[Cite as *State v. Partlow*, 2013-Ohio-2771.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 12AP-459
v.	:	(C.P.C. No. 11CR-6615)
Scott V. Partlow,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 28, 2013

Ron O'Brien, Prosecuting Attorney, and *Valerie Swanson*, for appellee.

Mark G. Kafantaris, for appellant.

APPEAL from the Franklin County Court of Common Pleas

KLATT, P.J.

{¶ 1} Defendant-appellant, Scott V. Partlow, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty of domestic violence in violation of R.C. 2919.25, and violating a protection order or consent agreement in violation of R.C. 2919.27, both felonies of the third degree. Because (1) trial counsel was not ineffective in failing to object to evidence concerning defendant's prior acts of domestic violence, and (2) sufficient evidence and the manifest weight of the evidence both support the trial court's judgment, we affirm.

I. History

{¶ 2} By indictment filed December 21, 2011, appellant was charged with one count of domestic violence and one count of violating a protection order or consent agreement, both felonies of the third degree. Beginning March 12, 2012, the trial court commenced a bench trial pursuant to appellant's waiver of his right to a jury trial. After overruling appellant's Crim.R. 29 motion at the conclusion of the state's case, and again at the conclusion of appellant's case, the court explained from the bench its reasons for finding appellant guilty of both counts. At a sentencing hearing set for April 6, 2012, the court sentenced appellant to 18 months on each count to be served concurrently, granting appellant 172 days of jail-time credit.

II. Assignments of Error

{¶ 3} Appellant assigns three errors:

> [I.] APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY ARTICLE I, SECTION 10 OF THE OHIO CONSTITUTION AND THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN HIS TRIAL COUNSEL FAILED TO OBJECT TO THE INTRODUCTION OF EVIDENCE RELATING TO PRIOR DOMESTIC VIOLENCE CONVICTIONS AND A CIVIL PROTECTION ORDER WHEN THE PRIOR CONVICTIONS AND PROTECTION ORDER HAD ALREADY BEEN STIPULATED TO BETWEEN THE PARTIES.
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> [II.] THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN DETERMINING THAT THERE WAS SUFFICIENT EVIDENCE TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT COMMITTED DOMESTIC VIOLENCE AND VIOLATED A PROTECTION ORDER IN VIOLATION OF R.C. 2919.25 AND R.C. 2919.27, RESPECTIVELY.
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> [III.] THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT IN FINDING HIM GUILTY OF DOMESTIC VIOLENCE AND VIOLATION OF PROTECTION ORDER IN VIOLATION OF R.C. 2919.25 AND R.C. 2919.27, RESPECTIVELY, WHEN THE CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

For ease of discussion, we address the assignments of error out of order.

III. Second Assignment of Error—Sufficiency of the Evidence

{¶ 4} Appellant's second assignment of error contends the evidence the state presented is insufficient as a matter of law to prove beyond a reasonable doubt that appellant committed the offense of domestic violence and violated a protection order contrary to the provisions of R.C. 2919.25 and 2919.27, respectively.

{¶ 5} Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). Sufficiency is a test of adequacy. *Id*. We construe the evidence in a light most favorable to the prosecution and 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; *State v. Conley*, 10th Dist. No. 93AP-387 (Dec. 16, 1993).

{¶ 6} R.C. 2919.25(A) specifies that "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member." R.C. 2919.25(F)(1)(a)(i) defines a family or household member to be one "who is residing or has resided with the offender: [a] spouse, a person living as a spouse, or a former spouse of the offender." R.C. 2919.25(F)(2), in turn, 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."

{¶ 7} In *State v. Williams*, 79 Ohio St.3d 459 (1997), the Supreme Court of Ohio held that 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." *Id*. at paragraph one of the syllabus. 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*. *See also 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' ").

{¶ 8} According to the victim, on June 15, 2011, she and appellant had been drinking earlier that evening; appellant also had been smoking marijuana. Appellant asked the victim to make him something to eat, but she resisted because she had been drinking and was concerned about using the range and oven under those circumstances. Angered at her response, appellant hit her in the face, causing her to fall backwards into a bookcase and to injure her arm as well. With that, appellant left the residence and the victim called police.

{¶ 9} Tammy Scott, a street officer with the city of Whitehall, responded to the call at 706 South Yearling Road. She found the victim angry, yelling, scared, and a bit hysterical. The officer noted things in the apartment appeared to be disheveled; items were "knocked over a little bit * * * [n]ot anything major." (Tr. 19.) She also noticed a little bit of blood on the wall, but because the victim was bleeding from her face, her nose, and maybe a cut below her eye, she did not find the blood of particular significance. As a result, the officer took no photograph, since the injury appeared to be minor. Although the victim appeared "pretty intoxicated," she still was able to communicate and answer questions. (Tr. 27.) Medics called to the scene cleaned the victim's face.

{¶ 10} The next day, the victim took photographs of her face and in particular the left eye. The photograph displayed not only the cut but also considerable swelling around it. The victim also took pictures of her left arm to demonstrate the injury caused when she fell into the bookcase. Shown the photographs at trial, the officer acknowledged that the cut she saw the night before could have caused the injury depicted in the photograph.

{¶ 11} During the course of her testimony, the victim described her relationship with appellant. She met appellant in March 2010 in a bar; he came home with her that night and never left though he had a separate residence for a short while. She noticed during a couple drinking incidents that his demeanor changed; he became "more aggressive * * * [and] his personality seemed to change." (Tr. 47.) She assumed the problem was alcohol, and she told him "the drinking had to slow down." (Tr. 47.)

{¶ 12} On September 9 or 10, 2010, appellant was charged with domestic violence against the victim and an order of protection issued requiring appellant to stay away from her; he did not stay away. She saw him again beginning November 2010 when she moved to Whitehall. As a result of another drinking incident, appellant again was charged with domestic violence against the victim and pleaded guilty to the offense. As with the first offense, he was put on probation and told to stay away.

{¶ 13} Beginning January 2011, appellant wanted to meet with the victim and try to work out things between them. She met with him, and they had a couple of drinks together. Because her car was leaking some antifreeze, she stayed over with him. Her car periodically was un-drivable in January and February 2011, so appellant told her he would fix the car; he did not. She ultimately started seeing him again in late April or early May 2011.

{¶ 14} On the night of the incident at issue, appellant needed to retrieve some band equipment from a gig that had failed earlier in the month. He earlier that day was chasing a neighbor around a car outside and "fattened the guy's lip, hit him." (Tr. 60.) Appellant "was in an aggravated state and he was drinking and [the victim had] had a few beers." (Tr. 60.) Because he was smoking marijuana and she did not want that in the apartment, she told him to smoke outside.

{¶ 15} As the day progressed, appellant "seemed to be getting more in an agitated state." (Tr. 63.) When the victim refused to prepare food for him, appellant came out of the chair he was sitting in, and he punched "right dead in [her] face." (Tr. 64.) He called her "a B * * * and a crack whore." (Tr. 64.) When she fell backwards, she hit the bookcase that was behind her and fell to the ground; appellant ran out the door. The victim's glasses came off, and she was not able to locate them until Officer Scott assisted her.

{¶ 16} When the prosecution asked her about her living arrangements with appellant, she stated she paid the bills and appellant "[o]nce in a while, you know, * * * would carry the laundry for [her] and things like that so [she] could do the laundry. He would run the sweeper. He would do dishes once in a while." (Tr. 51-52.) Although he was to maintain the vehicle, he did not do so. She basically expected him to do the things that a person in a marriage would do, as the two of them "were basically living as a married couple during those months." (Tr. 52.) They were intimate with one another. Appellant

gave her cash, part of which she used to fill the gas tank. Because appellant would typically waste most of his money, she frequently ended up giving him some money back. She also made sure he was fed, his clothes were washed and he had a clean environment in which to live.

{¶ 17} With those facts, the state presented sufficient evidence to support appellant's conviction for domestic violence and violation of an order of protection. Here, the victim testified appellant caused her physical harm by striking her in the face, causing a laceration below her left eye that left her eye swollen. While appellant contends he was not present at the time of the offense, the victim's testimony, if believed, is sufficient to establish that aspect of the state's case for domestic violence.

{¶ 18} Appellant more seriously challenges whether the victim qualifies as a spouse or person living as a spouse under the definitions set forth in R.C. 2919.25(F). Initially, the victim's testimony described their relationship during a period of time within five years of the date of the offense. Accordingly, the time factor set forth in R.C. 2919.25(F)(2) is met. The remaining issue is whether the evidence, if believed, reflects that the victim was a person living as a spouse with appellant. This issue, in turn, examines whether the victim and appellant were sharing familial or financial responsibilities and consortium. In that regard, the victim testified they shared financial responsibilities in that appellant provided her money, some of which she returned to him when he had exhausted his own supply. She cooked and cleaned for him, washed his clothes and kept the apartment clean. He helped with some of the duties around the apartment, and they engaged in an intimate relationship. On those facts, the trial court could find the necessary relationship, as each case is unique and "how much weight, if any, to give to each of those factors must be decided on a case-by-case basis by the trier of fact." *Williams; see also Colter*.

{¶ 19} R.C. 2919.27 proscribes violating a protection order and specifies that "[n]o person shall recklessly violate the terms of * * * [a] protection order issued or consent agreement approved" under R.C. 2919.26 or 3113.31; "[a] protection order issued" under R.C. 2151.34, 2903.213 or 2903.214; or "[a] protection order issued by a court of another state." The state's evidence, if believed, is sufficient to prove appellant violated R.C. 2919.27. Introduced as an exhibit during the trial was an order of protection issued pursuant to R.C. 3113.31(F)(3). It is time-stamped September 22, 2010, it is effective until

September 22, 2015, and it requires, among other things, that appellant stay away from the victim, not initiate or have contact with the victim, and not abuse the victim. According to the state's evidence, appellant violated all three provisions. Accordingly, sufficient evidence demonstrated appellant violated R.C. 2929.17.

{¶ 20} Appellant's second assignment of error is overruled.

IV. Third Assignment of Error—Manifest Weight of the Evidence

{¶ 21} Appellant's third assignment of error contends his convictions are against the manifest weight of the evidence.

{¶ 22} Appellant's manifest weight of the evidence contentions are premised on his argument that the court "erroneously resolved the conflicts between the testimony of [the victim] and [appellant's] alibi witnesses." (Appellant's brief, at 17-18.) The trial court however, as the trier of fact, was charged with resolving conflicts in the evidence and determining the credibility of the witnesses. In explaining its decision here, the trial court specifically found the testimony of the victim to be credible, noting her injuries were consistent with the officer's testimony at least as it related to the injury below the victim's left eye. The trial court discounted the officer's failure to take photographs of the victim or the blood in the apartment, finding the factors did not weigh one way or the other with the court.

{¶ 23} With respect to the testimony of appellant's alibi witnesses that appellant was with them at every band rehearsal (presumably including the night of the incident), the trial court found their testimony too general and unpersuasive. The court further noted that Uhrig denied knowing about the victim, even through the victim dated his cousin for approximately two years and caused his cousin to be arrested on at least two occasions. The court found such testimony unlikely.

{¶ 24} Nothing in the trial court's explanation for its decision suggests the court lost its way in resolving the credibility of the witnesses. To the contrary, the court was able to articulate specific facts that led it to find the victim credible and the alibi witnesses less than credible.

{¶ 25} Accordingly, we overrule appellant's third assignment of error.

V. First Assignment of Error—Ineffective Assistance of Counsel

{¶ 26} Appellant's first assignment of error asserts his trial counsel was ineffective in failing to object to testimony detailing the specifics of appellant's prior two convictions for domestic violence. Appellant contends such detail was unnecessary in that appellant was willing to stipulate to both prior offenses and thus provide the prosecution with the necessary evidence to support its contention that the present domestic violence offense is a third-degree felony under R.C. 2919.25. To prevail on an ineffective assistance of counsel claim, appellant must demonstrate (1) defense counsel's performance was so deficient he or she was not functioning as the counsel guaranteed under the Sixth Amendment to the U.S. Constitution and (2) defense counsel's errors prejudiced appellant, depriving him of a trial whose result is reliable. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Bradley*, 42 Ohio St.3d 136 (1989), paragraph two of the syllabus.

{¶ 27} Evid.R. 404(B) proscribes evidence of other crimes, wrongs, or acts "[t]o prove the character of a person in order to show that he acted in conformity therewith." Evidence showing other "bad acts" may be admissible, however, for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or acts." *Id*. Thus, details of the facts involved in appellant's prior domestic violence convictions may be admissible under Evid.R. 404(B), if relevant to a non-character issue such as a possible motive or identity. *State v. Tibbets*, 92 Ohio St.3d 146, 161 (2001), citing *State v. Henness*, 79 Ohio St.3d 53, 61 (1997). *See also* R.C. 2945.59 (stating when other acts evidence may be admissible).

{¶ 28} Counsel was not ineffective in failing to object to the victim's testimony concerning the details of the prior domestic violence incidents with appellant. The crucial issue in this case was the identity of the perpetrator. Appellant, through his alibi witnesses, denied being in the victim's home at the time of the offenses. Not only were the prior acts close in time to the one at issue, but the prior acts helped to establish that appellant was the perpetrator in the most recent incident. *See State v. Morrow*, 9th Dist. No. 23960, 2008-Ohio-3958 (noting the proximity of time to prior incidents rendered them admissible to establish appellant's intent in the case then at issue). *State v. Thompson*, 8th Dist. No. 81322, 2003-Ohio-3939, ¶ 24 (permitting the admission of

domestic violence evidence to prove identity where the appellant denies being the perpetrator); *State v. Jamison*, 49 Ohio St.3d 182, 185 (1990), quoting *Barnett v. State*, 104 Ohio St. 298, 303 (1922) (noting that "[w]here the identity of [an appellant] is the question in issue, any fact which tends to establish the identity has probative value").

{¶ 29} Here, the prosecution's evidence demonstrated that appellant showed a pattern of rage and aggression that became more prominent with his use of alcohol. The victim testified that she and appellant had been drinking that day and appellant was using marijuana. Consistent with his prior actions, appellant became enraged when the victim resisted preparing something for him to eat, culminating in his hitting her in the face. Indeed, appellant's assault on a neighbor earlier in the day was consistent with the pattern of drinking and violence to which the victim testified. Accordingly, defense counsel was not ineffective in failing to object to the testimony concerning the details of appellant's prior convictions because the trial court was within its discretion in allowing the testimony. *See State v. Harris*, 2d Dist. No. 19311, 2003-Ohio-1046, ¶ 8, quoting *State v. Watson*, 28 Ohio St.2d 15, 21 (1971) (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.)

{¶ 30} Even if counsel should have objected to the testimony, this record fails to demonstrate prejudice. Any error was harmless because the trial court, in a bench trial, presumably considered only the relevant, material, and competent portion of the victim's challenged testimony. *State v. Addison*, 10th Dist. No. 03AP-1102, 2004-Ohio-5154, ¶ 10, citing *State v. Bays*, 87 Ohio St.3d 15 (1999). Indeed, the trial court, in assessing the weight of the evidence, never referred to the facts of appellant's prior convictions; in assessing the credibility of appellant's two alibi witnesses, the trial court likewise never referred to the specifics of the two prior incidents. Rather, the court only noted their existence and Uhrig's failure to acknowledge knowing the victim in light of those prior convictions. As a result, even if appellant could show the evidence was wrongly admitted, he suffered no prejudice as a result. Appellant was not denied effective assistance of counsel.

{¶ 31} Appellant's first assignment of error is overruled.

VI. Disposition

{¶ 32} Having overruled appellant's three assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and McCORMAC, JJ., concur.

McCORMAC, J., retired, of the Tenth Appellate District, assigned to active duty under authority of Ohio Constitution, Article IV, Section 6(C).