

Douglas Griffith appeals his conviction for Domestic Battery,¹ a class D felony, and Battery,² a class A misdemeanor. He presents the following consolidated and restated issues for review:

1. Did the trial court properly deny Griffith's motion for discharge?
2. Is I.C. § 35-42-2-1.3 unconstitutionally vague as applied to Griffith?
3. Did the State present sufficient evidence to support his conviction for domestic battery?

We affirm.

The facts favorable to the convictions are that prior to February 5, 2009, Griffith and Lynn Ackerman had dated on and off for about a year and a half. During the last four months of this relationship, Griffith lived with Ackerman and her teenage daughter ("Daughter"). He first moved into her trailer home with them and then into a home purchased by Ackerman. The couple shared a bedroom and had an intimate sexual relationship. Although Ackerman paid the bills associated with the home, Griffith helped maintain the home and performed renovations on it.

On the evening of February 5, 2009, Griffith came home intoxicated. When he spoke in a rough manner to Ackerman's grandmother, Ackerman took him into the bedroom in an attempt to "lighten his mood". *Transcript* at 36. She asked him why he had not given her a kiss when he came home. Griffith shoved her against the wall, gave her a kiss, and said, "So, is this what you want?" *Id.* at 37. When she did not respond, he pushed her aside and repeatedly said, "You're the Devil." *Id.* He then picked her up and threw her onto the bed

¹ Ind. Code Ann. § 35-42-2-1.3 (West, Westlaw through 2010 2nd Regular Sess.).

head first. Ackerman began crying, and Daughter came running into the room. Daughter helped her mother out of the room and then called the police.

Griffith began running around the residence and taking items out to his van, all while repeatedly asking if Daughter had really called the police. When Daughter responded affirmatively, Griffith “got really angry, and he went after [Daughter], and head butted her three times. And the third time she went down on the ground.” *Id.* at 45. Ackerman immediately stepped in and grabbed Griffith’s hand to get him away from Daughter. She helped Daughter up and noticed a “huge goose egg” on Daughter’s head. *Id.* Ackerman quickly got an icepack for Daughter and directed her to another room. Ackerman then ran over and punched Griffith in the head as he knelt to collect his things. She exclaimed, “How dare you hit my child?” *Id.* at 46. Griffith stood up and responded, “Oh, so that’s the way you want to play, huh?” *Id.* He proceeded to punch Ackerman in the face, knocking her to the ground and causing her to bleed. As Ackerman tried to shield herself from further attack, Griffith slammed her against a wooden post and then threw her into a glass shelving unit. Finally, Griffith picked up a chair with which to hit Ackerman, who was curled up on the floor, but stopped at the urging of Ackerman’s grandmother. He then threw the chair to the side and left. The police arrived shortly thereafter.

On February 13, 2009, the State charged Griffith with two counts of domestic battery (one as a D felony and one as an A misdemeanor) and three counts of battery (one D felony and two A misdemeanors). The alleged victims were Ackerman and Daughter. On August 6, 2009, Griffith requested a speedy trial, and the trial court scheduled the jury trial for October

² I.C. § 35-42-2-1 (West, Westlaw through 2010 2nd Regular Sess.).

1. On that date, the court continued the trial due to congestion of the court's calendar. On October 8, the rescheduled trial date, the matter was once again continued due to court congestion. With no apparent objection from Griffith, the trial was reset in open court for December 3. On October 20, after the speedy trial deadline, Griffith, who was represented by counsel, filed a pro se motion to dismiss, which was summarily denied by the trial court. Thereafter, on December 3, Griffith, by counsel, filed a motion to discharge and dismiss. When that motion was denied by the trial court, Griffith sought a continuance of the trial. Griffith's jury trial was ultimately held on February 11, 2010. The jury found him guilty as charged, and the trial court entered convictions on the class D felony domestic battery count (as related to Ackerman) and a class A misdemeanor battery (as related to Daughter). Griffith now appeals.

1.

Griffith contends his convictions violated his right to a speedy trial because he was not tried by a jury within seventy days of his request for a speedy trial pursuant to Ind. Crim. Rule 4(B).³ Griffith acknowledges that the original trial date, which was within the seventy-

³ Crim. R. 4(B)(1) provides in pertinent part:

If any defendant held in jail on an indictment or an affidavit shall move for an early trial, he shall be discharged if not brought to trial within seventy (70) calendar days from the date of such motion, except ... where there was not sufficient time to try him during such seventy (70) calendar days because of the congestion of the court calendar.... [A] trial court may take note of congestion or an emergency without the necessity of a motion, and upon so finding may order a continuance. Any continuance granted due to a congested calendar or emergency shall be reduced to an order, which order shall also set the case for trial within a reasonable time.

day period, was rescheduled twice by the court “due to the court’s calendar.” *Appellant’s Brief* at 11. Without citing any *evidence* in the record, Griffith baldly asserts that the trial court had ample opportunity to conduct a timely trial because “[o]ther defendants who had served much less time in custody than Griffith had juries hear their cases between October 15, 2009 to November 19, 2009.” *Id.*

We initially observe that Griffith appears to have waived this claim. It is well-settled that a defendant must maintain a position reasonably consistent with his request for a speedy trial and must object, at his earliest opportunity, to a trial setting that is beyond the seventy-day time period. *Wilkins v. State*, 901 N.E.2d 535 (Ind. Ct. App. 2009), *trans. denied*. “If an objection is not timely made, the defendant has abandoned his request for an early trial.” *Id.* at 537.

In the instant case, the record reflects that on the morning of Griffith’s scheduled trial on October 8 (a trial date set within the seventy-day period) the trial court continued the matter due to court congestion and rescheduled the trial for December 3. Griffith, who was present in court and represented by counsel, did not object to the setting of this date outside the seventy-day period. Therefore, he cannot be heard to complain. *See Wilkins v. State*, 901 N.E.2d 535.

Waiver notwithstanding, Griffith’s appeal fails because he has not demonstrated that the trial court erred in delaying his trial due to court congestion.

A trial court’s finding of congestion is presumed valid. A defendant challenging that finding must demonstrate that, at the time it was made, the finding was factually or legally inaccurate. The trial court’s explanations are accorded reasonable deference, and this court will not grant relief unless a defendant establishes that the finding of congestion was clearly erroneous.

The reasonableness of the trial court's finding of congestion is judged within the context of the particular circumstances of the case.

Id. at 537 (internal citations omitted). Griffith has wholly failed to make the required showing. *See Bridwell v. State*, 659 N.E.2d 552, 554 (Ind. 1995) (“a defendant must present evidence, either at the time of the motion for discharge or upon a motion to correct error, demonstrating that the finding of ‘congestion’ is clearly erroneous”).

2.

Relying exclusively upon *Vaughn v. State*, 782 N.E.2d 417 (Ind. Ct. App. 2003), *trans. denied*, Griffith asserts that the domestic battery statute is unconstitutionally vague.

“Generally, a challenge to the constitutionality of a criminal statute must be raised by a motion to dismiss prior to trial, and the failure to do so waives the issue on appeal.” *Adams v. State*, 804 N.E.2d 1169, 1172 (Ind. Ct. App. 2004). As Griffith failed to file a motion to dismiss or otherwise challenge the constitutionality of the statute at trial, he may not raise this issue for the first time on appeal. *See Adams v. State*, 804 N.E.2d 1169.

Waiver notwithstanding, we will briefly address the issue. On review, we begin with the presumption of the constitutionality of the statute, and the challenger bears the burden of rebutting this presumption. *Wells v. State*, 848 N.E.2d 1133 (Ind. Ct. App. 2006), *reh'g granted on other grounds*, 853 N.E.2d 143, *trans. denied*. A statute will not be determined to be unconstitutionally vague if persons of ordinary intelligence would comprehend it adequately to be informed of the proscribed conduct. *Id.* A criminal statute need only inform the public of the generally proscribed conduct, and need not list with exactitude each item of conduct prohibited. *Id.* “Finally, vagueness challenges to statutes that do not involve

First Amendment freedoms must be examined in light of the particular facts of the case at hand.” *Id.* at 1146.

In this case, Griffith was convicted of domestic battery based upon the provision within I.C. § 35-42-2-1.3(a) applicable to a person who “is or was living as if a spouse of the other person”. In *Vaughn*, another panel of this court found this provision in the statute unconstitutionally vague as applied when the only evidence of a domestic relationship between the defendant and his victim was that the two, at some point in the past but not at the time of the battery, had lived together and had an intimate sexual relationship.⁴ Contrary to Griffith’s unsupported assertion on appeal, the evidence is quite different here.

The evidence most favorable to the conviction reveals that Griffith and his victim had dated on and off for one and one-half years and, unlike in *Vaughn*, at the time of the battery, they were living together, sharing the same bedroom, and involved in an intimate sexual relationship. Leading up to the battery, they had cohabitated, along with Ackerman’s teenage daughter, for four months in two different residences. Although Ackerman owned the home in which they were living and paid the bills, the couple maintained the home together and Griffith was actively remodeling it. Under the circumstances in this case, the “living as if a spouse of the other person” provision within the domestic battery statute was clearly

⁴ As an apparent response to *Vaughn*, our legislature amended I.C. § 35-42-2-1.3 to include factors to be reviewed when determining if a person is or was living as if a spouse: “(1) the duration of the relationship; (2) the frequency of contact; (3) the financial interdependence; (4) whether the two (2) individuals are raising children together; (5) whether the two (2) individuals have engaged in tasks directed toward maintaining a common household; and (6) other factors the court considers relevant.” I.C. § 35-42-2-1.3(c). In *Williams v. State*, 798 N.E.2d 457, 461 (Ind. Ct. App. 2003), we clarified that this list does not “serve as a litmus test[,] nor do we believe that the list of factors need even be consulted if the character of the relationship is clearly ‘domestic.’” We went on to state, “when the character of the relationship clearly warrants application of the

susceptible of meaning so as to place a person of ordinary intelligence on notice that Griffith's conduct violated the domestic battery statute.

3.

In a related argument, Griffith contends that the State presented insufficient evidence to support his conviction for domestic battery. He first contends that the State failed to establish the "living as if a spouse" element. Further, Griffith argues that the State failed to adequately rebut his claim of self-defense. We will address each in turn.

When considering a challenge to the sufficiency of evidence to support a conviction, we respect the fact-finder's exclusive province to weigh the evidence and therefore neither reweigh the evidence nor judge witness credibility. *McHenry v. State*, 820 N.E.2d 124 (Ind. 2005). We consider only the probative evidence and reasonable inferences supporting the conviction, and "must affirm 'if the probative evidence and reasonable inferences drawn from the evidence could have allowed a reasonable trier of fact to find the defendant guilty beyond a reasonable doubt.'" *Id.* at 126 (quoting *Tobar v. State*, 740 N.E.2d 109, 111-12 (Ind. 2000)). This standard applies with equal force to a claim that the State failed to sufficiently rebut a claim of self-defense. *Kimbrough v. State*, 911 N.E.2d 621, 635 (Ind. Ct. App. 2009) ("this Court will reverse only if no reasonable person could say that self-defense was negated by the State beyond a reasonable doubt").

With respect to the "living as if a spouse" element, Griffith asserts that the only evidence offered by the State was Griffith and Ackerman's cohabitation and sexual

domestic battery statute, i.e., the couple is cohabitating and engaged in an ongoing romantic relationship, a court would not need to undertake further analysis." *Id.*

relationship. As set forth above, this was not the only evidence presented by the State. Moreover, evidence that a couple is cohabitating and engaged in an ongoing romantic relationship is sufficient to establish this element. *See Williams v. State*, 798 N.E.2d at 461 (the character of the relationship “clearly warrants application of the domestic battery statute” when “the couple is cohabitating and engaged in an ongoing romantic relationship”). The State presented sufficient evidence on this element.

Turning to Griffith’s self-defense claim, Ind. Code Ann. § 35-41-3-2(a) (West, Westlaw through 2010 2nd Regular Sess.) provides that a person is justified in using reasonable force against another person to protect the person from what he reasonably believes to be the imminent use of unlawful force. The defendant is not justified in using force, however, if the defendant provokes, instigates, or participates willingly in the violence. *See Kimbrough v. State*, 911 N.E.2d 621. *See also* I.C. § 35-41-3-2(e).

We reject Griffith’s invitation to reweigh the evidence, which when considered in the light most favorable to the conviction clearly reveals that he provoked Ackerman and was the initial aggressor on the night in question. An intoxicated Griffith began his violence by shoving Ackerman up against a wall, calling her the devil, and then picking her up and throwing her onto their bed head first. Shortly thereafter, Griffith turned his anger toward Daughter, who had come to her mother’s aid and had called the police. “He got really angry, and he went after [Ackerman’s] daughter, and head butted her three times. And the third time she went down on the ground.” *Transcript* at 45. Ackerman immediately stepped in to get him away from Daughter. After observing a “huge goose egg” on Daughter’s head and briefly tending to the injury, Ackerman ran over and punched Griffith in the head as he knelt

to collect his things. *Id.* Griffith stood up and exclaimed, “Oh, so that’s the way you want to play, huh?” *Id.* at 46. He proceeded to punch Ackerman in the face, knocking her to the floor and causing her to bleed. As Ackerman tried to shield herself from further attack, Griffith slammed her against a wooden post and threw her into a glass shelving unit. The jury was provided with ample evidence establishing that Griffith was not acting in self-defense when he battered Ackerman.

Judgment affirmed.

BARNES, J., and CRONE, J., concur.