bear in mind the trier of fact's superior, first-hand perspective in judging the demeanor and credibility of witnesses.' " *Jennings* at ¶ 55, quoting *State v. Mickens*, 10th Dist. No. 08AP-626, 2009-Ohio-1973, ¶ 30, citing *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus.

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[3] Though appellant also testified at trial that he shot Anderson accidentally during the struggle for control of the firearm, his theory of innocence was that he shot in self-defense. Appellant did not request a jury instruction on the factual defense of accident. "Accident and self-defense are generally 'inconsistent by definition,' as self-defense presumes intentional, willful use of force to repel force or escape force, while accident is 'exactly the contrary, wholly unintentional and unwillful.' " *Hubbard*, 2013-Ohio-2735, at ¶ 59, quoting *State v. Barnd*, 85 Ohio App.3d 254, 260 (3d Dist.1993), and *State v. Champion*, 109 Ohio St. 281, 287 (1924). However, because the trial court properly instructed the jury regarding the elements of "knowingly" and "purposefully," if the jury had believed appellant's testimony that the shooting was accidental, the jury would have been required to find him not guilty pursuant to the court's general instructions. *Hubbard* at ¶ 61.

{¶ 30} Anderson testified that appellant pointed a handgun in his face and shot him twice, without provocation. Anderson denied striking the female party guest and denied attacking appellant. Following our review of the record, we find no justifiable basis to upset the jury's obvious conclusion that Anderson's account of the material events that transpired on January 28, 2016 was more believable than appellant's. Accordingly, appellant's first assignment of error is overruled.

B. Appellant's Second Assignment of Error

{¶ 31} In appellant's second assignment of error, appellant contends the trial court committed plain error by failing to properly instruct the jury on the issue of self-defense. We disagree.

{¶ 32} As previously noted, in Ohio, self-defense typically has three elements that a defendant must prove by a preponderance of the evidence: (1) the defendant did not create the violent situation, (2) the defendant had a bona fide belief he was in danger of death or great bodily harm and the only way to escape was the use of force, and (3) the defendant did not violate any duty to retreat. *State v. Williford*, 49 Ohio St.3d 247 (1990).[4] Before deadly force may be used as a defense against a danger of death or great bodily harm, the defendant must not have violated any duty to retreat in order to protect himself from that danger. *State v. Kucharski*, 2d Dist. No. 20815, 2005-Ohio-6541, ¶ 19, citing *Robbins*. To prove that the duty to retreat was not violated when deadly force was used, the defendant must ordinarily show that no means of retreat or avoidance was available to him and that his only means of escape or avoidance was the deadly force he used. *Id*. at ¶ 20, citing *State v. Melchior*, 56 Ohio St.2d 15 (1978). However, the Castle Doctrine, as codified by the Ohio General Assembly in R.C. 2901.09(B), provides that "[f]or purposes of any section of the Revised Code that sets forth a criminal offense, a person who lawfully is in that person's residence has no duty to retreat before using force in self-defense." The Castle Doctrine takes its name from the maxim that a person's home is his or her "castle." *State v. Martin*, 2d Dist. No. 27220, 2017-Ohio-7431, ¶ 40, citing *State v. Waller*, 2d Dist. No. 2013-CA-26, 2014-Ohio-237, ¶ 40, citing *State v. Comer*, 4th Dist. No. 10CA15, 2012-Ohio-2261, ¶ 11, and 4 Blackstone, *Commentaries on the Laws of England*, Chapter 16 at 22 (Rev. Ed.1979).

[4] "Deadly force" is defined as any force that carries a substantial risk that it will proximately result in the death of any person. R.C. 2901.01(A)(2). The use of a gun constitutes the use of deadly force. *State v. Nelson*, 5th Dist. No. CA-7437 (July 11, 1988).

{¶ 33} Here, the trial court's jury instruction on self-defense reads, in relevant part, as follows:

> To establish self-defense the defendant must prove by a preponderance of the evidence (1) the defendant was not at fault in creating the situation giving rise to the affray, (2) the defendant had an honest 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) the defendant did not violate any duty to retreat or avoid the danger.
>
> * * *
>
> If you find that the defendant proved by a preponderance of the evidence the defense of self-defense, then you must find the defendant not guilty.
>
> *The defendant who is lawfully in his residence has no duty to retreat before using force in self-defense.*

(Emphasis added.) (Tr. Vol. 3 at 428-29, 432.)

{¶ 34} Appellant does not argue in this appeal that the jury instruction given by the trial court was inconsistent with a claim of self-defense under R.C. 2901.09(B). The Castle Doctrine, as codified in R.C. 2901.09(B), does not require the jury to be instructed that a defendant is presumed to have acted in self-defense if he is in his own residence when he uses deadly force against his attacker. Rather, it sets forth circumstances in which a person is not required to retreat, which relates to only one of the elements of self-defense. *Williford* at 250.

{¶ 35} Appellant's argument in support of his second assignment of error is that even though the trial court properly instructed the jury that appellant had no duty to retreat while lawfully in his residence, the trial court erred by failing to instruct the jury that appellant "was presumed to have acted in self[-]defense because he was in his own residence and that Anderson was in that residence unlawfully and without privilege." (Appellant's Brief at 4.) In other words, appellant argues the trial court committed plain error by failing to give the jury instruction required by former R.C. 2901.05(B)(1).[5]

[5] The 2018 amendment by H.B. No. 228 redesignated former (B)(1) through (3) as (B)(2) through (4).

{¶ 36} In 2008, the Ohio General Assembly, with the enactment of S.B. No. 184, expanded the reach of the Castle Doctrine under the common law by creating a presumption under former R.C. 2901.05(B)(1) that a person acts in self-defense "when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used * * * has unlawfully and without privilege to do so *entered the residence* * * * occupied by the person using the defensive force." (Emphasis added.) Appellant argues that in light of his trial testimony, the trial court plainly erred by failing to instruct the jury he was presumed to be acting in self-defense under R.C. 2901.05(B). We disagree.

{¶ 37} "A criminal defendant has a right to expect that the trial court will give complete jury instructions on all issues raised by the evidence." *Williford* at 251. *See also State v. Sneed*, 63 Ohio St.3d 3, 9 (1992). In examining the jury instructions, an appellate court must review the court's charge as a whole, not in isolation, in determining whether the jury was properly instructed. *State v. Burchfield*, 66 Ohio St.3d 261, 262 (1993). "Ordinarily, the trial court has discretion to decide to give or refuse a particular instruction, and an appellate court will not disturb that decision absent an abuse of discretion." *State v. Lipkins*, 10th Dist. No. 16AP-616, 2017-Ohio-4085, ¶ 28, citing *State v. Teitelbaum*, 10th Dist. No. 14AP-310, 2016-Ohio-3524, ¶ 127. Here, however, appellant concedes the plain-error standard applies in our review of his second assignment of error because his trial counsel did not object to the self-defense instruction given by the trial court and did not request an instruction based on the expanded Castle Doctrine under R.C. 2901.05(A).

{¶ 38} Under Crim.R. 52(B), plain errors affecting substantial rights may be noticed by an appellate court even though they were not brought to the attention of the trial court. To constitute plain error, there must be (1) an error, i.e., a deviation from a legal rule, (2) that is plain or obvious, and (3) that affected substantial rights, i.e., affected the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27 (2002). Courts are to notice plain error under Crim.R. 52(B), " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " *Id.*, citing Crim.R. 30. Accordingly, a jury instruction that allegedly violates R.C. 2901.05(A) does not constitute a plain error or defect under Crim.R. 52(B) unless, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Long*, 53 Ohio St.2d 91 (1978). Notice of plain error under Crim.R.

52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice. *Id*.

{¶ 39} Former R.C. 2901.05(B)(1) provides, in relevant part, as follows:

> Subject to division (B)(2) of this section, a person is presumed to have acted in self defense or defense of another when using defensive force that is intended or likely to cause death or great bodily harm to another if the person against whom the defensive force is used is in the process of unlawfully and without privilege to do so *entering, or has unlawfully and without privilege to do so entered,* the residence or vehicle occupied by the person using the defensive force.

(Emphasis added.)

{¶ 40} The presumption of self-defense under R.C. 2901.05(B)(1) does not apply in this case because there is no dispute that Anderson lawfully entered appellant's premises, had previously visited appellant as a guest on numerous prior occasions, and was an invited guest to the party at appellant's home on the day the crime took place. *Lipkins* at ¶ 29. Appellant contends, however, because there is evidence in the record that appellant asked Anderson to leave the residence just prior to the shooting, Anderson became a trespasser in the home. During cross-examination, appellant recalled the events that took place just prior to the shooting as follows:

> Q. After she was hit, what did she do?
>
> A. She got up ready to fight. I mean, he didn't knock her out.
>
> Q. All right. And you intervened in the middle?
>
> A. Well, I'm supposed to. It's my house.
>
> Q. Did you intervene?
>
> A. Yes, sir.
>
> Q. *Did you tell* [*Anderson*] *to leave at that point?*
>
> *A. Yes, sir, I did. Then he got belligerent.*

(Emphasis added.) (Tr. Vol. 3 at 345.)[6]

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[6] During direct examination, appellant recalled the events that took place just prior to the shooting as follows:

> Q. All right. And he hit a woman in the face?
> A. Yeah.
> Q. What happened to the woman?
> A. She went down a little bit, and then she got up and was ready to fight. And then I jumped up and said "[y]'all got to break this up. *You know, y'all got to leave.*"

{¶ 41} Appellant claims that because there was evidence presented to support a finding that Anderson was a trespasser at the time of the shooting, the trial court committed plain error by failing to instruct the jury in accordance with former R.C. 2901.05(B)(1). We disagree.

{¶ 42} This very argument was recently rejected by the Eighth District Court of Appeals in *State v. Echevarria*, 8th Dist. No. 105815, 2018-Ohio-1193. In that case, there was no dispute that appellant invited the victim, Mr. Butler, into her home after she and Butler had spent time at Butler's home drinking alcohol and socializing. A dispute subsequently arose between the two during which appellant fought with Butler and cut him several times with a knife before he could escape. Appellant was subsequently convicted of felonious assault as a result of the incident. Appellant appealed her conviction arguing the trial court should have instructed the jury that she was entitled to the presumption of self-defense under R.C. 2901.05(B) because she asked Butler to leave but he refused, just prior to cutting Butler with the knife. In addressing appellant's argument, the Eighth District, relying on its prior decision in *State v. Callahan*, 8th Dist. No. 102900, 2016-Ohio-2934, made the following observations:

> This court recently considered and rejected a very similar argument in *Callahan* * * *. As the court explained:
>
> > By all the witnesses' accounts * * * [the victim] entered the home with the express privilege to do so. " * * * R.C. 2901.05(B)(1) looks to the status of the person against whom force is used when [he or] she entered the building." [*State v. Everett*, 1st Dist. Hamilton No. C-140275, 2015-Ohio-5273, ¶ 14.] Ohio courts have consistently applied the statute this way, recognizing that the presumption contained in R.C. 2901.05(B)(1) "clearly contemplates a scenario of a home/car invasion — i.e., the person against whom the defensive force is used is in the process of unlawfully and without privilege entering (or has entered) the

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And then that's when he came to me.
Q. Okay. So you -- did you physically step between them?
A. Yes, I did.

(Tr. Vol. 3 at 311-12.) Anderson also testified that moments before pulling the trigger and shooting him in the face, appellant told him "[j]ust go." (Tr. Vol. 2 at 175.)

> defendant's residence or vehicle." *State v. Nye*, 3d Dist. Seneca No. 13-13-05, 2013-Ohio-3783, 997 N.E.2d 552, ¶ 29; *see also State v. Hogg*, 10th Dist. Franklin No. 11AP-50, 2011-Ohio-6454, ¶ 36. Thus, because [the victim] entered the home lawfully, the R.C. 2901.05(B)(1) presumption does not apply.
>
> *Id*. at ¶ 29-30.
>
> Likewise, in this case, because Butler and Echevarria both testified that * * * Butler "entered" Echevarria's apartment at her invitation — not "unlawfully and without privilege" — the presumption of self-defense under R.C. 2901.05(B)(1) does not apply. Accordingly, the trial court did not abuse its discretion in refusing to instruct the jury regarding that presumption.

Echevarria at ¶ 43-44.

{¶ 43} The facts of this case are very similar to the facts in *Echevarria*, as both appellant and Anderson testified that Anderson entered appellant's premises on the night in question at appellant's invitation. As was the case in *Echevarria*, the evidence also shows appellant asked Anderson to leave moments before appellant resorted to the use of deadly force against Anderson.

{¶ 44} In *State v. Nye*, 3d Dist. No. 13-13-05, 2013-Ohio-3783, cited by the Eighth District in both *Echevarria* and *Callahan*, the Third District Court of Appeals held the trial court did not err in declining to give an instruction to the jury on the presumption of self-defense, pursuant to former R.C. 2901.05(B)(1), because the evidence did not establish that the victim was in the process of invading defendant's vehicle when defendant assaulted him. *Nye* at ¶ 29. In upholding appellant's conviction for felonious assault, the Third District stated "the facts of this case fail to establish that the home/vehicle invasion scenario described in R.C. 2901.05(B)(1) occurred for the presumption of self-defense to apply." *Id*.

{¶ 45} This court reached a similar conclusion in *State v. Hogg*, 10th Dist. No. 11AP-50, 2011-Ohio-6454, ¶ 36. In a case tried to the court without a jury, appellant stabbed the victim and killed him while the victim was in appellant's house. On appeal, this court rejected appellant's contention that the trial court erred in refusing to recognize the presumption that appellant acted in self-defense under former R.C. 2901.05(B)(1). In so

holding, this court noted the evidence supported the trial court's finding that appellant permitted the victim to enter his house, that defendant and the victim were neighbors, that they had spent most of the day prior to the incident drinking together, and that they frequently encountered each other. Under such circumstances, this court determined the trial court was not required to recognize the presumption of self-defense under the expanded Castle Doctrine.

{¶ 46} In *State v. Stewart*, 10th Dist. No. 12AP-527, 2013-Ohio-1463, appellant attacked a hair dresser who had been invited to the home by appellant's wife. In his appeal to this court from his conviction of felonious assault, appellant challenged the trial court's jury instruction on self-defense. In affirming appellant's conviction, this court, citing *Hogg*, made the following comments about the Castle Doctrine:

> The second disputed instruction was that of the "castle doctrine." That doctrine is codified in R.C. 2901.05(B) as follows: "[T]he castle doctrine * * * applies to situations where an intruder enters a home and the resident chooses force to protect himself or his family." *See State v. Madera*, 8th Dist. No. 93764, 2010 Ohio 4884. It was not applied where a party of drunken friends dissolved into an all out brawl and subsequently, the resident attacked a guest to forcefully remove him from the premises. In this case, appellant and Lucas knew each other for approximately three years and Lucas had been hair styling for appellant's wife and had even done so at his home before with his knowledge. Also as pointed out before, on the day of the offense, Lucas had been invited to the house by appellant's wife and he was lawfully at the house when appellant attacked him. Under those facts, the "castle doctrine" does not apply. *See State v. Hogg*, 10th Dist. No. 11AP-50, 2011 Ohio 6454, where the court held that when the victim was lawfully in defendant's house, he could not be removed as if he were an intruder.

Stewart at ¶ 12.

{¶ 47} In *State v. Madera*, 8th Dist. No. 93764, 2010-Ohio-4884, cited by this court in *Stewart*, appellant, Madera, and his brother were out at a club drinking with the victim and others. At the end of the evening, several of the men went back to the Maderas' home to continue drinking and socializing. When an argument broke out between the Maderas and the victim over money, Madera repeatedly asked the victim to leave, but he refused. In the ensuing melee, Madera assaulted the victim with a decorative sword.

{¶ 48} In his appeal from his convictions for aggravated robbery and felonious assault, Madera argued because the evidence showed the victim was a trespasser, the trial court erred by failing to instruct the jury on the presumption of self-defense under former R.C. 2901.05(B)(1) and committed plain error by failing to instruct the jury on criminal trespass. In affirming Madera's convictions, the court made the following observations:

> The Castle Doctrine, on which Madera relies, is often applied to situations where an intruder enters a home, and the resident uses force to protect himself or his family. We have not seen it applied successfully in situations where a party of drunken friends dissolves into an all-out brawl, and subsequently the resident attacks a guest to forcibly remove him from the premises.

Madera at ¶ 38.

{¶ 49} The foregoing case law stands for the proposition that a trial court does not err in refusing to consider or failing to instruct the jury on the presumption of self-defense under former R.C. 2901.05(B)(1) where the evidence conclusively shows the victim lawfully entered defendant's premises or vehicle. *Echevarria*; *Nye*; *Callahan*; *Stewart*; *Hogg*.[7] Appellant has not cited any case law, and this court has not found any, holding that a trial court errs by failing to instruct the jury as to the presumption of self-defense under former R.C. 2901.05(B)(1) where the evidence conclusively shows the victim was an invited guest in the defendant's home but was asked to leave immediately prior to the defendant's use of deadly force.

{¶ 50} Because the undisputed evidence in this case established that Anderson entered appellant's home lawfully as he had done many times in the past and that he entered appellant's home by expressed invitation on the night in question, appellant was not entitled the benefit of a presumption of self-defense under the expanded Castle Doctrine as set forth in former R.C. 2901.05(B)(1). *Echevarria*; *Nye*; *Callahan*; *Stewart*; *Hogg*; *Everett*. Appellant was, however, as explained above, entitled to the benefit of a jury instruction on self-defense in accordance with R.C. 2901.09(B), including the instruction that appellant did not have a duty to retreat in his own home. The trial court instructed the

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[7] See also *State v. Everett*, 1st Dist. No. C-140275, 2015-Ohio-5273, ¶ 14 ("[T]he trespassing statute speaks to a defendant entering or *remaining* without privilege. *See* R.C. 2911.21(A). In contrast, [former] R.C. 2901.05(B)(1) looks to the status of the person against whom force is used when she entered the building." (Emphasis sic.)).

jury that "[t]he defendant who is lawfully in his residence has no duty to retreat before using force in self-defense." (Tr. Vol. 3 at 432.) Consequently, appellant received the benefit of an accurate instruction on the issue of self-defense raised by the evidence. *Williford*.

{¶ 51} Moreover, the issue for this court is whether the trial court plainly erred by failing to instruct the jury on the presumption of self-defense under former R.C. 2901.05(B)(1). In *Lipkins*, this court held that the trial court did not commit plain error by failing to instruct the jury on the presumption of self-defense as set forth in former R.C. 2901.05(B)(1), where there was conflicting evidence whether defendant entered the victim's room without permission. *Id.* at ¶ 31. Here, the evidence conclusively establishes Anderson entered appellant's premises on appellant's invitation, as he had done many times previously. Under these circumstances, we perceive no trial court error with respect to the jury instruction on self-defense, let alone plain error.

{¶ 52} For the foregoing reasons, appellant's second assignment of error is overruled.

IV. CONCLUSION

{¶ 53} Having overruled appellant's two assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

DORRIAN and LUPER SCHUSTER, JJ., concur.

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