[Cite as *State v. Dawson*, 2018-Ohio-340.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 17 MA 0007
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
DOUGLAS DAWSON	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the County Court Area Number 5 of Mahoning County, Ohio Case No. 15 CRB 0001
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellee:	Atty. Paul J. Gains Mahoning County Prosecutor Atty. Ralph M. Rivera Assistant Prosecuting Attorney 21 West Boardman Street, 6th Floor Youngstown, Ohio 44503
For Defendant-Appellant:	Atty. Edward A. Czopur DeGenova & Yarwood, Ltd. 42 North Phelps Street Youngstown, Ohio 44503
JUDGES:	
Hon. Cheryl L. Waite Hon. Mary DeGenaro Hon. Carol Ann Robb	
	Dated: January 24, 2018

[Cite as *State v. Dawson*, 2018-Ohio-340.]
WAITE, J.

{¶1} Appellant Douglas Dawson appeals an October 16, 2015 Mahoning County Court No. 5 judgment entry convicting him of violating a protection order. Appellant argues that his conviction is not supported by sufficient evidence and is against the manifest weight of the evidence. He additionally argues that the trial court improperly joined at trial his 2014 charge for domestic violence with his 2015 charge for violation of a consent order, and that his trial counsel was ineffective for failing to object to this joinder. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} This appeal stems from an incident that occurred on November 27, 2014. Appellant and his three sons drove home from Thanksgiving dinner in Pennsylvania in one car and Appellant's ex-wife, the victim in this matter, drove home with their daughter in a separate car. When the victim arrived home, she found Appellant and their oldest son, aged nineteen, arguing. The son asked the victim if he could take the car and Appellant indicated that he had already told him no. However, their son took the keys out of the victim's car and left.

{¶3} After noticing that their son had left, Appellant then began arguing with the victim, who told him that she had not given their son the keys. Appellant ordered her to remove their son from their cellphone plan immediately and the victim refused. Appellant threatened to call the police and have their son arrested for stealing the car if the victim did not remove him from the plan. When Appellant picked up his phone to call the police, the victim knocked the phone out of his hands. After scrambling for

the phone, Appellant picked up the victim by the throat and slammed her on the bed, restraining her by keeping his arm around her throat in a "choke hold."

{¶4} The two younger sons heard the fighting and came into the room. The boys attempted to pull Appellant off of the victim. At some point, the boys had trouble freeing the victim and punched their father in the face several times, eventually freeing the victim. Their daughter called the police. When the police arrived, Appellant was uncooperative and initially refused to allow the children to speak to the officers. The boys willingly spoke to the officers with the victim's permission. The officers arrested Appellant upstairs. When bringing him down the stairs, he began loudly to resist their efforts. At the bottom of the stairs, Appellant knocked one of the officers into a china cabinet and continued to resist the officers' attempts at arrest. One of the officers eventually tased Appellant, causing him to fall to the ground. These facts resulted in the first set of charges: one count of domestic violence, a misdemeanor of the first degree in violation of R.C. 2919.25(A), one count of resisting arrest, a misdemeanor of the second degree in violation of R.C. 2921.33, and one count of obstructing official business, a misdemeanor of the second degree. The obstruction charge was later dismissed. These charges resulted in Case No. 2014 CRB 425.

{¶5} During their divorce proceedings, it appears that Appellant and his ex-wife entered into a consent protection order due to this altercation. Relevant to this appeal, Appellant was ordered to stay 500 feet away from the victim and their oldest son, with the exception that Appellant was permitted to attend school activities.

Appellant was prohibited from contacting the victim except for text messages related to issues involving the children. Appellant was permitted limited and temporary visitation only "on days and times to be arranged by parties." (12/30/14 Consent Order, p. 4.)

{¶6} On December 31, 2014, the day after the consent order was signed, Appellant texted the victim and asked what time he could pick up the children for New Year's Day. He also asked her if he could pick up some of his clothing. The victim responded that the children were not ready to see him and that he should wait until they were ready. Appellant continued to text the victim and she eventually blocked his phone number. Despite her refusal to arrange visitation, Appellant arrived at the victim's house to pick up the children the next day. The victim saw his truck in the driveway and called the police. Officers arrested him and Appellant was charged with violating a protection or consent order, a misdemeanor of the first degree in violation of R.C. 2919.27. This charge was filed under Case No. 2015 CRB 00001.

{¶7} At some point, cases 2014 CRB 425 and 2015 CRB 00001 were joined and Appellant faced one jury trial. The jury acquitted Appellant of the domestic violence and resisting arrest charges. However, the jury found him guilty of violating the consent order. The trial court sentenced Appellant to 180 days in jail with 150 days suspended. Three days of the jail sentence were to be served at the Mahoning County Justice Center and the remaining twenty-seven days were to consist of electronically monitored house arrest. Appellant was also placed on twelve months of probation. The trial court fined him $500 in addition to court costs. Appellant's

initial appeal was dismissed for failure to prosecute, however, we granted Appellant's subsequent motion for a delayed appeal. On February 14, 2017, the trial court granted Appellant's motion to stay his sentence pending this appeal.

ASSIGNMENT OF ERROR NO. 1

APPELLANT'S CONVICTION WAS BASED ON INSUFFICIENT EVIDENCE AS THERE WAS NO EVIDENCE THAT HE ACTED RECKLESSLY THEREBY DEPRIVING HIM OF DUE PROCESS.

{¶8} Appellant argues that he acted in accordance with the consent order, thus he could not have acted recklessly. Appellant interpreted the order to give him permission to pick up his children at his ex-wife's house. He argues that since he was merely picking up his children, he did not violate the order.

{¶9} In response, the state asserts that the order prohibited Appellant from being within 500 feet of the victim. Appellant parked in the victim's driveway, 100 feet from the victim. While Appellant argues that he was permitted to pick up the children for visitation, the state points out that the victim told him he could not pick up the children on that date. As Appellant knew this and admittedly placed himself within 100 feet of the victim, the state argues that his actions showed recklessness.

{¶10} "Sufficiency of the evidence is a legal question dealing with adequacy." *State v. Pepin-McCaffrey*, 186 Ohio App.3d 548, 2010-Ohio-617, 929 N.E.2d 476, ¶ 49 (7th Dist.), citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.3d 541 (1997). "Sufficiency is a term of art meaning that legal standard which is applied to determine whether a case may go to the jury or whether evidence is legally sufficient

to support the jury verdict as a matter of law." *State v. Draper*, 7th Dist. No. 07 JE 45, 2009-Ohio-1023, ¶ 14, citing *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 148 (1955). When reviewing a conviction for sufficiency of the evidence, a reviewing court does not determine "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Rucci*, 7th Dist. No. 13 MA 34, 2015-Ohio-1882, ¶ 14, citing *State v. Merritt*, 7th Dist. No. 09-JE-26, 2011-Ohio-1468, ¶ 34.

{¶11} In reviewing a sufficiency of the evidence argument, the evidence and all rational inferences are evaluated in the light most favorable to the prosecution. *State v. Goff*, 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). A conviction cannot be reversed on the grounds of sufficiency unless the reviewing court determines that no rational juror could have found the elements of the offense proven beyond a reasonable doubt. *Id*.

{¶12} In relevant part, R.C. 2919.27(A) provides that: "No person shall recklessly violate the terms of any of the following: (1) A protection order issued or consent agreement approved pursuant to section 2919.26 or 3113.31 of the Revised Code." The crux of this appeal is whether Appellant acted recklessly in violating the terms of the consent order. According to R.C. 2901.22(C):

> A person acts recklessly when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that the person's conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to

> circumstances when, with heedless indifference to the consequences, the person disregards a substantial and unjustifiable risk that such circumstances are likely to exist.

{¶13} In support of his argument, Appellant cites to an Eighth District case where the defendant was convicted of violating a consent order that prohibited him from calling the victim. *Cleveland v. Rogers,* 8th Dist. No. 80430, 2002-Ohio-3547. The Eighth District reversed the conviction because the trial court found the defendant guilty based on the court's erroneous belief that R.C. 2919.27 is a strict liability offense. Although the appellate court reversed the conviction due to application of the incorrect standard, the court also reviewed the merits of the defendant's sufficiency of the evidence argument. The language of the protection order stated that "[a]ll issues regarding custody, visitation, and support [of the child] shall be addressed in Juvenile Court." *Id.* at ¶ 2. The court read this clause in conjunction with a juvenile court order granting the defendant supervised visitation with the child by agreement of the parties. *Id.* Based on the language of these orders, the court found that the defendant reasonably believed visitation issues were outside of the scope of the protection order and that he was permitted to contact the victim to arrange visitation. *Id.* at ¶ 22.

{¶14} *Rogers* is distinguishable from the instant matter, as it involves an order stating that visitation would be addressed by the juvenile court, not the domestic court where the consent order originated. In the instant case, there is no language giving another court jurisdiction over visitation nor is there a separate order that

addresses visitation. The consent order in this matter speaks directly to visitation and the consent order, here, is the sole authority on visitation.

{¶15} The state cites to a Fourth District case where the defendant was convicted after failing to leave a church parking lot once he determined that three women who had protective orders against him were present. *State v. Lemley,* 4th Dist. No. 03CA28, 2004-Ohio-5886. The Fourth District affirmed the conviction based on the defendant's admission that he knew he was in violation of the protection order. *Lemley* appears to also be distinguishable, as it presents a different fact pattern and lacks a detailed analysis.

{¶16} The state also cites to a Fifth District case where a defendant entered the victim's property and was convicted of violating a protection order. *State v. Zobel,* 5th Dist. No. 2016 AP 030019, 2016-Ohio-5751. Although the court failed to provide an analysis, it affirmed the conviction because evidence was presented that a protection order was in effect at the time, the defendant knew it was in effect, and he entered onto the property of the victim with this knowledge. *Id.* at ¶ 43. From the limited facts it appears that *Zobel* is also factually distinguishable from the instant case.

{¶17} A Second District case does appear to more closely align with the instant matter, however. *State v. Putman-Albright,* 2d Dist. Nos. 26679, 26685, 2016-Ohio-319. In *Putman-Albright,* a protective order prohibited the defendant from being within 500 feet of her ex-husband. The order also prohibited her from contacting the victim. However, the order permitted the parties to communicate

about parenting issues by phone, text, or email. On several occasions, the defendant went to the bus stop where her ex-husband waited with their son, and on at least one occasion demanded the child. The defendant also spoke to her ex-husband about matters that did not concern their child. The appellate court affirmed her conviction, because the appellant communicated with her ex-husband in a manner not expressly allowed by the order. *Id.* at ¶ 23.

{¶18} Here, the consent order permitted Appellant to contact the victim solely about issues concerning visitation. While Appellant did attempt to arrange visitation, he admittedly also contacted the victim about picking up his possessions, which is outside the scope of the consent order. Importantly, the order permitted Appellant limited and temporary visitation only "on days and times to be arranged by parties." (12/30/14 Consent Order, p. 4.) While Appellant did attempt to arrange visitation, he concedes that the victim denied his request to see the children. He also concedes that the victim did not respond to further texts and he never received permission to pick up the children.

{¶19} Notably, Appellant's texts were sent the day after the order was signed and he appeared at the victim's house the next day. The text messages were the first attempt by the parties to discuss visitation following entry of the consent order and occurred the day after the order itself was signed. It is clear that the victim informed Appellant that he could not pick up the children and asked him to wait until the children were ready to see him. Appellant admits that at no point did the victim inform Appellant that he could pick up the children. Appellant also admittedly

contacted the victim about picking up his possessions, which is not permitted by the consent order. Appellant clearly knew his actions were not permitted. As the order solely permitted visitation on days and times mutually arranged by the parties and the victim told Appellant he could not pick up the children that day, the state provided sufficient evidence that Appellant recklessly violated the consent order.

{¶20} Accordingly, Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AS NO JURY COULD HAVE FOUND THAT HE ACTED "RECKLESSLY" WITHIN THE MEANING OF THE STATUTE.

{¶21} Appellant argues that his actions were reasonable under the circumstances. First, he argues that he delivered a copy of the protection order to the police. Second, he claims that he abided by the terms of the order. Third, he contends that he was permitted to see the children on the day in question. And fourth, he states that he remained in his vehicle and did not approach the victim's door. As such, he asserts that the jury's verdict is against the manifest weight of the evidence.

{¶22} The state responds that the jury was presented with substantial evidence that Appellant went to the victim's house in violation of the order without the victim's agreement to the visitation.

{¶23} Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." (Emphasis deleted.) *Thompkins*, 78 Ohio St.3d at 387. It is not a question of mathematics but depends on the effect of the evidence in inducing belief. *Id*. Weight of the evidence involves the state's burden of persuasion. *Id*. at 390 (Cook, J. concurring). The appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of 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. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, citing *Thompkins* at 387. This discretionary power is to be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id*.

{¶24} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The trier of fact is in the best position to weigh the evidence and judge the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶25} The jurors are free to believe some, all, or none of each witness' testimony and they may separate the credible parts of the testimony from the incredible parts. *State v. Barnhart*, 7th Dist. No. 09 JE 15, 2010-Ohio-3282, ¶ 42,

citing *State v. Mastel*, 26 Ohio St.2d 170, 176, 270 20 N.E.2d 650 (1971). As such, when there are conflicting versions of events, neither of which is unbelievable, a reviewing court will not choose which one is more credible. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999).

{¶26} Appellant's argument that he delivered a copy of the protection order to the police is irrelevant. As to Appellant's claim on appeal that he had permission to pick up the children, he admitted at trial that the victim told him he could not visit the children on that date and did not respond to his further requests. While Appellant urges that he remained in his vehicle and did not approach the door, the state presented evidence that the driveway was roughly 100 feet from the door. According to the consent order, Appellant was not permitted to be within 500 feet of the victim. Thus, it is irrelevant whether Appellant remained in his vehicle. Based on this record, the jury's determination that Appellant recklessly violated the consent order is supported by competent and credible evidence.

{¶27} Accordingly, Appellant's second assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 3

THE TRIAL COURT ERRED BY TRYING THE TWO, SEPARATE CASES TOGETHER WITHOUT ORDER OR MOTION TO HAVE THE SAME JOINED AND TO THE PREJUDICE OF APPELLANT.

{¶28} The law favors joining multiple criminal offenses in a single trial. *State v. Franklin*, 62 Ohio St.3d 118, 122, 580 N.E.2d 1 (1991), citing *State v. Lott*, 51 Ohio

St.3d 160, 163, 555 N.E.2d 293 (1990). Pursuant to Crim.R. 13, "[t]he court may order two or more indictments or informations or both to be tried together, if the offenses or the defendants could have been joined in a single indictment or information." The test for joinder of offenses in a single indictment is found within Crim.R. 8(A). Pursuant to Crim.R. 8(A), joinder is permitted if the offenses are: (1) of the same or similar character; (2) based on the same act or transaction; (3) based on two or more acts or transactions connected together or constituting parts of a common scheme; or, (4) part of a course of criminal conduct.

{¶29} Appellant argues that the trial court erroneously joined the two cases without a motion by either party and without issuing an order. Appellant also argues that, even if joinder was proper, he suffered prejudice, because the domestic violence charge is equivalent to evidence of a prior bad act. Because the consent order was entered into by agreement, Appellant argues that the domestic violence charge would have been inadmissible in a trial solely pertaining to a violation of the order. Appellant also claims that the evidence presented at his trial was not simple and direct.

{¶30} The state responds by arguing that Appellant has not shown prejudice. The state argues that, regardless, the evidence in this case was simple and direct and that the offenses were part of a single course of criminal conduct.

{¶31} Because there was no objection made to joinder, Appellant concedes that he is limited to a plain error review. A three-part test is employed to determine whether plain error exists. *State v. Parker*, 7th Dist. No. 13 MA 161, 2015-Ohio-

4101, ¶ 12, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). "First, there must be an error, *i.e.* a deviation from a legal rule. Second, the error must be plain. To be 'plain' within the meaning of Crim.R. 52(B), an error must be an 'obvious' defect in the trial proceedings. Third, the error must have affected 'substantial rights.' " *Parker* at ¶ 12, citing *State v. Billman*, 7th Dist. Nos. 12 MO 3, 12 MO 5, 2013-Ohio-5774, ¶ 25.

{¶32} Preliminarily, Appellant has not made the court file from Case No. 2014 CRB 425 part of this appellate record. Thus, we cannot review his contention that the trial court did not issue a judgment entry ordering joinder. Although it is unclear from this record how and when the cases were joined, it appears clear that defense counsel knew the cases were joined, as counsel was prepared to defend at trial against the charges brought under both case numbers. Importantly, nothing in either Crim.R. 8(A) or Crim.R. 13 prohibit a trial court from ordering joinder without a motion from either party. There is also nothing within either rule that requires the court to issue a judgment entry ordering joinder. In fact, the rules afford the trial court great discretion in ordering joinder. Hence, the trial court did not err even if joinder was ordered without a motion by either party or in a judgment entry.

{¶33} Turning to the question of whether joinder was proper pursuant to Crim.R. 8(A), the offenses charged in Case No. 2014 CRB 425 were unquestionably a part of the same act or transaction, as they occurred on the same day and at approximately the same time and arose from Appellant's aggressive actions towards his ex-wife. Due to these actions, Appellant and his ex-wife agreed to enter into the

protection order. Case No. 2015 CRB 00001 arose due to Appellant's arrival at the victim's house in violation of this agreed protection order. This record reflects that all of the offenses, then, were rooted in the same act or transaction.

{¶34} A defendant may move to sever trial of joined offenses pursuant to Crim.R. 14 if he can establish prejudice. *Lott*, *supra*, at 163. The state may counter a claim of prejudice utilizing two methods. First, the state may demonstrate that the evidence presented at trial for each offense was simple and direct. *State v. Moore*, 2013-Ohio-1435, 990 N.E.2d 625, ¶ 23 (7th Dist.), citing *State v. Coley*, 93 Ohio St.3d 253, 259, 754 N.E.2d 1129 (2001). Failing that, the state must show that all of the evidence presented at trial would have been admissible in each trial if tried separately. *Id.* If the state can demonstrate that the evidence is simple and direct, then it is not required to prove the stricter admissibility test. *State v. Harris*, 7th Dist. No. 13 MA 37, 2015-Ohio-2686, ¶ 29, citing *State v. Johnson*, 88 Ohio St.3d 95, 109, 723 N.E.2d 1054 (2000). Evidence is simple and direct when it is apparent that the jury was not confused as to which evidence proved which act. *Harris* at ¶ 30, citing *Coley*, *supra*, at 259.

{¶35} The evidence presented at trial, here, was simple and direct. The domestic violence and resisting arrest charges involved testimony regarding Appellant's actions on November 27, 2014. Those actions included picking up the victim by the throat and placing her in a chokehold until her two sons were able to free her. The charge involving violation of a consent order included evidence that Appellant texted the victim multiple times to address not only visitation but issues

prohibited by the order and then arrived at her house to pick up the children without permission. As these actions are readily distinguishable, it is not likely the jury could be confused as to which evidence supported each charge.

{¶36} Importantly, Appellant was acquitted of the most serious charges, domestic violence and resisting arrest. Based on this acquittal, it is apparent that joinder was not prejudicial. As such, Appellant cannot show plain error and his third assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 4

> APPELLANT WAS DENIED EFFECTIVE REPRESENTATION OF COUNSEL AND, THEREFORE, A FAIR TRIAL AND DUE PROCESS AS THE RESULT OF TRIAL COUNSEL'S FAILURE TO OBJECT TO THE TWO TRIALS PROCEEDINGS AS ONE.

{¶37} Appellant contends that trial counsel's failure to object to joinder amounted to deficient performance. Appellant argues that he suffered prejudice, as the outcome of the case may have been different if the cases had not been joined.

{¶38} In response, the state argues that as joinder was not improper in this case, trial counsel could not have been ineffective for failing to object.

{¶39} To successfully raise a claim of ineffective assistance of counsel, an appellant must demonstrate that counsel's performance was deficient and must also show resulting prejudice. *State v. White*, 7th Dist. No. 13 JE 33, 2014-Ohio-4153, ¶ 18, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶ 107.

Deficient performance occurs when counsel's performance falls below an objective standard of reasonable representation. *State v. Ludt*, 7th Dist. No. 09 MA 107, 2009-Ohio-2214, ¶ 3, citing *Strickland*, *supra*. In other words, there must be "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Lyons v. Schandel*, 7th Dist. No. 14 CA 898, 2015-Ohio-3960, ¶ 13, citing *Strickland*, *supra*.

{¶40} As joinder was proper in this case, counsel cannot be deemed ineffective for failing to object. Even if joinder was not proper, Appellant cannot show prejudice. As previously discussed, Appellant was acquitted of the two serious offenses. There is nothing within the record to suggest that joinder contributed to Appellant's sole conviction on the charge of violating a consent order. As such, Appellant's fourth assignment of error is without merit and is overruled.

Conclusion

{¶41} Appellant argues that his conviction is not supported by sufficient evidence and is against the manifest weight of the evidence. The record provides sufficient, competent credible evidence to support Appellant's conviction. Appellant also argues that the trial court improperly joined his two cases for trial and that his counsel was ineffective for failing to object. However, the trial court's decision to join the cases was proper. Accordingly, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

DeGenaro, J., concurs.

Robb, P.J., concurs.