[Cite as *State v. Krug*, 2009-Ohio-3815.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-L-085**
- vs -	:	
JON P. KRUG,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 09 CR 000008.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee*, 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).

MARY JANE TRAPP, P.J.

{¶1} Jon P. Krug appeals from the judgment of the Lake County Court of Common Pleas sentencing him upon his conviction of four counts of felonious assault and one count of carrying concealed weapons. These convictions stemmed from Mr. Krug's involvement in a bar fight at the Lake Effects bar, where he stabbed the bar's owner and an employee. The four felonious assault counts each carried a repeat violent offender ("RVO") specification. For his offenses and the RVO specifications, the

trial court imposed a total of 37 years and six months of prison, which Mr. Krug challenges in this appeal. After a review of the record and the applicable law, we affirm his convictions and sentence.

{¶2} In the early hours of December 30, 2007, Mr. Krug went to the Lake Effects bar in Madison, Ohio. At some point in the evening he went into an area in the bar where the bar's owner, Jason Reihner, was playing horseshoes with a group of people. Mr. Krug, wearing headphones and listening to his MP3 player, walked right into the horseshoe pit when one of the players was about to throw a horseshoe. Mr. Reihner confronted Mr. Krug and asked him to leave. He escorted Mr. Krug outside, and a fight between them erupted in the parking lot. As the two exchanged punches, a crowd gathered around them. Harold Layne, a cook at the bar, saw a knife in Mr. Krug's left hand and jumped into the fight to help Mr. Reihner. Both Mr. Layne and Mr. Reihner were stabbed. As Mr. Krug walked away, he was tackled to the ground by several bar patrons, who managed to pry the knife from his hand.

{¶3} Mr. Reihner was air-lifted to the Metro Health Medical Center in Cleveland to treat the stab wound to his abdomen. His spleen and part of his pancreas were removed and he was hospitalized for two-and-a-half weeks. Subsequently, he developed a related blood clot in his lung, for which he was hospitalized for another week.

{¶4} Mr. Layne, who suffered a stab wound to his abdomen that caused his intestines to protrude from his body, was air-lifted to the University Hospital in Geneva. He had part of his intestines removed as a result of the stab wound and was hospitalized for two weeks.

{¶5} On February 13, 2008, Mr. Krug was indicted by a Lake County Grand Jury of four counts of felonious assault. Counts one and two related to his stabbing of Mr. Layne. In count one, he was charged with felonious assault, a second degree felony in violation of R.C. 2903.11(A)(2), with an accompanying RVO specification in violation of R.C. 2941.149. In count two, he was charged with felonious assault, a second degree felony in violation of R.C. 2903.11(A)(1), also with the RVO specification.

{¶6} Counts three and four related to his stabbing of Mr. Reihner. In count three, he was charged with felonious assault, a second degree felony in violation of R.C. 2903.11(A)(2), with an RVO specification. In count four, he was charged with felonious assault, a second degree felony in violation of R.C. 2903.11(A)(1), also with the RVO specification. In addition, Mr. Krug was indicted on one count of carrying a concealed weapon, a felony of the fourth degree in violation of R.C. 2923.12(A)(1). Mr. Krug pled not guilty to all charges.

{¶7} Before trial, the state filed a motion in limine to exclude evidence regarding police reports of incidents that occurred previously at the Lake Effects bar. The court granted that motion. At the jury trial, 14 witnesses testified for the state and three for the defense, including Mr. Krug himself. The court also admitted 75 exhibits introduced by the state. The state and the defendant offered different accounts of how Mr. Reihner and Mr. Layne were stabbed during the fight.

{¶8} **Witnesses for the State**

{¶9} Mr. Reihner, the owner of the bar and one of the two victims, testified that when Mr. Krug walked into the horseshoe area in the middle of a game, he yelled to

him: “Hey you gotta watch yourself around here. We’re throwing horseshoes. Keep your head up.” Mr. Krug made a vulgar gesture at him and then walked to a group of female patrons playing cornhole and attempted conversations with them. When Mr. Reihner asked him to leave them alone, Mr. Krug went to the bar area and argued with a patron there. Mr. Reihner identified himself as the bar owner and asked Mr. Krug to leave, to which Mr. Krug responded: “Let’s take this outside.”

{¶10} Mr. Reihner then walked Mr. Krug out of the bar through a side door. Once they were outside, Mr. Krug “swung at him,” and they started to exchange punches. Mr. Layne tried to jump in to break up the fight but Mr. Reihner grabbed Mr. Layne and pushed him away because he did not want him involved. After a few more punches were exchanged, the fight suddenly stopped. Mr. Reihner noticed Mr. Layne lying on the ground. Mr. Layne told Mr. Reihner he was stabbed. Mr. Reihner was surprised because he did not see a knife during the fight. He looked down at Mr. Layne and then saw that his own side was bleeding. For the first time he realized he was stabbed as well.

{¶11} On the evening of the incident, Mr. Layne was watching television at the bar after finishing his shift in the kitchen. He heard a commotion and followed several people outside though the side door. Once outside, he saw Mr. Reihner and Mr. Krug arguing. At one point, he saw Mr. Krug reaching down to the left side of his leg and pulling out an eight-to-nine-inch-long knife. He took a couple of steps toward Mr. Reihner in an attempt to stop Mr. Krug, who then slung him against the wall and stabbed him. Mr. Layne looked down and saw his blood pouring out. He took a few more steps and collapsed, his intestines pouring out to the ground.

{¶12} Several patrons who were at the bar that evening also testified, although none witnessed the actual stabbings. Michael Elly was playing horseshoes when Mr. Krug walked through the area. Mr. Reihner asked him to be careful but Mr. Krug responded aggressively, saying to Mr. Reihner "I'll kick your ass." Mr. Reihner then asked him to leave and escorted him out. Mr. Elly went to the bathroom, and when he came out, his wife screamed frantically that "Jason [Reihner] was in trouble." He went outside and saw Mr. Krug held down by several people, and he managed to pry the knife out of Mr. Krug's hand.

{¶13} Jeff Haase, who also participated in the horseshoe game, testified he saw Mr. Krug walk through the horseshoe area. He and Mr. Reihner exchanged words and he heard Mr. Krug say "hey do you want to take this outside." Mr. Reihner responded: "I'm the owner, just get out." Mr. Haase followed Mr. Reihner and Mr. Krug outside and saw the two exchange punches. He estimated there were ten people gathering around watching the fight, but no one else was involved in the fight. Mr. Haase backed away from the fight, and heard somebody yell "he's got a knife, he stabbed him." He then saw Mr. Krug walk out of the crowd, with a knife in his left hand. Mr. Haase hip-checked him to the ground to prevent him from leaving and struggled with him to remove his knife. Mr. Haase injured his face when he head-butted Mr. Krug in an effort to get him to drop the knife.

{¶14} Mr. Reihner's brother, Herbert Reihner, tried to help Mr. Haase by getting on top of Mr. Krug as he was lying on the ground.

{¶15} Sonia Vickers, the bartender that night, saw Mr. Reihner escort Mr. Krug out of the side door and she followed them outside. She stood right in front of the two

men, who were arguing, pushing, and fighting. At one point Mr. Krug got "the better" of Mr. Reihner and she wondered why no one jumped in to help. She testified no one else was involved in the fight and no one prevented Mr. Krug from leaving. She realized Mr. Layne was stabbed when she saw "his intestines hanging out."

{¶16} Several firefighters and police officers who were called to the scene of the incident testified regarding how they tended to the two victims and their investigation of the incident.

{¶17} **Witnesses for the Defense**

{¶18} Mr. Krug testified on his own behalf. He portrayed Mr. Reihner as the aggressor in the fight. He admitted stabbing both Mr. Reihner and Mr. Layne, but claimed he stabbed Mr. Reihner in self-defense and did not know how Mr. Layne got stabbed.

{¶19} He testified earlier that day he went fishing with a friend, who had given him a knife the day before. When he returned, he sharpened the knife and put it on a table. Some friends came over to visit and he showed them the knife. When a female friend appeared to be uncomfortable with the sight of the knife, he folded it up and put it away in a sheath and then put it in the overalls he was wearing. Later, he and his friends decided to go to the bars to drink. They went to one bar, and while there, the knife fell out of his overalls as he bent over to play pool. He picked up the knife and put it in his overalls' right pocket.

{¶20} After the first bar, Mr. Krug and his friends went to the Lake Effects bar. While he was watching an Ultimate Fighting Championship on the bar television, he had a verbal confrontation over the way he was dressed with Herbert Reihner, the bar

owner's brother. Before he left, he went to the horseshoe area to say goodbye to a friend who was playing a game there. He inadvertently walked through the horseshoe pit and heard Mr. Reihner yell out. Mr. Krug testified he raised his hand to thank Mr. Reihner for the warning but Mr. Reihner looked visibly upset. As he kept walking, Mr. Reihner called him a "fucking idiot," and said "it's my bar, get the fuck out."

{¶21} Mr. Krug testified that he then turned around and left, but Mr. Reihner followed him outside, along with five other guys. He testified:

{¶22} "Jason [Reihner] was calling me a few choice names on the way out. At one point I did look over my shoulder, and I said dude, you don't want to fight me. You want to jump me is what you want to do. And I started walking towards the side door, and I got about halfway to the side door, and Jason come [sic] up behind me and pushed me. When Jason pushed me, I took a few steps and I caught my balance. And I turned around and looked at him, and his buddy, who I now know is Jay Davis, was holding Jason. He was holding Jason back. So I just turned around and left. I left the [sic], I walked straight out the door. I wasn't pushed out the door. I didn't put my hands up to stop."

{¶23} Mr. Krug testified that he walked through the door to the parking lot and toward a friend who was to give him a ride home. He took about four or five steps before he looked over his shoulder to make sure nobody followed him. About half way to his ride, Mr. Reihner came up behind him and pushed him. He testified Mr. Reihner "came at me like he was gonna try to tackle me to the ground. His face was right here on my thighs, and he had his arms around my legs and he was trying to push me backwards."

{¶24} Mr. Krug testified that people started to come out of the bar and some of them saw the altercation and headed toward them. He described a mob scene and gave a dramatically different account of what led to his stabbing of both Mr. Reihner and Mr. Layne.

{¶25} According to Mr. Krug, a crowd was converging around them. Mr. Reihner was trying to take him down and he was trying to push him off. The first person to swing at him was Mr. Layne. A female grabbed Mr. Layne and told him to let them fight it out. Ten people were pushing and grabbing him; one guy held him in a headlock. When he got out of the headlock, "the entire crowd" pushed him into a corner against the wall between a dumpster and an air conditioning unit. He testified that he tried to make his way through the crowd but someone pushed him back against the wall and he and Mr. Reihner were chest to chest. Mr. Reihner's left hand pinned him against the wall. With his back against the wall, he tried to swing at Mr. Reihner with his right arm, but somebody tried to control that arm. At that point, the following occurred:

{¶26} "Somebody pinned my arm up against my leg. When my arm was pinned against my leg, I realized that [I] still had my knife. I pulled the knife out and I stabbed Jason in the side."

{¶27} He testified he stabbed Mr. Reihner because he was "afraid" and "terrified." When asked to elaborate, he stated:

{¶28} "I have no idea. *** Once I stabbed Jason and he started to back up, he turned around and told somebody, I've been stabbed, leave him alone. Let the guy go. I've been stabbed. He's got a knife. Jason started to back up, and I started to get away from the wall. Once I *** started to come off of the wall, I remember somebody was

trying to control the knife. Some, that's how I, that's how – I personally believe that's how Ray [Layne] got stabbed. I believe he was trying to control my hand and the knife in it. It was pinned against the wall. I remember jerking my hand, but I don't recall who was there, who was holding it. Now I believe it was Ray. I believe that." When asked: "Did you try to stab Ray?" Mr. Krug answered: "No I did not."

{¶29} Lindsey Cotton, a part-time employee of the Ashtabula County Courthouse, was called as a defense witness, but her testimony did not support Mr. Krug's claim of self-defense. She was at the horseshoe area when Mr. Krug walked through the horseshoe area. He turned around and asked: "Did someone just call me a fucking idiot?" Mr. Reihner told him that he should have watched before he walked through. Mr. Krug then asked Mr. Reihner to "take it outside." Mr. Reihner refused, saying "you can just go. It's 2 o'clock. It's time to go." Mr. Reihner then escorted Mr. Krug outside. People were standing around and watching the two men fight. Some tried to separate the two, who were shoving each other. No one else was involved in the fight and no one other than Mr. Reihner hit Mr. Krug, who would have no reason to fear serious physical harm and was free to walk away at any time. As Ms. Cotton described, the fight between the two was "basically pushing and shoving, and maybe fisticuffs." She did not see Mr. Krug stab Mr. Layne or Mr. Reihner and only realized Mr. Layne was stabbed when Ms. Vickers screamed that he was stabbed. Ms. Cotton helped hold Mr. Krug down on the ground while others tried to pry the knife from his hand.

{¶30} Jay Davis was also called as a defense witness, but his testimony did not support Mr. Krug's claim of self-defense either. He was playing horseshoes when Mr.

Krug walked into the horseshoe area. Everyone said "look out" and Mr. Krug asked: "Did someone just call me an idiot?" Mr. Reihner said "yes, I did. You almost got hit with a horseshoe." Mr. Krug turned around and became aggressive and belligerent, saying "You want to take this outside. Let's go. Let's go." Mr. Reiner said: "that's it, you're out of here." Mr. Krug said: "who the F are you," to which Mr. Reiner responded: "I'm the owner, and you're out of here."

{¶31} Mr. Davis followed Mr. Reihner and Mr. Krug to the side door. As they reached the side door, he saw Mr. Krug stop before reaching the door and put his arms up, as if saying "I'm not leaving." Mr. Reihner then pushed him toward the door by grabbing Mr. Krug underneath his arms. They both took a couple of steps toward the door. Mr. Reihner then let go and they both walked outside. Once they were outside, Mr. Krug "immediately turned around and started coming at Jason. And again, aggressively and belligerently, saying come on, you want some of this. Let's go. Let's go."

{¶32} Mr. Krug came at Mr. Reihner and was motioning as if he was going to hit Mr. Reihner, who then put his arms underneath Mr. Krug's armpits and tried to wrestle him to the ground. The two men exchanged blows. Mr. Davis saw Mr. Reihner had Mr. Krug "bent over the dumpster and was hitting him." When Mr. Reihner backed off briefly, Mr. Davis grabbed him on the shoulder and said "that's enough." Around the same time Mr. Layne stepped into the fight. Mr. Reihner went back to the fight for just a second before he turned to Mr. Davis and said "I'm stabbed." Mr. Davis believed Mr. Krug was never in danger of being seriously harmed – he testified he had "witnessed fisticuffs before and [this] was a fairly minor fisticuff."

{¶33} After the five-day trial, the jury returned a verdict finding Mr. Krug guilty of all five counts. The court imposed a maximum eight-year prison term for each of the four felonious assault counts, and an 18-month term on the count of carrying a concealed weapon. The court merged count one with count two, and merged count three with count four, but ordered the terms for count two, count four, and count five to be served consecutively, which added to a prison term of 17 years and six months.

{¶34} As for the RVO specifications, the court determined Mr. Krug was a RVO and imposed an additional prison term of ten years for the RVO specification on the merged count two, and another ten-year term for the RVO specification on the merged count four. These two terms are to run consecutively to each other and to the terms imposed for the underlying offenses. Thus, Mr. Krug was sentenced to a total prison term of 37 years and six months.

{¶35} Mr. Krug timely appealed, raising five assignments of error for our review:

{¶36} "[1.] The trial court erred when it restricted the defense from presenting evidence regarding the victim's habit of and reputation for ejecting bar patrons in a violent manner in violation of the defendant-appellant's rights to due process and fair trial and to present and confront witnesses as guaranteed under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Section 10, Article 1 of the Ohio Constitution.

{¶37} "[2.] The trial court erred when it refused to submit the defendant-appellant's proposed jury instructions on aggravated assault and assault in violation of the defendant-appellant's 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.

{¶38} "[3.] The trial court erred when it refused to submit the defendant-appellant's proposed jury instruction on accident in violation of the defendant-appellant's 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.

{¶39} "[4.] 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.

{¶40} "[5.] The trial court erred by imposing consecutive prison terms under the repeat violent offender specifications in violation of the defendant-appellant's rights to due process and trial by jury and against double jeopardy as guaranteed under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution and Section 10, Article 1 of the Ohio Constitution."

{¶41} **Exclusion of the Evidence of the Victim's Habit and Reputation**

{¶42} Prior to trial, the state filed a motion in limine requesting the trial court to exclude evidence regarding prior incidents that occurred at the bar, which the defense planned to offer to show that (1) Mr. Reihner "had been violent with other customers that he removed from his bar and that he had acted in a similar manner with Mr. Krug," and that (2) Mr. Reihner "was generally aggressive and had a violent streak when he removed patrons from his bar and this violence was a habit on the part of the bar owner in dealing with 'problematic' bar patrons."

{¶43} The record reflects that the defense requested and was provided 25 police reports of previous responses by the police to the Lake Effects bar between 2005 and 2007. The state learned from the defense it intended to call as witnesses two Madison Township police officers who had responded to various prior incidents at the bar, and, in response, filed a motion in limine. The state argued that evidence regarding any prior incidents was irrelevant, and, even if it was relevant, any probative value would be substantially outweighed by the danger of unfair prejudice. The court granted the motion. The defense did not proffer any evidence regarding the prior incidents at trial; it made the proffer only after the court sentenced Mr. Krug and it did not provide specifics regarding the proffer.

{¶44} We review the trial court's ruling on evidentiary issues for abuse of discretion. *State v. Sledge*, 11th Dist. No. 2001-T-0123, 2003-Ohio-4100, ¶20 ("the determination to admit or exclude evidence is within the sound discretion of the trial court and will not be reversed by an appellate court absent an abuse of discretion").

{¶45} **Habit Evidence**

{¶46} Mr. Krug argues he should have been able to introduce this evidence pursuant to Evid.R. 406, which provides:

{¶47} "Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."

{¶48} "Evid.R. 406 does not define habit. 'Habit,' however, has been defined as a 'person's regular practice of meeting a particular kind of situation with a specific type

of conduct.' Although a precise formula does not exist for determining when the behavior may become so consistent as to rise to the level of habit, 'adequacy of sampling and uniformity of response are key factors.' These factors focus on whether the behavior at issue 'occurred with sufficient regularity making it more probable than not that it would be carried out in every instance or in most instances.'" *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, ¶131 (internal citations omitted).

{¶49} Here, the defense's proffer of the evidence lacks specificity. The proffered testimony from the police officers regarding the prior incidents did not establish Mr. Reihner himself, as opposed to the bar's bouncers or other employees, acted in a violent and aggressive manner in removing problematic patrons. The police reports and the officers' testimony would only show the police were called to the bar 25 times in two years to respond to incidents involving problematic patrons. Such evidence actually undermines the defense's claim that Mr. Reihner routinely took matters into his own hands and ejected undesirable patrons in a violent manner. In any event, the proffered evidence lacks specificity to show Mr. Reihner acted in a violent manner "with sufficient regularity making it more probable than not that it would be carried out in every instance or in most instances." As such, it is not admissible habit evidence under Evid.R. 406.

{¶50} **Character**

{¶51} Mr. Krug argues the evidence regarding the police reports of the prior incidents should have also been admitted under Evid.R. 404(2), which allows the introduction of certain character evidence. He claims the evidence would show that Mr. Reihner was aggressive when dealing with problematic patrons, and, by excluding the evidence, the trial court hampered his ability to present his claim of self-defense.

{¶52} Generally, evidence about a person's character is inadmissible for the purpose of proving he or she acted "in conformity therewith on a particular occasion." Evid.R. 404(A). An exception to this rule is set forth in Evid.R. 404(A)(2), which provides for the admissibility of "[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same." The form of admissible character evidence is limited by Evid.R. 405, which states:

{¶53} "(A) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

{¶54} "(B) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct."

{¶55} Thus, although evidence of a person's character is generally inadmissible to show he or she acted in conformity therewith on a particular occasion, character evidence is allowed if its presentation (1) relates to "reputation," (2) is in the form of an "opinion," or (3) relates to specific instances of a person's conduct if the person's character is an essential element of a charge, claim, or defense. Evid.R. 405.

{¶56} Here, the two police officers who were to testify regarding the police responses to the calls of incidents occurring at the bar, which may or may not have involved Mr. Reihner, could not have possibly testified about his character in the form of an "opinion," or testified about his "reputation" in the community. Therefore, the proffered testimony by the police officers would only be admissible as character

evidence if it relates to specific instances of Mr. Reihner's conduct, *if* his character is an essential element of "a charge, claim or defense." As to this point, Mr. Krug argues that "evidence that the bar owner was routinely aggressive with problematic patrons supported [his] assertions that he was treated aggressively to the point that he was forced to defend himself."

{¶57} The elements of self-defense are "(1) that the defendant was not at fault in creating the situation giving rise to the affray; (2) that the defendant had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force; and (3) that the defendant did not violate any duty to retreat or avoid the danger." *State v. Barnes* (2002), 94 Ohio St.3d 21, 24. In *Barnes*, the court considered the issue of whether a defendant claiming self-defense can introduce evidence of specific instances of a victim's conduct to prove that the victim was the initial aggressor, and it answered the question in the negative. The court explained:

{¶58} "Although a victim's violent propensity may be pertinent to proving that he acted in a way such that a defendant's responsive conduct satisfied the elements of self-defense, no element requires proof of the victim's character or character traits. A defendant may successfully assert self-defense without resort to proving any aspect of a victim's character. Therefore, Evid.R. 405(B) precludes a defendant from introducing specific instances of the victim's conduct to prove that the victim was the initial aggressor." Id. See, also, *State v. Vinson*, 11th Dist. No. 2006-L-238, Ohio-2007-5199, ¶81.

{¶59} Therefore, Mr. Krug cannot introduce evidence, through the proffered testimony by the police officers, regarding specific instances of the victim's conduct to prove the victim was the initial aggressor in the altercation.

{¶60} Furthermore, we are aware that a crucial element of self-defense is the state of mind of the defendant, *State v. Koss* (1990), 49 Ohio St.3d 213, 215, and therefore, the law allows a defendant, when arguing self-defense, to provide testimony about specific instances of the victim's prior conduct *known by the defendant* for the purposes of establishing the defendant's state of mind. *Vinson* at ¶63, citing *State v. Marsh* (Oct. 20, 1995), 11th Dist. No. 93-T-4855, 1995 Ohio App. LEXIS 4625, *10. In order to offer such evidence, however, it must be shown that the defendant had knowledge of such specific instances of conduct. *Vinson* at ¶81. See, also, *State v. Woodruff* (Dec. 31, 1997), 11th Dist. No. 96-L-111, 1997 Ohio App. LEXIS 6036, *10 ("Where evidence of the victim's violent character is offered as a factor bearing upon the defendant's state of mind, evidence of specific instances of conduct is admissible, but only if it can be shown that the defendant had knowledge of such specific instances of conduct").

{¶61} Here, the testimony shows Mr. Krug and Mr. Reihner did not know each other before the night of the incident, and no testimony was introduced or proffered to show Mr. Krug knew of any instances of Mr. Reihner's alleged aggressive or violent conduct toward patrons. Therefore, the proffered testimony by the police officers would not have any bearing on Mr. Krug's state of mind for his claim of self-defense.

{¶62} Because the proffered testimony is not admissible habit or character evidence pursuant to Evid. R. 406 and 404, the trial court did not abuse its discretion in excluding the evidence. The first assignment of error is without merit.

{¶63} **Jury Instruction on Lesser Offenses**

{¶64} Mr. Krug next argues that the trial court erred when it overruled his request to instruct the jury as to aggravated assault and assault.

{¶65} An appellate court reviews alleged error in a trial court's jury instructions for abuse of discretion. *State v. Mitchell* (1998), 53 Ohio App.3d 117, 120.

{¶66} A trial court "must give all instructions that are relevant and necessary for the jury to weigh the evidence and discharge its duty as the factfinder." *State v. Cornwell* (1999), 86 Ohio St.3d 560, 567, quoting *State v. Joy* (1995), 74 Ohio St.3d 178, 181.

{¶67} "Pursuant to R.C. 2945.74 and Crim.R. 31(C), a jury may consider three groups of lesser offenses on which, when supported by the evidence at trial, it must be charged and on which it may reach a verdict: (1) attempts to commit the crime charged, if such an attempt is an offense at law; (2) inferior degrees of the indicted offense; or (3) lesser included offenses." *State v. Deem* (1988), 40 Ohio St.3d 205, paragraph one of the syllabus.

{¶68} "An offense may be a lesser included offense of another if (i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense." *Deem*, paragraph three of the syllabus.

{¶69} **Whether a Jury Instruction on Aggravated Assault was Warranted**

{¶70} We first consider Mr. Krug's claim that the trial court committed an error in not instructing the jury on aggravated assault with regard to the two counts of felonious assault relating to Mr. Reihner.

{¶71} Felonious assault is defined by R.C. 2903.11(A) as follows:

{¶72} "(A) No person shall knowingly do either of the following:

{¶73} "(1) Cause serious physical harm to another or to another's unborn;

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

{¶75} Aggravated assault is defined in R.C. 2903.12 as follows:

{¶76} "(A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly:

{¶77} "(1) Cause serious physical harm to another ***."

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

{¶79} In *Deem*, the court was confronted with the identical issue of whether a defendant indicted of felonious assault was entitled to a jury instruction on aggravated assault. In resolving the issue, the court first determined that "as statutorily defined, the offense of aggravated assault is an inferior degree of the indicted offense -- felonious assault -- since its elements are identical to those of felonious assault, except for the additional mitigating element of serious provocation." Id. at 210-211.

{¶80} "Thus, in a trial for felonious assault, where the defendant presents sufficient evidence of serious provocation (such that a jury could both reasonably acquit defendant of felonious assault and convict defendant of aggravated assault), an instruction on aggravated assault (as a different degree of felonious assault) *must* be given." (Emphasis original.) Id. at 211.

{¶81} The court in *Deem*, however, concluded that the defendant did not present sufficient evidence of provocation to warrant an instruction on aggravated assault. Id. The court stressed:

{¶82} "Provocation, to be serious, must be reasonably sufficient to bring on extreme stress and the provocation must be reasonably sufficient to incite or to arouse the defendant into using deadly force. In determining whether the provocation was reasonably sufficient to incite the defendant into using deadly force, the court must consider the emotional and mental state of the defendant and the conditions and circumstances that surrounded him at the time." Id. at 211, quoting *State v. Mabry* (1982), 5 Ohio App.3d 13, paragraph five of the syllabus.

{¶83} Mr. Krug points to his testimony that he stabbed Mr. Reihner out of "fear" and "terror" thus warranting a jury instruction on aggravated assault.

{¶84} The trial court denied Mr. Krug's request for a jury instruction on aggravated assault, after determining that he did not act out of anger or rage, but instead, out of fear. The record reflects Mr. Krug testified that "I did not stab [Mr. Reihner] in anger. I stabbed him out of fear." Fear alone is insufficient to demonstrate the kind of emotional state necessary to constitute sudden passion or fit of rage. *State*

v. Mack (1998), 82 Ohio St.3d 198, 201. Therefore, the evidence in this case does not merit an instruction on aggravated assault, as the trial court correctly determined.

{¶85} The trial court refused to give a jury instruction on aggravated assault for another reason. It determined that because Mr. Krug was presenting an affirmative defense of self-defense, he could not also request an instruction on aggravated assault.

{¶86} We have noted on many occasions that "in most cases, an aggravated assault instruction is incompatible with instructions on self-defense so that both cannot be given together." *State v. Beaver* (1997), 119 Ohio App.3d 385, 397, citing *State v. Jones* (May 12, 1995), 11th Dist. No. 94-T-5021, 1995 Ohio App. LEXIS 1967; *State v. Smith* (Jan. 14, 1993), 11th Dist. No. 92-A-1695, 1993 Ohio App. LEXIS 1109.

{¶87} This case is no exception. Mr. Krug's testimony that he stabbed Mr. Reihner because he was in fear supports an instruction on self-defense, which would be incompatible with a claim that he did so out of a sudden passion or in a sudden fit of rage brought on by serious provocation occasioned by the victim.

{¶88} Therefore, the trial court's refusal to give an instruction on felonious assault was not an abuse of discretion.

{¶89} **Whether a Jury Instruction on Assault was Warranted**

{¶90} Mr. Krug also argues that the trial court erred when it denied his request for an instruction on assault as defined in R.C. 2903.13(B), in connection with the two felonious assault counts involving Mr. Layne.

{¶91} In denying the request, the trial court noted that Mr. Krug testified that he did not know how Mr. Layne got stabbed and also denied being careless or reckless with the knife.

{¶92} R.C. 2903.13(B) provides that "[n]o person shall recklessly cause serious physical harm to another ***." A person acts "knowingly" when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. R.C. 2901.22 (B). In contrast, a person acts "recklessly" "when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature." R.C. 2901.22(C).

{¶93} Assault pursuant to 2903.13(B) is a lesser included offense of felonious assault as defined in R.C. 2903.11(A)(1). *State v. Hartman* (1998), 130 Ohio App.3d 645, 646-647; *State v. Vera*, 8th Dist. No. 79367, 2002-Ohio-974, *15.

{¶94} "[A]n instruction is not warranted every time any evidence is presented on a lesser included offense. There must be 'sufficient evidence' to 'allow a jury to *reasonably* reject the greater offense and find the defendant guilty on a lesser included (or inferior-degree) offense.'" (Emphasis sic.) *State v. Conway*, 108 Ohio St.3d 214, 2006-Ohio-791, ¶314, quoting *State v. Shane*, 63 Ohio St.3d 630, 632-633.

{¶95} This court has specifically recognized that although assault is a lesser included offense of felonious assault, an instruction is only required if the evidence presented at trial "would reasonably support both an acquittal on the crime charged and a conviction on the lesser included offense." *State v. Gunther*, 125 Ohio App.3d 226, 240, citing *State v. Thomas* (1988), 40 Ohio St.3d 213, paragraph two of the syllabus. See, also, *State v. Calabrese (*Feb. 9, 1996*)*, 11th Dist. No. 95-L-054, 1996 Ohio App. LEXIS 416, *12.

{¶96} Consequently, for a jury instruction on assault to be warranted in this case, there must exist sufficient evidence to allow the jury to reasonably reject the

felonious assault charges, i.e., that Mr. Krug knowingly caused serious harm to Mr. Layne or caused him harm with a knife, and to find him guilty of assault defined in R.C. 2903.13(B), i.e., that he recklessly caused serious harm to Mr. Layne.

{¶97} Here, Mr. Layne testified when he saw Mr. Krug had a knife he went to help Mr. Reihner by trying to grab Mr. Krug, who then "slung [him] against the wall and stabbed [him]." Mr. Krug, on the other hand, testified he did not know how Mr. Layne got stabbed, guessing only that it happened after he stabbed Mr. Reihner when Mr. Layne tried to control the knife.

{¶98} While Mr. Krug could not offer a coherent account of how Mr. Layne got stabbed, Mr. Layne testified Mr. Krug slung him against the wall and stabbed him. Therefore, there is evidence that he acted "knowingly," i.e., that his conduct will probably cause a certain result, while there is no evidence offered to show that he acted "recklessly."

{¶99} Consequently, the jury could not have reasonably acquitted him of felonious assault and convicted him of reckless assault. Accordingly, the court did not abuse its discretion by refusing to instruct the jury on the lesser included offense.

{¶100} The second assignment of error is overruled.

{¶101} **Jury Instruction on Accident**

{¶102} Next, Mr. Krug claims that the trial court erred in refusing to submit his proposed jury instruction on the defense of accident as to the felonious assault charges relating to Mr. Layne. Mr. Krug initially claimed self-defense for stabbing both Mr. Reihner and Mr. Layne. However, after he testified he did not know how Mr. Layne got

stabbed, his counsel requested an instruction on accident in addition to self-defense regarding the felonious counts relating to Mr. Layne.

{¶103} It is long-settled that accident and self-defense are inconsistent theories. *State v. Champion* (1924), 109 Ohio St. 281. "When a defendant raises the defense of accident, 'the defendant denies any intent ***. He denies that he committed an unlawful act and says that the result is accidental.'" *State v. Martin*, 10th Dist. No. 07AP-362, 2007-Ohio-7152, ¶47, quoting *State v. Poole* (1973), 33 Ohio St.2d 18, 20. "The defense of accident is 'tantamount to a denial that an unlawful act was committed; it is not a justification for the defendant's admitted conduct. *** Accident is an argument that supports a conclusion that the state has failed to prove the intent element of the crime beyond a reasonable doubt.'" *Martin*, quoting *State v. Atterberry* (1997), 119 Ohio App.3d 443, 447.

{¶104} "The defenses of accident and self-defense are inconsistent by definition. Accident involves the denial of a culpable mental state and is tantamount to the defendant not committing an unlawful act. In contrast, a defendant claiming self-defense concedes he had the purpose to commit the act, but asserts that he was justified in his actions. The Supreme Court of Ohio has considered this paradox and stated: 'Self-defense presumes intentional, willful use of force to repel force or escape force. Accidental force *** is exactly the contrary, wholly unintentional and unwillful.'" *State v. Barnd* (1993), 85 Ohio App.3d 254, 260, quoting *Champion* at 286-287.

{¶105} We recognize courts have occasionally made exceptions to this general rule. In *State v. Brady* (1988), 48 Ohio App.3d 41, this court found the trial court erred in not giving the accident instruction when the defendant testified that the victim's

movement rammed the victim's body into the knife. We noted there that a defendant's "possession and drawing of a weapon may be in self-defense, but the actual infliction of the wound *** may be an accident." Id. at 42 (quotation omitted).

{¶106} The instant case is, however, not such a case where instructions on both self-defense and accident are both appropriate. Mr. Layne testified Mr. Krug slung him against the wall and stabbed him, while Mr. Krug could not offer much testimony as to the infliction of the wound. He testified he did not know how Mr. Layne got stabbed, guessing it happened after he stabbed Mr. Reihner when Mr. Layne tried to control the knife. Unlike in *Brady*, the scant testimony offered by Mr. Krug here did not warrant an instruction on both accident and self-defense. It is simply inconsistent for him to claim he was justified to intentionally use a knife to defend himself against both Mr. Reihner and Mr. Layne while claiming his stabbing of Mr. Layne was wholly unintentional.

{¶107} Mr. Krug also complains the trial court refused to instruct the jury on accident yet allowed him to argue that defense to the jury at closing, which could have potentially confused the jury.

{¶108} Our review of the transcript shows that when the defense requested an instruction on accident pertaining to his offense against Mr. Layne, the court refused on the ground that the evidence presented did not warrant the instruction. The court however stated the defense would be allowed to argue his claim of accident to the jury. Our review further shows that, although permitted, the defense counsel did *not* argue accident at closing. Rather, counsel argued Mr. Krug acted in self-defense throughout the incident regarding both Mr. Krug and Mr. Layne. Therefore, Mr. Krug's claim that the jury was potentially confused by a lack of instruction on accident is without merit.

{¶109} The third assignment of error is without merit.

{¶110} **Manifest Weight**

{¶111} Mr. Krug asserts that the jury clearly lost its way in finding him guilty of multiple counts of felonious assault, pointing to different accounts given by the witnesses at trial.

{¶112} "Unlike sufficiency of the evidence, manifest weight of the evidence raises a factual issue. 'The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Higgins*, 11th Dist. No. 2005-L-215, 2006-Ohio-5372, ¶35, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387.

{¶113} "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Fritts*, 11th Dist. No. 2003-L-026, 2004-Ohio-3690, ¶23, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶114} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. When examining witnesses' credibility, "the 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. A factfinder is free to believe all,

some, or none of the testimony of each witness appearing before it. *State v. Thomas*, 11th Dist. No. 2004-L-176, 2005-Ohio-6570, ¶29.

{¶115} The testimony presented at trial in this case is reminiscent of the classic Japanese motion picture Rashomon, in which each character recounts a different version of the story's event. Although there were several witnesses who watched the scuffle between Mr. Reihner and Mr. Krug, no one saw the actual stabbings. One of the victims, Mr. Reihner, did not even realize he was stabbed until after the fact. Because the witness, as well as the two victims and the defendant, each gave a different account of what transpired, it is difficult to reconstruct from the testimony an exact chronology of how the two victims got stabbed. This much is clear, however -- once Mr. Reihner and Mr. Krug were outside, they exchanged punches; Mr. Layne jumped into the fight and got stabbed; and, at some point, Mr. Reihner was stabbed as well.

{¶116} Mr. Krug claimed self-defense, yet he was the only one who testified others in the crowd were also attacking him while he fought with Mr. Reihner. Even his own witness, Ms. Cotton, did not support his account. She testified while others in the crowd tried to break up the fight, no one else other than Mr. Reihner and Mr. Krug were involved in the fight; Mr. Krug was free to walk away at any point; and Mr. Krug had no reason to fear serious harm, because the two of them were simply pushing and shoving each other. Mr. Krug's other witness, Mr. Davis, also testified that the fight between the two men was "a fairly minor fisticuff and Mr. Krug was not in danger of serious physical harm."

{¶117} The testimony of his own witnesses contrasted sharply with Mr. Krug's assertion that he was attacked by others in the crowd and it undermined his claim that

he was in terror and believed his only means of escape from the crowd was by use of deadly force.

{¶118} As to his stabbing of Mr. Layne, who suffered a wound deep enough that his intestines protruded from his body, Mr. Krug claims that he acted out of self-defense and also that it was an accident. He was not able to offer a coherent account at trial, other than stating he did not know how Mr. Layne ended up stabbed. Mr. Layne testified Mr. Krug slung him against the wall and stabbed him, and that his stabbing was "absolutely" not an accident. No other witnesses saw the stabbing, and the jury apparently chose to believe Mr. Layne's version of the event. The only testimony in support of Mr. Krug's claims of self-defense and accident came from Mr. Krug himself, and apparently the jury discredited it.

{¶119} The weight to be given to the evidence and the credibility of the witnesses are primarily for the trier of the facts and the choice between credible witnesses and their conflicting testimony rests solely with the finder of fact. Given the state of the evidence, we cannot say that the jury, in reconciling and resolving conflicts in the testimony, clearly lost its way and created a manifest miscarriage of justice mandating a new trial. The fourth assignment of error is overruled.

{¶120} **Repeat Violent Offender Specifications**

{¶121} The last assignment of error concerns the trial court's imposition of two consecutive 10-year prison terms for the RVO specifications pursuant to R.C. 2929.14(D)(2). Mr. Krug challenges these additional prison terms, raising six issues for our review.

{¶122} **Former R.C. 2929.14(D)(2)**

{¶123} In *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, the Supreme Court of Ohio reviewed former R.C. 2929.14(D)(2)(a) and R.C. 2929.14(D)(2)(b). Former R.C. 2929.14(D)(2)(a) stated, in pertinent part:

{¶124} "(2)(a) If an offender who is convicted of or pleads guilty to a felony also is convicted of or pleads guilty to a specification *** that the offender is a repeat violent offender, the court shall impose a prison term from the range of terms authorized for the offense under division (A) of this section that may be the longest term in the range ***. If the court finds that the repeat violent offender, in committing the offense, caused any physical harm that carried a substantial risk of death to a person or that involved substantial permanent incapacity or substantial permanent disfigurement of a person, the court shall impose the longest prison term from the range of terms authorized for the offense under division (A) of this section."

{¶125} The *Foster* court determined that former R.C. 2929.14(D)(2)(a) did not offend *Blakely v. Washington* (2004), 542 U.S. 296, because it did not require any impermissible judicial factfinding. However, the court determined that former R.C. 2929.14(D)(2)(b) violated *Blakely*. That section states:

{¶126} "(2)(b)The court may impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if the court finds that both of the following apply ***:

{¶127} "(i) The terms so imposed are inadequate to punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

{¶128} "(ii) The terms so imposed are demeaning to the seriousness of the offense, because one or more of the factors under section 2929.12 of the Revised Code indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense."

{¶129} The *Foster* court considered subsection (D)(2)(b) to be in violation of *Blakely* because it required the court to make findings before imposing additional penalty. Id. at ¶73 and ¶78.[1]

{¶130} **Current R.C. 2929.14(D)(2)**

{¶131} After *Foster*, the General Assembly amended R.C. 2929.14 several times. The amended version of R.C. 2929.14(D)(2)(a) and (D)(2)(b), under which Mr. Krug was sentenced, reads as follows:

{¶132} "(2)(a) *If division (D)(2)(b) of this section does not apply*, the court may impose on an offender, in addition to the longest prison term authorized or required for the offense, an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years *if all of the following criteria are met*:

{¶133} "(i) The offender is convicted of or pleads guilty to a specification of the type described in section 2941.149 [2941.14.9] of the Revised Code that the offender is a repeat violent offender.

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1. We are aware that the United Supreme Court recently issued an opinion in *Oregon v. Ice* (2009), 129 S.Ct. 711, which permitted judicial factfinding required by an Oregon statute before a trial court sentences a defendant who committed multiple offenses to consecutive sentences, which such a defendant historically faced by default Id. at 525. It remains to be seen whether the Supreme Court of Ohio would revisit *Foster* in light of *Ice*. Until it does, we remain bound by *Foster*. See *State v. Mickens*, 10th Dist. Nos. 08AP-743 and 08AP-744, 2009-Ohio-2554, ¶24; *State v. Reed*, 8th Dist. No. 91767, 2009-Ohio-2264, fn. 3; *State v. Starett*, 4th Dist. No. 07CA30, 2009-Ohio-744, ¶35.

{¶134} "(ii) The offense of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person.

{¶135} "(iii) The court imposes the longest prison term for the offense that is not life imprisonment without parole.

{¶136} "(iv) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are inadequate to punish the offender and protect the public from future crime, because the applicable factors under section 2929.12 of the Revised Code indicating a greater likelihood of recidivism outweigh the applicable factors under that section indicating a lesser likelihood of recidivism.

{¶137} "(v) The court finds that the prison terms imposed pursuant to division (D)(2)(a)(iii) of this section and, if applicable, division (D)(1) or (3) of this section are demeaning to the seriousness of the offense, because one or more of the factors under section 2929.12 of the Revised Code indicating that the offender's conduct is more serious than conduct normally constituting the offense are present, and they outweigh

the applicable factors under that section indicating that the offender's conduct is less serious than conduct normally constituting the offense.

{¶138} "(2)(b) The court shall impose on an offender the longest prison term authorized or required for the offense and *shall* impose on the offender an additional definite prison term of one, two, three, four, five, six, seven, eight, nine, or ten years if all of the following criteria are met:

{¶139} "(i) The offender is convicted of or pleads guilty to a specification of the type described in section 2941.149 [2941.14.9] of the Revised Code that the offender is a repeat violent offender.

{¶140} "(ii) The offender within the preceding twenty years has been convicted of or pleaded guilty to three or more offenses described in division (CC)(1) of section 2929.01 of the Revised Code, including all offenses described in that division of which the offender is convicted or to which the offender pleads guilty in the current prosecution and all offenses described in that division of which the offender previously has been convicted or to which the offender previously pleaded guilty, whether prosecuted together or separately.

{¶141} "(iii) The offense or offenses of which the offender currently is convicted or to which the offender currently pleads guilty is aggravated murder and the court does not impose a sentence of death or life imprisonment without parole, murder, terrorism and the court does not impose a sentence of life imprisonment without parole, any felony of the first degree that is an offense of violence and the court does not impose a sentence of life imprisonment without parole, or any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to

cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person." (Emphasis added.)

{¶142} As amended, the current sentencing scheme for RVOs has two components: the penalty enhancement for a RVO may be mandatory (under subsection (D)(2)(b)) or discretionary (under subsection (D)(2)(a)). Under the current scheme, in sentencing a defendant convicted of the RVO specification, the court is to look first to the mandatory provisions under subsection (D)(2)(b). Pursuant to that section, a trial court is mandated to impose the longest prison term authorized for an underlying offense and also an additional prison term between one and 10 years, upon a determination that (1) the offender is convicted or pleads guilty to a specification pursuant to R.C. 2941.149; (2) the offender had committed two offenses of "violence"; and (3) the current offense is "any felony of the second degree that is an offense of violence and the trier of fact finds that the offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person."

{¶143} When a RVO does not fit these criteria for mandatory penalty enhancement, subsection (D)(2)(a) *permits* the penalty enhancement for RVOs "if all of the following criteria are met": (1) the offender is convicted or pled guilty to RVO specification; (2) the current offense caused serious physical harm; (3) the court imposes the longest prison term for the underlying offense; (4) the court finds the prison terms are inadequate to punish the offender and protect the public; and (5) the court finds the prison terms are demeaning to the seriousness of the offense.

{¶144} **Whether Additional Penalty for RVO Specifications were Eliminated by *Foster***

{¶145} Regarding his RVO sentences, Mr. Krug first argues that the trial court erred when it imposed additional time for the RVO specifications, claiming the Supreme Court of Ohio had abolished the provisions permitting a trial court to impose additional penalty for RVOs in *Foster*.

{¶146} In *State v. Adams*, 11th Dist. No. 2006-L-114, 2007-Ohio-2434, ¶27, we addressed an identical claim and determined that only the requirement to make factual findings before imposing the additional penalty has been severed. See, also, *State v. Payne*, 11th Dist. No. 2006-L-272, 2007-Ohio-6740, ¶34, citing *Adams*.

{¶147} **Whether the Defendant was Properly Convicted of the RVO Specifications**

{¶148} Next, Mr. Krug argues he was neither convicted nor pled guilty to the RVO specifications and therefore the additional prison terms were improper. He draws our attention to the fact that both subsections (D)(2)(a) and (D)(2)(b) require that the offender be "convicted of or plead guilty to a specification of the type described in section 2941.149 [2941.14.9] of the Revised Code that the offender is a repeat violent offender."

{¶149} R.C. 2941.149 provides the following:

{¶150} "(A) The determination by a court that an offender is a repeat violent offender is precluded unless the indictment, count in the indictment, or information charging the offender specifies that the offender is a repeat violent offender. ***

{¶151} "***.

{¶152} "(B) *The court shall determine the issue of whether an offender is a repeat violent offender*." (Emphasis added.)

{¶153} "Repeat violent offender," in turn, is defined in R.C. 2929.01(CC) as follows:

{¶154} "'Repeat violent offender' means a person about whom both of the following apply:

{¶155} "(1) The person is being sentenced for committing or for complicity in committing any of the following:

{¶156} "(a) Aggravated murder, murder, any felony of the first or second degree that is an offense of violence, or an attempt to commit any of these offenses if the attempt is a felony of the first or second degree;

{¶157} "(b) An offense under an existing or former law of this state, another state, or the United States that is or was substantially equivalent to an offense described in division (CC)(1)(a) of this section.

{¶158} "(2) The person previously was convicted of or pleaded guilty to an offense described in division (CC)(1)(a) or (b) of this section."

{¶159} An "offense of violence," as defined in R.C. 2901.01(A)(9), includes the offense of felonious assault and aggravated burglary that Mr. Krug was previously convicted of. R.C. 2901.01(A)(9)(a).

{¶160} Here, Mr. Krug was charged with four counts of felonious assault, each of which carried a RVO specification. The indictment stated that the RVO specifications were based on his previous convictions for aggravated burglary in 1994 and felonious assault in 1993. Defense counsel stipulated to these convictions and the court stated in its sentencing entry that the defendant and the state stipulated to the defendant's prior convictions and that the court "finds, for all of the reasons stated on the record, pursuant

to R.C. 2941.149, R.C. 2929.14(D)(2)(a) and R.C. 2929.14(D)(2)(b), that Defendant is a Repeat Violent Offender as defined in R.C. 2941.149 and R.C. 2929.01."

{¶161} Mr. Krug argues that the language "convicted of or pleads guilty to" in R.C. 2929.14(D)(2)(a) and R.C. 2929.14(D)(2)(b) means that a trier of fact has to convict a defendant of the RVO specification. We disagree.

{¶162} The terms "repeat violent offender" and "offense of violence" are both statutorily defined. Accordingly, R.C. 2941.149(B) leaves the determination of whether a defendant is a RVO to the trial court. Once the prior convictions are stipulated, as in the instance case, the trial court is required to apply the statutory definitions and determine whether a defendant is a RVO. No additional factfinding is involved in that determination. Here, the trial court correctly determined that based on his prior convictions Mr. Krug is a RVO, and therefore convicted him of the RVO specifications. See *Foster* at ¶71 ("[u]nlike all other penalty-enhancing specifications, the court, not the jury, makes the necessary factual findings for convicting the offender of being a repeat violent offender").

{¶163} **Finding of Serious Physical Harm**

{¶164} Mr. Krug also claims he cannot be given the additional prison terms for the RVO specifications because the jury did not find that he caused serious physical harm in the underlying offense pursuant to R.C. 2929.14(D)(2).

{¶165} Both subsections (D)(2)(a) and (D)(2)(b) require that "the trier of fact finds that the [underlying] offense involved an attempt to cause or a threat to cause serious physical harm to a person or resulted in serious physical harm to a person." Mr. Krug

argues the jury should have made the specific finding of serious physical harm before the court could impose additional penalty for the RVO specifications.

{¶166} This claim is without merit. The jury found him guilty of felonious assault as charged in count two (regarding Mr. Layne) and count four (regarding Mr. Reihner), in violation of R.C. 2903.11(A)(1). That statute states that "[n]o person shall knowingly do either of the following: cause serious physical harm to another or to another's unborn." In order to find Mr. Krug guilty of felonious assault in violation of R.C. 2903.11(A)(1) in counts two and four, the finder of fact necessarily found, beyond a reasonable doubt, that he caused serious physical harm to Mr. Layne and Mr. Reihner. Because the causing of serious physical harm is an essential element of the offense of felonious assault prohibited by R.C. 2903.11(A)(1), no specific finding is required.

{¶167} **Whether the Trial Court Engaged in Impermissible Judicial Factfinding**

{¶168} Mr. Krug also asserts the trial court imposed additional prison terms for the RVO specifications pursuant to current R.C. 2929.14(D)(2)(a), which, despite *Foster*, still requires prohibited judicial factfinding.

{¶169} As we explain above, the current R.C. 2929.14(D)(2) provides for both mandatory ((D)(2)(b)) and discretionary ((D)(2)(a)) penalty enhancement for RVO specifications. We recognize that (D)(2)(a) still requires judicial factfinding by the trial court before it exercises its discretion in enhancing the penalty for a RVO. However, a reading of the judgment entry in this case indicates that the court imposed the additional penalty under the mandatory provisions in subsection (D)(2)(b), even though it did not expressly state that all three criteria under that subsection were met.

{¶170} Although the court failed to fully articulate its analysis under (D)(2)(b), it did state that it found the defendant to be a RVO pursuant to R.C. 2941.149 and that the trier of fact found him to have caused serious physical harm to the victims. Although the court did not specifically reference criterion (ii), the parties had stipulated that Mr. Krug had two prior convictions that were offenses of violence, thus satisfying criterion (ii).

{¶171} Because Mr. Krug was given the additional penalty under the *mandatory* provisions, no judicial factfinding was required, and the court did not engage in such impermissible factfinding before sentencing Mr. Krug to two additional prison terms for the RVO specifications.

{¶172} **Whether Two Consecutive Terms Can be Imposed Based Upon the Same Prior Offenses**

{¶173} The trial court imposed an additional ten-year prison term for each of the two merged felonious assault counts, to be served consecutively to each other and to the felonious assault counts. Mr. Krug argues the statute does not authorize multiple consecutive terms for the same prior offenses, referring us to the use of the singular noun "an additional definite prison term" in R.C. 2929.14(D)(2)(a) and (b).

{¶174} Our reading of the statute indicates that while it is correct that the statute only authorizes a single prison term for each RVO specification, nothing in the statute limits the number of specifications when, as in the instant case, the offender is charged with multiple counts of underlying offenses.

{¶175} Regarding the *consecutive* nature of the two additional prison terms for the RVO specifications, the trial court is vested with full discretion pursuant to *Foster* to

impose consecutive sentences. Id. at paragraph seven of the syllabus. That discretion extends to RVO sentencing.

{¶176} **Double Jeopardy**

{¶177} Lastly, Mr. Krug asserts that his sentences under Ohio's RVO statute violate his constitutional right to be free from double jeopardy. We have already addressed and rejected this claim in *State v. Crain*, 11th Dist. No. 2001-L-147, 2003-Ohio-1204, ¶76-77. See, also, *Adams* at ¶34. We explained that while the Double Jeopardy Clause of the Fifth Amendment protects a criminal defendant against multiple punishments for the same act or offense, the general rule is not applicable to cumulative sentences mandated by the legislature. *Crain* at ¶76, citing *Missouri v. Hunter* (1983), 459 U.S. 359, 366. In enacting R.C. 2929.14(D), the state legislature of Ohio has clearly required that repeat violent offenders be subject to cumulative sentences, and therefore the multiple punishments for RVO do not offend the Double Jeopardy Clause. Id.

{¶178} Mr. Krug's fifth assignment of error is overruled.

{¶179} For all the foregoing reasons, the judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

TIMOTHY P. CANNON, J.,

concur.