[Cite as *State v. Whitman*, 2018-Ohio-2924.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
-vs-	:	
	:	Case No. 2017CA00079
	:	
RICHARD STANTON WHITMAN	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2016CR2255
JUDGMENT:	AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
DATE OF JUDGMENT ENTRY:	July 23, 2018

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
JOHN D. FERRERO, JR. STARK CO. PROSECUTOR KRISTINE W. BEARD 110 Central Plaza South, Ste. 510 Canton, OH 44702-1413	GEORGE URBAN 116 Cleveland Ave. NW Canton, OH 44702

Delaney, J.

{¶1} Appellant Richard Stanton Whitman appeals from the May 5, 2017 Judgment Entry of conviction and sentence of the Stark County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} The following facts are adduced from the record of appellant's jury trial.

{¶3} Appellant is the brother of Janeann Whitman. On November 28, 2016, appellant was living in an upstairs bedroom in Janeann's residence on Hursh Place Northwest in the city of Canton. Janeann's niece, Kendra Brabazon, also lived at the residence with her two small children. Kendra was staying at the house temporarily. Consequently, Kendra's boxes, furniture, and mattresses were scattered around the house.

{¶4} Appellant is described as a chronic alcoholic who was usually intoxicated, and Kendra described appellant as visibly intoxicated on November 28, 2016. That morning, a dispute arose while Janeann was at work. Kendra and appellant briefly argued when appellant came downstairs and told Kendra to take his dogs out; she said she would "in a minute." Appellant returned upstairs but came back down to find Kendra's children pulling toys out of boxes. Appellant became agitated because he had cleaned the toys up at one point. Appellant told Kendra and the children to put the toys away but Kendra said they didn't have to. Appellant briefly returned upstairs, came back down, grabbed a box of toys, and took it outside. He placed Kendra's property in the front yard and said Kendra and her children could "get out."

{¶5} Kendra called Janeann at work and told her about the confrontation. Kendra and the children then left the house to go to the restaurant where Janeann was working. Janeann called appellant and told him to put Kendra's property back in the house and chided him that it wasn't up to him to throw Kendra out of the house.

{¶6} Janeann also called a friend, David Eadie, and asked him to go to the house to make sure appellant brought Kendra's property back inside. Eadie and Janeann had worked together, dated, and lived together at one point. Their relationship was now described as "friends" but Janeann and Kendra acknowledged they relied on Eadie to help them frequently, with virtually "everything." Eadie agreed to meet Kendra at the house upon her return.

The first encounter between Eadie and appellant: Eadie admonishes appellant for putting Kendra's property out

{¶7} Eadie met Kendra at the house between 12:30 and 1:00 p.m. He walked into the house with Kendra and her children and appellant came downstairs. Eadie said he wanted to talk but appellant told him to get out. Eadie told appellant it was up to Janeann who was allowed to be in the house, and told appellant to leave Kendra and her kids alone. Kendra also testified that Eadie accused appellant of laying around drinking all day, not helping with bills, and said if there was a problem he (Eadie) would take care of it. Appellant told Eadie to "take care of it, then" but Eadie said he wasn't going to touch appellant in front of the children.

{¶8} Appellant went back upstairs and Eadie stayed for a while, talking to Kendra and the kids. Eadie left. Janeann came home from work and Kendra left for a short period.

{¶9} When Kendra returned to the house, she found Janeann very upset. Janeann was sitting on the couch texting appellant, even though he was in his bedroom upstairs. Janeann told Kendra appellant had taken her gun, a Smith and Wesson .9 millimeter, broken it up, and buried it in pieces in the backyard. Janeann went upstairs and argued in person with appellant. Kendra heard her say, "Don't point that gun at me."

{¶10} Kendra climbed over the baby gate at the bottom of the steps and went upstairs to see what the problem was. She saw appellant holding a .22 shotgun and asked what was going on. Janeann said appellant took her gun and was now pointing the rifle at her and at himself. Kendra told Janeann she was taking her kids and leaving. Janeann told Kendra she didn't know what to do about appellant; she considered calling the police and trying to get him put in jail to sober up, or to get a psychiatric evaluation. She also considered calling Eadie and asking him again to "handle it." Kendra told her to call the police and left with her kids; she went to a neighbor's house down the street.

Second encounter: Eadie takes .22 rifle from appellant

{¶11} Janeann testified on behalf of appellant at trial. She acknowledged Kendra called her at work on November 28 and complained about appellant putting her things outside; Janeann called David Eadie and asked him to handle it while she was at work.

{¶12} Janeann described the incident with appellant pointing the .22 rifle in greater detail. Upon her return home from work, appellant texted her from the bedroom and the two argued. She went upstairs to confront him and found him sitting on his bed with the .22 rifle. Janeann testified appellant pointed the rifle first at her and then at himself, but claimed she never felt threatened and he didn't make any threats toward her;

instead, Janeann believed he might harm himself. She said she yelled at him and went back downstairs. She hoped to distract appellant from hurting himself.

{¶13} Downstairs, Janeann texted another sister and said she intended to call the police, but her sister responded that appellant would "go crazy" if she called the police. Janeann decided instead to call Eadie again, to "talk him down." Eadie agreed to return to speak to appellant and Janeann went back upstairs. Appellant remained in his room and she went to her own room.

{¶14} Janeann realized Eadie had returned when she heard a loud "wham," which she said was Eadie slamming appellant against the wall. Janeann came into the room and tried to pull the two apart, and all three fell to the ground. Janeann said Eadie was on top of appellant with his hand on his throat. At one point, though, appellant had a machete in his hand. Eventually the scuffle ended and Eadie took whatever weapons he could find out of the room, including the machete and the .22 rifle. Janeann went downstairs and Eadie also came down, placing the rifle behind a mattress.

{¶15} Eadie then attempted to lure appellant downstairs by yelling to him that he was letting appellant's dogs out.

Third and fatal encounter: Appellant fires on Eadie three times

{¶16} Janeann said Eadie went back upstairs to investigate a strange green light on the wall. As he climbed the steps, Janeann said she didn't want him to return upstairs because he "just kept beating on [her] brother." Eadie continued upstairs and Janeann grabbed her phone.

{¶17} She heard three shots from upstairs and ran from the house calling 911. Appellant came downstairs and told her he shot Eadie. When she asked why, he said "he was coming after me again."

{¶18} In the meantime, when she arrived at the neighbor's house, Kendra discovered a missed call from Janeann and called her back. Janeann said Eadie was at the house beating up appellant, requiring Janeann to get in between them. Kendra told her to call the police but Janeann said her phone was about to die and asked Kendra to call instead. Kendra refused and Janeann hung up.

{¶19} Kendra waited five minutes and tried to call Janeann again. There was no answer. She called Eadie's phone next and he didn't answer. Kendra felt uneasy. Janeann called her back and told her appellant had just shot Eadie and there was blood everywhere.

{¶20} Upon cross-examination of Janeann by appellee, a different version of the dispute between appellant and his sister emerged. Janeann acknowledged appellant is a chronic alcoholic and that his all-day drinking caused the problems that led to the shooting. She also acknowledged she habitually called Eadie to deal with her problems because she knew he would respond instantly and take care of whatever she needed.

{¶21} On the day of the shooting, she texted back and forth with appellant, arguing over his treatment of Kendra and the disappearance of Janeann's .9 millimeter firearm. The texts between Janeann and appellant were introduced at trial as appellee's Exhibit 15. Janeann and detectives scrolled through messages on her phone on video, revealing the extent of their argument. Appellant taunted Janeann for sending Eadie to the house to deal with him.

{¶22} Appellant had taken Janeann's firearm from a drawer in her bedroom, and both Janeann and Eadie were aware he had it, although appellant claimed to have dismantled it and buried it in pieces throughout the backyard. Janeann knew appellant had access to two guns, her own .9 millimeter and the .22 rifle. During her own confrontation with him, appellant had pointed the .22 rifle at Janeann and at himself. She believed appellant was despondent because he knew she was leaving in January to take a new job and no one else would take him in. The family was sensitive to threats of suicide because another brother of Janeann and appellant had killed himself.

{¶23} Janeann acknowledged the first person who came to mind to help her was David Eadie, and she called him for the express purpose of getting the guns away from appellant. Despite Kendra advising her to call the police, she called Eadie instead and repeatedly asked him to deal with appellant, who was armed and drunk.

{¶24} Janeann acknowledged that after the shooting, while she was on the phone with 911, appellant laughed in the background and she had to tell him "there's nothing funny."

Investigation and appellant's statement to detectives

{¶25} Several Canton police officers sped to the scene of the reported shooting. They found a male and a female on the porch of the Hursh Place address, later identified as appellant and Janeann. Appellant staggered and seemed intoxicated; he mumbled and slurred his speech. Appellant was cuffed and placed in a patrol car and officers cleared the house. They found David Eadie deceased in the upstairs hallway. The .9-millimeter Smith and Wesson firearm was located on the bathroom sink with the magazine out and chamber empty.

{¶26} Appellant was transported to the Canton Police Department Detective Bureau for questioning. Detective Prince spoke to appellant about six hours after he arrived; he was initially too intoxicated to make a statement. He was given time and food to allow him to sober up.

{¶27} Appellant said there was an argument and he shot Eadie three times. He said he "couldn't have made a clearer shot on a deer [he] was trying to kill." Eadie had taken the .22 rifle and appellant's cell phone during the earlier encounter with appellant, when they fought and were separated by Janeann. Appellant told Detective Prince that Eadie struck him so hard in the stomach that he defecated on himself.

{¶28} Eadie went downstairs after the physical altercation and yelled to appellant, "You've got two minutes." He then told appellant he would let appellant's dogs loose out the front door. Rather than go downstairs, appellant remained in his bedroom and armed himself with the .9-millimeter firearm. Appellant claimed he was aware of an incident in which Eadie had "shot up the house," so he didn't want Eadie to get the .9 millimeter.

{¶29} Appellant thus sat on the corner of his bed with the firearm cocked, and as Eadie came up the steps and into the bedroom, appellant said "No" and fired three times. Appellant said he didn't want to hurt anyone but he also did not want to be beaten by Eadie again. He said he didn't know if Eadie had anything in his hands as he came up the stairs and he "didn't need to know" if he had anything in his hands: appellant didn't want to be hit again.

{¶30} Appellant acknowledged Eadie came back upstairs in search of the .9 millimeter, intending to take it from him. When asked why appellant didn't just give the gun back to Janeann, he claimed she never asked for it.

{¶31} Appellant did not complain of any injuries to detectives and no visible injuries were observed.

{¶32} Three shell casings were found inside the bedroom. Eadie was at the doorway of appellant's bedroom; his feet were at the doorway and his head was extended down the hallway, almost to the stairs. Eadie had been shot in the left side of his head, in the chest, and above his lip.

{¶33} The .22 Mossberg rifle was also recovered from the house; it was found inside the front door, behind a mattress.

Appellant's trial testimony

{¶34} Appellant testified on his own behalf at trial. He said he cleaned the house on November 28, 2016 and was angered when Kendra's kids pulled toys out. He acknowledged he was drinking "a significant amount" of whiskey and Sprite throughout the day. Eadie came over to the house the first time at Janeann's request, when Kendra complained about appellant putting her property out in the front yard. Appellant acknowledged they argued and Eadie left.

{¶35} Appellant and Janeann argued with each other via text message throughout the day, even after she returned from work. Appellant acknowledged he had two guns in his possession at that point: the .22 rifle and his sister's .9 millimeter. The .9 millimeter was largely the subject of the text arguments, and appellant was handling the .22 rifle, threatening suicide, when Janeann came upstairs to talk to him.

{¶36} Eadie returned to the house, came upstairs to appellant's bedroom, grabbed him and threw him against the wall. Eadie punched him in the stomach, causing him to soil himself, and Janeann came into the room and pulled the two apart. Eadie

went downstairs with the .22, appellant's cell phone, and a machete appellant had in his bedroom.

{¶37} Appellant now claimed Eadie said he would be back upstairs in two minutes to "finish what he started" and to "throw [appellant] out a window." Eadie yelled upstairs that he was letting appellant's dogs out but appellant "would not allow [himself] to be baited into coming downstairs." Instead, when he heard Eadie messing with the baby gate at the bottom of the stairs, appellant got the .9 millimeter out from under this mattress, put the magazine into it, chambered a round, and sat with the weapon on his knee. Appellant testified he thought at the time, "God, don't make me have to shoot this asshole."

{¶38} Appellant heard Eadie coming up the steps, down the hallway, and into the bedroom doorway. Appellant and Eadie briefly looked at each other, and Eadie saw the gun. Appellant said, "No, David," and threw himself backward as he fired at Eadie three times. When asked why it was necessary for him to shoot Eadie, appellant replied, "he was there to hurt me" and "he was going to finish the job and throw me out the window."

{¶39} Appellant took the magazine out of the gun and placed the gun on the bathroom sink. He said he kicked Eadie's foot as he stepped over him on his way downstairs after the shooting. When he spoke to Janeann downstairs, he told her not to go upstairs to check on Eadie because it "wouldn't do any good."

{¶40} Upon cross-examination, appellant acknowledged he did not tell police or anyone else about Eadie's alleged statement that he was coming upstairs to "finish the job" and to throw appellant out the window. Appellant admitted he didn't care whether Eadie had anything in his hands (such as a weapon) when he came back upstairs

because appellant was going to shoot him no matter what. He picked up the gun, put in the magazine, and chambered a round when he heard Eadie stepping over the baby gate at the bottom of the stairs.

Indictment, Trial, and Conviction

{¶41} Appellant was charged by indictment with one count of murder pursuant to R.C. 2903.02(A), a special felony [Count I] and one count of having weapons while under disability pursuant to R.C. 2923.13(A)(2) and/or (A)(4), a felony of the third degree [Count II]. Count I was accompanied by a firearm specification pursuant to R.C. 2941.145.

{¶42} Appellant entered pleas of not guilty.

{¶43} Prior to trial, appellant filed a motions in limine to prevent appellee and appellee's witnesses from referring to Eadie as the "victim," to exclude any reference to appellant's prior criminal history, and to exclude portions of his interview with police in which reference was made to his criminal history. Appellee filed a motion in limine to exclude evidence of alleged prior bad acts of Eadie.

{¶44} Appellant filed a request for jury instructions on self-defense "as defined in O.J.I. § 421.19."

{¶45} The matter proceeded to trial by jury and appellant was found guilty as charged. The trial court sentenced appellant to an aggregate prison term of 21 years to life.

{¶46} Appellant now appeals from the judgment entries of his convictions and sentence.

{¶47} Appellant raises four assignments of error:

ASSIGNMENTS OF ERROR

{¶48} "I. THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S REQUEST FOR A 'NO DUTY TO RETREAT'/DEFENSE OF RESIDENCE OR VEHICLE" INSTRUCTION."

{¶49} "II. THE TRIAL COURT ERRED BY OVERRULING APPELLANT'S OBJECTIONS TO TESTIMONY REGARDING APPELLANT'S PRIOR ACTS."

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

{¶51} "IV. THE TRIAL COURT ERRED BY NOT STATING ON THE RECORD, OR IN ITS SENTENCING ENTRY, ITS GROUNDS FOR IMPOSING CONSECUTIVE PRISON SENTENCES, AS REQUIRED BY R.C. 2929.14(C)(4)."

ANALYSIS

I.

{¶52} In his first assignment of error, appellant argues the trial court erred in overruling his request for a "no duty to retreat/defense of residence or vehicle" instruction. We disagree.

{¶53} When reviewing a trial court's jury instructions, the proper standard of review for an appellate court is whether the trial court's refusal to give a requested jury instruction constituted an abuse of discretion under the facts and circumstances of the case. *State v. Miku*, 5th Dist. Stark No. 2017 CA 00057, 2018-Ohio-1584, --N.E.3d--, ¶ 53, citing *State v. Klusty,* 5th Dist. Delaware No. 14 CAA 07 0040, 2015-Ohio-2843, 2015 WL 4275545, ¶ 25. Failure to properly instruct a jury is not in most instances structural

error, thus the harmless-error rule of *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) applies; failure to properly instruct the jury does not necessarily render a trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. *State v. Bleigh,* 5th Dist. Delaware No. 09-CAA-03-0031, 2010-Ohio-1182, 2010 WL 1076253, ¶ 119, citing *Neder v. United States*, 527 U.S. 1, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

{¶54} Whether jury instructions correctly state the law is a legal issue that an appellate court reviews de novo. *See, e.g., State v. Dean*, 146 Ohio St.3d 106, 2015–Ohio–4347, 54 N.E.3d 80, ¶ 135; *see also State v. Brown*, 2016–Ohio–1358, 62 N.E.3d 943, ¶ 71 (11th Dist.). Although a trial court has "broad discretion to decide how to fashion jury instructions," the trial court must "'fully and completely'" give the jury all instructions that are "'relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder.'" *State v. White*, 142 Ohio St.3d 277, 2015–Ohio–492, 29 N.E.3d 939, ¶ 46, quoting *State v. Comen*, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990), paragraph two of the syllabus.

{¶55} In the instant case, appellant requested a self-defense instruction. Self-defense is an affirmative defense that a defendant must prove by a preponderance of the evidence. R.C. 2901.05(A); *State v. Goff*, 128 Ohio St.3d 169, 2010-Ohio-6317, 942 N.E.2d 1075, ¶ 36. To prevail on a claim of self-defense, a defendant must prove three elements: (1) the defendant was not at fault in "creating the situation giving rise to the affray"; (2) the defendant had a bona fide belief that he or she was in imminent danger of death or great bodily harm and that the only means of escape from such danger was through the use of force; and (3) the defendant did not violate any duty to retreat or avoid

the danger. *State v. Jones,* 5th Dist. Stark Nos. 2007–CA–00041, 2007–CA–00077, 2008–Ohio–1068, ¶ 32, citing *State v. Robbins*, 58 Ohio St.2d 74, 388 N.E.2d 755 (1979), paragraph two of the syllabus. If the defendant fails to prove any one of these elements by a preponderance of the evidence, the defendant has failed to demonstrate that he acted in self-defense. *State v. Cassano*, 96 Ohio St.3d 94, 107, 2002-Ohio-3751, 772 N.E.2d 81.

{¶56} The issue in the instant case concerns the instruction upon the third element of self-defense, whether appellant had any duty to retreat. R.C. 2901.09(B) creates an exception to the general duty to retreat. *State v. Black*, 5th Dist. Stark No. 2011 CA 00175, 2012-Ohio-2874, ¶ 25. Under R.C. 2901.09(B)—also known as the "Castle Doctrine"—"a person who lawfully is in that person's residence has no duty to retreat before using force in self-defense, defense of another, or defense of that person's residence." R.C. 2901.05(B)(1) provides that a defendant is "presumed to have acted 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 defendant used the defensive force "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 * * * occupied by the [defendant] using the defensive force." The presumption is rebuttable and may be rebutted by a preponderance of the evidence. R.C. 2901.05(B)(3). Further, the presumption does not apply if the person against whom the defendant used defensive force "has a right to be in, or is a lawful resident of, the residence." R.C. 2901.05(B)(2)(a).

{¶57} Application of the Castle Doctrine affects the elements of self-defense the defendant must establish, depending upon his status in the household. "The difference

between the Castle Doctrine and the rebuttable presumption of self-defense lies in the legal status of the victim." *State v. Lewis*, 2012–Ohio–3684, 976 N.E.2d 258, ¶ 18 (8th Dist.). If the victim was lawfully in the defendant's residence at the time the defendant used force against the victim, the defendant would not be entitled to the presumption of self-defense. *Id*. at ¶ 19; R.C. 2901.05(B)(1)–(2). However, the Castle Doctrine would still apply, i.e., the defendant would have no duty to retreat from the residence if the defendant was lawfully occupying the residence at the time he or she used the force. *Lewis* at ¶ 17–19; *State v. Bushner*, 9th Dist. Summit No. 26532, 2012–Ohio–5996, ¶ 16. It would then be the defendant's burden to prove the remaining elements of self-defense by a preponderance of the evidence. *Id.*

{¶58} In the instant case, therefore, if Eadie was lawfully in the residence when shot by appellant, appellant is not *presumed* to have acted in self-defense. Under those circumstances, appellant could still rely upon the Castle Doctrine to establish he had no duty to retreat, but he must still establish by a preponderance of the evidence that (1) he was not at fault in "creating the situation giving rise to the affray" and (2) he had a bona fide belief that he was in imminent danger of death or great bodily harm at Eadie's hands and that the only means of escape from such danger was shooting Eadie.

{¶59} At trial, neither party questioned Eadie's lawful presence in the residence. Indeed, there was some evidence to indicate he had once lived there himself and certain household bills may have still been in his name; he typically came and went from the residence on a regular basis. Instead, the arguable issues at trial were whether appellant was at fault in creating the affray and whether he reasonably believed shooting Eadie was his only means of escape from imminent danger of death or great bodily harm.

{¶60} On appeal, however, appellant argues the trial court committed structural error in essentially omitting the Castle Doctrine from the jury instructions. The trial court's challenged self-defense instruction *in toto* is as follows:

* * * *.

Self-defense. The Defendant claims to have acted in self-defense. To establish a claim of self-defense, the Defendant must prove by the greater weight of the evidence that:

1) He was not at fault in creating the situation giving rise to the altercation;

2) He had reasonable grounds to believe, and an honest belief, even if mistaken, that he was in imminent or immediate danger of death or great bodily harm, and that his only reasonable means of retreat or escape from such danger was by the use of deadly force;

3) And he had not violated a duty to retreat or escape to avoid the danger.

Duty to retreat. A Defendant had a duty to retreat if he was at fault in creating the situation giving rise to the shooting or he did not have reasonable grounds to believe and an honest belief that he was in imminent and immediate danger of death or great bodily harm or that he had a reasonable means of escape from that danger other than the use of deadly force.

No duty to retreat. The Defendant no longer had a duty to retreat if:

1) He retreated or withdrew from the situation or reasonably indicated his intent to retreat or withdraw from the situation and no longer participated in it; and

2) He then had reasonable grounds to believe and an honest belief that he was in imminent and immediate danger of death or great bodily harm; and

3) The only reasonable means of escape from the danger was by the use of deadly force, even though he was mistaken as to the existence of that danger.

In deciding whether the Defendant had reasonable grounds to believe and an honest belief that he was in imminent danger of death or great 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 David Eadie and decide whether his acts and words caused the Defendant reasonably and honestly to believe that he was about to be killed or receive great bodily harm.

If the Defendant used more force than reasonably necessary and if the force used is greater—or greatly disproportionate to the apparent danger, then the defense of self-defense is not available.

* * * *.

If the Defendant proves by the greater weight of the evidence that the Defendant acted in self-defense, then your verdict must be not guilty.

> The State is permitted to rebut the presumption by establishing by the greater weight of the evidence that the elements of self-defense have not been met.
>
> * * * *.
>
> T. II, 237-240.

{¶61} The given jury instruction omits a portion requested by appellant. Appellant had requested the following additional instruction from Ohio Jury Instructions Section 421.19(D), defense of residence (essentially the Castle Doctrine): "A person who lawfully is in his/her residence has no duty to retreat before using force in self-defense." The trial court declined to give that portion of the instruction over appellant's continuing objection. The trial court reasoned that appellant was temporarily staying at the residence, bills at the house were actually in Eadie's name, and Eadie freely came and went from the residence. The trial court apparently declined to give the requested instruction based upon appellant's temporary status in the home.

{¶62} We find, though, that the evidence established appellant was a cohabitant in the residence. The Ohio Supreme Court has held that cohabitants have no duty to retreat: "[t]here is no duty to retreat from one's own home before resorting to lethal force in self-defense against a cohabitant with an equal right to be in the home." *State v. Huff*, 5th Dist. Stark No. 2006CA00081, 2007-Ohio-3360, ¶ 42, citing *State v. Thomas*, 77 Ohio St.3d 323, 673 N.E .2d 1339 (1997). Appellee concedes that appellant resided in the home and that the requested additional instruction would have been appropriate according to the evidence.

{¶63} Although the requested instruction would have been appropriate considering the evidence adduced at trial, our question on review is whether the failure to give such an instruction either affected appellant's substantial rights or contributed to his conviction. *State v. Jackson*, 22 Ohio St.3d 281, 285, 490 N.E.2d 893, 897–98 (1986), citing Crim.R. 52(A); *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). We find it did not, and conclude that the omission of the requested instruction is not structural error in this case.

{¶64} As we noted above, the relative statuses of Eadie and appellant in the home, and appellant's duty to retreat or lack thereof, were not debated questions of fact at trial. The issues were whether appellant was at fault in creating the affray and whether he reasonably believed shooting Eadie was his only choice to avoid great bodily harm or death. Despite appellant's self-serving trial testimony, the evidence established appellant resolved to shoot Eadie as Eadie was on his way back up the stairs, and he laughed about doing so as his sister was still on the phone with 911. Appellant did not tell police in the immediate aftermath of the shooting that he feared Eadie was going to throw him out a window. Instead, he admittedly was thinking at the time, "God, don't make me shoot this asshole;" he had been "pushed" enough and didn't need to see whether Eadie had a weapon or not. (T. 159; Appellee's Exhibit 16.)

{¶65} The jury simply rejected appellant's theory of self-defense. *State v. Jackson*, supra, 22 Ohio St.3d 281, 285, 490 N.E.2d 893 (1986). Had the jury been instructed upon the Castle Doctrine, it would have had no effect on the inescapable conclusion drawn from the evidence: appellant did not act in self-defense and did not present evidence which, if believed by a properly-instructed jury, would have supported

an acquittal. *State v. Williford*, 49 Ohio St.3d 247, 251, 551 N.E.2d 1279, 1282 (1990). The error in omitting the Castle Doctrine instruction was therefore harmless. *Id*.

{¶66} In *State v. Williford*, 49 Ohio St.3d 247, 551 N.E.2d 1279 (1989), the case upon which appellant relies, there was conflicting testimony as to whether the defendant lured the victim onto his porch and killed him, or whether the defendant killed the victim in self-defense or in defense of his wife. *Id.* at 250. The trial court in that case had instructed the jury on the three elements of self-defense, including the requirement that the defendant prove that he did not violate any duty to retreat or avoid the danger. *Id.* at 249. The trial court did not, however, give a further instruction that the defendant was under no duty to retreat from his home. *Id.* Because there had been testimony that the confrontation between the defendant and the victim occurred in the defendant's house and on his porch, the Ohio Supreme Court found the trial court had committed prejudicial error in failing to give a "no duty to retreat" instruction. *Id.* at 250–251. The Court held that the lack of the "no duty to retreat" instruction, combined with the failure to instruct the jury that the defendant had a privilege to defend members of his family, warranted a new trial. *Id.* at 252–253.

{¶67} Appellant cites *Williford* for the proposition that an incomplete jury instruction requires reversal. We disagree but find *Williford* instructive because it distinguishes between cases of colorable claims of self-defense and those in which self-defense claims are discredited. The Court found Williford "presented testimony which, if believed by a properly instructed jury, would have supported an acquittal" and therefore the error in the jury instructions was not harmless. *Williford*, 49 Ohio St.3d at 251, citing *State v. Jackson*, supra, 22 Ohio St.3d 281, 284, 490 N.E.2d 893 (1986), cert. denied,

480 U.S. 917, 107 S.Ct. 1370, 94 L.Ed.2d 686 (1987). Reversal is not the inevitable result of an error in the instructions, though. The *Williford* Court noted the jury-instruction error was harmless in another case because the facts were markedly different. Citing *Jackson,* supra, the Court observed that the self-defense argument was discredited:

> Jackson and the victim fought outside Jackson's apartment. *Id.* at 284-285, 22 OBR at 455, 490 N.E.2d at 897. After the fight was broken up, Jackson threatened to kill the victim, then immediately went into his apartment to get his gun. As the victim was walking up the porch stairs to retrieve some belongings from Jackson's apartment, Jackson shot him. The victim was not carrying a weapon. *Id.* at 285, 22 OBR at 455, 490 N.E.2d at 897. We noted that the witnesses who testified in support of Jackson's claim of self-defense were "thoroughly discredited," and found the error to be harmless. *Id.*
>
> *State v. Williford*, 49 Ohio St.3d 247, 251, 551 N.E.2d 1279 (1990).

{¶68} The circumstances of the case sub judice have more in common with those of *Jackson* than *Williford*. The evidence established appellant was at fault in creating the situation that led to the shooting and he was not in danger of death or great bodily harm from Eadie.

{¶69} We therefore conclude that even if the trial court erred by not giving the jury the Castle Doctrine instruction, we cannot say, and appellant has not demonstrated, that any such error was prejudicial. See, *State v. Huff*, supra, 5th Dist. Stark No. 2006CA00081, 2007-Ohio-3360, at ¶ 53 [defendant entitled to requested instruction but

trial outcome not affected by given instruction]. There is nothing in the record to suggest that the jury instruction "'probably misled the jury in a matter materially affecting [appellant's] substantial rights,'" *State v. Dean*, 146 Ohio St.3d 106, 2015–Ohio–4347, 54 N.E.3d 80, ¶ 135, quoting *Kokitka v. Ford Motor Co.*, 73 Ohio St.3d 89, 93, 652 N.E.2d 671 (1995), or otherwise resulted in a "'manifest miscarriage of justice.'" *State v. Jackson*, 8th Dist. Cuyahoga No. 100125, 2014–Ohio–3583, ¶ 49, appeal not allowed, 141 Ohio St.3d 1490, 2015-Ohio-842, 26 N.E.3d 825, quoting *State v. Hancock*, 12th Dist. Warren No. CA2007-03-042, 2008–Ohio–5419, ¶ 13, appeal not allowed, 121 Ohio St.3d 1410, 2009-Ohio-805, 902 N.E.2d 34.

{¶70} Appellant's first assignment of error is overruled.

II.

{¶71} In his second assignment of error, appellant argues the trial court erred in overruling his objections to testimony regarding his prior bad acts. We disagree.

{¶72} This argument involves disputed evidence of prior bad acts by both Eadie and appellant, which both parties sought to introduce.

{¶73} Appellant asked the trial court for permission to introduce evidence that Eadie once "shot up the house." Eadie lived in the house before appellant moved in. Eadie allegedly became upset and fired a gun into the floor of the house; neither Janeann nor appellant was present. Janeann was told of the incident after the fact by Eadie's son. Appellant implied Eadie "shot up the house" because he was upset to learn Janeann planned to leave Ohio to take a promotion at a restaurant location elsewhere and was involved with another man.

{¶74} Appellee asked the trial court for permission to introduce evidence about what was referred to as the "Kalahari incident." Details of this incident were also vague but apparently a dispute arose at the Kalahari Resort in Sandusky between appellant, Janeann, and Eadie. Appellee asked appellant about the incident on cross-examination and appellant said Eadie "poked himself in the eye with my finger." Appellant acknowledged Eadie then walked away from the dispute.

{¶75} The trial court admitted evidence of both incidents, stating in response to the parties' arguments that to be fair to both sides, "it's got to be either all or nothing." T. 134. Both parties therefore introduced the evidence as described: briefly and summarily. Appellant argues, though, the trial court should have weighed the Kalahari-incident evidence "in isolation" and the decision to admit the evidence created material prejudice.

{¶76} We find the limited evidence of the "Kalahari incident" did not result in material prejudice. Evid.R. 402 provides that "[a]ll relevant evidence is admissible * * * [and that] [e]vidence which is not relevant is not admissible." Pursuant to Evid.R. 401, "relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Decisions regarding the admissibility of evidence at trial are within the broad discretion of the trial court and will be upheld absent an abuse of discretion and material prejudice. *State v. Lang,* 129 Ohio St.3d 512, 2011–Ohio–4215, 954 N.E.2d 596, ¶ 86.

{¶77} Considering the very limited nature of the "Kalahari incident" evidence in light of the overwhelming evidence otherwise adduced at trial, we conclude the trial court did not abuse its discretion in admitting the evidence and appellant did not suffer any

material prejudice therefrom. See, *State v. Draper*, 5th Dist. Knox No. 05-CA-17, 2006-Ohio-2396, ¶ 16.

{¶78} Appellant also argues the trial court improperly permitted appellee to insinuate he was a drunken "scrapper," meaning that he became violent when intoxicated. We disagree with appellant's characterization of the evidence and further note that appellant and his witness, his sister, cited his chronic intoxication as a major factor in his behavior that day, from the run-in with Kendra to the threats of suicide with Janeann to the confrontations with Eadie.

{¶79} The trial court did not abuse its discretion in admitting the challenged evidence and appellant's second assignment of error is therefore overruled.

III.

{¶80} In his third assignment of error, appellant argues his murder conviction is against the manifest weight of the evidence. We disagree.

{¶81} On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. The discretionary power to grant a new hearing should be exercised only in the exceptional case in which the evidence weighs heavily against the judgment. *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. In effect, the appellate court sits as a "thirteenth juror" and "disagrees with the factfinder's resolution of the conflicting testimony." *Thompkins* at 387.

{¶82} Because the trier of fact is in a better position to observe the witnesses' demeanor and weigh their credibility, the weight of the evidence and the credibility of the witnesses are primarily for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N .E.2d 212 (1967), paragraph one of the syllabus. The standard is difficult to meet, as the rule is necessary "to preserve the jury's role with respect to issues surrounding the credibility of witnesses." *Thompkins* at 389.

{¶83} Appellant was found guilty of one count of murder pursuant to R.C. 2903.02(A), stating, "No person shall purposely cause the death of another * * *."[1] He argues his murder conviction is against the manifest weight of the evidence because he established by a preponderance of the evidence that he acted in self-defense, citing his own self-serving testimony and that of his sister. Self-defense is an affirmative defense that legally excuses admitted criminal conduct. *State v. Jones*, 5th Dist. Richland No. 2016 CA 0045, 2017-Ohio-8633, ¶ 41, citing *State v. Edwards*, 1st Dist. Hamilton No. C–110773, 2013–Ohio–239, ¶ 5, and *State v. Poole,* 33 Ohio St.2d 18, 19, 294 N.E.2d 888 (1973). The affirmative defense of self-defense places the burden of proof on a defendant by a preponderance of the evidence. *In re Collier*, 5th Dist. Richland No. 01 CA 5, 2001 WL 1011457, citing *State v. Caldwell,* 79 Ohio App.3d 667, 679, 607 N.E.2d 1096 (4th Dist.1992).

{¶84} To establish self-defense through the use of deadly force, a defendant must prove the following elements: (1) that the defendant was not at fault in creating the situation giving rise to the affray; (2) that the defendant had a bona fide belief that he was

[1] Appellant does not challenge his conviction upon one count of having weapons while under disability.

in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) that the defendant did not violate any duty to retreat or avoid the danger. *Jones*, supra, 2017-Ohio-8633 at ¶ 42, citing *State v. Keil*, 5th Dist. Richland No. 16CA28, 2017–Ohio–593, ¶ 40 and *State v. Barnes*, 94 Ohio St.3d 21, 24, 2002–Ohio–68, 759 N.E.2d 1240 (additional citation and internal quotations omitted). 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. *Id.*, citing *State v. Jackson,* supra, 22 Ohio St.3d 281, 284, 490 N.E.2d 893 (1986).

{¶85} Appellant first argues he was not responsible for creating the situation giving rise to the fatal confrontation with Eadie but we find the jury could reasonably disagree. The spiral of events began with appellant drunkenly arguing with Kendra about her children and placing her property out on the front lawn. Janeann was at work and called Eadie to go to the house to make appellant to put the property back in the house. Janeann returned from work to continue the argument with her brother by text, at which point appellant threatened suicide and brandished the .22 rifle. Janeann called Eadie again to "talk [appellant] down." Janeann and appellant testified Eadie now physically confronted appellant, but during this confrontation Eadie recovered the .22 rifle and a machete so appellant couldn't harm himself or anyone else. Eadie went up the steps for the third time to recover Janeann's firearm, which appellant refused to give back.

{¶86} The jury could also reasonably reject appellant's claims that he had no choice but to shoot Eadie. Although at trial appellant testified he feared for his life because Eadie threatened to "finish the job" and to throw him out a window, he never mentioned the alleged threats to police in his statement after the incident. Instead, he

described how he shot Eadie as cleanly as he would have shot a deer. He further acknowledged it didn't matter whether Eadie had a weapon or not because he wasn't going to be beaten again, and he therefore shot Eadie three times while he was still in the doorway of the bedroom.

{¶87} Upon our review of the entire record, we are not persuaded the jury lost its way. The jury heard appellant's statement to police in the aftermath of the shooting and were able to compare it to his testimony at trial. The jury also had the benefit of the taped 911 call and appellant's statement to police. Appellant did not tell detectives Eadie threatened to "finish the job" or "throw [him] out a window" and was callous in the immediate aftermath of the incident, laughing during Janeann's 911 call and equating the shooting of Eadie with shooting a deer. We also note the jury could compare the intensity of the argument in the text messages between Janeann and appellant the day of the murder with Janeann's testimony at trial, in which she attempted to minimize appellant's culpability.

{¶88} We have frequently recognized jurors in a criminal trial are "the firsthand triers of fact, [and are] patently in the best position to gauge the truth." *See, e.g.*, *State v. Frazier,* 5th Dist. Stark No. 2010CA00042, 2011–Ohio–434, ¶ 23. Furthermore, while a jury may take note of inconsistencies and resolve or discount them accordingly, such inconsistencies do not render a defendant's conviction against the manifest weight of the evidence. *See State v. Craig,* 10th Dist. Franklin No. 99AP–739, 1999 WL 29752, citing *State v. Nivens*, 10th Dist. Franklin No. 95APA09–1236, 1996 WL 284714.

{¶89} Upon review, we find the jury reasonably rejected appellant's claim of self-defense after hearing the evidence, including the 911 call and appellant's statement to

detectives. The jury did not clearly lose its way and create a manifest miscarriage of justice.

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

IV.

{¶91} In his fourth assignment of error, appellant argues the trial court did not state its reasons for imposing consecutive sentences on the record at the sentencing hearing or in the judgment entry of sentence. We agree.

{¶92} In Ohio, there is a statutory presumption in favor of concurrent sentences for most felony offenses. R.C. 2929.41(A). The trial court may overcome this presumption by making the statutorily-enumerated findings set forth in R.C. 2929.14(C)(4). *State v. Bonnell*, 140 Ohio St.3d 209, 2014–Ohio–3177, 16 N.E.3d 659, ¶ 23. This statute requires the trial court to undertake a three-part analysis. *State v. Alexander*, 1st Dist. Hamilton Nos. C–110828 and C–110829, 2012–Ohio–3349, 2012 WL 3055158, ¶ 15.

{¶93} R.C. 2929.14(C)(4) provides as follows:

> If multiple prison terms are imposed on an offender for convictions of multiple offenses, the court may require the offender to serve the prison terms consecutively if the court finds that the consecutive service is necessary to protect the public from future crime or to punish the offender and that consecutive sentences are not disproportionate to the seriousness of the offender's conduct and to the danger the offender poses to the public, and if the court also finds any of the following:
>
> (a) The offender committed one or more of the multiple offenses while the offender was awaiting trial or sentencing, was under a sanction

imposed pursuant to section 2929.16, 2929.17, or 2929.18 of the Revised Code, or was under post-release control for a prior offense.

(b) At least two of the multiple offenses were committed as part of one or more courses of conduct, and the harm caused by two or more of the multiple offenses so committed was so great or unusual that no single prison term for any of the offenses committed as part of any of the courses of conduct adequately reflects the seriousness of the offender's conduct.

(c) The offender's history of criminal conduct demonstrates that consecutive sentences are necessary to protect the public from future crime by the offender.

{¶94} In *Bonnell*, supra, at the syllabus, the Supreme Court of Ohio held that the trial court is required to make the findings mandated by R.C. 2929.14(C)(4) at the sentencing hearing and to incorporate its findings into its sentencing entry, but it has no obligation to state reasons to support its findings.

{¶95} Furthermore, the sentencing court is not required to recite "a word-for-word recitation of the language of the statute." *Bonnell*, ¶ 29. "[A]s long as the reviewing court can discern that the trial court engaged in the correct analysis and can determine that the record contains evidence to support the findings, consecutive sentences should be upheld." *Id.* A failure to make the findings required by R.C. 2929.14(C)(4) renders a consecutive sentence contrary to law. *Bonnell*, ¶ 34. However, a trial court's inadvertent failure to incorporate the statutory findings in the sentencing entry after properly making those findings at the sentencing hearing does not render the sentence contrary to law;

rather, such a clerical mistake may be corrected by the court through a nunc pro tunc entry to reflect what actually occurred in open court. *Bonnell*, ¶ 30.

{¶96} In the instant case, the record indicates the trial court considered that appellant was intoxicated and in possession of two firearms; he demonstrated a lack of remorse immediately after the incident when he laughed about killing Eadie and at sentencing when he claimed he acted in self-defense; and he admittedly was drunk all day and fired three shots at an unarmed man who came to the house to help other family members.

{¶97} As appellee concedes, though, the trial court seems to have considered R.C. 2929.14 and addressed the elements of appellant's conduct which justified consecutive sentences, but did not makes the required statutory findings on the record or in the sentencing entry. See, *State v. Mayweather*, 5th Dist. Licking No. 17-CA-84, 2018-Ohio-1686, ¶ 67. We therefore sustain appellant's assignment of error and remand to the trial court for resentencing.

{¶98} Appellant's fourth assignment of error is sustained and the judgment of the Stark County Court of Common Pleas is reversed in part. The matter is remanded to the trial court for the limited purpose of resentencing.

CONCLUSION

{¶99} Appellant's first, second, and third assignments of error are overruled. The fourth assignment of error is sustained, the judgment is reversed, and the matter is remanded to the trial court for the limited purpose of resentencing.

By: Delaney, J.,

Hoffman, P.J. and

Baldwin, J., concur.