[Cite as *State v. Clouse*, 2012-Ohio-3471.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 11AP-857
v.	:	(C.P.C. No. 10CR-11-6404)
Troy F. Clouse,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on August 2, 2012

Ron O'Brien, Prosecuting Attorney, and *Laura R. Swisher*, for appellee.

W. Joseph Edwards, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶ 1} Defendant-appellant, Troy F. Clouse ("appellant"), appeals from a judgment of conviction and sentence entered by the Franklin County Court of Common Pleas pursuant to a jury verdict finding him guilty of two counts of felonious assault and an additional count of domestic violence that was tried to the bench.

{¶ 2} The charges against appellant arose from an incident occurring in the early morning hours of October 22, 2010, in which an adult female victim, N.E., was severely beaten with a baseball bat and suffered multiple broken bones and scalp lacerations. Although the relationship between appellant and the victim was a matter of dispute at

trial, the state sought the domestic violence charge on the basis that the two were cohabitating at the time of the crime.

{¶ 3} The trial court denied motions to suppress use of the baseball bat allegedly used in the incident and introduction of some testimony regarding prior domestic violence incidents. At trial, testimony was presented from the victim, several responding police officers, and a physician who testified regarding the victim's injuries. Appellant testified in his own defense. The trial court denied a Crim.R. 29 motion and allowed the felonious assault charges to go to the jury. The court, upon motion by the defense, also gave an alternative instruction on the inferior offense of aggravated assault based upon provocation or a state of rage.

{¶ 4} The jury returned guilty verdicts on the two counts of felonious assault. To this the court added a guilty verdict on the domestic violence charge. For sentencing, the court merged the domestic violence charge with the two felonious assault counts but did not merge the two felonious assault counts between themselves. The court then imposed two consecutive five-year sentences for a total ten-year term of imprisonment.

{¶ 5} Appellant has timely appealed and brings the following five assignments of error:

> I. THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE APPELLANT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION.
>
> II. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR AQUITTAL PURSUANT TO CRIMINAL RULE 29.
>
> III. THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE APPELLANT WHEN THE CONVICTION AND WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> IV. THE TRIAL COURT ERRED IN DISALLOWING APPELLANT'S QUESTIONING REGARDING [N.E.'S] RESIDENCE ON THE DATE THAT SHE TESTIFIED IN VIOLATION OF THE OHIO RULES OF EVIDENCE

> THEREBY DEPRIVING APPELLANT OF HIS SUBSTANTIAL AND PROCEDURAL DUE PROCESS RIGHTS UNDER THE FEDERAL AND STATE CONSTITUTIONS.
>
> V. THE TRIAL COURT ERRED IN ALLOWING TESTIMONY REGARDING APPELLANT'S PRIOR CONTACT WITH [N.E.] IN VIOLATION OF THE OHIO RULES OF EVIDENCE THEREBY DEPRIVING APPELLANT OF HIS SUBSTANTIAL AND PROCEEDURAL DUE PROCESS RIGHTS UNDER THE FEDERAL AND STATE CONSTITUTIONS.

(Sic passim.)

{¶ 6} Appellant's first and third assignments of error will be addressed together. Both of these challenge the sufficiency and manifest weight of the evidence heard at trial.

{¶ 7} The legal concepts of sufficiency of the evidence and weight of the evidence involve different determinations. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). As to sufficiency of the evidence, " 'sufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." *Id.*, citing Black's Law Dictionary 1433 (6th Ed.1990). A determination as to whether the evidence is legally sufficient to sustain a verdict is a question of law. *Thompkins* at 386. When we review the sufficiency of the evidence upon appeal, we construe the evidence 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*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. As a result, when we review the sufficiency of the evidence, we do not on appeal reweigh the credibility of the witnesses. *State v. Yarbrough*, 95 Ohio St.3d 227, 2002-Ohio-2126, ¶ 79.

{¶ 8} The relevant inquiry on review of the sufficiency of the evidence is whether, "after viewing the evidence in the light most favorable to the prosecution, *any*

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis sic.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

{¶ 9} As opposed to the concept of sufficiency of the evidence, the court in *Thompkins* noted that "[w]eight 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. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief.' " (Emphasis sic.) *Thompkins* at 388, quoting Black's Law Dictionary at 1594.

{¶ 10} As the finder of fact, the jury is in the best position to weigh the credibility of testimony by assessing the demeanor of the witness and the manner in which he testifies, his connection or relationship with the parties, and his interest, if any, in the outcome. The jury can accept all, a part or none of the testimony offered by a witness, whether it is expert opinion or eyewitness fact, whether it is merely evidential or tends to prove the ultimate fact. *State v. McGowan*, 10th Dist. No. 08AP-55, 2008-Ohio-5894, citing *State v. Antill*, 176 Ohio St. 61, 67 (1964).

{¶ 11} When 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 fact finder's resolution of the conflicting testimony. *Thompkins* at 387. An appellate court should reverse a conviction as against the manifest weight of the evidence in only the most "exceptional case in which the evidence weighs heavily against the conviction," instances in which 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." *State v. Martin*, 20 Ohio App.3d 172, 175 (1st Dist.1983).

{¶ 12} The indictment in this case included one count each of the two types of felonious assault defined by R.C. 2903.11, which states that no person shall knowingly

"[c]ause serious physical harm to another," or knowingly "[c]ause or attempt to cause physical harm to another * * * by means of a deadly weapon or dangerous ordnance." R.C. 2903.11(A)(1) and (2). Upon the urging of defense counsel, the court also instructed the jury in connection with these charges upon the inferior offense of aggravated assault, which comprises the same elements as the crime of felonious assault under R.C. 2903.11 but adds a mitigating element that the accused committed the crime "while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by a serious provocation occasioned by the victim that is reasonably sufficient to insight the person into using deadly force." R.C. 2903.12(A). R.C. 2903.12 explicitly, and R.C. 2903.11 implicitly, refer to the definition found in R.C. 2923.11(A) for a deadly weapon: "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon."

{¶ 13} The offense of aggravated assault is an inferior degree of felonious assault because its elements are identical, with the additional presence of one or both mitigating circumstances of acting under the influence of passion or a sudden fit of rage brought on by serious provocation occasioned by the victim. *State v. Stewart*, 10th Dist. No. 10AP-526, 2011-Ohio-466, ¶ 7. Aggravated assault therefore comprises the same conduct as felonious assault, but its nature and penalty are mitigated by provocation. *Id*. A defendant bears the burden of proving the mitigating factor by a preponderance of the evidence. *State v. Johns*, 10th Dist. No. 11AP-203, 2011-Ohio-6823, ¶ 20, citing *State v. Rhodes*, 63 Ohio St.3d 613 (1992), syllabus.

{¶ 14} Appellant was also charged with one count of domestic violence, a violation of R.C. 2919.25, which provides that "no person shall knowingly cause or attempt to cause physical harm to a family or household member."

{¶ 15} To prove the elements of these offenses, the principal evidence presented by the prosecution consisted of testimony of the victim, various arresting officers, and an emergency room physician.

{¶ 16} N.E. testified that she shared an apartment with appellant on West Mound Street in Columbus, Ohio, and that she had a key to the premises. In the early evening of November 21, 2010, N.E. and appellant had a confrontation, during which appellant assaulted her, knocked her down, "dog stomp[ed]" her, and threw a bicycle at her. (Tr. 102.) N.E. left the apartment, went to a neighbor's house, and called the police. By the time police arrived to take a report, appellant had driven away. N.E. attempted to return to the apartment and gather her belongings but found that she had left her keys inside and was locked out. She broke the laundry room window to enter the apartment and gather her possessions. At this time, she sold appellant's television to an unidentified person to obtain money. She called two friends to come give her a ride from the area and help her in case appellant returned before she left.

{¶ 17} Appellant then returned, and N.E. heard him pounding and yelling at the outside door. N.E. then called 911 again and yelled to appellant that the police were on their way. Appellant eventually let himself into the apartment, grabbed a baseball bat from a closet, and began attacking her. Appellant beat N.E., striking her on the arms and head. N.E. stated that appellant had hit her about two dozen times, that she had extensive injuries to her head, arm, and elbow, and that she had spent three days in a coma in the hospital. Upon cross-examination and confronted with hospital records, N.E. stated that it might have been only one and one-half day and that she might not have been in a coma. N.E. admitted to using crack cocaine earlier on the day of the crime but asserted that she was not under the influence at the time of the beating and could therefore clearly recall the events in connection therewith.

{¶ 18} Dr. Steven Kolodzik ("Dr. Kolodzik"), an orthopedic surgeon, testified that, on the night in question, he worked at Mount Carmel West Hospital. He was in a supervisory position overseeing resident physicians who directly treated N.E. in the emergency room. Dr. Kolodzik did not personally treat N.E., but approved the decisions made by the emergency room resident physicians. In preparation for trial, he reviewed her medical history and x-rays in connection with her treatment. N.E. had a fracture to her right elbow, a laceration in the same area but probably caused by a separate impact,

and a "nightstick fracture" to the right forearm. Dr. Kolodzik specified that a nightstick fracture is a descriptive medical term because it is often associated with a defensive wound incurred by raising a forearm to fend off a blow from a club of some sort. Although the term is descriptive of the injury, he testified that it is not the only way in which such an injury can occur, and his testimony should not be taken to mean that N.E.'s forearm fracture was necessarily the result of such a blow.

{¶ 19} The records also revealed a scalp laceration. Dr. Kolodzik was not aware whether the records disclosed any information as to whether N.E. had been tested or treated for illegal drug use on the night in question.

{¶ 20} At the close of Dr. Kolodzik's testimony, defense counsel moved to strike his testimony entirely because he had not phrased his testimony within a reasonable degree of medical certainty, the applicable standard, and because Dr. Kolodzik had not personally treated N.E. The court denied the motion to strike.

{¶ 21} On cross-examination, Dr. Kolodzik stated that N.E. was admitted on October 22 and discharged on October 23. He confirmed that the treatment notes indicated that N.E. was agitated and uncooperative with emergency room staff. His review confirmed that the records did not describe N.E. as being in a coma when she was in the hospital.

{¶ 22} Jerome Powell ("Powell") testified for the prosecution. Powell stated that he had known N.E. for approximately three years, first meeting her at drug and alcohol program meetings. He was not sure if he had dropped her off at the apartment earlier that day but, in any event, did return to pick her up when she called him. Upon approaching the door, he heard N.E. screaming and shouting that someone was hitting her with a bat. He heard another voice shouting something about a television. Powell stood in the downstairs corridor, unsure of what to do, and eventually called police. He also called his friend Abbey Andray ("Andray") to inform her what was happening. Powell then went to pick up Andray in his car and return to the apartment, which was only a few blocks from where Andray lived. As they were returning, they saw N.E. leave

the apartment and run to a neighbor's porch. The police were already there and prevented Powell from approaching N.E.

{¶ 23} Powell testified that he did not know appellant, had never met him, and had nothing against him. On cross-examination, Powell confirmed that he had prior convictions for theft and forgery. He stated that N.E. was "caught up in the streets" and could be seen on the street in many different places. (Tr. 331.)

{¶ 24} The state next called Rich Jackson ("Jackson"), a Columbus paramedic. Jackson responded to the 911 call on the night in question and transported N.E. to the hospital. He had direct memory of the run in question. When they arrived, they found that several police cruisers had already responded. The victim was on the porch of her home holding her head. Jackson noticed bruising on her arms and extensive bleeding from the back of her head. Jackson and his partner placed N.E. on a backboard to immobilize her and took her to the hospital immediately because they deemed her a serious trauma patient at that time. His assessment was based primarily on the injuries to the back of her head. N.E. was somewhat combative, which Jackson said was consistent with a head injury but, based on information provided by police officers, Jackson administered Narcan to reverse the effects of crack cocaine intoxication. N.E. remained combative after this drug was administered, which again Jackson attributed to the head injury since the effects of crack cocaine would have been neutralized. Jackson also noted a deformity on the patient's forearm consistent with a fracture.

{¶ 25} Officer Bradley Wannemacher ("Officer Wannemacher") of the Columbus Division of Police, testified as one of the arresting officers on the night in question. Officer Wannemacher responded to a call on West Mound Street at 1:46 a.m. on October 22, 2010. When he arrived, he could see an apparent victim on the south side of Mound Street, who directed officers to a house across the street wherein appellant had locked himself. The officers took positions to encircle the building. At this time, Officer Wannemacher could hear someone in the apartment "ranting and raving, * * * it sounded like he was throwing stuff around in the house yelling." (Tr. 344.) The apartment was on the second story with stairs leading from the first floor entrance. The

officers gained entrance by forcing the first floor door to the hallway and stairs. As they began to force the second floor door into the apartment, appellant yelled that he would open the door. Appellant unlocked the door and then ran to the back of the apartment. Officers followed him through the hallway and apprehended appellant in a back room. At this time, appellant did not put up a fight but appeared very intoxicated and agitated. Because appellant would not follow directions, he required some minor use of force to control his movements and allow him to be handcuffed and patted down.

{¶ 26} Officers noticed that the room was in some disarray and that there were blood splatters on the floor. In the same room where appellant was subdued and handcuffed, the arresting officers observed in plain view a baseball bat with blood spots on it. This was taken as evidence. Because appellant continued to be rather agitated, officers chose to call a paddy wagon rather than attempt to wrestle him into the more confined space of the back of a standard police cruiser.

{¶ 27} Officer James Null ("Officer Null") testified regarding the chain of custody of the baseball bat taken from the scene and the transport of appellant to the county jail. Because appellant appeared agitated and combative, the transporting officers did not attempt to follow the usual procedure of fingerprinting and photographing appellant at police headquarters, but chose to transport him directly to the Franklin County jail. Officer Null then turned in the baseball bat to the police property room. He also turned in a pair of blood-spattered pants taken from appellant.

{¶ 28} Brian Johnson ("Johnson"), a forensic scientist with the Columbus Division of Police Crime Lab, testified regarding his analysis of substances found on the baseball bat taken as evidence. He performed a basic test to determine whether or not the stains on the bat were in fact blood, which they were. He then preserved samples of the blood for future analysis but did not perform any DNA analysis himself. Johnson testified that he was not qualified as a DNA analyst and was unaware if any further DNA testing was performed on the blood samples to identify them with appellant or the victim. No such tests were performed to his knowledge on the blood-stained pants taken from appellant on the night of the beating.

{¶ 29} For the defense, appellant testified on his own behalf. He stated at the outset that he has been diagnosed as bipolar, manic depressive, paranoid schizophrenic, obsessive compulsive, co-dependant, and suffering from panic attacks or anxiety attacks. He collects Social Security disability income for these conditions.

{¶ 30} Appellant testified that the apartment where the assault took place was in his name alone and that N.E. did not live there. He stated that N.E. was a prostitute that he "had used for sex." (Tr. 446.) He denied that N.E. lived in his apartment or had a key. Appellant stated that, on previous occasions, N.E. had stolen property from him, including three televisions over the course of 13 months, including the one taken on the night in question.

{¶ 31} Appellant further testified that, on the night of October 21, 2010, he was in his apartment with a former girlfriend named Penny. He had not heard anything from N.E. for three days. The doorbell rang, and when appellant opened the door, N.E. entered the apartment and immediately dialed 911 and began complaining about the presence of Penny. Penny left, and appellant made N.E. leave as well, which upset N.E., who then ran to a neighbor and called 911 again. In order to get N.E. to leave the apartment, appellant promised to buy her drugs. When she was outside, he locked all the doors to the apartment and left by himself, leaving N.E. behind. Appellant denied throwing a bicycle at N.E. at any time during the incident.

{¶ 32} Appellant testified that he then went to his friend Tony's house to cool off and distance himself from the confrontation with N.E. When appellant arrived at Tony's, N.E. called and said she had reported him to the police and that the police had an arrest warrant for him. Appellant stayed at Tony's for approximately six hours, then returned to his apartment and found N.E. with the phone in one hand and a baseball bat in the other. At this time, two of N.E.'s friends, Powell and Andray, attempted to discretely exit the apartment while he faced N.E. Appellant stated that, before he reached home, he was aware that his television had again been stolen and, as a result, was in a rage when he got there. N.E. hit him in the ribs with the baseball bat, and he took the bat away from her and "tapped her a couple of times." (Tr. 456.)

{¶ 33} Appellant described N.E.'s demeanor when he returned home as combative and intoxicated. Appellant believed that his ribs were injured and probably broken from the blow delivered by N.E.

{¶ 34} In rebuttal, the prosecution played for the jury an audio recording of an interview of appellant conducted by a police detective on the day after his arrest. Appellant's account of the evening given in this interview corresponds in many particulars with his trial testimony, but appellant also indicated that after N.E. hit him he blacked out and could not recall what happened.

{¶ 35} With respect to the sufficiency and manifest weight of the evidence, appellant essentially challenges the credibility of N.E.'s testimony. This testimony, in conjunction with the supporting medical evidence and testimony of arresting officers and responding paramedics, was sufficient to establish that appellant had repeatedly struck N.E. with a baseball bat and inflicted serious physical harm. This court and many other appellate courts in Ohio have repeatedly held that a baseball bat, wielded with the requisite intent, meets the definition of R.C. 2923.11(A) as a deadly weapon. *See*, *e.g.*, *State v. McCoy*, 10th Dist. No. 99AP-969 (June 22, 2000). The separate physical injuries suffered by the victim to both her arms and her head substantiate the allegations that multiple, violent blows caused her serious injuries. Giving due deference to the jury's role as the finder of fact, there is ample evidence in the record to support appellant's convictions for felonious assault under both R.C. 2919.25(A) and (B) because each of the separate blows could serve as a basis for finding that appellant knowingly caused physical harm to the victim and did so by means of a deadly weapon.

{¶ 36} Appellant also asserts that the evidence was uncontroverted in that, if he did commit the elements of felonious assault, he did so while under the influence of sudden passion or in a fit of rage brought on by provocation occasioned by the victim. The basis for this is that the victim had broken into his apartment and had stolen and sold his television set. The jury, however, was free to accept only in part or entirely reject the testimony of any witness regarding the alleged provocation. Appellant bore the burden of establishing the mitigating factors to support conviction on the inferior

offense. In weighing the competing descriptions of events, the jury manifestly concluded that appellant had not met this burden. In the context of the limited reweighing of evidence available to us upon appellate review, we find no reason to disturb the jury's conclusion in this respect.

{¶ 37} Finally, appellant challenges his conviction for domestic violence, asserting that the evidence does not support the necessary element that the victim was a "family or household member" under R.C. 2919.25.

{¶ 38} In addition to various types of familial relationships that do not apply in the present case, R.C. 2919.25 defines "family or household member" as "[a] spouse, a person living as a spouse, or former spouse of the offender." R.C. 2919.25(F)(1)(a)(i). The domestic violence statute further defines a "person living as a spouse" as "a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question." R.C. 2925.25(F)(2).

{¶ 39} Courts are often faced with ambivalent or confused facts when attempting to determine whether the facts in a criminal case support conviction for the offense of domestic violence. As such, the Supreme Court of Ohio has recognized the need to avoid formalistic reliance on one or two indicia to define the domestic circumstances of the parties: "The offense of domestic violence, as expressed in [R.C. 2919.25], arises out of the relationship of the parties rather than their exact living circumstances." *State v. Williams*, 79 Ohio St.3d 459, 463-64 (1997). The essential elements of " 'cohabitation' are: (1) sharing familial or financial responsibilities and (2) consortium." *Id.* at paragraph two of the syllabus. "Possible factors establishing shared familial or financial responsibilities might include provisions for shelter, food, clothing, utilities, and/or commingled assets. Factors that might establish consortium include mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship, and conjugal relations." *Id.* at 465. Each case is unique and "how much weight, if any, to give to each of these factors must be decided on a case-by-case basis by the trier of fact."

Id. We also note that the factors listed by the Supreme Court in *Williams* are non-exclusive. *See also State v. Walburg*, 10th Dist No. 10AP-1087, 2011-Ohio-4762; *State v. Colter*, 2d Dist. No. 17828 (Mar. 17, 2000), quoting *State v. Young*, 2d Dist. No. 16985 (Nov. 20, 1998) (concluding that, in determining whether two persons cohabitated for purposes of R.C. 2919.25(F), " 'courts should be guided by common sense and ordinary human experience' ").

{¶ 40} The victim testified that she had lived with appellant off and on for about four years, which appellant acknowledged to some degree. Appellant's testimony and his recorded statement to police immediately after his arrest are at best ambivalent on this point. In his direct testimony he claimed that he merely "used" N.E. for sex and that she neither lived with him nor had a key to his home. In contrast, at other points, he testified that he was disturbed when N.E. disappeared without explanation for days on end, only to suddenly reappear at the apartment. In the police interview recording presented in rebuttal, appellant stated: "I mean, I ain't done nothing but help this girl, feed her, everything, do nothing but help this girl." (Tr. 507-08). "[Y]ou guys don't understand. I do love her." (Tr. 522).

{¶ 41} We conclude the evidence in the present case was sufficient when construed in favor of appellant to establish that appellant and N.E. shared sufficient familial responsibilities, such as shelter, and consortium, such as affection, society, aid of each other, and conjugal relations, to establish cohabitation.

{¶ 42} In summary, there was sufficient evidence before the jury to convict appellant of two counts of felonious assault and one count of domestic violence, and those convictions are not against the manifest weight of the evidence. Appellant's first and third assignments of error are overruled.

{¶ 43} Appellant's second assignment of error asserts that the trial court erred in denying appellant's motion for acquittal pursuant to Crim.R. 29. Crim.R. 29(A) requires the court to, upon motion, order the entry of the judgment of acquittal if the evidence is insufficient to sustain a conviction. Such a judgment shall be entered if, at the conclusion of the state's case, the evidence is such that reasonable minds could reach

different conclusions as to whether each element of the crime was proved beyond a reasonable doubt. *State v. Bridgeman*, 55 Ohio St.2d 261 (1978), syllabus. A Crim.R. 29 motion addresses the sufficiency of the state's evidence, and we therefore apply the same standard of review to such motions as we would in reviewing a general challenge to the sufficiency of the evidence. *State v. Hernandez*, 10th Dist. No. 09AP-125, 2009-Ohio-5128, ¶ 6. For the same reasons set forth in our analysis of appellant's first and third assignments of error, we overrule appellant's second assignment of error.

{¶ 44} Appellant's fourth assignment of error asserts that the trial court erred in limiting defense counsel's questioning of the victim on cross-examination. During preliminary questioning on direct examination, the victim stated that she was not under the influence of drugs while giving her testimony and had not used drugs for several days prior to trial. In the context of other testimony given by N.E., this contrasted with her admission that she was a past user of crack cocaine and other drugs and, although largely in recovery from her drug use, had slipped and used drugs occasionally over the previous year.

{¶ 45} The defense wished to establish by further questioning on cross-examination that, if the witness had not used drugs over the few days prior to trial, it was only because she was incarcerated at the time she testified and did not have access to drugs. The trial court refused to allow this line of questioning, explaining that the prosecution's questioning on drug use as a preliminary to direct examination was to establish that the witness was not currently, i.e., while on the stand, under the influence of drugs and her testimony was therefore reliable. The trial court concluded that the prosecution had not "opened the door" to further questioning on the victim's history of drug use or incarceration, and that questions regarding her drug use at times other than the night of the crime and the period immediately preceding her testimony were not relevant or material to her recollection of events and reliability as a witness. The trial court expressed that any questioning regarding the witness's current incarceration would be unduly prejudicial without any offsetting relevance.

{¶ 46} The admission or exclusion of evidence is left to the sound discretion of the trial court, and we will not disturb such rulings absent an abuse of discretion by the trial court. *State v. Robb*, 88 Ohio St.3d 59, 68 (2000); *State v. Martin*, 19 Ohio St.3d 122, 129 (1985). The term "abuse of discretion" connotes more than a mere error of law or judgment; it implies that the court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶ 47} The trial court's reasoning in excluding this line of questioning was clearly expressed and in no way arbitrary or capricious. While appellant now argues that testimony regarding N.E.'s current incarceration was relevant because it would further establish N.E. as a habitual drug user with a propensity for dishonesty, the trial court could reasonably have concluded that specific testimony regarding N.E.'s current incarceration was not probative of any fact essential to determination of the action, and the essential question of whether N.E. was sober at the time of giving her testimony was all that needed to be established. Under these conditions, we find no abuse of discretion on the part of the trial court in limiting questioning as it did, and appellant's fourth assignment of error is overruled.

{¶ 48} Appellant's fifth assignment of error asserts that the trial court erred in allowing testimony regarding violent interaction between appellant and N.E. several hours before the assault that formed the basis for the charges against appellant. This refers to N.E.'s testimony that, on the evening of October 21, 2010, the two had argued, and appellant had knocked N.E. down and thrown a bicycle at her. Appellant now argues that this is inadmissible evidence of other crimes, wrongs or acts, and was put forth by the prosecution with the purpose of proving appellant's bad character or that he would act in conformity with the prior acts.

{¶ 49} "The admissibility of other acts evidence is carefully limited because of the substantial danger that the jury will convict the defendant solely because it assumes that the defendant has a propensity to commit criminal acts, or deserves punishment regardless of whether he or she committed the crime charged in the indictment." *State*

v. Belger, 5th Dist. No. 10CAA020021, 2011-Ohio-980, citing *State v. Curry*, 43 Ohio St.2d 66, 68 (1975).

{¶ 50} Such character evidence is generally barred by Evid.R. 404(B), which provides as follows: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

{¶ 51} R.C. 2945.59 similarly addresses evidence of other criminal conduct:

> In any criminal case in which the defendant's motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing an act is material, any acts of the defendant which tend to show his motive or intent, the absence of mistake or accident on his part, or the defendant's scheme, plan, or system in doing the act in question may be proved, whether they are contemporaneous with or prior or subsequent thereto, notwithstanding that such proof may show or tend to show the commission of another crime by the defendant.

{¶ 52} Together, the rule and statute allow admission of other acts demonstrating criminal conduct when they are " 'so blended or connected with the one on trial as that proof of one incidentally involves the other; or explains the circumstances thereof.' " *State v. Wilkinson*, 64 Ohio St.2d 308, 317 (1980), quoting *United States v. Turner*, 423 F.2d 481, 483-84 (7th Cir.1970).

{¶ 53} N.E.'s testimony regarding the incident earlier in the evening provided essential background for the charged assault and, in fact, formed a continuous narrative explaining the events on the evening in question. It also served to establish the nature of the relationship between the parties as part of the domestic violence prosecution. Evidence of the first alleged assault was so intermingled with evidence directly describing the second that it was not necessary to exclude such evidence on the sole basis that it tended to prove the bad character of appellant. Appellant's fifth assignment of error is accordingly overruled.

{¶ 54} In summary, we find that appellant's convictions on two counts of felonious assault and one count of domestic violence were supported by sufficient evidence and not contrary to the manifest weight of the evidence. We further find that the trial court did not err in its evidentiary rulings both before and during trial. We therefore overrule appellant's five assignments of error and affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

SADLER and FRENCH, JJ., concur.