

NO. 12-1861

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**IN THE SUPREME COURT OF OHIO**

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APPEAL FROM  
THE OHIO COURT OF APPEALS  
FOR CUYAHOGA COUNTY, OHIO  
NO. 97697

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STATE OF OHIO,

Plaintiff-Appellant

vs.

TIMOTHY TATE,

Defendant-Appellee

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**MERIT BRIEF OF APPELLEE**

Counsel for Defendant-Appellee

**CHRISTOPHER R. FORTUNATO**

Reg. No. 0038599

13363 Madison Avenue

Lakewood, Ohio 44107

216-228-1166

[learnedhand@live.com](mailto:learnedhand@live.com)

Counsel for Plaintiff- Appellant

**TIMOTHY J. MCGINTY**

Cuyahoga County Prosecutor

**KRISTEN L. SOBIESKI (0071523)**

Assistant Prosecuting Attorney

The Justice Center

1200 Ontario Street

Cleveland, Ohio 44113  
216-443-7800

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## STATEMENT OF THE CASE

On or about August 11, 2011, the Appellee was indicted with one count of domestic violence, in violation of R.C. 2919.25 (A). (D. 1.) The indictment included language alleging the Appellee had been convicted in two previous domestic violence cases. The allegations of prior convictions, if proven, would make the crime punishable as a third degree felony.

On August 18, 2011, the Appellee demanded discovery from the Appellant. (D. 5.) The Appellee also moved to reduce his bond on August 24, 2011. (D. 6.) On August 29, 2011, the Appellant sought discovery from the Appellee. (D. 9.) The same day, the Appellant answered Appellant's demand for discovery. (D. 9.) The Appellant supplemented its initial discovery response on September 29, 2011 and October 11, 2011. (D. 11, 12.)

Trial commenced on October 14, 2011. (D. 14.) On October 17, 2011, the jury returned a verdict against the Appellee of guilty to domestic violence as a third degree felony. (D. 19.) On November 22, 2011, the trial court sentenced the Appellee to two years imprisonment. (D. 22.)

On December 13, 2011, the Appellee filed his timely notice of appeal from the judgment and conviction of November 22, 2011 to the Court of Appeals for Cuyahoga County. On September 20, 2012, the Court of Appeals reversed the conviction at 2012-Ohio-4276. On November 5, 2012, the Appellee filed its timely notice of appeal seeking review from this decision. This Court granted jurisdiction on February 20, 2013.

## STATEMENT OF FACTS

The Appellee was arrested on July 18, 2011 and charged with a misdemeanor count of domestic violence, in violation of R.C. 2919.25. Upon discovering the Appellee may have committed domestic violence previously, detectives for the City of Cleveland sought to charge the Appellee with a felony. (Tr. 195-196.)

Trial was set to commence on October 14, 2011. (D. 10.) At that time, the Appellant's main witness and victim, Yesolde Collins, refused to show up for trial. At that time, Appellee's counsel did not move the Court to dismiss the matter once the victim was brought in on a warrant. (Tr. 72-79.) During this hearing, Appellee's trial counsel never asked questions of the victim on her statement that she did not appear pursuant to the subpoena after the victim stated her lack of attendance was due to "listening to friends and family members" and now had a "clear understanding" why she had to be in court. (Tr. 76.) Counsel also did not go into any of these issues once the victim testified at Tr. 183-194.

The Appellant's agents were forced to go out and arrest the victim in order for her to testify against the Appellee. (Tr. 4-5; 180-182.)

Prior to when evidence was taken, Appellant's trial counsel stipulated to the authenticity of certified entries of Appellant's two misdemeanor convictions for domestic violence.

THE COURT: So, there's a stipulation that needs to be dealt with.

MR. KLOPP: Two prior convictions.

MS. TURNER-McCALL: Your honor, I have a certified copy from Franklin County Municipal Court of the defendant's two prior first degree misdemeanor domestic violence convictions, and there's a stipulation.

THE COURT: *You stipulate to the authenticity?*

MR. KLOPP: Yes, sir.

THE COURT: Okay. That will be noted.

(Tr. 5.) Emphasis added.)

Later, Appellee's counsel argued at the close of evidence that the Appellant did not prove the elements that enhanced the offense from a first degree misdemeanor to a third degree felony. He sought to throw out the specifications in the indictment that raise the charge to a third degree felony when he moved for a partial judgment of acquittal under Crim. R. 29. (Tr. 199-201.) From the transcript Appellee's counsel stipulated to authenticity of the certified entries. Appellant did not place further evidence in the record that established Appellee was the same person who had committed those two convictions.

However, the trial court overruled the motion. (Tr. 200.)

## LAW AND ARGUMENT

Stipulations to authenticity of journal entries do not prove identity of a defendant.

On November 1, 2012, just a few weeks after the Court of Appeals rendered judgment for this case, this Court answered the same or similar question in *State v. Gwen*, 2012- Ohio- 5046.

*Gwen, supra*, held

“while R.C. 2945.75(B) (1) *permits* the state to prove a prior conviction by submitting a judgment entry of the conviction, the statute does not restrict the manner to proof to that method alone. \*\*\*[W]hen the state *chooses* to prove a prior conviction by using a judgment entry, that entry must comply with Crim. R. 32(C).

Crim. R. 32 (C) provides, in pertinent part:

A judgment of conviction shall set forth the plea, the verdict, or findings upon which each conviction is based, and the sentence.

The Appellant used certified entries to prove the Appellee’s prior convictions.

R.C. 2945.75 (B) (1) also provides:

[w]henever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction *together with evidence sufficient to identify the defendant* named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction.

(Emphasis added.)

*Gwen, supra*, only discusses the method of how a certified copy of a conviction is used in a case where an enhanced provision is an element of the crime and must be proved beyond a reasonable doubt. Cf. *State v. Allen* (1987), 29 Ohio St.3d 53. It remains to be seen how the Appellant provided “evidence sufficient to identify the

defendant named in the entry as the offender at the case at bar.” Appellee’s counsel stipulated to the authenticity of the document, but not that the person named in the document was the defendant at bar. The Court of Appeals correctly held that the certified copy alone would be insufficient proof without entering evidence that the person at the bar was also the same person who was the subject of the entry. *State v. Macalla*, 2008-Ohio-569. The Court of Appeals held the certified entries showed little more than the “convictions displayed the name of Timothy Tate \*\*\*\*,” that the stipulations was to authenticity not to identity. *State v. Tate*, 2012-Ohio-4276, p. 14. The Court of Appeals took pains to mention that the trial court specifically asked about authenticity when it asked about stipulations. The Appellant simply relied on the stipulation to encompass identity as well when that was not what was stated on the record.

The Appellant’s explanation of how this entry was connected to the Appellant was by having a Cleveland police detective, who could not testify to the authenticity of a Franklin County document for lack of personal knowledge, recount how he found the entry. His testimony is incompetent to demonstrate identity because the Cleveland detective does not have personal knowledge about journal entries in another municipal court. (Tr. 200-201.) The Appellant’s detective, who was not someone connected with the journal entry—either a court clerk or a peace officer connected with the misdemeanor conviction—could not testify that the certified entry referred to the Appellant.

The Appellant is trying to conflate Appellee’s stipulation to authenticity to a total stipulation where the Appellee would concede he was the Tate in the Franklin County journal entries. The trial court judge point-blank asked trial counsel that there was a

stipulation only to authenticity. The Appellant failed to place evidence into the record that proved the enhancements.

A stipulation is defined as a “voluntary agreement between opposing counsel concerning disposition of some relevant point so as to obviate need for proof or to narrow range of litigable issues.” *Burdge v. Board of County Commrs.* (1982), 7 Ohio App.3d 356, 358 quoting Black’s Law Dictionary (5<sup>th</sup> Ed. 1979.) *Burdge, supra*, also stood for the premise that a stipulation could not be used against a party that did not agree to it. *Id.* Syllabus 2.

Had the Appellant been forced to enter evidence of prior convictions, without the Appellee’s stipulation, the State would have had to bring a deputy clerk with knowledge of its court’s files to testify the entry was a memorialization of the conviction and sentence connected with the defendant as Crim. R. 32 (C) directs. Along with that entry, the State would have to call a corresponding law enforcement officer, who would produce a photograph and fingerprints that were taken when a defendant was booked for the crime he was originally charged. This the Appellant did not do. It relied on the Appellee’s stipulation solely to authenticity to prove identity.

The Appellant cannot deny that the trial court, as well as Appellee’s trial counsel, limited the stipulation of the journal entries to authenticity. In so doing, Appellant concludes that there was no need to stipulate to the entry because it was self-authenticating under Evid. R. 902(4). If that was so, then why did the Appellant ask the Appellee to stipulate to the certified journal entry? However, the Appellant cannot infer that Appellee’s stipulation on the record “constituted his acknowledgment that those prior convictions were his own.” Brief of Appellant, 9. The Appellant cannot change the

character of the stipulation especially when the trial court limited its character on the record. The Appellant cannot cause the Appellee to be bound by stipulation he did not make. *Burdge, supra*.

Appellant's reliance on various stipulation cases from several Courts of Appeal do not apply directly to Appellee. Specifically, the Appellant's reliance on *State v. Large*, 2007-Ohio-4685 concerned a stipulation to a previous OVI conviction. However, the case was a subsequent misdemeanor OVI prosecution where a prior conviction is not required as an element of the case, but is generally used to enhance sentencing. In addition, the colloquy between court and counsel did not limit the scope of the stipulation to authenticity.

The self authenticated documents here do not connote identity of a criminal defendant.

Appellant goes to the length of its argument to say that authentication of the entries was not even required, and as a result, the stipulation was meant to be to identity since stipulating to authenticity would be superfluous. If that was so, then why did Appellant enter into a stipulation? The issue of self authentication does not infer that the Appellee's stipulation constitutes identity that the convictions in the entries were the Appellant's. This is especially so when the trial court limited the stipulated issue to authenticity.

The Appellee did not invite error. The Appellant did and is trying to correct it.

The Appellee and the trial court were very distinct when the stipulation to the certified entries was made for authenticity. At the time, the Appellant did not reject the stipulation and demand the stipulation of the entries would also pertain to identity.

Therefore, the only invited error is Appellant who was not careful at this juncture Appellant's reliance on *State v. Misconin*, 2010-Ohio-4475 which bases its holdings on cases where blanket stipulations were made on the record and agreed to by a criminal defendant, do not apply here. Again, the stipulation in the instant case was limited, so the cases relied on by the Appellant cannot be used here. In this instance, the Appellant is in the place of parties such as *Misconin, supra*. Similarly, the Appellant's reliance on *State v. Kneip* (1993), 87 Ohio App.3d 681 is misplaced because the error committed in the instant case was by the Appellant-State and not the Appellee.

The Appellant never proved the identity of the Appellee beyond a reasonable doubt.

The Court of Appeals properly found that no identity was placed into evidence that would prove the prior convictions. The Appellee replies *seriatim* to Appellant's contention there was evidence of identity.

1. Requesting a jury instruction limiting a jury's use of prior convictions is not evidence of identity, but merely a trial tactic knowing the case is going to a jury to instruct them on how such a prior conviction is used. It does not force a jury to find that an entry proves the identity of the Appellee.

2. *Voir dire* questioning is not evidence.

3. The victim's testimony concerned the instant case.

4. The victim identified the Appellee in court as and for the instant case now on appeal, not any prior convictions.

5. The victim may have testified about present and past living arrangements, but it still does not prove identity about prior cases.

6. There was no doubt that the judgment entries came from the Franklin County Municipal Court (which has jurisdiction over Columbus, but is not called the Columbus Municipal Court) but that does not establish that the Appellee was the same man in those entries notwithstanding he may or may not have lived in Columbus.

7. The detective may have testified that he believed that the Appellee had previous convictions. However, it was still the State's duty to prove such convictions by a reasonable doubt by bringing in evidence tying the Appellee's identity to the journal entries.

8. The state cannot use the identifying characteristics of Defendant's information in the current case to establish he was the same Defendant in the previous case. Even if it had, the Appellant did not seek to do that and offered NO evidence of that nature to connect the Appellee to the Franklin County cases.

Public policy supports that a Defendant should go free or have his conviction adjusted according to law when the prosecutor does not make its case beyond a reasonable doubt.

As the Court of Appeals held below, to ignore the error about a lack of evidence as to identity would be a "miscarriage of justice." *Tate, supra*, para. 36.

It is the role of a prosecutor to seek justice, not merely to convict. ABA Criminal Justice Standards Sec. 3-1.2 (c).

([http://www.americanbar.org/publications/criminal\\_justice\\_section\\_archive/crimjust\\_standards\\_pfunc\\_blkold.html](http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_pfunc_blkold.html).) Appealing this matter will most likely run out the clock to the point that the Appellee would have served his sentence before judgment is rendered herein.

This Court's affirmance of this case will not provide a chilling effect on prosecutor's acceptance of stipulations.<sup>1</sup> No matter how this case resolves, prosecutors will continue aggressively seeking convictions against domestic violence defendants. It is doubtful, that prosecutors will give up their pursuit of justice in such cases because of this case. Notwithstanding Appellant's reliance on generalities such as "domestic violence defendants are frequently repeat offenders", Appellant's brief, at 11, the sounder approach, which public policy would approve would be to affirm the judgment of the Court of Appeals, and recognize that the State did not prove its case with respect to the enhancing the crime from a misdemeanor to a felony.

#### CONCLUSION

The Appellee respectfully requests that this Court affirm the judgment of the Court of Appeals for Cuyahoga County and remand the matter to the Court of Common Pleas consistent with the Court of Appeal's mandate.

Respectfully submitted,

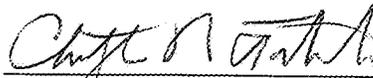
  
CHRISTOPHER R. FORTUNATO  
Reg. No. 0038599  
Attorney for Appellant  
13363 Madison Avenue  
Lakewood OH 44107  
216-228-1166

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<sup>1</sup> Actually, the offer of such stipulations is usually requested by the prosecutor in order to avoid having to call additional witnesses at trial. Generally, the defense does not offer to stipulate to prosecutor's evidence. It is not the province of defense counsel who is not obligated to make the State's case. Hence, Appellant's couching such a stipulation, in this case or generally, as an offer by the defense counsel mischaracterizes the usual procedure.

SERVICE

A copy of the foregoing brief of Appellant was sent by ordinary U.S. mail to Kristen Sobieski, assistant prosecuting attorney, 1200 Ontario Street, Cleveland, OH 44113 this 24 day of June 2013.

  
CHRISTOPHER R. FORTUNATO  
Attorney for Appellant

## APPENDIX

### **Standard 3-1.2 The Function of the Prosecutor**

- (a) The office of prosecutor is charged with responsibility for prosecutions in its jurisdiction.
- (b) The prosecutor is an administrator of justice, an advocate, and an officer of the court; the prosecutor must exercise sound discretion in the performance of his or her functions.
- (c) The duty of the prosecutor is to seek justice, not merely to convict.
- (d) It is an important function of the prosecutor to seek to reform and improve the administration of criminal justice. When inadequacies or injustices in the substantive or procedural law come to the prosecutor's attention, he or she should stimulate efforts for remedial action.
- (e) It is the duty of the prosecutor to know and be guided by the standards of professional conduct as defined by applicable professional traditions, ethical codes, and law in the prosecutor's jurisdiction. The prosecutor should make use of the guidance afforded by an advisory council of the kind described in standard 4-1.5.