[Cite as *State v. Marrero,* 2011-Ohio-1390.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 10AP-344
v.	:	(C.P.C. No. 09CR-11-6553)
Juan R. Marrero,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on March 24, 2011

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor,* for appellee.

Keith O'Korn, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Defendant-appellant, Juan R. Marrero, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to jury verdict, of one count of domestic violence in violation of R.C. 2919.25 and one count of abduction in violation of R.C. 2905.02. Because (1) the trial court did not err in its evidentiary rulings or in denying defendant's motion for a mistrial, (2) sufficient evidence supports defendant's abduction conviction, and the manifest weight of the evidence supports defendant's

abduction and domestic violence convictions, (3) the trial court did not err in failing to instruct the jury on lesser included offenses, in submitting a corrected verdict form to the jury during deliberations, in failing to merge defendant's convictions for sentencing, or in imposing consecutive sentences, and (4) defendant did not receive ineffective assistance of counsel, we affirm.

I. Facts and Procedural History

{¶2} By indictment filed November 2, 2009, defendant was charged with one count of domestic violence, a felony of the fourth degree, and one count of abduction, a felony of the third degree. The charges arose out of an October 10, 2009 incident between defendant and the victim, his live-in girlfriend.

{¶3} According to the state's evidence, the couple had been driving around the city of Columbus most of the day when they went back to their shared apartment so defendant could pick up some compact disks before they drove to Marysville. Defendant went into the apartment and told the victim to wait in the car. After waiting for about 15 minutes, she called him. Defendant's remarks upset her, so the victim drove from the apartment onto Cleveland Avenue. As she was driving, defendant called her and said he was sorry for the fight, so she returned to pick him up at the apartment.

{¶4} Defendant entered the car, kneeled on the passenger seat, and began to hit the victim. He would not allow her to exit the car, forced her into the back seat, choked her, and began driving the car while continuing to punch her. As defendant drove, the victim attempted to call 911 from the backseat. When the car neared a stoplight on Cleveland Avenue, the victim jumped out of the car and ran into the street. Defendant

parked the car and followed her, grabbing her neck and hair and pulling her down. (Tr. 44.)

{¶5} Karen Days was driving on Cleveland Avenue when she saw the victim running in the street as defendant grabbed her and attempted to drag her toward his car. Two men approached the couple, and defendant fled. Days put the victim in her car, drove to the nearby Speedway, and called 911. Police arrived and photographed the victim's injuries.

{¶6} Pursuant to trial, a jury returned verdicts finding defendant guilty of domestic violence and abduction as charged in the indictment. The trial court sentenced defendant to two years on the abduction charge and 17 months on the domestic violence charge, to be served consecutively. Although the trial court's initial "Judgment Entry on Sentencing" stated a prison term was mandatory pursuant to R.C. 2929.13(F), ten days later the court issued an amended judgment entry correctly stating a prison term was not mandatory. From the amended entry defendant appeals.

II. Assignments of Error

{¶7} Defendant assigns the following errors:

> ASSIGNMENT OF ERROR #1
>
> THE INTRODUCTION OF PRIOR BAD ACT EVIDENCE AGAINST APPELLANT THROUGH THE ALLEGED VICTIM'S STATEMENTS TO THE JURY AND TO A 911 OPERATOR VIOLATED EVID.R. 404(B) AND 901(B)(6), AND APPELLANT'S RIGHTS TO A FAIR TRIAL, DUE PROCESS, AND CONFRONTATION.
>
> ASSIGNMENT OF ERROR #2
>
> THE TRIAL COURT ERRED WHEN IT DID NOT GRANT APPELLANT'S REQUEST FOR A MISTRIAL, THUS VIO-

LATING HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS UNDER THE 14TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR # 3

OTHER EVIDENTIARY RULINGS CONSTITUTED ABUSES OF DISCRETION AND, INDIVIDUALLY AND COLLECTIVELY (AND WITH OTHER ERRORS), VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL AND TO CONFRONT HIS MAIN ACCUSER UNDER THE U.S. AND OHIO CONSTITUTIONS.

ASSIGNMENT OF ERROR #4

APPELLANT'S CONVICITON WAS NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 1 & 16 OF THE OHIO CONSTITUTION AND THE CONVICTIONS WERE ALSO AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR #5

THE TRIAL COURT ERRED IN FAILING TO INCLUDE THE APPELLANT'S REQUESTED LESSER-INCLUDED OFFENSES IN THE JURY INSTRUCTIONS AND IN SUBMITTING A VERDICT FORM WITH AN OMITTED ELEMENT.

ASSIGNMENT OF ERROR #6

THE COURT ERRED CONVICTING AND SENTENCING THE APPELLANT FOR THIRD-DEGREE FELONY ABDUCTION AND FOURTH-DEGREE FELONY DOMESTIC VIOLENCE IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT OF THE U.S. CONSTITUTION AND ARTICLE 1, SECTION 10 OF THE OHIO CONSTITUTION.

ASSIGNMENT OF ERROR #7

IN CONTRAVENTION OF RECENT U.S. SUPREME COURT PRECEDENT, *OREGON V. ICE*, AND THE RE-

> ENACTED SENTENCING CODE, THE TRIAL COURT ERRED BY IMPOSING CONSECUTIVE SENTENCES WITHOUT MAKING THE REQUIRED STATUTORY FINDINGS PURSUANT TO R.C. §§ 2929.14(E)(4), 2929.41(A). THE TRIAL COURT'S ORIGINAL FINDING OF MANDATORY PRISON TIME WAS ALSO CONTRARY TO LAW.
>
> ASSIGNMENT OF ERROR #8
>
> TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 10 & 16 OF THE OHIO CONSTITUTION.

{¶8} For ease of discussion, we first address defendant's fourth assignment of error and then consider the remaining assignments of error in order.

III. Fourth Assignment of Error – Sufficiency and Manifest Weight of the Evidence

{¶9} Defendant's fourth assignment of error challenges the sufficiency and manifest weight of the evidence.

A. Sufficiency of the Evidence

{¶10} Defendant initially contends the state failed to present sufficient evidence to support the jury's verdict finding him guilty of abduction. Whether evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Sufficiency is a test of adequacy. Id. The evidence is construed in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Conley* (Dec. 16, 1993), 10th Dist. No. 93AP-387. When reviewing the sufficiency of the evidence the court does not weigh the credibility of the witnesses. *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79.

{¶11} Abduction under R.C. 2905.02 requires the state to prove defendant "without privilege to do so * * * knowingly * * * [b]y force or threat" either (1) "remove[d] another from the place where the other person is found" or (2) "restrain[ed] the liberty of another person, under circumstances which create a risk of physical harm to the victim, or place the other person in fear." R.C. 2905.02(A)(1) and (2).

{¶12} Here, the victim testified that on her return to the apartment complex defendant entered her car, began hitting her, and told her to get into the back seat. She tried to get out of the car to comply with defendant's command, but "[h]e wouldn't let [her] out of the car. So, he grabbed [her] by [her] hair and was pushing [her] into the back seat." (Tr. 41.) Despite her "begging and pleading to get out of the car," defendant "refused to let [her] out of the car," instead taking her to wherever he was driving. (Tr. 42.) While she was in the back seat, defendant told her she was "done," which she understood to mean "[h]e was threatening [her] life" and was going to kill her. (Tr. 43.)

{¶13} The victim's testimony was sufficient to support a "removal" abduction conviction pursuant to R.C. 2905.02(A)(1), as defendant used force to coerce her into the back seat of the car where, despite her pleas, he not only threatened her life but took her to wherever he was driving. Moreover, such evidence supports a "restraint of liberty" abduction conviction pursuant to R.C. 2905.02(A)(2), because defendant punched the victim and threatened her life to prevent her getting out of the car, all of which created a risk of physical harm and placed her in fear.

B. Manifest Weight

{¶14} Defendant also asserts both convictions are against the manifest weight of the evidence.

{¶15} Sufficiency of the evidence and manifest weight of the evidence are distinct concepts; they are "quantitatively and qualitatively different." *Thompkins* at 386. When presented with a manifest weight argument, we engage in a limited weighing of evidence to determine whether sufficient competent, credible evidence permits reasonable minds to find guilt beyond a reasonable doubt. *Conley,* supra; *Thompkins* at 387 (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony"). In the manifest weight analysis the appellate court considers the credibility of the witnesses and determines whether 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., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The jury may take note of any inconsistencies and resolve them accordingly, "believ[ing] all, part, or none of a witness's testimony." *State v. Raver,* 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶16} As to the abduction charge, defendant claims he acted with privilege when he grabbed the victim around the neck and attempted to drag her back to the car. Although we question what privilege would allow defendant to attempt to forcibly drag the victim toward his car, we need not resolve the issue, as defendant's actions in the car support the abduction charge. Defendant did not present any evidence to contradict the victim's testimony and on appeal challenges only the victim's credibility.

{¶17} Defendant attempted to impeach the victim's credibility by demonstrating she, after the incident at issue, wrote him a letter while he was in jail awaiting trial, visited him numerous times at the jail, called him, and professed her love to him. The victim explained her conduct, testifying she loved defendant, but he had a way of "getting into her head" and telling her what she wanted to hear to draw her back to him. (Tr. 54, 57, 93.) She also stated that, after some counseling, she realized she was in an abusive relationship and ended her contacts with defendant.

{¶18} Engaging in the limited weighing of the evidence we are permitted, we cannot say that the jury clearly lost its way when it found defendant guilty of abduction beyond a reasonable doubt. The trier of fact was in the best position to judge the credibility of the victim, and we may not substitute our judgment for that of the jury. Defendant's abduction conviction is not against the manifest weight of the evidence.

{¶19} In defining domestic violence, R.C. 2919.25(A) provides "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member." "Family or household member" means a person living as a spouse who resides with the offender. R.C. 2919.25(F)(1)(a). A "person living as a spouse" includes a person who is cohabitating with the offender. R.C. 2919.25(F)(2). The victim testified defendant was her former boyfriend and, at the time of the incident, they had been living together for just over one year. The victim thus was a family or household member within the meaning of the statute.

{¶20} Defendant claims the domestic violence conviction is against the manifest weight of the evidence because the victim's testimony was not believable. Defendant asserts he could not possibly have punched the victim while he was driving the car.

Noting hers was a compact car, the victim clarified that aspect of her testimony, stating that after she was in the backseat, defendant again punched and choked her and then began to drive the vehicle. As he drove, he had one hand on the wheel and used his other hand to reach around to punch her.

{¶21} Contrary to defendant's assertions, the victim's account of the events was not so physically challenging the jury could not believe it. Even if the jury disbelieved the particular portion of the victim's testimony defendant notes, the evidence of defendant's punching and choking the victim before he began to drive the car would support the jury's conclusion that defendant caused physical harm to the victim. See R.C. 2901.01(A)(3) (stating physical harm means any injury regardless of its gravity or duration).

{¶22} Defendant contends the victim's testimony also was unbelievable because he could not have answered the 911 operator's call back while driving and punching the victim. He lastly asserts her claims of injury are not believable because not only do the photos of the victim from October 10, 2009 not reveal bleeding but the injuries appear to be old.

{¶23} Once again the victim explained, testifying she called 911 from the back seat of the car. The 911 operator called back as they approached a stop sign; defendant at that point answered the phone and said everything was okay. Moreover, contrary to defendant's argument concerning the victim's injuries, State's Exhibit 2 depicts blood on the victim's face, and State's Exhibits 3 and 4 show bruising and redness. Beyond the exhibits, Days testified the victim was bleeding from her face and feet, and the responding officer stated the victim had bruises on her arm, a swollen right eye, and scratches on her

face. The testimony the state offered, as well as the photographs, present a basis for the jury to find the victim credible.

{¶24} Because sufficient evidence supports the jury's verdict finding defendant guilty of abduction, and the manifest weight of the evidence supports the jury's verdicts finding defendant guilty of both abduction and domestic violence, defendant's fourth assignment of error is overruled.

IV. First Assignment of Error – Evidence Issues under Evid.R. 901, the Confrontation Clause & Evid.R. 404(B)

{¶25} Defendant's first assignment of error asserts the trial court erred by allowing into evidence the victim's statements about prior abuse she sustained from defendant. Defendant initially challenges the victim's statements during the second 911 call that Days placed in transporting the victim to Speedway. After Days told the 911 operator their location and the victim's status as injured, the operator asked if the victim knew the perpetrator, to which the victim stated, "He does it all the time." (Tr. 119; State's Exhibit 7.) When, after intervening questions, the operator again asked how the victim knew him, the victim stated, "He is my boyfriend. I had an incident two weeks ago." (Tr. 120; State's Exhibit 7.)

{¶26} Defendant also disputes admission of the victim's statement during redirect examination. The victim initially testified her relationship with defendant "started off with some verbal abuse." (Tr. 94.) The judge sustained defendant's objection, struck the answer, and instructed the jury to disregard it. The victim subsequently added that in her relationship with defendant "something bad would happen" and then defendant would tell her what she wanted to hear to draw her back to him. (Tr. 99.)

{¶27} A trial court has broad discretion concerning the admission of evidence; in the absence of an abuse of such discretion that materially prejudices a defendant, a reviewing court generally will not reverse an evidentiary ruling. *State v. Issa*, 93 Ohio St.3d 49, 64, 2001-Ohio-1290; *Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 66. *State v. Barnes*, 94 Ohio St.3d 21, 23, 2002-Ohio-68 (noting a trial court abused its discretion when it "acted unreasonably, arbitrarily, or unconscionably").

A. Authentication of victim's comments on the 911 tape

{¶28} Defendant claims the court erred when it allowed the victim's comments on the second 911 tape into evidence through Days' testimony, as the state failed to properly authenticate the tape.

{¶29} "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Evid.R. 901(A). A witness with knowledge may authenticate an item by testifying the "matter is what it is claimed to be." Evid.R. 901(B)(1). Moreover, a voice may be identified "whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." Evid.R. 901(B)(5).

{¶30} Before the state played the tape of the 911 calls that Days placed, Days stated she listened to the tapes and acknowledged she had retrieved the victim from the street at the time she placed the calls. Days identified her own voice on the call, stated she was present when the victim talked to the 911 operator, and confirmed the victim's voice was the other one on the call. In overruling defendant's objection to the state's

playing the tape, the trial court stated the "witness was present when the conversation took place. And to her recall, it is accurate transcription of what she heard the alleged victim say." (Tr. 123.)

{¶31} The state adequately authenticated the 911 tape before moving to admit it into evidence when Days testified she made the 911 call, testified it was what the state claimed it to be and identified her and the victim's respective voices on the tape. Evid.R. 901(B)(1). Having been next to the victim as she spoke to the 911 operator, Days could authenticate the voice. Evid.R. 901(B)(5).

B. Right to Confrontation

{¶32} Defendant argues the state violated his right to confront his accuser when the state did not play the tape of the 911 call at issue until after the victim testified and the opportunity to cross-examine her was past. The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." Thus, "testimonial statements of a witness who did not appear at trial" may not be admitted unless the witness "was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington* (2004), 541 U.S. 36, 53-54, 124 S.Ct. 1354, 1365.

{¶33} Defendant initially asserts the victim's statements to the 911 operator about past abuse and threats were testimonial, but the assertion arguably is unfounded. *Crawford* did not expressly define "testimonial statements," but it indicated the term at least included ex parte in-court testimony or its functional equivalent, extrajudicial statements contained in formalized testimonial materials such as affidavits and depositions, and "statements that were made under circumstances which would lead an

objective witness reasonably to believe that the statement would be available for use at a later trial." Id. at 51-52, quoting brief for National Assoc. of Criminal Defense Lawyers as Amici Curiae, 3. See also *Davis v. Washington* and *Hammon v. Indiana* (2006), 547 U.S. 813, 822, 126 S.Ct. 2266, 2273 (concluding statements are non-testimonial when made "in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency"); *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, paragraph two of the syllabus (adopting an "objective witness" test and stating that for "Confrontation Clause purposes, courts should focus on the expectation of the declarant at the time of making the statement").

{¶34} The victim's statements arguably were non-testimonial, since they were to ensure police were coming to the scene of an emergency to aid the victim who believed defendant was going to kill her. When police arrived, minutes after the 911 call at issue, the victim was "very upset, crying, shaking. She was real apprehensive to talk. She was checking the area. She wasn't sure she was in a safe location." (Tr. 141.) See *State v. Sanchez*, 8th Dist. No. 93569, 2010-Ohio-6153, ¶20 (concluding statements were non-testimonial because they were made in the context of an ongoing emergency, as "the events * * * occurred just moments before police arrived," "Garcia exhibited signs of distress," "[t]he perpetrator had not yet been apprehended, and Garcia was injured and crying"); *Cleveland v. Colon*, 8th Dist. No. 87824, 2007-Ohio-269, ¶5, 20, discretionary appeal not allowed, 114 Ohio St.3d 1426, 2007-Ohio-2904, cert. denied, 552 U.S. 1148, 128 S.Ct. 1080 (determining statements made to an officer following a domestic violence incident were non-testimonial, as officers arrived just after the incident occurred, the

perpetrator had just fled the scene, and police were assisting the victim in an ongoing emergency).

{¶35} Even if the victim's statements were testimonial, the Confrontation Clause was not violated because the victim testified at trial. *State v. Taylor*, 9th Dist. No. 06CA009000, 2008-Ohio-1462, ¶42 (noting that "even if part of the 911 call was testimonial, because [the victim] testified at trial and was available for cross-examination, there was no Confrontation Clause violation"). Although the state did not play the 911 call at issue until after the victim testified, the victim mentioned the conversation during her testimony, and defendant could have cross-examined her regarding the 911 call. See *State v. Schewirey*, 7th Dist. No. 05 MA 155, 2006-Ohio-7054, ¶14-15 (allowing officer's statements of what children said to him about sexual assaults, because the children who testified before the officer were subject to cross-examination as to the events). Indeed, defendant could have requested the opportunity to recall the witness for further testimony after the 911 call, but did not.

{¶36} Accordingly, defendant's contentions under the Confrontation Clause are unpersuasive.

C. Evid.R. 404(B)

{¶37} Defendant next points to two instances in the state's evidence that he contends violated Evid.R. 404(B) as evidence of prior bad acts. He first cites the victim's testimony on redirect examination that when something bad happened in the couple's relationship, defendant would say the right thing to bring her back. He further notes the victim's comments on Days' 911 call indicating defendant physically abused her before the day of the incident.

{¶38} Evid.R. 404(B) provides "[e]vidence of other crimes, wrongs, or acts [are] not admissible to prove the character of a person in order to show action in conformity therewith." Such evidence, however, may "be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evid.R. 404(B).

{¶39} Defendant attempted in cross-examination to impeach the victim's credibility by demonstrating she could not have been afraid of defendant, as she visited defendant in the jail several times after the incident occurred. The victim's statement during the state's redirect examination was properly admitted to explain the nature of the victim's relationship with defendant and address the issue defendant raised in cross-examination. *State v. Harris*, 2d Dist. No. 19311, 2003-Ohio-1046, ¶8, quoting *State v. Watson* (1971), 28 Ohio St.2d 15, 21 (noting "evidence of other offenses may be received if relevant for *any purpose* other than to show mere propensity or disposition on [the] accused's part to commit the crime") (emphasis added); *State v. Smith* (1990), 49 Ohio St.3d 137, 140. See also *State v. Fadis*, 10th Dist. No. 01AP-865, 2002-Ohio-1349 (concluding evidence of defendant's prior violent conduct toward the victim was admitted for the non-propensity purpose of showing the true nature of the defendant and the victim's relationship, including to rebut claim defendant and victim maintained a close relationship).

{¶40} Similarly, the two statements in the 911 call also were properly admitted. The 911 tapes were relevant not only to the nature of the victim's relationship with defendant but also to what occurred between the victim and defendant in the victim's car. Moreover, the prejudicial effect of the statement that defendant previously caused harm to the victim was minimal in light of evidence defendant had a prior domestic violence

conviction. The trial court further reduced any prejudicial effect of such evidence when it instructed the jury that while "[t]here was testimony indicating the defendant had, on previous occasions, allegedly committed unlawful acts involving [the victim]," the jury was not to consider that testimony "to prove the character of the defendant in order to show that he acted in conformity with that character." (Tr. 171.)

{¶41} Accordingly, we overrule defendant's first assignment of error.

V. Second Assignment of Error – Mistrial

{¶42} Defendant's second assignment of error contends the trial court erred in denying his motion for a mistrial after the state's lay witness testified to her opinion concerning a legal conclusion.

{¶43} Days, who witnessed a portion of the incident between defendant and the victim, was the president of the Columbus Coalition Against Family Violence at the time of the incident. She so identified herself in her testimony to the jury. In response to the prosecution's request that she describe what she saw, she stated she was returning home when she "probably had in [her] career the first experience of witnessing personally a domestic violence situation." (Tr. 106.) Defendant objected, the court sustained the objection, and defendant moved for a mistrial; the court denied the motion. The court also stated the term "domestic violence" was "pretty much a term of art and well known in the public." (Tr. 117.) Although the state on appeal agrees the witness should not have so testified, it maintains the opinion was harmless in light of the witness's factual testimony.

{¶44} A court reviewing a trial court's decision on a motion for mistrial defers to the judgment of the trial court, as it is in the best position to determine whether the circumstances warrant the declaration of a mistrial. *State v. Glover* (1988), 35 Ohio St.3d

18, 19. We thus review a trial judge's decision for an abuse of discretion. *Columbus v. Aleshire*, 187 Ohio App.3d 660, 2010-Ohio-2773, ¶42, citing *State v. Sage* (1987), 31 Ohio St.3d 173, 182.

{¶45} "A mistrial should not be ordered in a criminal case merely because some error or irregularity has intervened, unless the substantial rights of the accused or the prosecution are adversely affected." *State v. Reynolds* (1988), 49 Ohio App.3d 27, 33. A trial court should only declare a mistrial when "the ends of justice so require and a fair trial is no longer possible." *State v. Franklin* (1991), 62 Ohio St.3d 118, 127, cert. denied, 504 U.S. 460, 112 S.Ct. 2315 (citations omitted). To determine whether the defendant was deprived of a fair trial, we must determine whether, "absent the improper remark[], the jury would have found the appellant guilty beyond a reasonable doubt." *Aleshire*, citing *State v. Maurer* (1984), 15 Ohio St.3d 239, 267.

{¶46} "Testimony in the form of an opinion or inference otherwise admissible is not objectionable solely because it embraces an ultimate issue to be decided by the trier of fact." Evid.R. 704. A lay witness's opinion testimony is limited to those opinions or inferences that are "(1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." Evid.R. 701. Because lay witnesses may testify only on personal knowledge, and "[q]uestions of law are outside of the realm of firsthand knowledge, * * * a lay witness may not offer legal conclusions." *Woods v. Capital Univ.*, 10th Dist. No. 09AP-166, 2009-Ohio-5672, ¶71. Indeed, when a lay witness opines on a legal conclusion, the witness's testimony rarely will be helpful to the jury because the testimony attempts to answer,

rather than aid the jury in answering, the ultimate question at issue. *Becton v. Starbucks Corp.* (S.D.Ohio 2007), 491 F.Supp.2d 737, 742.

{¶47} *State v. Clemons* (Mar. 30, 1988), 3d Dist. No. 1-86-36 is instructive in resolving defendant's contentions. In that case, a lay witness testified she was not with the victim the "particular night that she got killed." Id. The defendant moved for a mistrial based on the statement, and the trial court denied the motion. The appellate court concluded that, even if "killed" denoted a conclusion on an ultimate legal issue, the trial court did not abuse its discretion in denying the motion for a mistrial, as the trial court promptly instructed the jury to disregard the witness's remark. *Clemons* thus concluded the trial court's decision to deny the motion for a mistrial "was reasonable, not arbitrary and by no means unconscionable." Id; see also *State v. Woodward*, 10th Dist. No. 03AP-398, 2004-Ohio-4418, ¶35.

{¶48} Similarly, the trial court here immediately admonished the witness "to answer the question fully and completely and then just stop talking," sustained defendant's objection to the answer, and instructed the jury it was "not required to accept as true any opinions expressed by a witness during their testimony." (Tr. 106, 107, 167.) Because the court took appropriate remedial measures to cure any prejudice Days' statement may have caused, it did not abuse its discretion in denying defendant's motion for a mistrial. Defendant's second assignment of error is overruled.

VI. Third Assignment of Error – Other Evidentiary Rulings

{¶49} Defendant's third assignment of error asserts the trial court erred in several evidentiary rulings that combined with other errors to deprive defendant of a fair trial.

A. Relevancy

{¶50} Defendant contends the trial court erred by allowing into evidence, over defendant's objection, the victim's statement that defendant "deserves what he gets. He has a daughter." (Tr. 54.) Defendant asserts the court should have excluded the testimony because the unfair prejudice the statement caused substantially outweighed any relevancy or probative value the statement may have had. Evid.R. 403(A). To exclude evidence pursuant to Evid.R. 403(A), "the probative value must be minimal and the prejudice great." *State v. Morales* (1987), 32 Ohio St.3d 252, 258.

{¶51} The victim testified that after the state filed the charges, defendant, in an attempt to exonerate himself, told her to write a letter stating she had a fight with a female. The state asked her why she did not write the letter, and she responded "because he deserves what he gets. He has a daughter." (Tr. 54.) The statement was relevant to explain why, in the victim's view, she did not write the letter: defendant caused her injuries and thus deserved the consequences of his actions. Evid.R. 401. Moreover, any prejudicial effect the statement may have caused was minimal in light of its probative value in explaining why the victim did not write the requested letter that would have served as defendant's primary defense to the charges. The trial court did not abuse its discretion in admitting the statement into evidence.

{¶52} Defendant also claims the trial court erred by allowing into evidence the victim's statement that, as a result of counseling, she "recognized the true aspects of domestic violence." (Tr. 58.) The victim offered the statement in response to defendant's attempts to impeach the victim's credibility with evidence she could not have been afraid of him in view of her post-incident visits at jail, calls, and love letters to him.

{¶53} To explain her conduct, the victim testified she initially did not cooperate with the state because in post-incident talks to defendant he told her what she wanted to hear, convinced her they would be together, and assured her things would be favorably resolved. She testified that once she was in counseling she "recognized the true aspects of domestic violence, what really happens," she was able to end her relationship with defendant. Her testimony thus was relevant to show why the victim initially continued her relationship with defendant, a significant aspect of defendant's defense. Evid.R. 401. The trial court did not act arbitrarily, unreasonably, or unconscionably in allowing the statement into evidence.

{¶54} Defendant next contends the trial court erred when it prevented defendant from impeaching the victim's testimony with statements she made to defendant's family regarding a fight she had with a female. On cross-examination the victim agreed "the whole idea that [she] had a fight with a female [was] a total fabrication," as defendant caused all the injuries she sustained on October 10, 2009. (Tr. 87.) In response to defendant's asking whether she admitted she had conversations with the defendant's family members during the course of the case, the victim said she had. When defendant then asked whether "during that period of time you indicated that you had found another individual," the state objected, and the court sustained the objection. (Tr. 88.) Later, after the state finished presenting its evidence, defendant rested, his counsel stating defendant would "not put on any evidence. My evidence was impeachment evidence. I don't think it is proper to go back to the jury." (Tr. 156.)

{¶55} With that premise, defendant asserts the trial court prevented him from properly examining the victim concerning her statements to defendant's family about a

possible fight with a female. The difficulty lies in attempting to discern to what defendant's question was directed. On this record, we cannot decipher the question to know whether the question is relevant or the answer would have favored defendant. Nor did defendant rephrase the question. Accordingly, we cannot say the trial court abused its discretion in sustaining the state's objection.

B. Hearsay

{¶56} Defendant also contends the trial court erred in allowing inadmissible hearsay into evidence that bolstered the testimony of other witnesses. A party may bolster or corroborate "another witness's testimony as long as the testimony is relevant and not objectionable on specific evidentiary grounds." *State v. Hurst* (Mar. 7, 2000), 10th Dist. No. 98AP-1549. A statement is inadmissible hearsay when it is (1) an out-of-court statement and (2) offered to prove the truth of the matter asserted. Evid.R. 801(C) and 802. When a party offers an extrajudicial statement to explain "the actions of a witness to whom [the] statement was directed," the party is not offering the statement for the truth of the matter asserted, and the statement is not hearsay. *Maurer* at 262; *State v. Thomas* (1980), 61 Ohio St.2d 223, 232.

{¶57} Defendant initially contends the trial court erred in overruling his objection to the victim's statement that the woman whose car she entered after the incident with defendant "told [her] that she was going to take [her] to Speedway." (Tr. 51.) Defendant similarly asserts the trial court erred in overruling defendant's objection to the victim's statement that, as she got into Days' car, Days told her "she had done called 911. They were on their way, and she was going to take me over" to Speedway. (Tr. 52.) Lastly, defendant contends the trial court erred by allowing into evidence the victim's statement

that, as she was filling out a police report, a man came over "and said they had spotted Mr. Marrero on foot." (Tr. 52-53.) None of the statements were offered for the truth of the matter asserted. The first two explained the victim's actions of going to Speedway with Days so they again could call 911. The last explained why police and the victim left the Speedway: to try to find defendant whom someone claimed to have spotted in the area.

{¶58} Defendant next contends the trial court improperly allowed the victim to testify about the prosecution's extrajudicial comments. The state asked the victim how many times the prosecutor's office asked her to cooperate in prosecuting the case. The court allowed the victim to respond, over defendant's objection, that "[a]t the beginning it was more frequently. We had distanced our communication for awhile." (Tr. 57.) Even if the objection should have been sustained, defendant's brief does not explain how the answer prejudiced him, and we are unable to see any notable prejudice in light of the remaining testimony the state offered.

{¶59} Defendant also asserts the trial court erred in allowing into evidence portions of Days' testimony where she reiterated what others said to her. Defendant in particular points to Days' testimony that she heard the victim screaming, "Please help me. He is going to kill me." (Tr. 108.) Defendant similarly contends the trial court erred when it allowed Days to testify that, immediately after the victim entered Days' car, and in response to Days' inquiry whether any weapons were involved, the victim said to Days, "I don't believe he has a gun, but he is known to carry a knife." (Tr. 108.) Both statements are excited utterances pursuant to Evid.R. 803(2) and are admissible. *State v. Scarl,* 11th Dist. No. 2002-P-0091, 2003-Ohio-3493, ¶64-65 (concluding that where victim arrived at police station winded, hysterical and bleeding, her statements to an

officer that her husband assaulted her and chased her in a car as she ran from the house, as well as answer to officer's question that husband hit her "too many" times, "clearly constituted excited utterance"). *State v. Reynolds* (Dec. 18, 1986), 8th Dist. No. 51326 (determining woman's statement to police officer that "[h]e is going to kill me like he killed Nicie" was admissible as an excited utterance where officer witnessed defendant strike the woman several times and the woman ran, jumped into the officer's car and made the statement).

{¶60} Defendant further contends the trial court improperly allowed a police officer to testify that during the evening of October 10, 2009 the officer and her partner were working patrol when they received a call to the area of Cleveland and Ferris Avenues. The officer stated that, before receiving the information, she received several domestic violence calls from the area of Belcher and Dresden, the area around the victim's apartment complex. Concerning those earlier calls, the officer stated the "cell-phone towers tried to trace it, which they refer to those." (Tr. 136-37.) Defendant objected based on hearsay, and the trial court overruled the objection. The officer finished by testifying they refer to it as a "rebid" when the cell-phone towers try to pinpoint from where a call was placed. (Tr. 137.) Defendant similarly claims the trial court improperly admitted the officer's statement that "the run stated there was a female screaming for help." (Tr. 138-39.) Neither statement was hearsay. The first was offered to explain why the officers initially were in the area of Belcher and Dresden trying to find the caller, but subsequently went to Cleveland and Ferris once they received the updated location. Likewise, the latter statement was offered to show what factors influenced the officer's actions that evening in

responding to the call. Moreover, in view of the evidence offered, the challenged evidence did not prejudice defendant.

{¶61} The trial court did not abuse its discretion in admitting any of the statements into evidence.

C. Authentication

{¶62} Defendant asserts the trial court erred when it allowed the jury to hear tapes of the first set of 911 calls between the victim, defendant, and a 911 operator because no one from the 911 call center or police authenticated the exhibit. Moreover, defendant notes, the victim identified her voice only after the state played the 911 call to the jury and only the victim identified defendant's voice.

{¶63} Prior to playing the 911 call the victim placed while she was in the car with defendant, the state asked the victim if she listened to State's Exhibit 6, she replied she did, and the tape consisted of her "calling 911, and 911 returning the phone call talking to Mr. Marrero." (Tr. 50.) Defendant objected "as to foundation," the court overruled the objection, and allowed the state to play the exhibit to the jury. (Tr. 50.) Contrary to defendant's contentions, the above exchange is sufficient to authenticate the tape pursuant to Evid.R. 901(B)(1), as the victim testified the tape was what the state claimed it be: the victim's calling 911, a 911 operator calling back, and a 911 operator talking to defendant. See also Evid.R. 901(A) (stating authentication is "satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims"). The trial court did not abuse its discretion in admitting the tape into evidence.

{¶64} Accordingly, we overrule defendant's third assignment of error.

VII. Fifth Assignment of Error – Lesser-Included Offenses and Verdict Form

{¶65} Defendant's fifth assignment of error contends the trial court erred in refusing to instruct the jury on defendant's requested lesser-included offenses and in initially submitting to the jury a verdict form with an omitted element.

A. Lesser-Included Offenses

{¶66} R.C. 2945.74 and Crim.R. 31(C) allow a trier of fact to consider lesser-included offenses of a charged offense. "An offense may be a lesser included offense of another if (i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, as statutorily defined, ever be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense." *State v. Deem* (1988), 40 Ohio St.3d 205, paragraph three of the syllabus.

{¶67} A court need instruct on a lesser-included offense "only where 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. We must determine whether the trial court's decision constituted "an abuse of discretion under the facts and circumstances of the case." *State v. Wolons* (1989), 44 Ohio St.3d 64, 68, quoting *State v. Adams* (1980), 62 Ohio St.2d 151, 157. When determining whether the trial court should have given the lesser included offense instruction, "[t]he evidence must be considered in the light most favorable to defendant." *State v. Wilkins* (1980), 64 Ohio St.2d 382, 388.

1. Assault

{¶68} Defendant initially contends the trial court erroneously declined to instruct the jury on assault as a first degree misdemeanor as a lesser-included offense of felony domestic violence.

{¶69} R.C. 2903.13(A) prohibits assault, providing in relevant part that "[n]o person shall knowingly cause or attempt to cause physical harm to another." Similarly, R.C. 2919.25(A) prohibits domestic violence, stating "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member." Even if assault properly were considered a lesser-included offense of felony domestic violence, a jury instruction on assault nonetheless was inappropriate.

{¶70} When the evidence is construed in the light most favorable to defendant, the evidence would not have allowed the jury reasonably to reject the domestic violence offense while finding defendant guilty of assault, since R.C. 2903.13(A) assault differs from R.C. 2919.25(A) domestic violence only in that domestic violence required the offender to direct the physical harm toward a family or household member. The state presented uncontradicted evidence the victim was a family member as defined in R.C. 2919.25(F), as defendant and the victim had been a couple for a year and a half, lived together for just over a year, and were still living together when the offense occurred. Even if the victim were absent from the shared apartment the night before the incident, she still was a family or household member for purposes of the statute. The trial court did not err in refusing to give the requested instruction.

2. Disorderly Conduct

{¶71} Defendant also argues the trial court erred in not instructing the jury on disorderly conduct as a lesser-included offense of domestic violence. R.C. 2917.11(A)(1) prohibits disorderly conduct, stating "[n]o person shall recklessly cause inconvenience, annoyance, or alarm to another by doing any of the following: [e]ngaging in fighting, in threatening harm to persons or property, or in violent or turbulent behavior."

{¶72} Even if disorderly conduct properly may be considered a lesser-included offense of domestic violence, the evidence, when construed in defendant's favor, would not have supported an acquittal on the crime charged and a conviction on the lesser-included offense. *Thomas*; *Wilkins*. Defendant argues to the contrary, asserting the victim's "minor injuries coupled with [her] credibility problems would have reasonably supported an acquittal on assault charges and a conviction for disorderly conduct for the scene [the victim] and [defendant] were involved in at Cleveland and Ferris." (Appellant's brief, 19.) Even a minor injury, however, constitutes physical harm for purposes of the domestic violence statute, and the state's evidence demonstrated the victim suffered bruises, scratches, and bleeding.

{¶73} In the end, defendant's only argument to support acquittal on the domestic violence charge is the victim's "credibility problems." In our analysis of defendant's fourth assignment of error, we considered the issue and concluded the victim's "credibility problems" largely were explained and did not warrant discrediting the overwhelming evidence from the victim, Days, a police officer, and 911 tapes, all of which indicated defendant, throughout the course of events on October 10, 2009, caused the victim physical harm by punching, choking, and pulling her. We thus cannot say a jury

reasonably could have found defendant guilty of disorderly conduct and not guilty of domestic violence.

3. Unlawful Restraint

{¶74} Defendant contends the trial court erred in not instructing the jury on unlawful restraint as a lesser-included offense of abduction. R.C. 2905.03(A) prohibits unlawful restraint and states "[n]o person, without privilege to do so, shall knowingly restrain another of the other person's liberty." R.C. 2905.02(A)(1) and (2), prohibit abduction, stating "[n]o person, without privilege to do so shall knowingly * * * [b]y force or threat remove another from the place where the other is found * * * [or] restrain the liberty of another under circumstances that create a risk of physical harm to the victim or place the other person in fear."

{¶75} Again, even if unlawful restraint is a lesser-included offense of abduction, the trial court did not err in refusing to instruct on unlawful restraint. Although defendant claims he was entitled to an unlawful restraint instruction because the evidence indicated he restrained the victim without the use of force or threat and without either causing a risk of physical harm to the victim or placing her in fear, all the evidence indicates to the contrary. According to the evidence offered at trial, defendant used force and threats to restrain the victim, caused a risk of and actual physical harm to her, and placed her in fear by not letting her exit the vehicle, grabbing her by her hair, and pushing her into the back seat. He then continued to refuse to let her out of the car as he drove, punching her and threatening her life. The trial court did not abuse its discretion in refusing to give the requested instruction on unlawful restraint, as the jury could not have reasonably found defendant not guilty of the greater offense.

{¶76} The trial court did not err in denying defendant's request for jury instructions on the lesser included offenses of assault, disorderly conduct, or unlawful restraint.

B. Omitted Element

{¶77} Defendant lastly asserts the trial court erred when it submitted to the jury a verdict form for fourth-degree felony domestic violence without the prior conviction element, the element necessary to enhance the degree of defendant's conviction from a first-degree misdemeanor to a fourth-degree felony.

{¶78} The parties stipulated to the prior offense, and the state informed the jury of defendant's 2008 plea of no contest to the charge of domestic violence. The first verdict form submitted to the jury addressed only the domestic violence charge being tried to the jury; it did not include the prior conviction element. Shortly after the jury began deliberating, the trial court realized its mistake, called the jury back to the courtroom, provided a corrected form, and instructed the jury that if the jury found defendant guilty of domestic violence, the jury would be required to additionally determine whether defendant previously was convicted of domestic violence. The jury recommenced deliberations, and defendant objected to the proceeding. An hour later the jury returned its verdict, finding defendant guilty of domestic violence and concluding he previously was convicted of domestic violence.

{¶79} R.C. 2945.75(A)(2) provides that "[a] guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged." Here, the signed guilty verdict finds the additional element of defendant's prior domestic violence conviction. Defendant nonetheless

contends that because the original, unsigned verdict form did not contain the prior conviction specification, we must reduce his conviction to a first-degree misdemeanor.

{¶80} Although defendant cites a plethora of cases to support his contentions, none speaks to a situation where an element, stipulated by the parties, was omitted from the original verdict form but corrected before the jury reached a verdict. A more similar situation occurred in *Maurer*, where the jury returned an incomplete verdict form that did not contain a finding on the specification, and the trial court refused to accept it. Id. at 248-49. The trial court advised the jury of its mistake, and the jury then returned with a properly executed verdict form. Id. at 249. On review, the Ohio Supreme Court stated it could "detect no prejudice or contravention of appellant's due process rights" by having the jury correct its mistake and determine defendant's guilt on the specification. Id. at 249. Even less prejudice is evident here, where the court corrected the verdict form before the jury reached any decision, and the final jury verdict form properly complied with R.C. 2945.75(A)(2).

{¶81} Accordingly, we overrule defendant's fifth assignment of error.

VIII. Sixth Assignment of Error – Allied Offenses of Similar Import

{¶82} Defendant's sixth assignment of error asserts the trial court violated the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, and Section 10, Article I of the Ohio Constitution, when, over defendant's objection, it sentenced defendant for third-degree felony abduction and fourth-degree felony domestic violence stemming from the same conduct. Defendant requests a remand so the trial court may merge the offenses.

{¶83} "The federal and state constitutions' double jeopardy protection guards citizens against cumulative punishments for the 'same offense.' " *State v. Hall,* 10th Dist. No. 05AP-957, 2006-Ohio-2742, ¶16, citing *State v. Moss* (1982), 69 Ohio St.2d 515, 518. "Despite such constitutional protection, a state legislature may impose cumulative punishments for crimes that constitute the 'same offense' without violating double jeopardy protections." Id. at ¶16. "Under the 'cumulative punishment' prong, double jeopardy protections do 'no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.' " Id. at ¶16, quoting *Missouri v. Hunter* (1983), 459 U.S. 359, 366, 103 S.Ct. 673, 678. When determining "the constitutionality of imposing multiple punishments against a criminal defendant in one criminal proceeding for criminal activity emanating from one transaction, appellate courts are limited to assuring that the trial court did not exceed the sentencing authority the legislature granted to the judiciary." Id., citing *Moss* at 518, citing *Brown v. Ohio* (1977), 432 U.S. 161, 97 S.Ct. 2221.

{¶84} R.C. 2941.25 provides that where a defendant's same conduct "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." R.C. 2941.25(A). Where, however, "the defendant's conduct constitutes two or more offenses of dissimilar import" or "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." R.C. 2941.25(B). R.C. 2941.25 is a legislative attempt "to codify the judicial doctrine of merger, i.e., the principle that 'a major crime often includes as inherent therein

the component elements of other crimes and that the component elements, in legal effect, are merged in the major crime.' " *State v. Brown,* 119 Ohio St.3d 447, 2008-Ohio-4569, ¶42, quoting *State v. Botta* (1971), 27 Ohio St.2d 196, 201.

{¶85} The Supreme Court of Ohio recently reviewed and revised the analysis under R.C. 2941.25. *State v. Johnson*, ___N.E.2d___, 2010-Ohio-6314, ¶40 (summarizing the allied offenses jurisprudence prior to *Johnson*). The court held that, when determining whether two offenses "are allied offenses of similar import subject to merger under R.C. 2941.25, the conduct of the accused must be considered." Id. at syllabus. *Johnson* thus overruled *State v. Rance,* 85 Ohio St.3d 632 to the extent *Rance* instructed courts to compare the statutory elements of the two offenses in the abstract. Id. at ¶44. Under *Johnson*, "the court need not perform any hypothetical or abstract comparison of the offenses at issue in order to conclude that the offenses are subject to merger." Id at ¶47. Rather, the court simply must ask whether the defendant committed the offenses by the same conduct. Id.

{¶86} Accordingly, in analyzing defendant's conduct, we ask "whether it is possible to commit one offense *and* commit the other with the same conduct, not whether it is possible to commit one *without* committing the other." (Emphasis sic.) Id. at ¶48, citing *State v. Blankenship* (1988), 38 Ohio St.3d 116, 119 (Whiteside, J., concurring). If the offenses are of similar import because the defendant committed them through the same conduct, the court then must ask whether the offenses were committed separately or with a separate animus. Id. at ¶49-51.

{¶87} Defendant's conduct exhibits distinct and separate crimes. According to the victim, she went back to the apartment complex to pick up defendant; he entered on the

passenger side of her car and began to punch her in the face. Such evidence supports a domestic violence conviction. Later, after punching the victim in the face, defendant grabbed her by the hair, pushed her into the back seat, and refused to let her out of the car. Such separate evidence supports an abduction conviction. Accordingly, we overrule defendant's sixth assignment of error.

IX. Seventh Assignment of Error – Consecutive Sentences & Sentencing Entry

{¶88} Relying on *Oregon v. Ice* (2009), 555 U.S. 160, 129 S.Ct. 711, defendant asserts in his seventh assignment of error the trial court erred in imposing consecutive sentences without making the required statutory findings contained in R.C. 2929.14(E)(4) and 2929.41(A).

{¶89} As enacted pursuant to S.B. 2 in 1996, R.C. 2929.14(E) directed trial courts to make specified findings of fact before imposing consecutive sentences. Due to United States Supreme Court decisions which called into question the constitutionality of provisions like R.C. 2929.14(E), the Ohio Supreme Court considered the requirements of the statute in *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856. See *Blakely v. Washington* (2004), 542 U.S. 296, 303, 124 S.Ct. 2531, 2537 (determining judicial fact finding which not only increased a defendant's sentence beyond the statutory maximum for the standard range of sentences but was not based on "the facts reflected in the jury verdict or admitted by the defendant" violated the defendant's Sixth Amendment right to trial by jury); see also *Apprendi v. New Jersey* (2000), 530 U.S. 466, 120 S.Ct. 2348.

{¶90} *Foster* found R.C. 2929.14(E) unconstitutional. Id. at paragraph three of the syllabus. It concluded R.C. 2929.14(E) violated the principles announced in *Blakely* because "the total punishment increase[d] through consecutive sentences only after

judicial findings beyond those determined by a jury or stipulated to by a defendant." Id. at ¶67. The Supreme Court of Ohio accordingly severed R.C. 2929.14(E) and 2929.41(A). Id. at paragraph four of the syllabus. After *Foster,* Ohio trial courts could impose consecutive sentences without making any findings of fact. *State v. Houston,* 10th Dist. No. 06AP-662, 2007-Ohio-423, ¶3, appeal not allowed, 114 Ohio St.3d 1426, 2007-Ohio-2904.

{¶91} In *Ice* the United States Supreme Court held, "in light of historical practice and the authority of States over administration of their criminal justice systems, that the Sixth Amendment does not exclude" a state law requiring a judge to make certain factual findings before imposing consecutive instead of concurrent sentences. Id. at 714-15. Defendant argues *Ice* and subsequent re-enactments of R.C. 2929.14 post-*Ice*, either alone or collectively, require trial courts to comply with the findings under severed R.C. 2929.14(E).

{¶92} The Supreme Court of Ohio recently determined in *State v. Hodge,* 128 Ohio St.3d 1, 2010-Ohio-6320 that *Ice* did "not revive Ohio's former consecutive-sentencing statutory provisions, R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in *State v. Foster*." Id. at paragraph two of the syllabus. Accordingly, "[t]rial court judges are not obligated to engage in judicial fact-finding prior to imposing consecutive sentences," unless and until "the General Assembly enacts new legislation requiring that findings be made." Id. at paragraph three of the syllabus. The statutes severed in *Foster* thus remain "null and of no effect absent an affirmative act of the General Assembly." Id. at ¶36. Accordingly, the trial court did not err when it sentenced

defendant to consecutive sentences without engaging in the judicial fact-finding under severed R.C. 2929.14(E)(4).

{¶93} Based on the foregoing, we overrule defendant's seventh assignment of error.

X. Eighth Assignment of Error – Ineffective Assistance of Counsel

{¶94} Defendant's eighth assignment of error asserts he received ineffective assistance of counsel, as guaranteed to him by the Sixth Amendment to the United States Constitution and Sections 10 and 16, Article I, of the Ohio Constitution.

{¶95} To prove ineffective assistance of counsel, defendant must demonstrate his counsel's performance fell below an objective standard of reasonable representation and prejudiced him. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus, following *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. Defendant thus must establish his counsel was deficient, in that his counsel made errors so serious counsel was not functioning as the "counsel" the Sixth Amendment guarantees. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. Defendant also must establish that counsel's deficient performance prejudiced him, demonstrating counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable. Id. Unless defendant makes both showings, it cannot be said that his convictions resulted from a breakdown in the adversary process that renders the result unreliable. Id. Defendant asserts his counsel was ineffective in three ways.

A. Unanimity Instruction

{¶96} Defendant alleges his trial counsel was ineffective by failing to move for a jury instruction and verdict form on the abduction charge that requested the jury

unanimously find defendant either removed the victim from a place where she was found, pursuant to R.C. 2905.02(A)(1), or restrained the victim of her liberty, pursuant to R.C. 2905.02(A)(2). Counsel was not deficient in failing to request such an instruction; nor would the unanimity instruction, if given, have changed the outcome of the case.

{¶97} Crim.R. 31(A) guarantees a jury verdict will be unanimous. A jury nonetheless "need not always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime." *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, ¶38, quoting *Richardson v. United States* (1999), 526 U.S. 813, 817, 119 S.Ct. 1707, 1710. The critical inquiry, when determining whether a defendant was deprived of the Crim.R. 31(A) right to juror unanimity "is whether the case involves 'alternative means' or 'multiple acts.' " Id. at ¶48.

{¶98} A case involves "alternative means" when "a single offense may be committed in more than one way." Id. at ¶49. Although the jury must be unanimous "as to guilt for the single crime charged, * * * [u]nanimity is not required * * * as to the means by which the crime was committed so long as substantial evidence supports each alternative means." Id. (noting that, in "reviewing an alternative means case, the court must determine whether a rational trier of fact could have found each means of committing the crime proved beyond a reasonable doubt").

{¶99} By contrast, a "multiple acts case" is one in which several acts are alleged, and any one could satisfy the crime charged. In those circumstances, "the jury must be unanimous as to which act or incident constitutes the crime." Id. at ¶50 (citations omitted). In those circumstances, "the State [must] elect the particular criminal

act upon which it will rely for conviction," and the trial court must "instruct the jury that all of them must agree that the same underlying criminal act has been proved beyond a reasonable doubt." Id.

{¶100} In *State v. McKnight*, 107 Ohio St.3d 101, 2005-Ohio-6046, McKnight was charged with kidnapping, and the court instructed the jury "to determine whether 'McKnight, by force, threat or deception, did remove Emily Murray from the place where she was found or restrain Emily Murray of her liberty.' " Id. at ¶227 (emphasis omitted). Although McKnight argued the instruction deprived him of a unanimous jury verdict, the court concluded the kidnapping instruction was proper "because the alternatives were given to the jury disjunctively." Id. at ¶228, citing *State v. Nields*, 93 Ohio St.3d 6, 30, 2001-Ohio-1291; *State v. Cook* (1992), 65 Ohio St.3d 516, 527. The court explained that "[j]urors need not agree on a single means for committing" the offense, because different "jurors may be persuaded by different pieces of evidence, even when they agree on the bottom line. Plainly there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict." Id., quoting *Schad v. Arizona* (1991), 501 U.S. 624, 631-32, 111 S.Ct. 2491, 2497, quoting *McKoy v. North Carolina* (1990), 494 U.S. 433, 449, 110 S.Ct. 1227, 1236-37. See also *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, ¶186-88 (concluding jurors need not agree on a single means for committing an offense).

{¶101} Here, counsel was not deficient because the court disjunctively instructed the jury on the alternatives for committing abduction. (Tr. 171.) Because defendant's case involved a single crime that could have been committed by alternative means, a unanimity instruction was not required. Accordingly, defendant's counsel did not render

ineffective assistance by failing to request a unanimity instruction on the abduction charge.

B. Days' Occupation

{¶102} Defendant next contends he received ineffective assistance of trial counsel when counsel failed to move to exclude any reference to Days' employment or association with the Columbus Coalition Against Family Violence. Defendant also argues his counsel was ineffective in failing to move for a mistrial immediately after Days testified she witnessed a domestic violence situation.

{¶103} "Judicial scrutiny of counsel's performance must be highly deferential" because "[t]here are countless ways to provide effective assistance." *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065. A defendant must keep in mind that the "challenged action 'might be considered sound trial strategy.' " Id. Defense counsel's decision not to move to exclude any reference to Days' occupation may have been a tactical decision, as counsel could have used Days' employment to discredit her testimony by suggesting a bias in favor of the victim. Moreover, counsel's failure to move to exclude reference to Days' employment did not prejudice defendant in light of the totality of the evidence adduced at trial depicting the beating and forced restraint and relocation the victim sustained.

{¶104} As to defendant's contentions regarding a motion for mistrial, defense counsel objected immediately after the witness so testified, and counsel moved for a mistrial a short time later. Defendant fails to explain how the minor delay in moving for a mistrial altered the outcome of the motion or the case, and we see none.

C. Ice

{¶105} Defendant asserts that if we find his trial counsel failed to fully preserve the *Ice* argument for review in his sixth assignment of error, then his trial counsel was ineffective for not making a more specific objection based on *Ice*. Counsel objected "to the consecutive sentences." (Tr. 225.) Even if counsel's objection were deemed insufficiently specific, defendant would be unable to demonstrate prejudice, as *Hodge* definitively states judges may impose consecutive sentences without engaging in judicial fact-finding. *Hodge*, at paragraph three of the syllabus.

{¶106} Based on the foregoing, we overrule defendant's eighth assignment of error.

XI. Disposition

{¶107} Having overruled defendant's eight assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

FRENCH and CONNOR, JJ., concur.

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