[Cite as *State v. Melton,* 2010-Ohio-1278.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-L-078**
- vs -	:	
GREGORY D. MELTON, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Court of Common Pleas, Case No. 08 CR 000499.

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} Mr. Gregory D. Melton, Jr. appeals the judgment of his conviction by the Lake County Court of Common Pleas for felonious assault, having a weapon while under a disability, and improperly handling a firearm in a motor vehicle.

{¶2} Mr. Melton presents seven assignments of error, all of which are without merit. First, we find the trial court properly limited the scope of cross-examination of the state's witnesses and did not err by excluding "non-impeachable evidence." Second, although the state failed to demonstrate that a key witness would be unavailable to

testify at trial, the error is harmless as it was merely cumulative to the evidence presented. Third, the trial court did not err in accepting and reading to the jury the joint stipulation as to Mr. Melton's prior illegal drug trafficking conviction as it is an essential element of the charge of having a weapon while under a disability. The wording of the stipulation was identical to the statute, and any possible prejudicial effect was dissipated by the court's limiting jury instruction. Nor do we find that the trial court erred in allowing testimony that was relevant in order to establish that Mr. Melton possessed the pistol used in this crime.

{¶3} We also do not find his counsel was ineffective for agreeing to the joint stipulation. Nor do we find his failure to object to the "prior bad acts" testimony that linked Mr. Melton to possession of the pistol resulted in ineffective assistance. In fact, Mr. Melton's counsel did make an objection, albeit one of hearsay, and the trial court limited the examination to solely an inquiry as to the pistol and not the "bad acts" surrounding the witness' observations of his possession of the weapon. Finally, as to Mr. Melton's sixth and seventh assignments of error, the state entered more than sufficient evidence from which the jury could find that Mr. Melton was the actual shooter on the day of the incident, and we cannot say the jury so lost its way as the manifest weight of the evidence heavily supports the jury's verdict.

{¶4} Thus, we affirm.

{¶5} **Substantive and Procedural Facts**

{¶6} Over the span of a three-day jury trial, the state presented evidence and testimony that on the afternoon of July 30, 2008, Mr. Melton attempted to shoot Mr. Keashawn Ernest with a 380 Cobra semiautomatic pistol. Mr. Ernest's wife, Crystal,

began dating Mr. Melton shortly after she separated from Mr. Ernest. Although she was trying to repair her relationship with her husband, she was also dating Mr. Melton. The conflicts between the two men pre-dated the shooting. The men had provoked each other by telephone, and during several of these altercations Mr. Melton brandished a pistol.

{¶7} Several hours before the shooting, Mr. Ernest drove to the house he formerly shared with his wife, Crystal. He testified that upon his arrival, he saw Mr. Melton waiting in the passenger seat of Crystal's car, along with his nephew or cousin, Brian, who was sitting in the backseat. Throughout the investigation, no effort was made to locate or further identify "Brian."

{¶8} When Mr. Ernest pulled next to Crystal's car, the two men began to provoke each other again. The verbal altercation escalated and both men got out of their vehicles. Crystal, alerted to the fact that her husband had arrived by the loud music coming from his vehicle, rushed outside to break up the altercation. She told the men to calm down, that she would speak with Mr. Ernest later, and drove away with Mr. Melton and Brian.

{¶9} Mr. Ernest then went into the home to collect some belongings, left the apartment complex, and encountered the three driving down the road. He looked over to his right and noticed Crystal was driving while Mr. Melton waved a pistol at him from the passenger seat. He pulled in front of them and turned onto the nearest street when he heard a bullet shoot through his back window. The bullet seemingly lodged into the headliner of his vehicle, about a foot from his head. He immediately pulled over and

called 911, reporting the incident and giving the dispatcher Crystal's vehicle information. He then drove to the Painesville Police Department.

{¶10} When he arrived, the police took his statement and searched the vehicle, taking apart the headliner of the vehicle to locate the bullet and scraping the markings the bullet had left behind. The bullet itself was not located during the search. After Mr. Ernest left the station, he began unpacking the boxes into which the police had placed the miscellaneous items collected from his vehicle during the search, and found the spent bullet inside his cigarette pack which had been resting by the center console during the shooting. He alerted the police and drove back to the station to drop off the newly found evidence.

{¶11} The Brooklyn police were familiar with Mr. Melton's address, and upon hearing the Painesville Police Department dispatch regarding the arrest warrants for Crystal and Mr. Melton, two Brooklyn detectives drove to Mr. Melton's home to see if the two would appear. The detectives parked down the street until they saw the two approach in Crystal's car, this time with Mr. Melton driving and Crystal in the passenger seat. They had dropped off Brian on their way, and had made brief stops at a tanning salon and beauty supply store.

{¶12} They were arrested upon arrival, and the detectives began a search of the vehicle. Detective Christopher Frey and Detective Joe Tenhunfeld stopped the search after finding a pistol in the center console of the vehicle. They found a fifty-bullet box of ammunition for a 380 Cobra from which five bullets were missing in Mr. Melton's garage.

{¶13} The Painesville police arrived on the scene shortly thereafter to transport Crystal and Mr. Melton, as well as the vehicle, back to the station. Without even opening the door of the vehicle, Detective John Levicki observed a bullet casing lodged between the passenger seat and the center console of Crystal's vehicle. He seriously doubted that a bullet casing could land in the front seat from a shooter in the backseat. Detective Levicki also spoke with Mr. Jeremy Hathy, the owner of the pistol, who appeared at the Painesville Police Station several days later.

{¶14} Mr. Hathy, who testified by way of a video deposition because he had since moved to Florida, identified the pistol as his own. He told the police that although he usually kept the firearm at his father's, he left it with Mr. Melton and Crystal before leaving for another trip to Florida that June. He had carried the firearm with him on previous trips, but decided he did not want to travel with it again.

{¶15} Before his trip, Mr. Melton's brother gave Mr. Hathy permission to store his belongings at the home Mr. Melton and his brother shared. Mr. Hathy testified that he placed his belongings on the kitchen floor, the unloaded pistol on the counter, and gave the keys to Crystal. He also informed Mr. Melton of these facts simultaneously by phone. Later in his testimony, he admitted he could not recall if he spoke with Mr. Melton by phone or if Mr. Melton was physically present, but he knew Mr. Melton was aware that he was leaving a weapon for safekeeping.

{¶16} Mr. Hathy, who owns several firearms and had never fired this particular Cobra semiautomatic pistol, could not recall if the box of ammunition was full. When he came back from his trip, he tried to retrieve his belongings, but could not get reach Mr. Melton or his brother. Once his father told him what had happened, he immediately

went to the Painesville Police Department, believing the pistol was his. He gave them his receipt of registration, which indeed, matched the serial number of the pistol located in Crystal's vehicle.

{¶17} Three 911 calls, several of which were from the day of the incident, were played for the jury. The first and most critical call came from Mr. Ernest roughly one week before the shooting in which he reported that Mr. Melton was threatening him with a pistol and that he had been threatening him with the same pistol for several weeks. He reported that Mr. Melton had possession of the pistol, as well as narcotics, and relayed Crystal's vehicle information and location. Despite agreeing to the dispatcher's request that he file a report, he failed to do so.

{¶18} Although Crystal denied any knowledge of the shooting when she was arrested, she later made a statement and then testified on the stand to the contrary. In exchange for her testimony, she pled guilty to one charge of obstructing official business, and the second charge against her, complicity to felonious assault, was dropped.

{¶19} Crystal testified that she did not see the shooting or what happened to Mr. Ernest because Mr. Melton told her to continue driving and to get on the freeway, although this was not the first time she observed Mr. Melton with the pistol. The first time she observed Mr. Melton with the pistol was when they were in his hot tub and it was lying nearby. She next saw it when he pointed it at her face on two different occasions in which he told her that she needed to think about what they had been through together.

{¶20} The pistol was examined by the Lake County Crime Lab, along with the cigarette pack containing the lead projectile, the spent casing, the cartridge, evidence collected from the spent hole of the vehicle headliner, as well as the actual headliner. The pistol was loaded with four live rounds and a total of five bullets were missing from the box of ammunition. The jacket from the spent bullet and the fragmented copper were linked to the bullet shot into Mr. Ernest's vehicle, as well as the semiautomatic pistol found in Crystal's vehicle.

{¶21} Prior to trial, the defense requested bifurcation of the felonious assault and weapon while under a disability charges to avoid possible prejudice, a prior conviction being one of the elements of having a weapon under a disability. The state and the defense agreed to a joint stipulation as to Mr. Melton's prior drug trafficking conviction, which they agreed would be read to the jury with a limiting instruction. At the end of the state's case-in-chief, the joint stipulation was read to the jury. After the defense's Crim.R. 29 insufficiency of the evidence motion was overruled, the defense rested, and the case was given to the jury.

{¶22} A guilty verdict was returned on all three counts: felonious assault, a second-degree felony in violation of R.C. 2903.11(A)(2), with two firearm specifications pursuant to R.C. 2941.145 and R.C. 2941.146; having a weapon while under a disability, a third-degree felony in violation of R.C. 2923.13(A)(3); and, lastly, improperly handling firearms in a motor vehicle, a fourth-degree felony in violation of R.C. 2923.16(A).

{¶23} Mr. Melton was sentenced to serve a total term of imprisonment of 13 years: a six-year term on the count of felonious assault, to be served consecutively to

the concurrent three-year and five-year mandatory terms for the firearm specifications; a two-year term for having a weapon while under a disability, to be served consecutively to the first count; and a one-year term for improperly handling a firearm in a motor vehicle, to be served concurrently to counts one and two.

{¶24} Mr. Melton now timely appeals, raising seven assignments of error for our review:

{¶25} "[1.] The trial court erred to the prejudice of the defendant-appellant by failing to allow him to completely present his defense and thoroughly cross-examine key witnesses, in violation of his rights as guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

{¶26} "[2.] The trial court erred to the prejudice of the defendant-appellant when it permitted a deposition of a state's witness in violation of the defendant-appellant's state and federal constitutional rights to due process and a fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

{¶27} "[3.] The trial court erred in not excluding all reference to the defendant-appellant's prior drug trafficking conviction from the state's case-in-chief in violation of his rights to due process and fair trial as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

{¶28} "[4.] The trial court committed plain error by admitting testimony concerning prior bad acts by the defendant-appellant in violation of his right to a fair trial

as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Sections 10 and 16, Article I of the Ohio Constitution.

{¶29} "[5.] The defendant-appellant's constitutional rights to due process under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution were prejudiced by the ineffective assistance of trial counsel.

{¶30} "[6.] The trial court erred to the prejudice of the defendant-appellant when it denied his motion for acquittal made pursuant to Crim.R. 29(A).

{¶31} "[7.] 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."

{¶32} **Limited Cross-Examination of Key Witnesses**

{¶33} In his first assignment of error, Mr. Melton contends the trial court erred in limiting his cross-examination of Mr. Ernest and Crystal regarding the history of violence in their relationship. He argues that evidence of any prior violence between Crystal and Mr. Ernest would support his theory that Crystal was the shooter as no one actually saw Mr. Melton fire the pistol. We find Mr. Melton's contention to be without merit as the jury heard of the couple's tumultuous relationship during the direct and cross-examination of both witnesses. Further, any reference to Mr. Ernest's minor misdemeanor for domestic violence would have been improper and prejudicial.

{¶34} "The Sixth Amendment to the United States Constitution and the Ohio Rules of Evidence guarantee the right of a criminal defendant to confront the witnesses against him for the biases they may hold." *State v. Miller*, 11th Dist. No. 2004-T-0082, 2005-Ohio-5283, ¶32, citing *State v. Minier* (Sept. 28, 2001), 11th Dist. No. 2000-P-

0025, 2001 Ohio App. LEXIS 4411, 4; *State v. Norwood* (Mar. 22, 2002), 11th Dist. No. 2000-L-146, 2002 Ohio App. LEXIS 1325, 6. A criminal defendant's right to confront and cross-examine a witness, however, is not unlimited. Id., citing *Delaware v. Arsdall* (1986), 475 U.S. 673, 679. "The Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." Id, quoting *Arsdall*, quoting *Delaware v. Fensterer* (1985), 474 U.S. 15, 20. "Furthermore, the 'constitutional right to cross-examine adverse witnesses does not authorize defense counsel to disregard sound evidentiary rules.'" Id., quoting *State v. Amburgey* (1987), 33 Ohio St.3d 115, 117.

{¶35} "While cross-examination itself is a matter of right, the 'extent of cross-examination with respect to an appropriate subject of inquiry is within the sound discretion of the trial court.'" Id. at ¶33, quoting *State v. Green* (1993), 66 Ohio St.3d 141, 147, quoting *Alford v. United States* (1931), 282 U.S. 687, 691. "Moreover, the trial court may impose reasonable restrictions on the scope of cross-examination based on concerns about harassment, prejudice, confusion of the issues, or relevance of the inquiry." Id., citing *State v. Brown*, 11th Dist. No. 2001-T-0146, 2003-Ohio-2364, ¶14, citing *Arsdall* at 679.

{¶36} Thus, "[a] reviewing court will not reverse a trial court's ruling on the scope of cross-examination absent an abuse of discretion." Id. at ¶37, quoting *State v. Slagle* (1992), 65 Ohio St.3d 597, 605. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." Id., citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶37} Evid.R. 609(A) provides that a witness' prior convictions are inadmissible unless the conviction is punishable by death or carries a term of imprisonment of more than one year, and the court determines the probative value of the evidence outweighs the danger of unfair prejudice, confusion of the issues, or misleading the jury. See Evid.R. 609(A)(1) and (2). Further, pursuant to Evid.R. 609(A)(1)(3), a crime, regardless of its punishment, is admissible if it involves a dishonest or false statement.

{¶38} Defense counsel was permitted to ask Mr. Ernest the nature of his relationship with Crystal. Mr. Ernest denied the couple's arguments were ever physical, although he testified their fights were, at times, verbally abusive. The state's objection to defense counsel's next question, whether Crystal ever had a cause to call 911, was sustained.

{¶39} The transcript also reveals that defense counsel was permitted to cross-examine Crystal as to the nature of the couple's altercations, insofar as counsel had been permitted to inquire of Mr. Ernest.

{¶40} Before Crystal was cross-examined by defense counsel, a side-bar discussion was held regarding Mr. Ernest allegedly beating Crystal. The trial court limited Crystal's cross-examination, finding that Mr. Ernest's possible conviction, a minor misdemeanor for domestic violence, was not proper evidence as it was being offered for impeachment purposes. The court did, however, allow defense counsel to inquire as to the nature of the couple's altercations, just as he had been allowed to ask Mr. Ernest.

{¶41} Thus, the court properly limited the scope of cross-examination to exclude any introduction of any possible minor misdemeanor convictions, while allowing the defense to inquire as to the nature of the couple's relationship.

{¶42} Moreover, defense counsel elicited on both cross-examinations that the couple had a tumultuous relationship. Defense counsel was permitted to ask both witnesses if their altercations were physical, which both denied. The jury heard that the couple separated because Mr. Ernest had been having an extramarital affair. Both testified that they "were trying to work things out." On redirect, Crystal also testified she was not angry enough to hurt Mr. Ernest and that on the day of the shooting there were no arguments between them, only between Mr. Ernest and Mr. Melton. Thus, the jury was presented with ample evidence of Crystal's motive to shoot Mr. Ernest.

{¶43} We find no abuse of discretion in the court's decision to limit defense counsel's cross-examination of Mr. Ernest and Crystal as to the nature of their altercations.

{¶44} Mr. Melton's first assignment of error is without merit.

{¶45} **Video Deposition Testimony**

{¶46} In his second assignment of error, Mr. Melton contends the trial court erred in permitting a videotape deposition of Mr. Hathy, the owner of the pistol, to be played for the jury. He contends the trial court abused its discretion in granting the state's motion for such a deposition because the state did not adequately demonstrate Mr. Hathy's unavailability.

{¶47} We agree with Mr. Melton that the state failed to adequately demonstrate Mr. Hathy's unavailability. We determine the trial court abused its discretion by granting

the state's motion ex parte a mere two hours after it was filed without allowing the defense to file its brief in opposition. Simply because Mr. Hathy was purportedly moving out of state does not, without more, demonstrate "unavailability" under the rule or in the constitutional sense.

{¶48} "Crim.R. 15 governs the procedure for taking the deposition of a prospective witness in a criminal matter. Succinctly, the rule authorizes the deposition if 'it appears probable' that the witness is unable to attend a trial and if it further appears that the witness's testimony is 'material' and 'necessary *** in order to prevent a failure of justice.' Without a finding of unavailability, however, a trial court's decision to admit videotaped deposition testimony affronts the Confrontation Clause of the United States Constitution." *State v. Johnson*, 8th Dist. No. 80436, 2002-Ohio-7057, ¶52, citing *Brumley v. Wingard* (C.A.6, 2001), 269 F.3d 629. "Thus, the knowing preparation of a videotaped deposition as a substitute for the trial testimony of a constitutionally available witness is inconsistent with the values of the Confrontation Clause, despite reduced concerns with reliability." Id., citing *Brumley* at 642.

{¶49} "The primary object of the constitutional provision in question was to prevent deposition or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether it is worthy of belief." *Brumley* at 642, quoting *United States v. Mattox*, 156 U.S. 237, 242-43.

{¶50} Notably absent in this case was any evidence of attempts by the state to procure Mr. Hathy's testimony at the time of trial, apart from an averment in the state's motion that Mr. Hathy was moving out of state. Such an allegation, without more, does not constitute a showing of unavailability for constitutional purposes. No reason is given why Mr. Hathy could not travel from Florida to Ohio to testify at trial. "The Supreme Court [of the United States] has held that 'a witness is not "unavailable" for purposes of *** the confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial.'" *Brumley* at 640, quoting *Barber v. Paige* (1968), 390 U.S. 719, 724-24.

{¶51} We recognize, as the Sixth Circuit did in *Brumley*, that a videotaped preservation deposition alleviates many of the concerns underlying the Confrontation Clause as the witness testified under oath; the defendant could be present and represented by counsel; the defense could cross-examine the witness in a manner similar to cross-examination at trial; and the judge could even be present to rule on objections. Id. at 642. These factors, however, support the trial court's conclusion that the videotaped deposition was reliable, they do not address the Confrontation Clause's "preference for face-to-face confrontation at trial." Id., citing *Ohio v. Roberts* (1980), 448 U.S. 56, 63. "This particular concern requires that deposition testimony be admitted only when the witness is unavailable." Id.

{¶52} In this case, the state did not attempt to seek Mr. Hathy's attendance. A good-faith showing of attempts by the state to procure attendance must be made -- not just a bare averment that a witness will have moved out of the state by the time of trial -- to satisfy the requirements of the Sixth Amendment.

{¶53} Nonetheless, we find the trial court's error in allowing the videotaped deposition and the state's failure to make a good-faith attempt to procure the live testimony of Mr. Hathy at trial was harmless as there was more than enough substantial evidence to link Mr. Hathy to the pistol.

{¶54} "Under Evid.R. 103(A) and Crim.R. 52(A), error is harmless unless substantial rights of the defendant are affected." *State v. Hutson*, 11th Dist. No. 2007-P-0026, 2008-Ohio-2315, ¶19, citing *State v. Hicks* (Aug. 16, 1991), 6th Dist. No. L-83-074, 1991 Ohio App. LEXIS 3856, 13.

{¶55} The test is whether "there is substantial evidence to support the guilty verdict even after the tainted evidence is cast aside." Id. at ¶20, quoting *State v. Cowans* (1967), 10 Ohio St.2d 96, 104.

{¶56} "The Ohio test *** for determining whether admission of inflammatory and otherwise erroneous evidence is harmless non-constitutional error requires the reviewing court to look at the whole record, leaving out the disputed evidence, and then to decide whether there is other substantial evidence to support the guilty verdict. If there is substantial evidence, the conviction should be affirmed, but if there is no other substantial evidence, then the error is not harmless and a reversal is mandated." Id. at ¶21, quoting *State v. Davis* (1975), 44 Ohio App.2d 335, 347.

{¶57} A review of the record reveals that even without the testimony of Mr. Hathy that he gave Mr. Melton the pistol a few weeks prior to the incident, there was more than substantial evidence to support the jury's conviction. Two witnesses, the victim as well as Mr. Melton's girlfriend, identified the pistol as belonging to Mr. Melton, both having seen him in separate incidents on previous occasions with the pistol.

Further, a box of bullets belonging to the pistol, with five missing, were found in Mr. Melton's garage, and the casing of the spent bullet was located in Crystal's vehicle between the passenger seat and the front center console, where Mr. Melton had been sitting at the time of the shooting.

{¶58} Mr. Melton's second assignment of error is without merit.

{¶59} **Prior Conviction an Essential Element of an Offense**

{¶60} In his third assignment of error, Mr. Melton contends the trial court erred in failing to exclude all reference to his prior conviction for drug trafficking. Specifically, he contends that the trial court erred when it accepted and read to the jury the parties' joint stipulation, the language of which included the nature of the offense, i.e., drug trafficking. We find this argument to be without merit as the stipulation simply recited, verbatim, the statutory name of the offense, "illegal drug trafficking in a drug of abuse." Moreover, the court gave a limiting instruction as to the jury's use of Mr. Melton's prior conviction in order to balance any possible prejudicial use.

{¶61} Mr. Melton was charged with one count of having a weapon while under a disability, in violation of R.C. 2923.13(A), which states: "*** no person shall knowingly acquire, have, carry, or use any firearm or dangerous ordnance, if any of the following apply:

{¶62} "***.

{¶63} "(3) The person *** has been convicted of any offense involving the illegal possession, use, sale, administration, distribution, or trafficking in any drug of abuse ***."

{¶64} Before trial, the court overruled defense counsel's motion to bifurcate the trial to try the weapon while under a disability charge solely to the judge, and the parties entered into the following joint stipulation which was read to the jury (over the continuing objection of defense counsel) at the close of the state's case-in-chief:

{¶65} "The defendant, Gregory D. Melton, Jr., has previously been convicted of illegal trafficking in a drug of abuse, to-wit: drug trafficking, in the Cuyahoga County Court of Common Pleas, case number CR-05-472574-B, dated December 23, 2005."

{¶66} As we noted in *State v. Toddy* (Mar. 30, 2001), 11th Dist. No. 2000-A-0004, 2001 Ohio App. LEXIS 1549, "[t]he Supreme Court of Ohio has recognized [R.C. 2923.13] to be 'clear and unambiguous on its face, and requires no interpretation.'" Id. at 6-7, quoting *State v. Taniguchi* (1995), 74 Ohio St.3d 154, 156. "As such, '[a] court should give effect to the words *actually employed in a statute*, *and should not delete words used, or insert words not used*, in the guise of interpreting the statute.'" (Emphasis added.) Id., quoting *Taniguchi* at 156.

{¶67} Thus, there was no error in the joint stipulation because it merely stated the words actually used in the statute. Furthermore, the court gave the following limiting instruction to the jury on how the prior conviction for a drug of abuse could be considered:

{¶68} "The parties have stipulated that the defendant has been previously convicted of an offense involving the illegal trafficking of a drug of abuse. ***

{¶69} "The stipulation was received because a prior conviction is an element of the offense charged. It was not received and you may not consider it to prove the

character of the defendant or in order to show that he acted in conformity with that character."

{¶70} Without a showing of prejudice, we must presume that the jury followed the court's instructions and did not consider Mr. Melton's prior conviction as character evidence. See *State v. Ross* (Apr. 21, 1993), 9th Dist. No. 92CA005422, 1993 Ohio App. LEXIS 2257, 8-9; *State v. Ware*, 8th Dist. No. 82644, 2004-Ohio-1791, ¶22. Moreover, we fail to see how simply stating the name of the offense in a *joint* stipulation, with a limiting instruction, was misused in any way to argue his guilt on the unrelated counts of felonious assault or improperly using a firearm in a motor vehicle.

{¶71} Mr. Melton contends that that our decision in *State v. Hatfield,* 11th Dist. No. 2006-A-0033, 2007-Ohio-7130, is pertinent to the circumstances of this case. The facts of *Hatfield*, however, are strikingly dissimilar as in that case we found the state erred in refusing to accept the defense's stipulation as to any prior charges. Thus, we reversed on this basis, remarking in *Hatfield* that: "[a]ccordingly, *Old Chief* [519 U.S. 172] bars evidence of prior convictions offered solely to prove a defendant's status as a convicted criminal. Under circumstances where a defendant's legal status must be proved, the probative value of a defendant's admission and stipulation to a prior conviction has equivalent value to a fuller record with less potential for prejudice thereby justifying a limitation on prosecutorial discretion." Id. at ¶144, citing *Old Chief* at 190-191.[1]

1. It is important to note that the Supreme Court of Ohio recently accepted *State v. Baker*, 9th Dist. No. 23713, 2009-Ohio-2340, in order to review whether the holding of *Old Chief*, granting a right to a defendant to stipulate to prior criminal convictions, applies to state law prosecutions or if it is limited solely to prosecutions under federal law. See *State v. Baker*, 123 Ohio St.3d 1516, 2009-Ohio-6486.

{¶72} Thus, contrary to Mr. Melton's contention, the court properly followed the jurisprudence of *Old Chief*, providing the jury with limited information of Mr. Melton's legal status, an essential element needed to convict one of having a weapon while under a disability charge. Moreover, despite defense counsel's objection, the parties jointly entered into the stipulation, the wording of the statute was strictly followed without any detail of the actual offense, and the jury was given a limiting instruction as to its use. As an aside, we also note that Mr. Ernest testified to his prior drug trafficking conviction on direct examination.

{¶73} Mr. Melton's third assignment of error is without merit.

{¶74} **Prior Bad Acts**

{¶75} In his fourth assignment of error, Mr. Melton contends the trial court committed plain error by allowing evidence of his prior bad acts by way of Crystal's testimony that Mr. Melton threatened her with the same pistol on two prior occasions. We determine Mr. Melton's contention is without merit as Crystal's testimony regarding the pistol was not offered to prove Mr. Melton's propensity to commit a crime or as a reflection of bad character, but was offered as evidence linking Mr. Melton to that pistol. Thus, the alleged prior threats Mr. Melton made to Crystal with the pistol in hand as well as Crystal's testimony that she had seen the pistol on other occasions in his possession, were not offered for the truth of the matter asserted, but rather as circumstantial evidence that the pistol was under Mr. Melton's control.

{¶76} We also note that apart from this testimony, there was ample circumstantial evidence linking Mr. Melton to the pistol, such as Mr. Hathy's testimony that he placed the pistol in Mr. Melton's care, Mr. Ernest's call to 911 a week or two

prior to the shooting, the casing from the spent bullet that was located in the car where Mr. Melton had been sitting at the time of the shooting, the box of bullets that was located in Mr. Melton's garage, as well as the testimony of how a casing of a bullet is ejected from this particular weapon, which could only have been done by someone sitting in the front passenger seat.

{¶77} 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." Evid.R. 401. "Accordingly, 'the question of whether evidence is relevant is ordinarily not one of law but rather one which the trial court can resolve based on common experience.'" *State v. Swick* (Dec. 21, 2001), 11th Dist. No. 97-L-254, 2001 Ohio App. LEXIS 5857, 11-12, quoting *State v. Lyles* (1989), 42 Ohio St.3d 98, 99. "Indeed, the Supreme of Court of Ohio observed that 'the issue of whether testimony is relevant or irrelevant *** is best decided by the trial judge who is in a significantly better position to analyze the impact of the evidence on the jury.'" Id., quoting *State v. Simon* (May 26, 2000), 11th Dist. No. 98-L-134, 2000 Ohio App. LEXIS 2272, 13, quoting *Columbus v. Taylor* (1988), 39 Ohio St.3d 162, 164.

{¶78} "Evid.R. 404(B) sets forth a nonexhaustive list of proper bases upon which evidence of other crimes, wrongs, or acts may be offered. Weissenberger's Ohio Evidence (1998), Section 404.23, 114. The paramount question in determining admissibility of such evidence is whether it is being introduced only to prove character and conforming conduct, or, alternatively, whether it is being offered to prove some other relevant fact of consequence to the proceeding. The burden is on the proponent

to demonstrate its admissibility under Evid.R. 404(B)." *State v. Davis* (Dec. 31, 1998), 11th Dist. No. 97-L-246, 1998 Ohio App. LEXIS 6389, 8.

{¶79} Further, "[t]he admissibility of evidence under Evid.R. 404(B) is within the sound discretion of the trial court. *State v. Slagle* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. *** An appellate court will not reverse the decision of a trial court in the absence of an abuse of discretion. In this context, an abuse of discretion connotes more than an error of law or judgment; rather, it implies that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *State v. Montgomery* (1991), 61 Ohio St.3d 410, 413; *State v. Adams* (1980), 62 Ohio St.2d 151, 157." Id. at 8-9.

{¶80} A review of the record reveals that the state asked Crystal if she could describe when she observed Mr. Melton with the pistol in his possession. Crystal testified that she first observed the pistol lying next to Mr. Melton's hot tub, and she next observed it when he held it to her face when she came to collect the money he owed her for bailing him out of jail. At that point, defense counsel interjected a hearsay objection, and a side-bar discussion followed. The state argued that this testimony was "highly relevant because it shows his knowledge and his use or at least possession of the weapon in the days prior to the event in question so it goes against any mistake. It does place the weapon in his hand, it applies to his knowledge of the weapon in general and that it's carried so *** it's relevant to the case."

{¶81} The court agreed, overruling defense counsel's objection, but limiting the state's questioning to simply the next time she observed the pistol in Mr. Melton's possession, which happened to be when it was, again, for the second time, pointed at

her face. The court limited this questioning to omit any references to her posting bail for Mr. Melton in a separate case or to the actual threat that occurred at the time.

{¶82} Thus, the state continued its questioning:

{¶83} "STATE: Did you get a look at the gun he was holding on that occasion?

{¶84} "CRYSTAL: Yeah, it was right in my face, yes.

{¶85} "STATE: Was it being pointed at you?

{¶86} "CRYSTAL: It was like right here (indicating) in my face, yes.

{¶87} "STATE: And based on the good look that you got was it the same gun that I just showed you in Court here several minutes ago?

{¶88} "CRYSTAL: Yes, it's the same gun.

{¶89} "STATE: Were there any other occasions where you saw that same gun in the possession of the defendant?

{¶90} "CRYSTAL: The next day."

{¶91} Crystal then described next seeing the pistol in Mr. Melton's possession when he was sitting on the stairs leading to the second landing of his home, where he again pointed it at her. On the day of the shooting, she observed the same pistol in Mr. Melton's possession when Mr. Melton pointed it out of the window as Mr. Ernest turned onto the side street. She did not, however, testify that she saw the pistol or saw who possessed it when it was actually fired.

{¶92} We cannot say the trial court abused its discretion in admitting the testimony in question because it was directly relevant to the charge and it was properly offered to connect Mr. Melton with the pistol, an essential element of the crimes charged. See *State v. Sweeney*, 11th Dist. No. 2006-L-252, 2007-Ohio-5223, ¶22-34.

{¶93} Mr. Melton's fourth assignment of error is without merit.

{¶94} **Ineffective Assistance of Counsel**

{¶95} In his fifth assignment of error, Mr. Melton contends his counsel was ineffective in two aspects of his defense. First, his counsel erred in agreeing to the joint stipulation of his prior drug trafficking offense and, second, in failing to raise a prior bad acts objection to Crystal's testimony concerning her familiarity of the pistol in Mr. Melton's possession. Defense counsel did object to the admission of prior bad acts, albeit by way of a hearsay objection, and as a result, the court did limit the testimony. Defense counsel also preserved an objection to the joint stipulation. We have already determined the joint stipulation to be proper. Further, Mr. Melton fails to identify how, even if defense counsel had been ineffective in these two areas, the outcome of the trial would have been different.

{¶96} "'[W]hen a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness.' *** The [Supreme Court of Ohio] recognized that there are '(***) countless ways to provide effective assistance in any given case.'" *State v. Sands*, 11th Dist. No. 2007-L-003, 2008-Ohio-6981, ¶35, quoting *State v. Vinson, Jr.,* 11th Dist. No. 2006-L-238, 2007-Ohio-5199, ¶29, citing *State v. Allen* (Sept. 22, 2000), 11th Dist. No. 99-A-0050, 2000 Ohio App. LEXIS 4356, 10, citing *State v. Bradley* (1989), 42 Ohio St.3d 136, 142, quoting *Strickland v. Washington* (1984), 466 U.S. 668, 687-689. "'Therefore, the court stated "judicial scrutiny of counsel's performance must be highly deferential. (***)."'" Id.

{¶97} "In addition, 'because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. (***).' Id. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. Id. (Parallel citations omitted.) Thus, '[t]o warrant reversal, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."' *** *Vinson* at ¶30, citing *Allen* at 10-11, citing *Bradley* at 142, quoting *Strickland* at 694." Id. at ¶36.

{¶98} "Further, '[t]his court concluded in *State v. Rudge* (Dec. 20, 1996), 11th Dist. No. 95-P-0055, 1996 Ohio App. LEXIS 5807, 12, that "[s]trategic and tactical decisions will not form the basis of a claim of ineffective assistance of counsel, even if there had been a better strategy available to him."' Thus, '[e]rrors of judgment regarding tactical matters do not substantiate a claim of ineffective assistance of counsel.' *Vinson* at ¶31, quoting *Allen* at 11." Id. at ¶37.

{¶99} As we reviewed, while preserving an objection to the joint stipulation, such a stipulation was for the benefit of his client in order to avoid presentation of the details of the prior drug trafficking conviction. Secondly, his counsel did object by way of a hearsay objection to the state's line of questioning of Crystal's knowledge of Mr. Melton's possession of the pistol. The determinative question is whether the outcome of the proceedings would have been different. That cannot be said in this case.

{¶100} Mr. Ernest testified that he observed Mr. Melton with the same pistol, both personally and on one of the recorded 911 calls. Crystal testified that she saw the pistol in Mr. Melton's hand around the time of the shooting; it was found in her vehicle; the spent casing of the bullet was located wedged between the center console and the passenger seat where Mr. Melton had been sitting; Mr. Ernest testified he observed Mr. Melton waving the pistol at him while he was at the home and on the road during their encounter; and Mr. Hathy, the owner of the pistol, testified that he gave it to Mr. Melton for safekeeping.

{¶101} Thus, Mr. Melton has failed to allege that but for his counsel's actions, which we determine were not ineffective in any case, the outcome of the trial would have been otherwise.

{¶102} Mr. Melton's fifth assignment of error is without merit.

{¶103} **Sufficiency of the Evidence**

{¶104} In his sixth assignment of error, Mr. Melton argues that there is insufficient evidence to support his convictions because the state did not prove beyond a reasonable doubt that Mr. Melton was the one who possessed and fired the pistol at Mr. Ernest. He contends that the evidence points to three possible shooters as he, Crystal, and Brian were in the vehicle at the time of the shooting. Thus, he contends the state failed to introduce sufficient evidence that he was the shooter. We disagree with this contention and determine the state carried its burden of proof by introducing more than sufficient evidence from which the jury could conclude Mr. Melton was the shooter.

{¶105} "[T]he standard of review for a sufficiency of the evidence claim is 'whether after viewing the probative evidence and the inference[s] drawn therefrom in

the light most favorable to the prosecution, any rational trier of fact could have found all the elements of the offense beyond a reasonable doubt. The claim of insufficient evidence invokes an inquiry about due process. It raises a question of law, the resolution of which does not allow the court to weigh the evidence. ***' (Citations omitted.) 'In essence, sufficiency is a test of adequacy[;] [w]hether the evidence is legally sufficient to sustain a verdict ***.' (internal citations omitted.) 'Thus, sufficiency of the evidence tests the burden of production.'" *State v. McFeely*, 11th Dist. No. 2008-A-0067, 2009-Ohio-1436, ¶23 (citations omitted).

{¶106} Mr. Melton contends that the state only proved that some occupant in Crystal's vehicle was the shooter, but not who actually fired the shot because the evidence submitted merely proves that all three were riding in Crystal's vehicle at the time the pistol was fired and that the bullet struck Mr. Ernest's car.

{¶107} Mr. Melton's argument, however, attacks the weight of the evidence rather than its sufficiency. Nor can we say the state failed in its burden of production. Specifically, there was evidence that Mr. Hathy gave Mr. Melton his pistol for safekeeping several weeks prior to the incident; that both Mr. Ernest and Crystal observed Mr. Melton with it in his possession on several different occasions before the day of the shooting; and both witnessed Mr. Melton waving the pistol at Mr. Ernest before it was fired. Additionally, the shell casing of the bullet was found lodged between the front passenger seat and the center console where Mr. Melton had been sitting at the time of the shooting, and the pistol was located in the center console of Crystal's vehicle upon Mr. Melton's arrest.

{¶108} As the Supreme Court of Ohio stated in *State v. Jenks* (2001), 61 Ohio St.3d 259, "[c]ircumstantial evidence and direct evidence inherently possess the same probative value and therefore should be subjected to the same standard of proof. ***" Id. at paragraph one of the syllabus. Thus, we cannot say the state failed to introduce sufficient evidence from which the jury could conclude Mr. Melton was the shooter. Indeed, the state more than carried its burden of production although no one actually saw Mr. Melton pull the trigger.

{¶109} Mr. Melton's sixth assignment of error is without merit.

{¶110} **Manifest Weight of the Evidence**

{¶111} In his final assignment of error, Mr. Melton contends the manifest weight of the evidence supports an acquittal on all three charges, and thus, the jury clearly lost its way in arriving at its verdict. He argues, as he did in his sufficiency challenge, that because there were two other people with him at the time of the shooting, the evidence as to the identity of the shooter is inconclusive. Because we have determined there was more than enough evidence to support the jury's verdict, we find this contention to be without merit as well.

{¶112} "When reviewing a claim that a judgment was against the manifest weight of the evidence, an appellate court must review the entire record, weigh both the evidence and all reasonable inferences, consider the credibility of the witnesses, and determine whether in resolving conflicts, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that a new trial must be ordered." *McFeely* at ¶77 (citations omitted).

{¶113} "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against a conviction. *** The role of the appellate court is to engage in a limited weighing of the evidence introduced at trial in order to determine whether the state appropriately carried its burden of persuasion. *** The reviewing court must defer to the factual findings of the trier of fact as to the weight to be given to the evidence and credibility of witnesses." Id. at ¶78 (internal citations omitted).

{¶114} Based on the evidence and testimony presented at trial, we cannot conclude the jury so lost its way or created a manifest miscarriage of justice when it found Mr. Melton guilty on all three counts. Three different witnesses placed the pistol in Mr. Melton's possession. The bullets for this pistol were located in his garage, with five missing from the box, four of which were later located in the pistol. The missing bullet was determined to be the same bullet fired at Mr. Ernest. The spent casing from the bullet was found where Mr. Melton had been sitting in Crystal's vehicle and the pistol was found in the center console of Crystal's car. Both Crystal and Mr. Ernest observed Mr. Melton with that pistol in the weeks prior to the shooting.

{¶115} Simply because the jury chose not to believe Mr. Melton's version of the events does not mean the jury lost its way. "It is well-settled that when assessing the credibility of the witnesses, '[t]he choice between the credibility of 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.' *** Furthermore, if the evidence is susceptible to more than one interpretation, a reviewing court must interpret it in a manner consistent with the verdict." *McFeely* at ¶81 (internal citations omitted).

{¶116} In short, the jury was free to believe the state's version of events, and we cannot say the jury so lost its way or created a manifest miscarriage of justice when our review of the evidence reveals that its manifest weight strongly supports the jury's verdict.

{¶117} Mr. Melton's seventh assignment of error is without merit.

{¶118} The judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J., concurs in judgment only,

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

COLLEEN MARY O'TOOLE, J., dissents with Dissenting Opinion.

{¶119} I respectfully dissent.

{¶120} In his second assignment of error, appellant contends that the trial court erred by allowing the state to take and use at trial the deposition of Jeremy Hathy without requiring the state to present evidence that the witness was unavailable. I agree.

{¶121} Crim.R. 15 provides, in part:

{¶122} "(A) If it appears probable that a prospective witness will be unable to attend or will be prevented from attending a trial or hearing, and if it further appears that his testimony is material and that it is necessary to take his deposition in order to prevent a failure of justice, the court at any time after the filing of an indictment,

information, or complaint shall upon motion of the defense attorney or the prosecuting attorney and notice to all the parties, order that his testimony be taken by deposition ***.

{¶123} "***

{¶124} "(F) At the trial or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used if it appears: that the witness is dead; or, that the witness is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or that the witness is unable to attend or testify because of sickness or infirmity; or that the party offering the deposition has been unable to procure the attendance of the witness by subpoena. ***"

{¶125} "At most, Rule 15(F) permits the admission of deposition testimony when the deponent is out of the state. But this does not relieve the State of its duty to make a good-faith effort to obtain the witness's presence." *Brumley*, supra, at 640. The Confrontation Clause requires that the witness in question be unavailable from a constitutional perspective before their deposition can be played for the jury. Id. To use a deposition in lieu of live testimony, without the requisite showing of unavailability, is a violation of the defendant's constitutional rights. Id. at 633. To be constitutionally unavailable, the state must show that it made a good-faith effort to obtain the witness's presence at trial. Id. at 640. If the location of the witness is known to the state and if the state has a mechanism to secure the witness's attendance, the witness is not unavailable. Id. at 641.

{¶126} In the instant matter, the state filed a notice of deposition pursuant to Crim.R. 15 and a motion requesting permission to take a deposition of Jeremy Hathy, in

which it alleged that Mr. Hathy was moving out of state. There was no affidavit or evidence supporting the state's assertion attached to the state's motion. The trial court granted the state's motion without giving appellant an opportunity to respond. This writer believes that the trial court simply took the assertions of the prosecutor as sworn evidence in granting the motion. Mr. Hathy's deposition was taken, and appellant objected based on the fact that there was no evidence that Mr. Hathy would be unable to testify in person at the trial.

{¶127} I believe the use of Mr. Hathy's videotaped deposition affronted the Constitution, as there was no showing by the state that it made any effort to locate Mr. Hathy prior to trial and that he was in fact unavailable. The record establishes that the state simply introduced the deposition, over appellant's objection, and played it for the jury. Based on *Brumley*, supra, the use of the deposition in lieu of live testimony, without the requisite showing of unavailability, violated appellant's constitutional rights.

{¶128} I believe the trial court's judgment should be reversed and remanded.

{¶129} For the foregoing reasons, I dissent.