

**THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

STATE OF OHIO,	:	OPINION
Plaintiff-Appellee,	:	CASE NO. 2009-L-042
- vs -	:	
SCOTT V. NADOCK,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 08 CR 000169.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Teri R. Daniel*, Assistant Prosecutor, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

R. Paul LaPlante, Lake County Public Defender, and *Vanessa R. Clapp*, Assistant Public Defender, 125 East Erie Street, Painesville, OH 44077 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Scott V. Nadock, has appealed to this court from a judgment of conviction entered by the Lake County Court of Common Pleas, after trial by jury, on one count of felony domestic violence. For the reasons discussed below, we affirm.

{¶2} On March 2, 2008, Matthew Nadock was assisting his father, appellant, install a hardwood floor in his home in Mentor, Ohio. Matthew arrived at approximately 7:30 a.m. Appellant's live-in girlfriend, Maryjo Munnings, her twelve-year-old son Dillan, and appellant's roommate Bob Olup, was also present at the house. Appellant and Mr.

Olup were drinking beer and Jagermeister when Matthew arrived. Matthew also consumed alcohol that morning, but testified that over the course of four hours he had only one shot of Jagermeister and one beer. Later in the morning, Matthew's fiancé, Emily Robinson phoned him reporting a leak in the couple's kitchen sink. At that point, Matthew left appellant's house to fix the problem. At approximately 2 p.m., Matthew returned with Emily and their puppy to celebrate his Aunt Sandy Piercy's birthday. Upon his arrival, Matthew testified that, with the exception of Bob Olup, who had passed out due to intoxication, the remaining adults in appellant's home were still drinking.

{¶3} At approximately 3 p.m., Sandy Piercy arrived at appellant's house with her husband Kevin and their granddaughter Tenisha. The evidence indicated that the mood in the house was lively and everyone was enjoying themselves. Appellant finished cooking steaks and the partygoers commenced eating dinner. During dinner, however, a disagreement erupted between appellant and Matthew.

{¶4} The quarrel began when appellant allowed Matthew's dog to eat a piece of steak. Matthew testified he had repeatedly asked appellant to refrain from feeding the dog "people food" but appellant treated the matter as a joke. The men began cursing and shouting at one another. During the exchange, Matthew emphasized that he did not "want the dog eating f***ing table food" and he did not "think it's f***ing funny." Appellant remained uncooperative, responding "F*** you bitch, I'll do what I want" and then shoved Matthew. Appellant then attempted to push Matthew's head, but Matthew moved and, in response, punched appellant. According to Matthew, appellant then drove him into a kitchen counter and proceeded to bite him twice on the chest.

{¶5} Although no independent witness saw the beginning of the physical confrontation, Emily testified she saw Matthew stumble backwards in the kitchen after the argument had escalated in both tension and volume. Because only Matthew and appellant were in the kitchen, she surmised the stumble was caused by appellant pushing Matthew. Emily then stated she temporarily lost sight of the men. She then entered the kitchen and saw appellant, leaning on Matthew, whose back was against the counter, with his head on Matthew's chest.

{¶6} Emily testified she tried to intervene and stop the fight. When she came between the two men, however, she claimed appellant had a look on his face of "pure disgust, like he was disgusted by me." After glowering at Emily, appellant allegedly punched the girl in the head then pulled her to the floor by her hair. Matthew, in an attempt to free Emily, proceeded to knee appellant in the head. Appellant abruptly released Emily, but latched onto Matthew's right leg and bit into his thigh causing the limb to bleed. As the fight continued, appellant again bit Matthew, this time on the finger; this bite also opened up a large cut which eventually caused scarring to Matthew's finger. The altercation ended shortly thereafter and Matthew and Emily left appellant's home.

{¶7} While Matthew and Emily drove away, Emily phoned the police. Multiple officers were dispatched but Patrolman Charles Cox was the first to respond. The officer met the couple at the end of appellant's street. He noted Emily was crying and Matthew had sustained multiple, visible injuries, including a lacerated finger. Although Matthew and Emily admitted they had consumed alcohol during the day, Patrolman Cox noted that neither Matthew nor Amy exhibited any indicia of intoxication.

{¶8} After Matthew and Emily related their respective stories to Patrolman Cox, he, along with other officers, went to appellant's home where he met Ms. Munning. Ms. Munning explained that appellant was not in the house. The police confirmed this and went next door where appellant was finally located in the home of his neighbor. Appellant emerged from the home and exclaimed "[h]ere I am, I knew you were coming." The officers noticed appellant had some abrasions on his face and redness in one of his eyes. He told the officers that he had been in a physical altercation with Matthew over Matthew's dog; appellant claimed, however, that he was defending himself against Matthew's threatening, aggressive behavior.

{¶9} While relating his story, the officers noticed appellant exhibited a strong odor of alcohol; bloodshot eyes; and slow, slurred speech. Due to the visible injuries suffered by Matthew, appellant's statements at the scene, and the fact appellant hid from police, Patrolman Cox concluded appellant was the primary, physical aggressor and placed him under arrest.

{¶10} On April 25, 2008, appellant was indicted on one count of domestic violence, a felony of the third degree, in violation of R.C. 2919.25(A). Appellant waived his right to be present at his arraignment and a plea of "not guilty" was entered on his behalf.

{¶11} On September 9, 2008, appellant filed a motion in limine to prohibit the introduction of any evidence concerning appellant's prior domestic violence convictions. He argued that he was not advised of the effect of his pleas. During the hearing, appellant amended his motion in limine to a motion to dismiss. The trial court subsequently overruled the motion.

{¶12} On October 15, 2008, appellant filed a pleading entitled “Notice of Intent to Stipulate and Motion in Limine and Request to Voir Dire Prosecutor as to Reason for Refusal to Stipulate.” Appellant asserted he was willing to enter into a stipulation to his two prior domestic violence convictions in order to “exclude knowledge of said convictions from the jury in the State’s case in chief.” Appellant asserted that “[p]ermitt[ing] the jury to know the defendant’s prior domestic violence convictions will be grossly prejudicial and contrary to law and the Ohio Rules of Evidence.” Appellant later filed a second motion in limine seeking to exclude any mention of appellant’s criminal record in the state’s case-in-chief or for the purpose of impeachment. Appellant claimed, pursuant to Evid.R. 403, that the probative value of any such evidence was substantially outweighed by the danger of unfair prejudice. In this motion appellant again indicated his willingness to stipulate to his prior domestic violence convictions to the extent that “said prior offenses be kept from the jury ***.” The trial court overruled appellant’s motions.

{¶13} The matter proceeded to jury trial. Matthew’s, Emily’s, and Officer Cox’s testimony was consistent with the facts summarized supra. However, the defense provided a different version of the events. Maryjo, Kevin, and Sandy each testified that Matthew was the aggressor; none of these witnesses, however, saw the fight begin. These witnesses also testified that appellant asked Matthew to leave on several occasions before the fight began, but Matthew refused.

{¶14} Also, appellant testified in his own defense. Similar to Maryjo, Kevin, and Sandy, appellant asserted he had asked Matthew to leave three times before the altercation. According to appellant, Matthew became more threatening as the argument

escalated and accordingly, appellant predicted, he knew there was going to be a fight. On direct examination, appellant acknowledged that he put his hands on Matthew first, but claimed he did so because Matthew was coming at him in a menacing fashion. He therefore asserted any physical contact he initiated was done in self-defense, contrary to Matthew's version of the fight.

{¶15} After hearing the evidence, the jury returned a verdict of guilty. On February 23, 2009, appellant was sentenced to a two-year term of imprisonment. He now appeals assigning five errors for our review.

{¶16} Appellant's first assignment of error alleges:

{¶17} "The trial court erred in denying the defendant-appellant's motion in limine to prohibit the introduction of the defendant-appellant's prior domestic violence convictions in violation of his rights to due process and fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article 1 of the Ohio Constitution."

{¶18} Before addressing the merits of appellant's initial assignment of error, we point out that a motion in limine is a tentative and precautionary vehicle which seeks an anticipatory ruling on an evidentiary issue at trial. *Defiance v. Kretz* (1991), 60 Ohio St.3d 1, 4. The denial of a motion in limine is within the sound discretion of the trial court. *State v. Werfel*, 11th Dist. Nos. 2002-L-101 and 2002-L-102, 2003-Ohio-6958, at ¶64. A reviewing court will not disturb the trial court's ruling save an abuse of discretion. *Id.* An abuse of discretion connotes more than a mere error of law or judgment; rather, it implies that the court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶19} During the motion hearing, it is clear that appellant was attempting to challenge the validity of, i.e., collaterally attack, his past domestic violence convictions. To this end, appellant makes two arguments; namely, he asserts that his past convictions were obtained (1) without his knowledge that they could be used to enhance the severity of future charges and (2) without a full explanation of the circumstances surrounding the offense to which appellant pleaded.

{¶20} When the state attempts to use a prior conviction to enhance the degree of a subsequent charge, the defendant may attack the use of that conviction for enhancement by alleging a constitutional infirmity. *State v. Armbruster*, 3d Dist. No. 9-03-15, 2004-Ohio-289, at ¶6, citing *State v. Lamer* (June 28, 2001), 10th Dist. No. 00AP-1204, 2001 Ohio App. LEXIS 2872. A defendant asserting such a constitutional challenge must level an objection to the use of the prior conviction and present adequate evidence to establish a prima facie constitutional infirmity. *State v. Adams* (1988), 37 Ohio St.3d 295, paragraph two of the syllabus. Absent a prima facie showing, an appellate court shall presume all underlying proceedings were conducted pursuant to the applicable rules of law. *State v. Brandon* (1989), 45 Ohio St.3d 85, syllabus.

{¶21} With this procedure in mind, however, the only constitutional infirmity that a criminal defendant may allege to collaterally challenge a prior penalty-enhancing conviction is the denial of the fundamental right to be represented by counsel. *State v. Dowhan*, 11th Dist. No. 08-L-064, 2009-Ohio-684, at ¶12, citing, *State v. Culberson*, 142 Ohio App.3d 656, 662-663, 2001-Ohio-3261; see, also, *Brandon*, supra, at 86; *Custis v. United States* (1994), 511 U.S. 485, 496; (wherein the Supreme Court

expressly refused to extend the right to attack collaterally prior convictions used for sentencing enhancement beyond the right to have appointed counsel. *Id.* at 496). Such an infirmity “**** consists of a conviction obtained without the assistance of counsel, or its corollary, an invalid waiver of the right to counsel.” *Armbruster*, *supra*, at ¶7, quoting *Culberson*, *supra*.

{¶22} In this case, the state used two prior convictions for domestic violence to enhance appellant’s charge to a felony, one from 1997 and one from 2005. In the latter proceedings, appellant was represented by counsel. As a result, appellant cannot attack the validity of that conviction as a tool for enhancement. With respect to the 1997 conviction, the record indicates appellant was not represented by counsel. However, there is nothing in the record which would indicate appellant was denied counsel or did not enter a valid waiver of counsel. Appellant merely averred, by way of affidavit, that he pleaded no contest to domestic violence in 1997 without an attorney. In *State v. Thompson*, 121 Ohio St.3d 250, 2009-Ohio-314, the Supreme Court recently underscored that “[a] bald allegation of constitutional infirmity is insufficient to establish a prima facie showing with respect to an ‘uncounseled’ plea.” *Id.* at 252. Here, appellant does not even allege that his lack of counsel caused the infirmities of which he complains. As a result, we must presume the 1997 proceedings were conducted “in accordance with the rules of law.” *Brandon*, *supra*, at syllabus. Because appellant has failed to establish an acknowledged constitutional infirmity, his first assignment of error is overruled.

{¶23} For his second assignment of error, appellant contends:

{¶24} “The trial court erred in denying the defendant-appellant’s motion in limine to exclude all reference to the defendant-appellant’s two prior domestic violence convictions from the state’s case-in-chief in violation of his rights to due process and fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article 1 of the Ohio Constitution.”

{¶25} Under his second assigned error, appellant argues the trial court abused its discretion when it denied his motion in limine that sought to stipulate to his prior domestic violence convictions and, if granted, exclude any mention of those convictions to the jury. Appellant argued that the motion should have been granted because permitting the jury to know of his prior domestic violence convictions violated Evid.R. 403(A), pursuant to *Old Chief v. United States* (1997), 519 U.S. 172.

{¶26} A violation of R.C. 2919.25(A) is usually a first degree misdemeanor. See R.C. 2919.25(D)(2). However, if a defendant has previously been convicted of two or more domestic violence offenses, R.C. 2919.25(D)(4) provides that a violation of R.C. 2919.25(A) is a felony of the third degree. Since prior convictions for domestic violence raises the degree of a subsequent offense, the prior convictions are essential elements of that offense. *State v. Allen* (1987), 29 Ohio St.3d 53, 54. Accordingly, the state must prove the prior convictions for domestic violence beyond a reasonable doubt. *State v. Henderson* (1979), 58 Ohio St.2d 171, 173.

{¶27} Appellant asserts that *Old Chief*, supra, mandates that the trial court accept his stipulation regarding his prior convictions, thereby excluding all evidence concerning his prior convictions.

{¶28} In *Old Chief*, the defendant was charged with violating a federal statute prohibiting the possession of a firearm by anyone who had a prior conviction of a crime punishable by a term of imprisonment exceeding one year. *Id.* at 174. The defendant offered to stipulate to the fact of the prior conviction and sought to preclude the prosecutor from revealing the name and nature of the prior felony conviction to the jury. The defendant asserted that, in light of his offer to stipulate, evidence relating to the name and nature of the previous felony conviction would unfairly prejudice his case pursuant to Evid.R. 403. *Old Chief*, *supra*, at 175. The trial court rejected the defendant's stipulation and the defendant was convicted.

{¶29} The United States Supreme Court accepted certiorari and concluded the trial court abused its discretion by rejecting the stipulation. *Id.* at 174. In reaching this conclusion, the Court reasoned that because the defendant's legal status was the subject of the stipulation, the stipulation would satisfy the element of the offense charged. See *Id.* at 186. The Court underscored that its holding represented a limited exception to the general principle that "the prosecution is entitled to prove its case free from any defendant's option to stipulate the evidence away." *Id.* at 189.

{¶30} *Old Chief* stands for the substantive proposition that, in order to avoid undue prejudice, a court must accept a defendant's stipulation on an element of a crime which simply goes to his or her legal status. However, *Old Chief* neither states nor implies that the jury must remain ignorant of that prior conviction. The point is that where a defendant's legal status is a material element of a charged crime, "the fact of the qualifying conviction is alone what matters under the statute." (Emphasis added) *Id.* at 191. As a result: "[t]he most the jury needs to know is that the conviction admitted by

the defendant falls within the class of crimes that Congress thought should bar a convict from possessing a gun, and this point may be made readily in a defendant's admission and underscored in the court's jury instruction." *Id.* at 191. Thus, the stipulation ensures that the jury would know *only* the fact of a prior felony convictions, which is admissible under Evid.R. 403, not the facts underlying those convictions, which are inadmissible under the rule. *Id.* at 186-192.

{¶31} In its opinion, Court explicitly recognized that even where a defendant stipulates to his legal status, the jury must nevertheless be made aware of the concession. A thorough reading of *Old Chief* consequently demonstrates that a defendant is entitled to stipulate to the fact of his legal status, but the jury must still find that fact to be established in order to convict the defendant in a later proceeding where the fact is a necessary element of the charged crime.

{¶32} Here, appellant specifically sought to stipulate to the convictions "and exclude knowledge of said convictions from the jury in the state's case in chief." Unlike the defendant in *Old Chief*, appellant was not simply offering to stipulate to his status as a two-time domestic violence convict to the jury; rather, appellant's offer to stipulate was expressly conditioned upon the state excluding all mention of those previous convictions from the state's case-in-chief. For this reason, *Old Chief* does not support appellant's argument.

{¶33} This analysis notwithstanding, appellant cites this court's holding in *State v. Hatfield*, 11th Dist. No. 2006-A-0033, 2007-Ohio-7130, in support of his argument. In *Hatfield*, the defendant was charged under R.C. 2903.06(B)(3), to wit, aggravated vehicular homicide. That subsection provides: "[e]xcept as otherwise provided in this

division, aggravated vehicular homicide committed in violation of division (A)(2) of this section is a felony of the third degree. Aggravated vehicular homicide committed in violation of division (A)(2) of this section is a felony of the second degree, if, at the time of the offense, the offender was driving under a suspension imposed under [R.C.] 4510 ***.” The defendant tried to admit, via stipulation, that his license was suspended at the time of the incident leading to the charges. The trial court overruled the objection and, over defense counsel’s objection, admitted evidence of the defendant’s entire driving history which included and active license suspension and six previous suspensions. *Hatfield*, supra, at ¶141.

{¶34} On appeal, this court reversed the trial court’s decision, reasoning:

{¶35} “The admission of appellant’s history of convictions for driving under suspension serves as a textbook instance of the problem *Old Chief* was designed to prohibit. In overruling defense counsel’s objections, the trial court determined that the driving history was admissible to show appellant’s actions were ‘not just a casual thing.’ Put another way, the history was admitted to illustrate appellant had a propensity to behave in defiance of the law which, in the court’s view, would allow for an inference of ‘heedless indifference’ or recklessness. Admitting the record for the purpose articulated by the trial court allowed the jury to generalize appellant’s earlier bad acts into evidence of appellant’s bad character which raised the likelihood that the jury will convict appellant for crimes other than those charged or, perhaps even worse, convict because appellant is a ‘bad person’ deserving punishment. *Id.* at 181.” *Hatfield*, supra, at ¶146.

{¶36} Just as it differs from *Old Chief*, the instant matter is also distinguishable from the scenario before this court in *Hatfield*. The defendant in *Hatfield* sought to

admit the element of having a suspended license to the jury through stipulation. This is different from seeking to stipulate to an element but conditioning the offer on shielding the stipulation from the jury. *Hatfield* therefore provides no guidance for our analysis in the case at bar.

{¶37} With this in mind, the request presented in appellant's motion can be construed in two ways. On one hand, it can be seen as an attempt to bifurcate proof of the prior convictions element via judicial notice. On the other, it could be viewed as a back-door attempt to completely undermine the state's ability to prove a material element to the jury. Regardless of which interpretation one chooses, both are impermissible and, in any event, would eventuate in a finding of invited error.

{¶38} With respect to the former, a defendant is not entitled to bifurcate proceedings, nor may he waive jury trial on a prior conviction element alone. *State v. Sweeney* (1999), 131 Ohio App.3d 765, 773. In other words, in a jury trial, the jury, not the trial court, must determine the existence of a prior conviction as a factual matter beyond a reasonable doubt. *State v. Arnold* (Jan. 24, 2002), 8th Dist. No. 79280, 2002 Ohio App. LEXIS 201, *6. This court has held that when a trial court accepts a defendant's invitation to bifurcate the proof, it abuses its discretion. *State v. Flasck* (Dec. 29, 2000), 11th Dist. No. 99-T-0173, 2000 Ohio App. LEXIS 6229, *6-*7. (In *Flasck*, this court specifically addressed the enhanced degree of the offense of OVI and held that the evidence of the defendant's prior convictions must be presented to the jury during the guilt phase of the trial.) Nevertheless, because the defendant is the party that prompts such an error, he may not take advantage of his stratagem on appeal. As the Eighth Appellate District has pointed out:

{¶39} “[w]here the existence of a prior conviction enhances the degree of a subsequent offense, it is an essential element of that offense that the state must prove beyond a reasonable doubt. *** Consequently, while it may have been error for the trial court to bifurcate proof of appellant’s prior conviction from the remainder of the elements of the charged offenses, it was appellant who requested the bifurcation in order to avoid the prejudicial effect inherent in having the jury exposed to appellant’s past felony background. Appellant willingly stipulated the existence of the prior conviction for this very reason. Under the invited-error doctrine, a party will not be permitted to take advantage of an error which he himself invited or induced the trial court to make. ****” (Citations omitted). *State v. Nieves* (1997), 121 Ohio App.3d 451, 455-456.

{¶40} Accordingly, if appellant’s motion is read as an attempt to bifurcate, the trial court clearly acted within its discretion in denying it.

{¶41} Furthermore, if appellant’s motion is read as an attempt to preclude any evidence of his prior convictions, the trial court’s denial was also proper. In order to prove its case, the state was required to prove to the finder-of-fact that the defendant was previously convicted of two or more crimes of domestic violence. One way of meeting this burden and avoid undue prejudice to the defendant is to tell the factfinder that the defendant has stipulated to one element of the offense charged, viz., that he admits to having at least two prior domestic violence convictions. See, e.g., *Old Chief*, supra. In crafting his motion as he did, however, appellant sought to prevent the state from introducing *any* evidence of his prior convictions to the factfinder. Regardless of the intent of appellant’s motion, “**** it is error for the trial court to prevent the state from

introducing evidence of the prior conviction when that fact is a material element of the prosecution's case." *Arnold*, supra, at *6; see, also, *Nievas*, supra, at 455. As a result, this motion was properly denied as a matter of law.

{¶42} Appellant's second assignment of error is overruled.

{¶43} Appellant's third assignment of error asserts:

{¶44} "The trial court committed reversible error when it refused to give the defendant-appellant's requested jury instruction on self-defense in violation of the defendant's right to due process and fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article 1 of the Ohio Constitution."

{¶45} A requested instruction should be given if it represents a correct statement of the law, it is relevant to the facts of the case, and has not been given in the general charge. *State v. Jeffers*, 11th Dist. No. 2007-L-011, 2008-Ohio-1894, at ¶33. For the purpose of appellate review, "[t]he decision to issue a particular jury instruction rests within the sound discretion of the trial court." *Hatfield*, supra, at ¶122, quoting *State v. Huckabee* (Mar. 9, 2001), 11th Dist. No. 99-G-2252, 2001 Ohio App. LEXIS 1122, *18.

{¶46} Here, appellant asserts the trial court's use of Ohio Jury Instructions (OJI) in its charge relating to the affirmative defense of self-defense was insufficient to apprise the jury of an unambiguous statement of the relevant, applicable law. Appellant therefore argues the trial court abused its discretion by declining to issue his proposed instruction.

{¶47} The following jury instruction, taken from OJI, was given to the jury regarding self defense:

{¶48} “The Defendant is asserting an affirmative defense known as self-defense. To establish that he was justified in using force not likely to cause death or great bodily harm, the Defendant must prove by the greater weight of the evidence that he was not at fault in creating the situation giving rise to the altercation with his son; and he had an honest belief, even if mistaken, that he was in immediate danger of bodily harm.”

{¶49} Appellant contends the foregoing instruction is ambiguous because it allowed the jury to conclude he could not legally claim self-defense if he were responsible for the verbal altercation which led to the fight. In an effort to elucidate the mechanics of self-defense, appellant sought to include the word “primarily” in the instruction. His proposed instruction would have read: “*** the defendant must prove by the greater weight of the evidence that he was not primarily at fault in creating the situation giving rise to the altercation with his son ***.” Appellant contends his instruction provides a clearer version of the law of self-defense.

{¶50} Although we understand appellant’s concern regarding the general instruction’s ambiguity, we fail to see how inserting the word “primarily” would cure the potential problem. This court has previously stated “[a] trial court must act with extreme caution when giving an instruction that is outside the standard Ohio Jury Instructions to ensure that it is a correct statement of the applicable law.” *Jeffers*, supra, at ¶49. As appellant’s proposed, self-crafted instruction adds no additional clarity, we fail to see how the trial court acted arbitrarily or unreasonably in refusing to utilize it.

{¶51} More importantly, however, it is well-established that a single jury instruction must not be considered in a vacuum but must be viewed in the context of the instructions as a whole. *State v. Price* (1979), 60 Ohio St.2d 136, at paragraph four of

the syllabus. After the trial court gave the self-defense instruction under consideration, it instructed the jury on appellant's burden in establishing the affirmative defense. Immediately subsequent to doing so, the court issued the following legal caveat to the jury:

{¶52} "Words alone do not justify the use of force. Resort to such force is not justified by abusive language, verbal threats, or other words, no matter how provocative.

{¶53} "In deciding whether the Defendant had reasonable grounds to believe and an honest belief that he was in immediate danger of bodily harm, you must put yourself in the position of the Defendant, with his characteristics, his knowledge or lack of knowledge, and under the circumstances and conditions that surrounded him at the time. You must consider the conduct of Matthew Nadock and decide whether his acts and words caused the Defendant reasonably and honestly to believe he was about to receive bodily harm.

{¶54} "If the Defendant used more force than reasonably necessary and if the force used is greatly disproportionate to the apparent danger, then the defense of self-defense is not available."

{¶55} We hold the trial court's follow-up instructions cured any potential ambiguity in the initial self-defense instruction. Therefore, the trial court did not abuse its discretion in declining to supplement the OJI instruction with appellant's requested instruction.

{¶56} Appellant's third assignment of error is overruled.

{¶57} Appellant's fourth assignment of error provides:

{¶58} “The trial court erred to the prejudice of the defendant-appellant when it denied his motion for acquittal made pursuant to Crim.R. 29(A).”

{¶59} Evidential sufficiency invokes an inquiry into due process, and examines whether the state introduced adequate evidence to support the verdict as a matter of law. *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, *13. “An appellate court reviewing whether the evidence was sufficient to support a criminal conviction examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the mind of the average juror of the defendant's guilt beyond a reasonable doubt.” *State v. Troisi*, 179 Ohio App.3d 326, 329, 2008-Ohio-6062. A reviewing court may not reweigh or reinterpret the evidence; rather, the proper inquiry is, after viewing the evidence most favorably to the prosecution, whether the jury could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273.

{¶60} Appellant was convicted of felony-three domestic violence pursuant to R.C. 2919.25(A), which provides: “No person shall knowingly cause or attempt to cause physical harm to a family or household member.” Appellant contends the state failed to prove, beyond a reasonable doubt, that he knowingly caused physical harm to Matthew.

{¶61} Specifically, appellant acknowledges he pushed Matthew prior to any punches being thrown. However, he asserts his involvement at this point was minimal and the severity of the fight escalated only when Matthew allegedly punched him. According to appellant, [i]t was after this time that an attempt was made to cause injury to Matthew, but, *** it was done in self-defense.”

{¶62} We point out that appellant’s argument under this assigned error effectively asks this court to weigh the persuasive value of the evidence submitted, viz., whether, given the testimony submitted, Matthew was the aggressor in the fight. A sufficiency argument, however, is more rudimentary and formulaic. If there was *some evidence* produced to show that appellant, regardless of his construction of events, knowingly caused harm to Matthew, the state submitted enough evidence to send the case to the jury. For the reasons that follow, we hold the state met its burden of production.

{¶63} R.C. 2901.22(B) provides: “[a] person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.” With respect to the mens rea element of a crime, courts will generally presume a person intends the natural, reasonable, and probable consequences of his or her voluntary acts. See, e.g., *State v. Oliver*, 11th Dist. No. 2008-L-160, 2009-Ohio-4928, ¶33.

{¶64} The state submitted evidence that appellant and Matthew had a hostile, invective-laced verbal altercation prior to the fight. Both Matthew and Emily testified, however, that appellant initiated the physical affray by pushing Matthew with both hands and subsequently pinning him against a kitchen counter. These events led to a more aggressive physical exchange between appellant and Matthew during which appellant bit Matthew in the chest twice, bit Matthew’s thigh, as well as his right pinky finger. The bites left bruises to Matthew’s chest and left bleeding lesions on both his thigh and finger.

{¶65} Significantly, appellant admitted he bit Matthew during the fight as a means of defending himself. Under these (or perhaps any set of facts), it is difficult to imagine how a person could inadvertently or negligently bite another person. By acknowledging he seized Matthew's flesh with his teeth during a heated physical altercation, appellant effectively conceded, at the least, he knowingly attempted to cause Matthew physical harm. When viewed in a light most favorable to the state, Matthew's and Emily's testimony, in conjunction with the evidence of Matthew's injuries and appellant's direct admission that he intentionally bit Matthew (regardless of *his* purported purpose), was sufficient to prove, beyond a reasonable doubt, appellant knowingly caused or attempted to cause physical harm to Matthew.

{¶66} Appellant's final assignment of error alleges:

{¶67} "The trial court erred to the prejudice of the defendant-appellant when it returned a verdict of guilty against the manifest weight of the evidence."

{¶68} While a test of evidential sufficiency requires a determination of whether the state has met its burden of production, a manifest weight inquiry analyzes whether the state met its burden of persuasion. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52. Specifically, a manifest weight challenge concerns:

{¶69} "the inclination of the greater *amount* of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of

mathematics, but depends on its *effect in inducing belief.*” Id. at 387, citing Black’s Law Dictionary (6th Ed. 1990), (Emphasis sic.).

{¶70} In weighing the evidence submitted at a criminal trial, an appellate court must defer to the factual findings of the jury regarding the weight to be given the evidence and credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶71} Under his final assignment of error, appellant asserts the conviction under review was against the weight of the evidence because the testimony of Matthew and Emily lacked credibility. In particular, he asserts the jury lost its way because he presented adequate evidence that Matthew was the aggressor and any ensuing injuries sustained by Matthew were inflicted in self-defense.

{¶72} To establish self-defense, a defendant must show “* * * (1) * * * [he] was not at fault in creating the situation giving rise to the affray; (2) * * * [he] has [sic] a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of * * * force; and (3) * * * [he] must not have violated any duty to retreat or avoid the danger.” *State v. Robbins* (1979), 58 Ohio St.2d 74, paragraph two of the syllabus. “If the defendant fails to prove *any one* of these elements by a preponderance of the evidence he has failed to demonstrate that he acted in self-defense.” (Emphasis sic.) *State v. Williford* (1990), 49 Ohio St.3d 247, 249, quoting *State v. Jackson* (1986), 22 Ohio St.3d 281, 284.

{¶73} As discussed above, the state presented evidence that, after an acrimonious argument, appellant pushed Matthew. Appellant then drove Matthew against a counter along the back wall of the kitchen and bit him in the chest twice.

According to Matthew, Emily unsuccessfully tried to break-up the fight, at which point all three individuals went to the ground.

{¶74} Emily testified she heard the argument between appellant and Matthew; she further testified she witnessed Matthew “fall back,” as though appellant had pushed him. She stated Matthew and appellant were temporarily outside her field of vision; however, she entered the kitchen and saw appellant had pinned Matthew to a cabinet with his face on Matthew’s chest. She testified she tried to get in between the men but appellant struck her in the face and pulled her to the floor by her hair.

{¶75} Alternatively, appellant testified his actions were taken in response to Matthew’s aggressive, physical posturing. While he acknowledged he pushed Matthew, appellant asserted he did so only because Matthew walked toward him with clenched fists. At the time he shoved Matthew, appellant claimed he was concerned for his safety. Notwithstanding this representation, he testified that, given the tone of the disagreement, he “knew there was going to be a fight.”

{¶76} When considering witness credibility, “[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact.” *State v. Awan* (1986), 22 Ohio St.3d 120, 123. “The fact finder is free to believe all, some, or none of the testimony of each witness appearing before it.” *State v. McKinney*, 11th Dist. No. 2007-T-0004, 2008-Ohio-3256, at ¶222. Moreover, if the evidence admits to more than one interpretation, an appellate court is required to interpret it in a manner consistent with the verdict. *Id.* “As trial courts often note, proof beyond a reasonable

doubt does not mean proof beyond any doubt.” *State v. Burgess*, 11th Dist. No. 2002-L-019, 2004-Ohio-3338, at ¶37.

{¶77} With these standards in mind, we further note that a conviction is not against the weight of the evidence simply because the jury chose to believe the prosecution’s evidence over that of the defense. *State v. Eggleston*, 11th Dist. No. 2008-L-047, 2008-Ohio-6880, at ¶47, citing *State v. Beesler*, 11th Dist. No. 2002-A-011, 2003-Ohio-2814, at ¶22. Despite appellant’s version of the events, the jury chose to accept the version offered by Matthew and Emily. Their testimony indicates appellant shoved Matthew, drove him into the kitchen cabinet and proceeded to bite him on the chest. Such evidence is sufficient to undermine appellant’s claim of self-defense because it reflects appellant was the aggressor, i.e., under these circumstances, he was at fault for creating the situation which led to the affray. We consequently hold the jury’s verdict does not represent a miscarriage of justice because it was consistent with and supported by the evidence submitted by the state. Accordingly, appellant’s conviction for felony-three domestic violence was not against the manifest weight of the evidence.

{¶78} Appellant’s final assignment of error is overruled.

{¶79} For the reasons discussed in this opinion, appellant’s assignments of error are overruled and the judgment of conviction entered by the Lake County Court of Common Pleas is therefore affirmed.

DIANE V. GRENDALL, J., concurs,

COLLEEN MARY O’TOOLE, J., dissents with a Dissenting Opinion.

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I respectfully dissent.

With regard to his second assignment of error, appellant asserts that *Old Chief* mandates that the trial court should have accepted his stipulation with respect to his prior convictions thereby excluding all evidence concerning his prior convictions. I agree with appellant and disagree with the majority that *Old Chief* does not support his argument.

In *Old Chief*, the United States Supreme Court determined that a defendant's conviction must be reversed where a past conviction is an element of the offense for which the defendant is on trial and the state refuses to accept a defendant's stipulation regarding the conviction. [Id. at 174](#). In that case, one of the crimes that the defendant had been charged with was possession of a firearm by a felon. *Id.* at 174. The defendant offered to stipulate to the fact that he had been convicted of a felony, without informing the jury of the nature of the felony. *Id.* at 175. The prosecution refused to accept the stipulation and instead introduced copies of the convictions. *Id.* at 177. The Court determined that where there was another method to prove the prior convictions, it was unduly prejudicial to the defendant at trial to allow the jury to hear the exact nature of the prior conviction. *Id.* at 185. Thus, the Court reversed the defendant's conviction and found that the district court's refusal to accept the stipulation was an abuse of discretion. *Id.* at 192.

In the instant matter, a necessary element of the offense appellant had been charged with was his two prior convictions for domestic violence. The majority contends that appellant wanted to present nothing to the jury, therefore, *Old Chief* does not apply. However, the record establishes that appellant offered to stipulate that he had been convicted of the two requisite domestic violence offenses. Thus, I believe that the motion in limine should have been granted because permitting the jury to know of appellant's prior domestic violence convictions violated Evid.R. 403(A) pursuant to *Old Chief*. However, appellant's motion in limine was denied at trial and the state introduced certified copies of his prior convictions.

Pursuant to *Old Chief*, this writer believes that the trial court's evidentiary ruling was an abuse of discretion. The state, in refusing to accept the stipulation, violated the Supreme Court's holding in *Old Chief*. Thus, I believe appellant's second assignment of error has merit and his conviction should be reversed and remanded for a new trial. See *State v. Hatfield*, 11th Dist. No. 2006-A-0033, 2007-Ohio-7130, at ¶148.

Accordingly, I respectfully dissent.