[Cite as *State v. Ryan*, 2009-Ohio-3235.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
		No. 08AP-481
Plaintiff-Appellee,	:	(C.P.C. No. 07CR-7931)
v.	:	No. 08AP-482
		(C.P.C. No. 08CR-1635)
Leslie D. Ryan,	:	
		(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 30, 2009

Ron O'Brien, Prosecuting Attorney, and *Sheryl L. Prichard*, for appellee.

Keith O'Korn, for appellant.

APPEALS from the Franklin County Court of Common Pleas.

BROWN, J.

{¶1} In these consolidated delayed appeals, defendant-appellant, Leslie D. Ryan, appeals from judgments of the Franklin County Court of Common Pleas following a jury trial in which the jury found appellant guilty of domestic violence and felonious assault. For the reasons that follow, we affirm appellant's convictions.

{¶2} On October 31, 2007, appellant was indicted in common pleas case No. 07CR-7931 on one count of domestic violence, in violation of R.C. 2919.25, a third-degree

felony.[1] On March 6, 2008, appellant was indicted in common pleas case No. 08CR-1635 on one count of felonious assault, in violation of R.C. 2903.11, a second-degree felony. The state subsequently filed a motion for joinder of the cases and, by entry filed March 18, 2008, the trial court granted the state's motion for joinder.

{¶3} At trial, the state presented evidence that, on October 18, 2007, at approximately 8:00 p.m., Blendon Township Police Officers Adam Dross and Branch Wayt were dispatched to 2625 Claridon Road following a report by appellant's wife, Amelia Ryan ("Ryan"), that appellant had threatened to kill her. Ryan resided at that address with her mother-in-law, Joyce Ryan. Ryan informed officers that appellant had left the scene. The officers subsequently prepared a warrant for his arrest.

{¶4} At approximately 10:00 p.m. that evening, officers received a call from a neighbor who resided at 2609 Claridon Road. The neighbor reported a domestic dispute involving appellant and Ryan. The officers responded to the neighbor's residence where they found Ryan, visibly upset, with redness around her neck and upper shoulder area. The officers spoke to several witnesses and took photographs of Ryan's injuries. Approximately 45 minutes later, police officers apprehended appellant hiding in a wooded area near the scene.

{¶5} Ryan, who has been married to appellant for five years, testified as to the events of October 18, 2007. Ryan was at home that evening watching television, and appellant became upset with his mother because she would not give him money. According to Ryan, appellant "started to put his hands on her, push her, and I wasn't going to see that be done anymore. I hit him to get him off of his mother and it just didn't go much further at

[1] The indictment asserted that appellant had previously been convicted of negligent assault in 2004 and domestic violence in 2007 involving persons who were family members at the time of the offenses; accordingly, the charge was enhanced, pursuant to R.C. 2919.25(D)(4), to a third-degree felony.

that time." (Tr. 37.) At the time, appellant "told me he was going somewhere and if I was there when he got back, he was going to kill me." (Tr. 38.)

{¶6} At approximately 8:00 p.m., Ryan called 911. During that call, which was played for the jury, Ryan reported that appellant had just been released from prison on a domestic violence charge and had threatened to kill her. According to Ryan, police officers responded to the residence, took a report, and told her to call back if she needed further assistance.

{¶7} Later that evening, appellant returned to the residence. According to Ryan, appellant "wasn't happy" because she was still there. (Tr. 39.) Appellant pushed Ryan and told her to "get the hell out." (Tr. 39.) Appellant's mother continued to refuse to give him money, and he "tried pushing her." (Tr. 39.) When Ryan attempted to pick up the phone, appellant pulled the cord out of the wall. Ryan then ran to the neighbor's house and asked the neighbor to call 911.

{¶8} Appellant followed Ryan to the neighbor's house armed with a knife and told her, "that was it, he was going to kill me." (Tr. 39.) Appellant pushed Ryan's head against a cement table on the neighbor's front porch. Appellant put the knife to Ryan's throat and said "it wouldn't take him any thought to kill me, without a second thought." (Tr. 40.) He left the area, however, after neighbors informed him they had called the police. Police officers returned to the scene and took a statement from Ryan, who suffered bruises to her eye, ear, chin, wrist, and knees as a result of the incident.

{¶9} Robert Anthony Legg, age 15, resided at 2609 Claridon Road at the time of the incident. He was at home the evening of October 18, 2007, when he heard Helen Kimball, a family friend, yelling outside. Legg went outside and saw appellant on the front

porch arguing with Ryan. According to Legg, appellant punched Ryan and pushed her head against a cement table.

{¶10} Thereafter, appellant began walking back toward his mother's residence. Legg followed appellant and observed a knife in appellant's hand. Legg turned around and started walking toward his house; appellant followed him. Legg heard appellant say: "I'll kill that fat bitch." (Tr. 74.) Upon arriving at his house, Legg observed Ryan spitting up blood; Kimball was on the phone with the police. Appellant then walked back toward his mother's house.

{¶11} Kimball, who also resided at 2609 Claridon Road, testified that, on October 18, 2007, she heard neighbors arguing, and observed appellant "beating up" Ryan on the front porch. (Tr. 82.) Appellant continued to hit Ryan and pushed her head against a cement table. Ryan was upset and crying. Appellant then walked toward his mother's house.

{¶12} At this point, Kimball called 911. During that call, which was also played for the jury, Kimball reported that appellant had just beaten up Ryan and his mother. She also reported that Ryan told her appellant had parked a stolen vehicle in the neighborhood.

{¶13} Kimball testified that, while she was on the telephone with the police, she observed appellant walking toward her residence with a knife in his hand. Kimball heard appellant threaten to "cut the fat bitch's throat." (Tr. 85.) Legg then came outside and appellant "took off through the woods." (Tr. 85.)

{¶14} Following the state's case-in-chief, the parties stipulated that appellant had previously been convicted of domestic violence and negligent assault. Thereafter, appellant moved for judgment of acquittal, pursuant to Crim.R. 29; the trial court denied the motion. Appellant neither testified nor otherwise presented any evidence.

{¶15} In case No. 08CR-1635, the jury found appellant guilty of felonious assault. In case No. 07CR-7931, the jury found appellant guilty of domestic violence, and further found appellant was previously convicted of negligent assault and domestic violence. The trial court sentenced appellant to eight years incarceration on the felonious assault count, and five years incarceration on the domestic violence count, and ordered the sentences to be served consecutively.

{¶16} On appeal, appellant sets forth the following seven assignments of error for this court's review:

> ASSIGNMENT OF ERROR #1
>
> THE TRIAL COURT PLAINLY ERRED BY PERMITTING THE CONVICTION AND SENTENCING THE APPELLANT ON BOTH THE DOMESTIC VIOLENCE AND FELONIOUS ASSAULT INDICTMENTS IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION AND SECTION 10, ARTICLE I OF THE OHIO CONSTITUTION AND OHIO'S MULTIPLE COUNT STATUTE.
>
> ASSIGNMENT OF ERROR #2
>
> APPELLANT'S CONVICTION FOR FELONIOUS ASSAULT WAS NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION, AND THE FELONIOUS ASSAULT CONVICTION WAS ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> ASSIGNMENT OF ERROR # 3
>
> APPELLANT'S CONVICTION FOR DOMESTIC VIOLENCE WAS NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION, AND THE DOMESTIC

VIOLENCE CONVICTION WAS ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR # 4

THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S RULE 29 MOTION.

ASSIGNMENT OF ERROR #5

THE COURT'S MAXIMUM AND CONSECUTIVE SENTENCE EXCEEDED THE MAXIMUM PRISON TERM FOR THE MOST SERIOUS OFFENSE FOR WHICH APPELLANT WAS CONVICTED. APPELLANT'S SENTENCE WAS NOT SUPPORTED BY THE RECORD AND WAS CONTRARY TO LAW. THE TRIAL COURT'S ADHERENCE TO STATE V. FOSTER VIOLATED NEW SUPREME COURT PRECEDENT.

ASSIGNMENT OF ERROR # 6

TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR #7

THE TRIAL COURT PLAINLY ERRED IN FAILING TO DISMISS THE FELONIOUS ASSAULT INDICTMENT FOR PROSECUTORIAL VINDICTIVENESS IN VIOLATION OF THE APPELLANT'S RIGHT TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION.

{¶17} Appellant's first assignment argues that he committed only one act on the night of the incident; thus, the convictions for both domestic violence and felonious assault violate double jeopardy protections. Appellant further argues that the trial court erred by allowing convictions for both offenses because the two counts are allied offenses of similar import.

{¶18} Initially, we note that appellant did not raise these issues at sentencing. Matters not objected to at the trial court level are reviewed under the plain error standard. Crim.R. 52(B). In order to have plain error under Crim.R. 52(B), there must be an error, the error must be an "obvious" defect in the trial proceedings, and the error must have affected "substantial rights," meaning that the error must have affected the outcome of the trial. *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. Plain error is to be used " 'with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.' " Id., quoting *State v. Long* (1978), 53 Ohio St.2d 91, paragraph three of the syllabus.

{¶19} It is well-settled that "[t]he Double Jeopardy Clause of the United States Constitution prohibits (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *State v. Brown,* 119 Ohio St.3d 447, 2008-Ohio-4569, ¶10, citing *United States v. Halper* (1989), 490 U.S. 435, 440, 109 S.Ct. 1892, 1897. "These double- jeopardy protections apply to the states through the Fourteenth Amendment." Id., citing *Benton v. Maryland* (1969), 395 U.S. 784, 786, 89 S.Ct. 2056, 2062. In addition, Section 10, Article I of the Ohio Constitution provides that "[n]o person shall be twice put in jeopardy for the same offense."

{¶20} The instant case involves the third double jeopardy prohibition—the prohibition against multiple punishments for the same offense. "However, the Double Jeopardy clause only prevents a sentencing court from prescribing greater punishment than the legislature intended." *Brown* at ¶11, citing *State v. Rance*, 85 Ohio St.3d 632, 635, 1999-Ohio-291. The two-step test set forth in R.C. 2941.25, Ohio's multiple count statute, answers both the

constitutional and state statutory inquiries regarding the legislature's intent to permit cumulative punishments for the same conduct. *Brown* at ¶12, citing *Rance* at 639.

{¶21} R.C. 2941.25 provides:

> (A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.
>
> (B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more offenses of the same or similar kind committed separately or with a separate animus as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them.

{¶22} R.C. 2941.25 requires a two-step analysis. *State v. Cabrales,* 118 Ohio St.3d 54, 2008-Ohio-1625, ¶14. In the first step, the court must determine whether the offenses constitute allied offenses of similar import under R.C. 2941.25(A). In making this determination, "courts are required to compare the elements of offenses in the abstract without considering the evidence in the case, but are not required to find an exact alignment of the elements. Instead, if, in comparing the elements of the offenses in the abstract, the offenses are so similar that the commission of one offense will necessarily result in commission of the other, then the offenses are allied offenses of similar import." Id., paragraph one of the syllabus, clarifying *Rance*. If the offenses constitute allied offenses of similar import under R.C. 2941.25(A), the court must then proceed to the second step. Id. at ¶14.

{¶23} In the second step, the court must review the defendant's conduct to determine whether the defendant can be convicted of both offenses. Id. "If the court finds either that the crimes were committed separately or that there was a separate animus for each crime, the defendant may be convicted of both offenses." Id., quoting *State v.*

Blankenship (1988), 38 Ohio St.3d 116, 117. The Supreme Court of Ohio has defined "animus" as "purpose, intent, or motive." Id. at 119.

{¶24} R.C. 2903.11(A)(2) proscribes felonious assault and states in relevant part that "[n]o person shall knowingly * * * [c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance." R.C. 2919.25(A) governs domestic violence and provides that "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member."

{¶25} Assuming, arguendo, that the crimes of felonious assault, pursuant to R.C. 2903.11(A)(2), and domestic violence, pursuant to R.C. 2919.25(A), are allied offenses of similar import under the test enunciated in *Cabrales,* the evidence in this case demonstrates that appellant's actions constituted separate and distinct crimes.[2] Ryan, appellant's wife of five years, testified that appellant initially pushed her in the home they shared at 2625 Claridon Road, telling her to "get the hell out." (Tr. 39.) Ryan attempted to make a phone call, but appellant pulled the telephone cord out of the wall. Appellant's act of pushing his wife constitutes domestic violence in violation of R.C. 2919.25(A). "A defendant may be found guilty of domestic violence if the victim sustains minor injuries or even no injuries at all." *State v. West,* 10th Dist. No. 06AP-114, 2006-Ohio-5095, ¶16, citing *State v. Blonski* (1997), 125 Ohio App.3d 103, 104. Thereafter, Ryan left her home and ran to the neighbor's house at 2609 Claridon Road to call the police. Appellant followed her outside. Ryan testified that appellant "had a knife," and told Ryan "that was it, he was going to kill me." (Tr. 39.) At the neighbor's house, appellant hit Ryan's head on a cement table and placed the knife to her throat. Appellant's actions in this regard constitute felonious assault in violation

[2] Because the convictions in this case arise from separate conduct, we express no opinion as to whether R.C. 2903.11(A)(2) and 2919.25(A) are allied offenses of similar import.

of R.C. 2903.11(A)(2). The acts committed at 2625 Claridon Road were separate in time and place from the acts committed at 2609 Claridon Road; accordingly, they are separate offenses for which appellant could face conviction and sentence pursuant to R.C. 2941.25(B). The first assignment of error is overruled.

{¶26} As appellant's second, third, and fourth assignments are interrelated, we will address them jointly. Under his second assignment of error, appellant argues that his conviction for felonious assault was not supported by sufficient evidence and was against the manifest weight of the evidence. Under his third assignment of error, appellant contends his conviction for domestic violence was not supported by sufficient evidence and was against the manifest weight of the evidence. Under his fourth assignment of error, appellant urges that the trial court erred in failing to grant his Crim.R. 29 motion for judgment of acquittal.

{¶27} Preliminarily, we note that a motion for judgment of acquittal, pursuant to Crim.R. 29, tests the sufficiency of the evidence. *State v. Darrington,* 10th Dist. No. 06AP-160, 2006-Ohio-5042, ¶15, citing *State v. Knipp,* 4th Dist. No. 06CA641, 2006-Ohio-4704, ¶11. Accordingly, an appellate court reviews a trial court's denial of a Crim.R. 29 motion for acquittal using the same standard for reviewing a sufficiency of the evidence claim. *Darrington,* ¶15, citing *State v. Barron,* 5th Dist. No. 05 CA 4, 2005-Ohio-6108, ¶38.

{¶28} "The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different." *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, paragraph two of the syllabus. Accordingly, we shall separately discuss the standard of review applicable to each.

{¶29} In *State v. Jenks* (1991), 61 Ohio St.3d 259, the Supreme Court of Ohio held that "[a]n appellate court's function when reviewing the sufficiency of the evidence to support

a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." Id., paragraph two of the syllabus. The court further held that "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id.

{¶30} Whether the evidence is legally sufficient to sustain a verdict is a question of law, not fact. *Thompkins* at 386. In determining the sufficiency of the evidence, an appellate court must give "full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789. Accordingly, evaluation of witness credibility is not proper on review for evidentiary sufficiency. *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79. An appellate court may not disturb a jury verdict unless, after viewing the evidence in a light most favorable to the prosecution, the court finds that reasonable minds could not reach the conclusion reached by the jury. *State v. Treesh*, 90 Ohio St.3d 460, 484, 2001-Ohio-4.

{¶31} With these parameters in mind, we shall first examine whether the state presented sufficient evidence to support appellant's conviction for felonious assault. Appellant was convicted of felonious assault in violation of R.C. 2903.11(A)(2), which provides in pertinent part that "[n]o person shall knowingly * * * [c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance." Thus, the state was required to prove that appellant knowingly caused or attempted to cause physical harm to Ryan by means of a deadly weapon.

{¶32} Appellant concedes the state presented evidence that appellant pointed a knife at Ryan; however, appellant contends the state presented no evidence establishing that any physical harm befell Ryan from appellant's act of pointing the knife at her. Appellant notes that neither Ryan nor the other witnesses testified that appellant cut or stabbed Ryan with the knife or even attempted to do so. Appellant further notes that the photographs of Ryan's injuries do not depict injuries consistent with the use or attempted use of a knife.

{¶33} Under Ohio law, "[e]vidence that a defendant pointed a deadly weapon at another, without further evidence regarding the defendant's intention, is insufficient to sustain a conviction for felonious assault under R.C. 2903.11(A)(2)." *State v. Mincy,* 1st Dist. No. C-060041, 2007-Ohio-1316, ¶66, citing *State v. Brooks* (1989), 44 Ohio St.3d 185, syllabus. However, " 'the act of pointing a deadly weapon at another coupled with a threat, which indicates an intention to use the weapon to cause harm, is sufficient evidence' to sustain a conviction for felonious assault under R.C. 2903.11(A)(2)." Id. at ¶67, quoting *State v. Green* (1991), 58 Ohio St.3d 239, syllabus. See also *State v. Smith,* 4th Dist. No. 06CA7, 2007-Ohio-502, ¶39 (defendant's act of holding victim at knifepoint, "coupled with his repeated threats to cause bodily harm constitute sufficient evidence from which a rational trier of fact could conclude, beyond a reasonable doubt, that Smith committed felonious assault"); *State v. Wertz* (Oct. 30, 1998), 5th Dist. No. 98 CA 09 (act of putting knife to victim's throat and threatening to cut victim's throat or kill victim sufficient to support conviction for felonious assault with a deadly weapon); *State v. Williams,* 5th Dist. No. 03 CA-A-12-074, 2004-Ohio-6202, ¶27 (even without verbal threat, defendant's action in holding knife to victim's midsection and "squaring off" and locking focus on victim constituted an ample manifestation of intent to cause injury sufficient to constitute a "threat" as that word was used in the indictment).

{¶34} Ryan testified that appellant held a knife to her throat and said "it wouldn't take him any thought to kill me, without a second thought." (Tr. 40.) Legg testified that he saw appellant with a knife in his hand and heard him threaten to "kill that fat bitch." (Tr. 74.) Kimball testified that she observed appellant carrying a knife and heard him threaten to "cut the fat bitch's throat." (Tr. 85.) In light of the foregoing case law, we find that the state presented sufficient evidence that, if believed, would convince the average mind beyond a reasonable doubt that appellant knowingly attempted to cause the victim physical harm by means of a deadly weapon.

{¶35} We next address whether the state presented sufficient evidence to support appellant's conviction for domestic violence. R.C. 2919.25(A) states that "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member." Pursuant to R.C. 2919.25(D)(4), if the offender has previously been convicted of two or more offenses of the type described in R.C. 2919.25(D)(3) involving a person who was a family or household member at the time of the offense, a violation of R.C. 2919.25(A) is a felony of the third degree. R.C. 2919.25(D)(3) includes domestic violence as well as negligent assault under R.C. 2903.14, if the victim of the violation was a family or household member at the time of the violation, as penalty enhancing offenses.

{¶36} Appellant does not dispute that the state presented sufficient evidence to prove that he was guilty of domestic violence under R.C. 2919.25(A). In addition, appellant does not dispute that the state presented sufficient evidence to establish that he was convicted in 2007 of domestic violence against Ryan. Rather, appellant argues that the state failed to produce sufficient evidence that his prior conviction for negligent assault constituted a predicate offense for purposes of enhancing his domestic violence conviction to a third-degree felony under R.C. 2919.25(D)(3) and (4). Specifically, appellant contends

the state failed to prove that the victim in his 2004 conviction for negligent assault was a "family or household member" as defined in R.C. 2919.25(F)(1)(a)(ii). More particularly, appellant asserts the state failed to prove that the victim resided with appellant and is related to appellant by consanguinity or affinity. We disagree.

{¶37} R.C. 2919.25(F)(1)(a)(ii) provides:

> (F) As used in this section * * * of the Revised Code:
>
> (1) "Family or household member" means any of the following:
>
> (a) Any of the following who is residing or has resided with the offender:
>
> * * *
>
> (ii) A parent or a child of the offender, or another person related by consanguinity or affinity to the offender[.]

{¶38} At trial, Ryan testified that appellant's brother, Nicholas Ryan, was the victim in appellant's 2004 negligent assault conviction. Following the presentation of the state's evidence, the parties stipulated that appellant had a prior conviction for negligent assault against Nicholas Ryan from July 7, 2004. (State's Exhibit H.) In addition to the stipulation, the state also presented a certified copy of the sentencing entry memorializing appellant's conviction for negligent assault entered upon his plea of no contest. (State's Exhibit F.) The two complaints underlying the conviction were attached to the sentencing entry. One of the complaints charged appellant with domestic violence and alleged that the victim, Nicholas Ryan, appellant's brother, was a "family or household member." This evidence was sufficient to establish that appellant's prior conviction for negligent assault constituted a predicate offense for purposes of enhancing his domestic violence conviction to a third-degree felony under R.C. 2919.25(D)(3) and (4).

{¶39} Having determined that appellant's convictions for felonious assault and domestic violence are supported by sufficient evidence, we shall next examine appellant's claim that his convictions are against the manifest weight of the evidence. Appellant contends the jury lost its way in convicting him of felonious assault because only Ryan, and not the other witnesses, testified that appellant pointed a knife at her, and, in any event, the evidence failed to establish that he used or attempted to use the knife to cause her physical harm.

{¶40} An appellate court evaluates a manifest weight argument under a different standard than that employed in a sufficiency analysis. " 'The 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.' " *State v. Gray* (Mar. 28, 2000), 10th Dist. No. 99AP-666, quoting *State v. Buterbaugh* (Sept. 16, 1999), 10th Dist. No. 98AP-1093. In order for an appellate court to reverse the judgment of a trial court on manifest weight grounds, the appellate court must unanimously disagree with the jury's resolution of the conflicting evidence. *Thompkins* at 387. In a manifest weight review, the court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. Id. The discretionary power to reverse on manifest weight grounds should be exercised only in the exceptional case in which " 'the evidence weighs heavily against the conviction.' " Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶41} Initially, we note that, contrary to appellant's assertion, both Kimball and Legg testified that they observed appellant carrying a knife and heard him threaten to kill Ryan

with it. Further, even if Kimball and Legg had not so testified, appellant would not be entitled to a reversal on manifest weight grounds. A defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. *State v. Raver,* 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21. " 'While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render [a] conviction against the manifest weight * * * of the evidence.' " Id., quoting *State v. Nivens* (May 28, 1996), 10th Dist. No. 95APA09-1236. A jury, as trier of fact, is free to believe all, part or none of the testimony of the witnesses who appear before it. Id., citing *State v. Antill* (1964), 176 Ohio St. 61, 67. Consequently, although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must also give great deference to the jury's determination of witness credibility. *State v. Covington,* 10th Dist. No. 02AP-245, 2002-Ohio-7037, ¶28. The jury was free to find appellant guilty of felonious assault based upon Ryan's testimony alone.

{¶42} Further, we find no merit to appellant's contention that his conviction for felonious assault was against the manifest weight of the evidence because there was no evidence that he used or attempted to use the knife to cause physical harm to Ryan. As noted previously, evidence that appellant held the knife to Ryan's throat and threatened to kill her with it established that appellant committed felonious assault with a deadly weapon.

{¶43} Based upon our review of the entire record, we conclude that appellant's criticisms of the state's evidence in this case are inadequate to prove that the jury lost its way and created a manifest miscarriage of justice. Having determined that appellant's convictions for felonious assault and domestic violence are supported by sufficient evidence

and are not against the manifest weight of the evidence, we overrule appellant's second, third, and fourth assignments of error.

{¶44} Appellant's fifth assignment of error contends that the trial court's imposition of maximum and consecutive sentences was not supported by the record and was contrary to law. We disagree.

{¶45} " 'R.C. 2953.08(G) allows an appellate court to modify a sentence or remand for resentencing if the court "clearly and convincingly finds" that (1) the record does not support the sentence, or (2) "the sentence is otherwise contrary to law." ' " *State v. Burkes,* 10th Dist. No. 08AP-830, 2009-Ohio-2276, ¶10, quoting *State v. O'Keefe,* 10th Dist. No. 08AP-724, 2009-Ohio-1563, ¶39, citing R.C. 2953.08(G)(2)(a) and (b), and *State v. Burton,* 10th Dist. No. 06AP-690, 2007-Ohio-1941. " 'In applying this standard, we will look to the record to determine whether the trial court considered and properly applied the appropriate statutory guidelines and whether the sentence is otherwise contrary to law.' " *Burkes*, quoting *O'Keefe,* citing *State v. Vickroy,* 4th Dist. No. 06CA4, 2006-Ohio-5461, ¶15.

{¶46} As noted, appellant was convicted of felonious assault, in violation of R.C. 2911.03(A)(2), a felony of the second degree, and domestic violence, in violation of R.C. 2919.25, a felony of the third degree. If the sentencing court elects to or is required to impose a prison term, the court must impose a definite prison term of two, three, four, five, six, seven or eight years for a second-degree felony, R.C. 2929.14(A)(2), and must impose a definite prison term of one, two, three, four or five years for a third-degree felony, R.C. 2929.14(A)(3). Here, the trial court sentenced appellant to the maximum eight years on the felonious assault count and the maximum five years on the domestic violence count. Both sentences are within the statutory range for the offenses. The trial court elected to run the

sentences consecutive to each other pursuant to its discretionary and inherent authority. *State v. Bates,* 118 Ohio St.3d 174, 2008-Ohio-1983, ¶19.

{¶47} Appellant was sentenced after the Supreme Court of Ohio decided *State v. Foster,* 109 Ohio St.3d 1, 2006-Ohio-856. In *Foster,* the court excised as unconstitutional portions of Ohio's felony sentencing scheme that required trial courts to make findings and give reasons when imposing non-minimum, consecutive or maximum sentences. As a result, the court held that "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." Id., paragraph seven of the syllabus. Accordingly, post-*Foster,* " 'there is no mandate for judicial fact-finding in the general guidance statutes. The court is merely to "consider" the statutory factors.' " *State v. Rutter,* 5th Dist. No. 2006-CA-0025, 2006-Ohio-4061, ¶11, quoting *Foster* at ¶42.

{¶48} Appellant initially challenges the continued validity of *Foster* in the wake of the United States Supreme Court's decision in *Cunningham v. California* (2007), 549 U.S. 270, 127 S.Ct. 856. We note at the outset that " 'this Court is inferior in jurisdiction to the Ohio Supreme Court and must follow its mandates. Accordingly, we lack the jurisdictional authority under Article IV, Section 3(B)(2) of the Ohio Constitution to declare a mandate of the Ohio Supreme Court to be unconstitutional.' " *State v. Land*, 3d Dist. No. 2-07-20, 2007-Ohio-6963, ¶9; *State v. Withers,* 10th Dist. No. 08AP-39, 2008-Ohio-3175, ¶13 ("although appellant takes issue with the *Foster* court's choice of the severance remedy, this court has repeatedly rejected this same contention, finding we are bound to follow a decision of the Ohio Supreme Court and we cannot overrule that court's decision or declare it unconstitutional").

{¶49} Moreover, Ohio appellate courts have determined that *Foster* is not inconsistent with *Cunningham*. As the Third Appellate District recently stated in *State v. Moore*, 3d Dist. No. 5-07-18, 2008-Ohio-1152:

> *Cunningham* struck down California's three-tiered determinate sentencing law, which required trial courts to make certain findings of facts before imposing a higher-tier prison term. *Cunningham* remedied the constitutional infirmity by severing those portions making the scheme mandatory, leaving only advisory guidelines in place, which is the precise remedy adopted by *Foster.*

Id. at ¶18, quoting *Land* at ¶11. (Citations omitted.) As *Foster* is consistent with *Cunningham,* appellant's argument to the contrary is without merit.

{¶50} Appellant further argues that the trial court failed to expressly consider applicable sentencing guidelines, including the purposes of sentencing set forth in R.C. 2929.11 and the sentencing factors set forth in R.C. 2929.12. Again, we disagree.

{¶51} Post-*Foster,* trial courts are still required to comply with R.C. 2929.11 and 2929.12. "Although after *Foster* the trial court is no longer compelled to make findings and give reasons at the sentencing hearing because R.C. 2929.19(B)(2) has been excised, nevertheless, in exercising its discretion, the court must carefully consider the statutes that apply to every felony case. Those include R.C. 2929.11, which specifies the purposes of sentencing, and R.C. 2929.12, which provides guidance in considering factors relating to the seriousness of the offense and recidivism of the offender." *State v. Mathis,* 109 Ohio St.3d 54, 2006-Ohio-855, ¶38.

{¶52} R.C. 2929.11(A) provides that "[a] court that sentences an offender for a felony shall be guided by the overriding purposes of felony sentencing," which are "to protect the public from future crime by the offender and others and to punish the offender." Id. To effectuate those purposes, "the sentencing court shall consider the need for incapacitating

the offender, deterring the offender and others from future crime, rehabilitating the offender, and making restitution to the victim of the offense, the public, or both." Id. Thus, a felony sentence "shall be reasonably calculated to achieve the two overriding purposes of felony sentencing" set forth in R.C. 2929.11(A). R.C. 2929.11(B). The sentence must be "commensurate with and not demeaning to the seriousness of the offender's conduct and its impact upon the victim, and consistent with sentences imposed for similar crimes committed by similar offenders." Id.

{¶53} Pursuant to R.C. 2929.12(A), the sentencing court "has discretion to determine the most effective way to comply with the purposes and principles of sentencing set forth in [R.C. 2929.11]." In exercising that discretion, the court must consider the seriousness and recidivism factors outlined in R.C. 2929.12(B), (C), (D), and (E). R.C. 2929.12(A); *State v. Arnett* (2000), 88 Ohio St.3d 208, 213. R.C. 2929.12(A) also permits the trial court to consider "any other factors that are relevant" to the principles of felony sentencing. Id.

{¶54} The record must provide some indication that the trial court considered both R.C. 2929.11 and 2929.12 when sentencing a felony offender. *State v. Jones,* 7th Dist No. 07 MA 159, 2008-Ohio-3336, ¶14. However, courts have held that a sentencing court need not expressly state that it considered R.C. 2929.11 and 2929.12 in order for the record to reflect that it actually considered those statutes. *State v. Sharp,* 10th Dist. No. 05AP-809, 2006-Ohio-3448, ¶4 (holding that, under R.C. 2929.12, a sentencing court is not required to use specific language regarding its consideration of the seriousness and recidivism factors); *State v. Smith,* 3d Dist. No. 2-06-37, 2007-Ohio-3129, ¶27. A trial court may choose to employ the language set forth in R.C. 2929.11 and 2929.12 rather than expressly citing them. *Jones* at ¶16, citing *State v. Lewis*, 2d Dist. No. 2006CA0119, 2007-Ohio-6607, ¶16; *Smith.* As well, a sentencing court may rely on facts which fit within the overriding purposes

of felony sentencing in R.C. 2929.11 and the factors in R.C. 2929.12. *Jones* at ¶16, citing *State v. Starkey,* 7th Dist. No. 06 MA 110, 2007-Ohio-6702, ¶15; *State v. Teel,* 6th Dist. No. S-06-045, 2007-Ohio-3570, ¶15; *Sharp,* ¶4.

{¶55} Here, the trial court did not specifically cite to R.C. 2929.11 or 2929.12 at either appellant's sentencing or in its judgment entry. However, a review of the record indicates that the trial court considered both R.C. 2929.11 and 2929.12 in sentencing appellant and that the sentence was supported by the record.

{¶56} In support of its request that the trial court sentence appellant to maximum consecutive sentences, the prosecutor cited several factors, including appellant's extensive criminal record, which includes two separate aggravated robbery convictions and numerous arrests, including those for negligent assault, resisting arrest, forgery, and carrying a concealed weapon. The prosecutor further cited prison notes indicating that, while appellant was incarcerated pending trial in the instant case, he threatened to harm prison personnel and escape. The prosecutor also noted the emotional and psychological impact the incident had taken on Ryan, which, among other things, caused her great difficulty in preparing for and testifying at trial. The prosecutor further noted that the prosecution witnesses had reported that appellant threatened to kill them. In addition, the prosecutor noted that appellant's prior domestic violence conviction involved both Ryan and appellant's mother. The prosecutor asserted that appellant had assaulted his mother numerous times in the past and that she was terrified of him. The prosecutor also noted that appellant committed the instant offenses only days after he was released from prison on another domestic violence charge. Finally, the state opined that appellant would undoubtedly kill Ryan or his mother upon his release from prison.

{¶57} Following the prosecutor's remarks, the court stated:

> You know, certainly the comments that you've made are things, after the jury's verdict last night, are the same things that I was thinking of in terms of what sentence would be imposed on this. And I am certainly willing to impose consecutive sentences on these cases. I would have no reluctance in doing that given all the factors that are here because I certainly agree.
>
> Clearly, Mr. Ryan is the type of person who does seem to have that innate ability to prey upon people he knows are not going to give him any trouble. And I do fear that if he is released again, somebody is going to end up dead.
>
> So * * * I definitely would actually think that consecutive sentences would be beneficial to not only the victims of this offense but to the community as a whole.

(Tr. 145-46.)

{¶58} Following this discussion, the court noted appellant's lengthy criminal record, including the two aggravated robberies for which he was incarcerated, as well as the fact that he committed new offenses shortly after he was paroled on those two convictions. In addition, the court noted the severity of the instant offense and the fact that appellant likely would have carried through with his threat to slash Ryan's throat, but for the neighbors' intervention. The court agreed with the reasons set forth by the state in support of the sentence and concluded that appellant "needs to be kept off the streets." (Tr. 151.)

{¶59} The foregoing discussion satisfied the trial court's obligation to consider R.C. 2929.11 and 2929.12. The trial court's statements that appellant needed to be "kept off the streets" and that consecutive sentences would benefit "the community as a whole" demonstrate that the trial court considered the overriding purposes of felony sentencing, one of which is to "protect the public from future crime by the offender." R.C. 2929.11(A). In addition, the court's adoption of the prosecutor's averments regarding Ryan's emotional and

psychological state establishes that the court considered the seriousness factors set forth in R.C. 2929.12(B), one of which is the "serious physical, psychological, or economic harm" suffered by the victim as a result of the offense. R.C. 2929.12(B)(2). The trial court's reference to appellant's extensive criminal history and the fact that he committed the instant offense only days after he was released from prison on a previous domestic violence charge demonstrates that the court considered the recidivism factors in R.C. 2929.12(D)(2) and (3), which require evaluation of the offender's "history of criminal convictions" and the offender's failure to "respond[ ] favorability to sanctions previously imposed for criminal convictions," respectively. Finally, the trial court's expressed concern that appellant would have accomplished his goal of slitting Ryan's throat had the neighbors not intervened clearly indicates that the court considered "other factors" relevant to achieving the purposes and principles of felony sentencing. R.C. 2929.12(A).

{¶60} Appellant also contends, for the first time, that the sentence he received was inconsistent with that imposed in *State v. Newsome,* 11th Dist. No. 2003-A-0069, 2005-Ohio-1104. As noted, pursuant to R.C. 2929.11(B), a felony sentence must be " 'consistent with sentences imposed for similar crimes committed by similar offenders.' " *O'Keefe* at ¶40. " ' "Consistency, however, does not necessarily mean uniformity. Instead, consistency aims at similar sentences. Accordingly, consistency accepts divergence within a range of sentences and takes into consideration a trial court's discretion to weigh relevant statutory factors. * * * Although offenses may be similar, distinguishing factors may justify dissimilar sentences." ' " Id., quoting *State v. Battle,* 10th Dist. No. 06AP-863, 2007-Ohio-1845, ¶24, quoting *State v. King,* 5th Dist. No. CT06-0020, 2006-Ohio-6566, ¶23.

{¶61} As this court noted in *State v. Hayes,* 10th Dist. No. 08AP-233, 2009-Ohio-1100, ¶9, proper application of the statutory sentencing guidelines, not a case-by-case

comparison, achieves consistency in sentencing. See also *O'Keefe* at ¶41. "In order to demonstrate that a sentence is inconsistent, a defendant must show that the trial court did not properly consider the sentencing criteria prescribed by R.C. 2929.11 and 2929.12." *O'Keefe* citing *Hayes* at ¶10, citing *State v. Holloman*, 10th Dist. No. 07AP-875, 2008-Ohio-2650, ¶19. A defendant does not meet this burden by simply noting that his or her sentence is inconsistent with that of another defendant. Id., citing *Hayes* at ¶10.

{¶62} As noted above, the trial court properly considered and applied the sentencing criteria prescribed by R.C. 2929.11 and 2929.12. Moreover, even if appellant could demonstrate inconsistency simply by comparing his case to other cases, appellant did not offer the case to the trial court for its consideration. See *State v. Lawson,* 10th Dist. No. 02AP-148, 2002-Ohio-3329, ¶17 ("because such evidence is available at the time of sentencing, a defendant must be prepared to at least raise the consistency issue during the sentencing hearing and/or seek to supplement the record, if necessary, with comparable cases after the sentence has been imposed"). The fifth assignment of error is overruled.

{¶63} Appellant's sixth assignment of error asserts he was denied the effective assistance of counsel at trial. The Sixth Amendment to the United States Constitution guarantees a criminal defendant the effective assistance of counsel and the accused bears the burden of demonstrating that counsel was ineffective. *State v. Smith* (1985), 17 Ohio St.3d 98, 100.

{¶64} When reviewing a defendant's claim of ineffective assistance of counsel, this court applies the two-pronged test enunciated in *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064. *State v. Bradley* (1989), 42 Ohio St.3d 136, syllabus. A court must determine (1) whether counsel's performance fell below an objective standard of reasonable professional competence, and (2) if so, whether there is a reasonable probability

that counsel's unprofessional errors prejudiced the defendant so as to deprive him of a fair trial, a trial whose result is reliable. *Strickland* at 687-88.

{¶65} To demonstrate error in counsel's actions, the defendant must overcome the strong presumption that licensed attorneys are competent and that the challenged action is the product of sound trial strategy and falls within the wide range of reasonable professional assistance. Id. at 690-91. Since judicial scrutiny of counsel's performance is highly deferential, reviewing courts must refrain from second-guessing the strategic decisions of trial counsel. Id. To demonstrate resulting prejudice, a defendant must establish a reasonable probability that, but for counsel's errors, the outcome of the trial would have been different. Id.

{¶66} Appellant claims his defense counsel was ineffective in several respects. Appellant first argues defense counsel was ineffective in failing to oppose the state's motion to consolidate the two indictments into a single action for purposes of trial. On March 10, 2008, the state filed a motion, pursuant to Crim.R. 13 and 8(A), requesting that the two indictments be tried together. Defense counsel did not oppose the motion. The trial court granted the state's motion and ordered the indictments to be tried together.

{¶67} Crim.R. 13 provides that a court "may order two or more indictments * * * to be tried together, if the offenses * * * could have been joined in a single indictment." Under Crim.R. 8(A), a trial court may join offenses in the same indictment if the offenses "are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct."

{¶68} Generally, joining multiple criminal offenses for a single trial is favored under the law as a necessary device for promoting judicial economy. *State v. Davis* (Nov. 30,

1995), 10th Dist. No. 95APA05-538, citing *State v. Hamblin* (1988), 37 Ohio St.3d 153, 157-58. " 'Joinder conserves judicial and prosecutorial time, lessens the not inconsiderable expenses of multiple trials, diminishes inconvenience to witnesses, and minimizes the possibility of incongruous results in successive trials before different juries.' " *Davis,* quoting *State v. Thomas* (1980), 61 Ohio St.2d 223, 225.

{¶69} However, joinder may prejudice an accused's right to a fair trial if the jury is unable to distinguish the evidence as to each count and applies or cumulates evidence from one count to another. *Davis.* " 'Joinder may be prejudicial where the offenses are unrelated and the evidence as to each is very weak.' " Id., quoting *State v. Torres* (1981), 66 Ohio St.2d 340, 343. Crim.R. 14 permits relief from prejudicial joinder: "[I]f it appears that a defendant or the state is prejudiced by a * * * joinder for trial together of indictments * * * the court shall order an election or separate trial of counts * * * or provide such other relief as justice requires."

{¶70} The record in this case does not establish why defense counsel did not oppose joinder, or subsequently seek a severance. Many legitimate trial strategies could justify these decisions, including appellant's preference for a single trial rather than the "harassment, delay, trauma, and expense of multiple prosecutions." *State v. Schaim* (1992), 65 Ohio St.3d 51, 58, 1992-Ohio-31. Further, even if defense counsel had opposed the motion for joinder or subsequently moved for severance, the trial court would have been well within its discretion in maintaining the joinder. The charges against appellant arose out of the continuous events of October 18, 2007, and involved the same victim. All of the witnesses who testified for the prosecution would have had to testify at separate trials had the indictments not been consolidated. The offenses clearly could have been joined in a single indictment. The prosecutor explained that appellant was charged in two separate

indictments only because the information regarding appellant's threatening Ryan with a knife, which gave rise to the later felonious assault indictment, was not discovered until after appellant had been indicted on the domestic violence charge.

{¶71} A defendant seeking reversal on grounds that joinder was improper has the burden of demonstrating that his or her rights were prejudiced. *Davis,* citing *State v. Roberts* (1980), 62 Ohio St.2d 170, 175. Appellant claims that joinder prejudiced him because it permitted the jury to rely on strong evidence in one case to strengthen weak evidence in the other. Appellant argues that a single trial created a cumulation of evidence which may have led the jury to convict him on both indictments.

{¶72} "The jury is believed capable of segregating the proof on multiple charges when the evidence as to each of the charges is uncomplicated." *Davis,* citing *Roberts.* As previously noted, appellant's actions in pushing Ryan and ripping the telephone out of the wall at their home constituted domestic violence, and appellant's actions in holding Ryan at knifepoint and threatening to kill her at the neighbor's house constituted felonious assault. The evidence with respect to both indictments was direct and uncomplicated and could reasonably be separated as to each offense. As this court noted in *Davis,* " '[t]he evidence in the instant case * * * not only was direct and uncomplicated as to each indictment, but it was also amply sufficient to sustain each verdict, whether or not the indictments were tried together.' " Id., quoting *Roberts* at 193-94.

{¶73} Accordingly, we conclude not only that there was no potential risk to appellant from trying the cases together, but there were concomitant advantages to proceeding in a single trial. As such, we cannot conclude that defense counsel was ineffective in failing to oppose the state's motion for joinder.

{¶74} Appellant next contends defense counsel was ineffective in failing to move to dismiss the felonious assault indictment on grounds that the indictment resulted from prosecutorial vindictiveness. We note that, while defense counsel did not formally move to dismiss the felonious assault indictment, he did argue that appellant should not be sentenced on both charges because the state indicted him on the felonious assault charge only after he rejected a plea deal on the domestic violence charge. In any event, defense counsel was not ineffective in failing to assert that the state indicted appellant on the felonious assault charge out of vindictiveness. As noted previously, the prosecutor explained that appellant was charged separately only because the information regarding appellant's threatening Ryan with a knife, which gave rise to the later felonious assault indictment, was not discovered until after appellant had been indicted on the domestic violence charge.

{¶75} Appellant also contends defense counsel was ineffective in failing to object to his convictions and sentence on double jeopardy grounds. This court has addressed appellant's challenge in this regard and we concluded that no error occurred. Accordingly, even if defense counsel was deficient in failing to raise this issue, appellant cannot establish that the outcome of the trial would have been different had defense counsel raised the issue.

{¶76} Appellant next contends defense counsel was ineffective in failing to object to certain testimony offered by the state's witnesses during the state's case-in-chief, in failing to object to references in the 911 tapes regarding his recent release from prison on a domestic violence conviction and allegedly stealing a car, and in failing to cross-examine any of the state's witnesses.

{¶77} Regarding appellant's contention that defense counsel was ineffective in failing to object to witness testimony, we note that "[a] failure to object, in and of itself, does not rise

to the level of ineffective assistance of counsel." *State v. Jackson,* 8th Dist. No. 86105, 2006-Ohio-174, ¶88. Ohio courts have recognized that objections tend to disrupt the flow of a trial and are often considered by the fact finder to be technical and bothersome; hence, competent counsel may reasonably hesitate to object. Id., citing Jacobs, Ohio Evidence (1989), at iii-iv; *State v. Campbell*, 69 Ohio St.3d 38, 53, 1994-Ohio-492. Furthermore, the scope of cross-examination falls within the ambit of trial strategy. Tactical or strategic trial decisions, even if ultimately unsuccessful, will not substantiate a claim of ineffective assistance of counsel. *In re M.E.V.,* 10th Dist. No. 08AP-1097, 2009-Ohio-2408, ¶34.

{¶78} Moreover, we cannot find that defense counsel was ineffective in failing to object to the aforementioned references on the 911 tapes. The record reveals that defense counsel, recognizing the difficulty in redacting the offending references from the 911 tapes, requested that the trial court provide the jury a limiting instruction as to the permissible use of that information. Pursuant to that request, the trial court instructed the jury that evidence of a prior conviction for domestic violence could only be considered for purposes of establishing the elements of the offense the state must prove and that such evidence could not be considered for any other purpose, such as to demonstrate that appellant acted in conformity with that prior conduct. Regarding the reference to the stolen vehicle, the court instructed the jury that appellant was not charged with such an offense and that the jury should disregard the comment. A jury is presumed to follow the trial court's instructions. *State v. Brodbeck,* 10th Dist. No. 08AP-134, 2008-Ohio-6961, ¶72, citing *State v. Hancock,* 108 Ohio St.3d 57, 2006-Ohio-160, ¶86, citing *State v. Fears* (1999), 86 Ohio St.3d 329, 334.

{¶79} Appellant further contends defense counsel was ineffective in failing to request a jury instruction on the lesser-included offenses of fourth-degree felony domestic violence,

aggravated assault, negligent assault, aggravated menacing, and menacing. Appellant provides no case law or argument to establish whether the above offenses actually are lesser-included offenses to the charged crimes and does not explain why defense counsel should have requested instructions on such claimed lesser-included offenses in light of the evidence. Moreover, the Supreme Court of Ohio has recognized that failure to request an instruction on lesser-included offenses without more does not establish ineffective assistance of counsel. *State v. Griffie* (1996), 74 Ohio St.3d 332-33. Appellant must establish that the failure to make the request resulted from a reason other than trial strategy. Id. Appellant offers no suggestion that defense counsel's decision not to request a jury instruction on lesser-included offenses was anything other than trial strategy.

{¶80} In addition, we note that an instruction on a lesser-included offense is required only when the evidence presented at trial would reasonably support both an acquittal on the crime charged and a conviction upon the lesser-included offense. *State v. Thomas* (1988), 40 Ohio St.3d 213, paragraph two of the syllabus. As we discussed in our disposition of the second, third, and fourth assignments of error, appellant was convicted of third-degree felony domestic violence under R.C. 2919.25(A) and (D)(4) and felonious assault under R.C. 2929.11(A)(2), and we have determined that there was sufficient evidence to support these convictions and that these convictions were not against the manifest weight of the evidence. As appellant was not entitled to the claimed instructions on lesser-included offenses, defense counsel was not ineffective in failing to request such instructions. See *State v. Hillman,* 10th Dist. No. 06AP-1230, 2008-Ohio-2341, ¶36.

{¶81} Appellant next contends defense counsel was ineffective in failing to assert that his constitutional and statutory rights to a speedy trial were violated because he was not brought to trial within 90 days of his arrest. In averring that he was prejudiced by defense

counsel's failure to assert his speedy trial rights, we presume appellant to argue that defense counsel was ineffective in failing to file a motion to dismiss the charges for a violation of his speedy trial rights. We note that, when a claim of ineffective assistance of counsel is based upon counsel's failure to file a particular motion, a defendant must demonstrate that the motion had a reasonable probability of success. *State v. Barbour,* 10th Dist. No. 07AP-841, 2008-Ohio-2291, ¶14.

{¶82} The Sixth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution guarantee a criminal defendant the right to a speedy trial. "R.C. 2945.71 implements this guarantee with specific time limits within which a person must be brought to trial. If a defendant demonstrates that his or her speedy-trial right has been violated, he or she may seek dismissal of the criminal charges. R.C. 2945.73." *State v. Blackburn,* 118 Ohio St.3d 163, 2008-Ohio-1823, ¶10.

{¶83} Appellant was indicted on October 31, 2007 in case No. 07CR-7931 on one count of third-degree felony domestic violence. R.C. 2945.71(C)(2) provides that a person charged with a felony offense must be brought to trial within 270 days of his or her arrest. Further, "each day during which the accused is held in jail in lieu of bail on the pending charge shall be counted as three days." R.C. 2945.71(E). However, the Supreme Court of Ohio has determined that the triple-count provision of R.C. 2945.71(E) (formerly R.C. 2945.71(D)) is applicable only to those defendants held in prison in lieu of bail solely on the pending charges. *State v. Kaiser* (1978), 56 Ohio St.2d 29, paragraph two of the syllabus.

{¶84} Appellant apparently bases his claim that he was entitled to be brought to trial within 90 days on the triple-count provision of R.C. 2945.71(E). However, that provision is inapplicable here, as the record demonstrates that appellant was incarcerated on unrelated charges at the time he was indicted on October 31, 2007. Indeed, the record demonstrates

that, on October 31, 2007, the prosecutor requested that a warrant be issued and executed upon appellant at the Franklin County Corrections Center. Since appellant was not held in prison in lieu of bail solely on the pending domestic violence charge, he was not subject to the triple-count provision of R.C. 2945.71(E). Accordingly, the state was required to bring appellant to trial within 270 days of his arrest. Trial commenced on April 1, 2008, well within the 270-day period required by R.C. 2945.71(C)(2). Thus, defense counsel's failure to file a motion to dismiss the indictment for violating appellant's speedy trial rights could not have constituted ineffective assistance of counsel because such a motion would not have been successful. See *Barbour* at ¶17.

{¶85} Appellant further contends defense counsel was ineffective in conceding appellant's guilt to the domestic violence charge in closing argument and by stipulating to the admissibility of appellant's prior negligent assault conviction. It is clear from defense counsel's closing argument that his trial strategy was to focus on challenging the felonious assault charge because the state's evidence on the domestic violence charge was overwhelming. As noted previously, strategic trial decisions, even if ultimately unsuccessful, will not substantiate a claim of ineffective assistance of counsel. *In re M.E.V.* Further, for the reasons stated in our disposition of appellant's third assignment of error, counsel was not ineffective in stipulating to the prior negligent assault conviction, as it qualified as a penalty-enhancing predicate pursuant to R.C. 2919.25(D)(4).

{¶86} Finally, appellant contends defense counsel was ineffective in failing to object to the imposition of costs given appellant's indigent status. In *State v. White,* 103 Ohio St.3d 580, 2004-Ohio-5989, the Supreme Court of Ohio noted that R.C. 2947.23 does not prohibit a court from assessing costs against an indigent defendant, but "rather it *requires* a court to assess costs against all convicted defendants." (Emphasis sic.) Id. at ¶8. Accordingly, a

trial court may constitutionally assess court costs as part of the sentence imposed on an indigent defendant convicted of a felony. Id. at ¶9. Thus, defense counsel's failure to object to the imposition of costs could not have constituted ineffective assistance of counsel because such an objection would not have been successful.

{¶87} Having concluded that all of appellant's claims of ineffective assistance are without merit, we overrule appellant's sixth assignment of error.

{¶88} Appellant's seventh and final assignment of error contends the trial court plainly erred in failing to dismiss the felonious assault indictment on grounds of prosecutorial vindictiveness. Appellant contends the prosecutor indicted him on the felonious assault charge as retribution for appellant's failure to plead guilty to domestic violence. As noted earlier, the record clearly indicates that the prosecutor indicted appellant on the felonious assault charge after obtaining new information that appellant threatened Ryan with a knife. The prosecutor's explanation rebuts appellant's claim of a vindictive motive. The seventh assignment of error is overruled.

{¶89} Having overruled appellant's seven assignments of error, we hereby affirm the judgments of the Franklin County Court of Common Pleas.

Judgments affirmed.

BRYANT and SADLER, JJ., concur.

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