[Cite as *State v. Brown*, 2015-Ohio-950.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

LAKE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2014-L-032**
- vs -	:	
JOHN A. BROWN,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Lake County Court of Common Pleas, Case No. 13 CR 000592.

Judgment: Affirmed.

Charles E. Coulson, Lake County Prosecutor, and *Alana A. Rezaee,* Assistant Prosecutor, Lake County Administration Building, 105 Main Street, P.O. Box 490, Painesville, OH 44077 (For Plaintiff-Appellee).

Paul H. Hentemann, Northmark Office Building, 35000 Kaiser Court, #305, Willoughby, OH 44094-4280 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, John A. Brown, appeals from the judgment of the Lake County Court of Common Pleas convicting him of domestic violence and menacing by stalking. We affirm.

{¶2} Brandy Gallagher had moved into appellant's residence on approximately July 1, 2013. The couple had been in a tumultuous, albeit romantic, relationship for approximately two years. At the time, Ms. Gallagher had no other residence, and she

and appellant decided to live together to determine whether the arrangement would work out long term. The arrangement did not work out and a little over a week after her move in, on July 9, 2013, Ms. Gallagher was preparing to move out of appellant's residence

{¶3} At 4:00 p.m. that afternoon, appellant arrived at his home and began drinking. Ms. Gallagher was in the process of packing her belongings when the couple began to argue. As the argument escalated, appellant pushed Ms. Gallagher and she fell to the couch. Appellant also threatened to cut Ms. Gallagher up and bury her in a location where the couple had previously gone fishing.

{¶4} The argument continued as the evening wore on and, later, appellant picked up a utility box cutter as he and Ms. Gallagher were "having words." Ms. Gallagher, concerned appellant would hurt her or himself, grabbed the wrist of the hand holding the box cutter. As she tried to take the implement from him or force him to drop it, appellant maneuvered his hand in such a way as to cut the top of Ms. Gallagher's hand several times. With Ms. Gallagher bleeding, appellant dropped the box cutter. Appellant told Ms. Gallagher if she told the neighbors about the incident, he would kill her. The left side of the shorts Ms. Gallagher was wearing was covered with blood from the injuries she sustained. Ms. Gallagher retrieved the box cutter and placed it in a cooler in the kitchen.

{¶5} Ms. Gallagher remained in the house and called the couple's neighbor, Holly Johnson, requesting cigarettes. Ms. Johnson later visited the house. Ms. Gallagher did not relate the incident to Ms. Johnson and Ms. Johnson did not specifically notice the cuts on Ms. Gallagher's hand or the blood on her shorts. Shortly

after her arrival, Ms. Johnson left, accompanied by appellant. Once appellant left the house, Ms. Gallagher called the police.

{¶6} At approximately 9:00 p.m., Patrolmen Matthew Gosnik and Ronald Hess from the Madison Township Police Department were dispatched to the location. The dispatch indicated there had been a domestic violence dispute between a couple involving a knife and the male threatened to "chop up" the female and "leave her in the woods."

{¶7} Upon arriving, Patrolman Gosnik met with Ms. Gallagher, who appeared upset. He observed several cuts on the top of her hand and the blood on her shorts. Ms. Gallagher retrieved the box cutter from the cooler and gave it to the officer; the blade appeared to have dried blood and blond hair fibers on it. Ms. Gallagher's explanation of the event was consistent with her injuries.

{¶8} Patrolmen Hess and Gosnik spoke with appellant outside the home. Appellant denied both threatening as well as cutting Ms. Gallagher. He acknowledged, however, Ms. Gallagher had cut her hand earlier; he claimed he was eating a piece of cheese, tasted and observed blood on it, and concluded she must have cut herself while slicing the cheese. After inspecting the block of cheese in the home, however, they observed no blood on the cheese or bag in which it was contained. Appellant was ultimately arrested.

{¶9} On October 21, 2013, appellant was indicted by the Lake County Grand Jury on one count of felonious assault, a felony of the second degree, in violation of R.C. 2903.11(A)(2); one count of domestic violence, a felony of the third degree, in violation of R.C. 2919.25(A); and one count of menacing by stalking, a felony of the

fourth degree, in violation of R.C. 2903.211(A)(1). Appellant pleaded not guilty to each charge.

{¶10} The matter proceeded to jury trial on January 21, 2014. Prior to trial, the prosecution moved the court to call Ms. Gallagher as a "court's witness" pursuant to Evid. R. 614(A), which the trial court granted over defense counsel's objection.

{¶11} After hearing the evidence, the jury found appellant not guilty of felonious assault, but guilty of both domestic violence and menacing by stalking. The matter was referred to the Lake County Adult Probation Department for a presentence investigation report and victim impact statement. After a hearing, appellant was sentenced to two years of community control; he was further ordered to serve 100 days in the Lake County Jail, with credit for 55 days. Additional sanctions and conditions of probation, none of which are specifically relevant to this appeal, were also part of appellant's sentence.

{¶12} Appellant assigns four errors for this court's review. For ease of discussion, appellant's assignments of error shall be addressed out of order. Appellant's second assignment of error asserts:

{¶13} "The defendant-appellant, John A. Brown, contends that the trial court erred when it granted the state's request to call Brandy Gallagher as a Court witness pursuant to Evid.R. 614."

{¶14} Under this assigned error, appellant argues the trial court abused its discretion by granting the state's request to call the victim, Ms. Gallagher, as a court's witness, pursuant to Evid.R. 614. Appellant maintains the court erred because it permitted Ms. Gallagher to be called as a court's witness merely upon the state's

suggestion that she would be a "hostile witness" prior to her testimony. Further, appellant maintains calling Ms. Gallagher as a court's witness without some actual testimony that was contrary to a prior statement allowed the state to circumvent Evid.R. 607, which requires the state to establish surprise and damage before impeaching its own witness. We do not agree.

{¶15} Evid.R.614(A) provides that "[t]he court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called." The court's power to call a witness pursuant to Evid.R. 614(A) is inherent, and should be exercised in fulfillment of the court's fundamental obligation to assist in arriving at the truth. *State v. Davis*, 11th Dist. Lake No. 92-L-089, 1993 Ohio App. LEXIS 5917, *8 (Dec. 10, 1993), citing Evid.R. 614(A), Staff Notes. The decision whether to call individuals as witnesses of the court is a matter within the trial court's discretion. *State v. Knapp,* 11th Dist. Ashtabula No. 2011-A-0064, 2012-Ohio-2354, ¶69. Accordingly, "a trial court does not abuse its discretion in calling a witness as a court's witness when the witness's testimony would be beneficial to ascertaining the truth of the matter and there is some indication that the witness's trial testimony will contradict a prior statement made to police." *State v. Schultz*, 11th Dist. Lake No. 2003-L-156, 2005-Ohio-345, ¶29.

{¶16} Preliminarily, the state did not specifically characterize or suggest Ms. Gallagher was or would be a hostile witness. Rather, the state specifically requested the court to call her as its witness due to certain concerns regarding Ms. Gallagher's background and pre-trial acts and/or omissions; namely, she had been in a romantic relationship with appellant and, at the time of trial, she may have rekindled the

relationship. Also, the state noted that she had met with appellant's attorney twice and communicated with defense counsel by way of phone. And, even though she was scheduled to meet with the prosecutor on two separate occasions, she failed to show for either meeting. Based upon these points, the trial court allowed Ms. Gallagher to be called as a court's witness. In making its ruling, the court stated:

> **{¶17}** [Ms. Gallagher] failed to appear for a couple meetings with the State. Not required to meet with them obviously, but she's failed to appear for meetings with the prosecutor to discuss matters. She has met with [defense counsel].
>
> **{¶18}** There does appear to be an allegation here, doesn't seem to be disputed that there is a, was a relationship between the parties. You even indicated, meaning [defense counsel], that she continues to contact the Defendant in this case. I believe the standard for calling her as a Court's witness has been met

{¶19} This court has previously recognized that it may be the most prudent course to *actually* determine that a witness is varying materially from prior statements before calling her as a court's witness for impeachment purposes. *Knapp*, *supra*, at ¶72. Still, Evid.R. 614 does not mandate this method of calling a court's witness. And, "[t]his procedure is not necessary where the trial judge is reasonably justified in believing that the calling of the person as a court witness would benefit the jury in performing its fact-finding responsibilities." *Id*., citing *State v. Adams*, 62 Ohio St.2d 151, 158 (1980). Accordingly, contrary to appellant's position, "Evid.R. 614(A) does not require a witness to be shown hostile or shown that she will testify inconsistently prior to a court calling

that witness." *State v. Cisternino*, 11th Dist. Lake No. 99-L-137, 2001 Ohio App. LEXIS 1593, *10-*11 (Mar. 30, 2001).

{¶20} In this matter, it is clear the court was concerned that Ms. Gallagher's past and present relationship with appellant and her voluntary contact with appellant's counsel prior to trial, particularly in light of the fact that she refused to meet with the prosecutor, might affect her testimony at trial. In light of these foundational facts, the court possessed a reasonable basis to conclude that Ms. Gallagher would testify inconsistently with her prior statements to police; and, moreover, as the complaining witness, her testimony was unquestionably vital to ascertaining the truth in the matter. Accordingly, we hold the court was reasonably justified in calling Ms. Gallagher as a court's witness. We discern no abuse of discretion in the court's determination.

{¶21} One final point deserves attention. Appellant contends that calling Ms. Gallagher as a court's witness before any testimony was taken was merely an improper means to contravene Evid.R. 607(A). Evid.R. 607(A) provides, in relevant part: "The credibility of a witness may be attacked by any party except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage." Accordingly, pursuant to the foregoing rule, a party calling a witness may only impeach that witness, via a prior inconsistent statement, where the party is surprised and damaged by the testimony.

{¶22} Superficially, appellant is correct that Evid.R. 614 should not be used as "'a mere subterfuge to get evidence before the jury which is not otherwise inadmissible.'" *State v. Arnold*, 189 Ohio App.3d 507, 2010-Ohio-5379, ¶45 (2d Dist.),

quoting 53 A.L.R. Fed. at 500-501. Nevertheless, the fact that a witness may be impeached as a court's witness in an otherwise inadmissible fashion does not, by necessity, indicate subterfuge. *Arnold*, *supra*. Thus, to the extent the actual purpose of calling a witness as a court's witness is not made to evade the requirements of Evid.R. 607, Evid.R. 614 functions as an exception to the limitation imposed by Evid.R. 607(A). *Arnold*, at ¶45.

{¶23} In this matter, we have previously concluded the trial court's determination that Ms. Gallagher should be called as a court's witness was a reasonable exercise of its discretion. In this respect, the record does not support appellant's contention that the state used Evid.R. 614 simply as a means of contravening Evid.R. 607(A). The state provided a viable basis for its request and, indeed, there was no indication of subterfuge. Because, therefore, Ms. Gallagher was a witness properly called by the court pursuant to Evid.R. 614, and not by the state, Evid.R. 607(A) is inapplicable in this case.

{¶24} Appellant's second assignment of error lacks merit.

{¶25} Appellant's third and fourth assignments of error are related and shall therefore be addressed together. They provide:

{¶26} "[3.] The trial court failed to grant defendant-appellant's Rule 29 motion at the conclusion of the state's case.

{¶27} "[4.] The trial court failed to grant defendant-appellant's Rule 29 motion relative to the stalking charge."

{¶28} Under these assigned errors, appellant contends the trial court erred when it denied his motion for acquittal on both the domestic violence charge and the menacing by stalking charge.

{¶29} A "sufficiency" argument raises a question of law as to whether the prosecution offered some evidence concerning each element of the charged offense. *State v. Windle*, 11th Dist. Lake No. 2010-L-0033, 2011-Ohio-4171, ¶25. "[T]he proper inquiry is, after viewing the evidence most favorably to the prosecution, whether the jury could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Troisi* 179 Ohio App.3d 326, 2008-Ohio-6062 ¶9 (11th Dist.).

{¶30} With respect to appellant's conviction for domestic violence, the state was required to offer some evidence that appellant knowingly caused or attempted to cause physical harm to a family or household member. *See* R.C. 2919.25(A). R.C. 2919.25(F)(1)(a)(i) provides that a "family or household member" means: "(a) Any of the following who is residing or has resided with the offender: (i) A spouse, a person living as a spouse, or a former spouse of the offender[.]" R.C. 2919.25(F)(2) includes within the definition of "person living as a spouse" one "who otherwise is cohabitating with the offender."

{¶31} Appellant argues that the state failed to prove Ms. Gallagher was a "family or household member." In particular, he argues the evidence failed to establish the parties had any intent to permanently dwell with one another. And, as a result, he maintains the state failed to prove, beyond a reasonable doubt, Ms. Gallagher was cohabitating with appellant. We do not agree.

{¶32} In *State v. Williams*, 79 Ohio St.3d 459 (1997), the Ohio Supreme Court observed that the crime of domestic violence "arises out of the relationship of the parties rather than their exact living circumstances." *Id.* at 464. As a result, the Court held that the essential elements of "cohabitation," vis-à-vis "living as a spouse" are "(1) sharing of familial or financial responsibilities and (2) consortium." *Id.* at paragraph one of the syllabus.

{¶33} In *State v. McGlothan*, 138 Ohio St.3d 146, 2014-Ohio-85, the Court clarified that the "sharing of familial or financial responsibilities" does not *require* evidence of shared living expenses to establish cohabitation; rather, such conduct is merely one of a non-exhaustive list of factors a court may consider in determining cohabitation, none of which are, by themselves, a necessary condition for cohabitation.[1] *Id.* ¶13-14. The Court emphasized that the domestic violence statute was enacted because the General Assembly "'believed that an assault involving a family or household member deserves further protection than an assault on a stranger.'" *Id.* at 17, quoting *Williams*, at 463. And that domestic violence legislation represents the General Assembly's desire to offer protection to a wide class of persons that include family members as well as residents of the same household. *Id.* at ¶17, citing *State v. Carswell*, 114 Ohio St.3d 210, 2007-Ohio-3723, ¶32.

{¶34} In this case, evidence was presented that, although Ms. Gallagher had not resided with appellant for a lengthy period, she was indeed cohabitating with him at the time of the incident. At trial, Patrolman Ronald Hess testified he responded to appellant's home based upon a dispatch indicating there was a dispute involving a

1. Other factors include provisions for "shelter, food, clothing, utilities, and/or commingled assets." *Williams*, *supra*, at 465.

knife. While speaking with appellant on the scene, appellant told the officer that he *lived with* his girlfriend, Ms. Gallagher, and she had moved in with him eight days earlier. Moreover, Ms. Gallagher conceded she had moved in to live with appellant in early July. And, at that time, she had no alternative, independent residence. Moreover, although she had not moved all her belongings into the home as of the date of the incident, both her and appellant's original intention was to move everything into the residence permanently if the arrangement worked out well.

{¶35} Finally, Ms. Gallagher testified she and appellant were in an intimate, romantic relationship at the time she agreed to live with him. And, during the brief period she resided in his home, they stayed under the same roof and shared food, utilities, as well as other amenities in the home.

{¶36} From the foregoing, we conclude the state presented sufficient evidence to establish appellant and Ms. Gallagher shared shelter, food, and utilities and, as a result, shared familial responsibilities. Moreover, while living in the home, appellant and Ms. Gallagher were involved in a romantic, intimate, and, therefore, conjugal relationship sufficient to establish consortium. As a result, we hold there was adequate, persuasive evidence for the jury to conclude, beyond a reasonable doubt, Ms. Gallagher was a "household member" who was "living as a spouse" to the extent she was "cohabitating," as discussed in *Williams* and *McGlothan*, with appellant at the time of the incident. The evidence upon which appellant's domestic violence conviction was premised was therefore sufficient.

{¶37} Appellant was also convicted of menacing by stalking, in violation of R.C. 2903.211(A)(1), which provides: "No person by engaging in a pattern of conduct shall

knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person." R.C. 2901.22(B) states: "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist" "Pattern of conduct" is defined as "two or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents." R.C. 2903.211(D)(1).

{¶38} "R.C. 2903.211 does not attempt to define or give further meaning to the phrase "closely related in time."" *State v. Bone*, 10th Dist. Franklin No. 05AP-565, 2006-Ohio-3809, ¶24. "Consequently, 'whether the incidents in question were "closely related in time" should be resolved by the trier of fact "considering the evidence in the context of all the circumstances in the case."'" Id., quoting *State v. Dario*, 106 Ohio App.3d 232, 238 (1st Dist.1995).

{¶39} Appellant, without any detailed argumentation, simply asserts the state failed to submit sufficient evidence to prove the elements of aggravated menacing. We do not agree with appellant's contention.

{¶40} At trial, evidence was adduced that, on January 29, 2012, appellant and Ms. Gallagher were at a party thrown by a neighbor of appellant. Later in the evening, appellant left the home, but Ms. Gallagher remained. One of the attendees, Tyler Dahlin, had laid down on a couch and started to fall asleep. He stated Ms. Gallagher was in a recliner in the same room. Mr. Dahlin was awakened by appellant reentering the home and yelling at Ms. Gallagher. He observed appellant, in a fit of anger, push

Ms. Gallagher, with two hands, to the ground. Mr. Dahlin commented the push was forceful and he heard Ms. Gallagher hit the ground with a "thud." He testified Ms. Gallagher's face was red and her eyes were very large; she appeared to be in a state of "negative surprise." Mr. Dahlin subsequently arose from the couch and "had words" with appellant. Appellant left and Mr. Dahlin called the police. When police arrived, however, Ms. Gallagher refused to speak with them and appellant did not answer his door.

{¶41} Ms. Gallagher testified that she and appellant were fighting because appellant accused her of having an affair. She stated, however, that appellant merely grabbed her in an attempt to get her out of the house and, in the process, she fell due to her intoxication. Nevertheless, because of the fall, she had an MRI and was treated with pain medication.

{¶42} On October 12, 2012, Chae DiPietro, Ms. Gallagher's adult daughter, received a call from her mother. Ms. DiPietro testified her mother was whispering into the phone and she sounded scared and worried. Ms. Gallagher asked her daughter to call the police, which she did. Earlier that day, Ms. Gallagher had taken a trip to Erie, Pennsylvania with appellant in a limousine. They went to a casino where appellant became intoxicated and had a loud confrontation with Ms. Gallagher in which he accused her again of having an affair. Appellant berated Ms. Gallagher, calling her a slut and a whore; appellant was ultimately asked to leave the casino and, on the way home, Ms. Gallagher called her daughter.

{¶43} Police greeted appellant and Ms. Gallagher at appellant's house. According to Sergeant Matthew Byers from the Madison Township Police Department

Ms. Gallagher appeared upset like she had been crying. Appellant refused to speak with police, but Ms. Gallagher explained that she was not going to stay at appellant's house that night and asked that her car be moved from his driveway. In a statement to police, Ms. Gallagher related she had been scared for her life because appellant had threatened her in an unspecified manner.

{¶44} Finally, on July 9, 2013, the day of the underlying incident, Ms. Gallagher was moving out of appellant's house, when another argument commenced. During the exchange, appellant, again, cast various epithets at Ms. Gallagher and, at one point, pushed her to the couch. Appellant additionally threatened to cut Ms. Gallagher up and bury her where they had previously gone fishing. The argument continued and, eventually, appellant picked up a box cutter. In her statement to police, Ms. Gallagher asserted she could see the blade of the box cutter and appellant cut her with the implement multiple times on the hand. Appellant dropped the box cutter and Ms. Gallagher placed it in a cooler. After appellant left the house, she called the police.

{¶45} Ms. Gallagher testified that she was cut not through an intentional action of appellant, but when she grabbed his wrist to urge him to put the blade on the table. While holding his wrist, she testified, appellant attempted to pull away, at which point, the tip of the blade scratched her skin multiple times.

{¶46} Given the foregoing facts, the jury could conclude, beyond a reasonable doubt, that, through a pattern of conduct, appellant knowingly caused her to believe that he would cause physical harm or mental distress to Ms. Gallagher. In each of the three instances detailed above, one could reasonably conclude that appellant was aware his conduct, whether through a physical act or verbal abuse/threats, would probably cause

Ms. Gallagher either physical harm or mental distress. Furthermore, although there is approximately an eight-month gap between each of the three instances, a jury could still reasonably conclude that this constitutes a pattern of conduct where the incidents were sufficiently closely related in time. *See e.g. McKinley v. Kuhn*, 4th Dist. Hocking No. 10CA5, 2011-Ohio-134, ¶18-22 (pattern of conduct for menacing by stalking CPO affirmed where two incidents occurred over an eight month period). Under the circumstances of this case, therefore, we hold there was sufficient, credible evidence for the jury to convict appellant of menacing by stalking.

{¶47} Appellant's third and fourth assignments of error are without merit.

{¶48} Appellant's first assignment of error provides:

{¶49} "Because the appellant's felonious assault and domestic violence charges were committed by way of a single act and with a single state of mind, they are allied offenses pursuant to R.C. 2941.25(A), and the resulting acquittal of the felonious assault would also mandate an acquittal of the domestic violence charge."

{¶50} Under this assignment of error, appellant contends that had he been convicted of both felonious assault and domestic violence, the guilty findings would have merged for purposes of sentencing because the charges were based upon the same conduct and committed with the same state of mind. Appellant maintains the doctrine of merger should also apply to abrogate a conviction when a jury has reached an acquittal on a charge that arises out of the same conduct and state of mind as the charge of which a defendant is convicted. Applying this logic, appellant maintains that his acquittal on the felonious assault charge operated to preclude the jury from finding him guilty of domestic violence because each charge was premised upon the same

conduct and the same state of mind. Appellant's "reverse merger" postulation essentially asserts the trial court should have merged the jury's guilty verdict on the domestic violence charge with the acquittal for the felonious assault charge. Appellant's argument is without merit.

{¶51} First of all, the record does not indicate appellant raised this argument before the trial court. It is accordingly waived save plain error.

{¶52} The doctrine of merger, codified under R.C. 2941.25, applies to the sentencing phase of the criminal trial. Its purpose is to prevent multiple findings of guilt and corresponding punishments for closely related offenses arising from the same conduct. *See e.g. State v. Johnson*, 128 Ohio St.3d 153, 2010-Ohio-6314, ¶43. The goal of the merger doctrine would not be served by abrogating an otherwise valid conviction simply because the jury acquitted a defendant of another charge, even where the mutual charges were premised upon the same conduct. Where, as here, the evidence adduced at trial supports the jury's verdict of guilty for domestic violence, the conviction is valid as a matter of law, notwithstanding the jury's decision to acquit on the felonious assault charge.

{¶53} It may be true that the charges of felonious assault and domestic violence would have merged had the jury found appellant guilty on each count. It does not follow, however, that an acquittal on the felonious assault charge necessitates an acquittal on the domestic violence charge. The elements of the felonious assault and the domestic violence charge against appellant were not the same such that an acquittal on one charge would necessarily lead to an acquittal on the other.

{¶54} We acknowledge that the evidence could have technically supported a guilty verdict for felonious assault because there was sufficient evidence that appellant knowingly caused the victim physical harm with a box cutter; *and* a box cutter has been found to constitute a deadly weapon. *See e.g. State v. Hill*, 10th Dist. Franklin No. 09AP-398, 2010-Ohio-1687. Nevertheless, the jury apparently determined that the facts of this case did not merit a conviction for felony-two felonious assault. This does not imply, however, the circumstances that led to the charges did not support the conviction for domestic violence. "Jury nullification occurs when the jurors disregard the instruction and arrive at a verdict based upon their collective conscience." *State v. McGrath*, 8th Dist. Cuyahoga No. 93445, 2010-Ohio-4477, ¶102. We cannot say, with certainty, jury nullification played a role in the underlying verdict; nevertheless, the verdict reflects the jury's view of the facts and evidence and should not be disturbed simply because its determinations may be perceived as inconsistent.

{¶55} To this point, the Supreme Court of the United States has determined that the sanctity of a jury verdict should be preserved despite potential inconsistencies. *Dunn v. United States*, 284 U.S. 390, 393 (1932). And an acquittal on one count cannot be asserted as res judicata as to another count, even though the evidence was the same to support each verdict. *Id.* In *Dunn*, the court observed:

{¶56} "The most that can be said in such cases is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to

exercise, but to which they were disposed through lenity." *Id.*, quoting *Steckler v. United States,* 7 F.2d 59, 60 (2d Cir.1925)

{¶57} In sum, appellant was not entitled to have the trial court negate his conviction for domestic violence simply because the jury acquitted him on the felonious assault charge. Even though both crimes were premised upon the same conduct, the jury was free to weigh the evidence and arrive at a conclusion that reflected its perception of the facts and circumstances of the case.

{¶58} Appellant's first assignment of error lacks merit.

{¶59} For the reasons discussed in this opinion, the judgment of the Lake County Court of Common Pleas is affirmed.

DIANE V. GRENDELL, J.,

THOMAS R. WRIGHT, J.,

concur.