[Cite as *State v. Perkins*, 2010-Ohio-2968.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

FAYETTE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-10-019
	:	O P I N I O N
- vs -		6/28/2010
	:	
BILLY JED PERKINS, JR.,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM FAYETTE COUNTY COURT OF COMMON PLEAS
Case No. 09 CRI 00140

David B. Bender, Fayette County Prosecuting Attorney, Kristina M. Rooker, 110 East Court Street, Washington C.H., Ohio 43160, for plaintiff-appellee

Jeffrey A. McCormick, 1225 U.S. Highway 22 SW, Washington C.H., Ohio 43160, for defendant-appellant

BRESSLER, J.

{¶1} Defendant-appellant, Billy Jed Perkins, Jr., appeals from his conviction in the Fayette County Court of Common Pleas for domestic violence. We affirm.

{¶2} On June 23, 2009, M.H. sustained injuries to her face, back, and knees resulting from an alleged physical altercation with appellant, her then live-in boyfriend. Following a police investigation, appellant was arrested and charged with domestic violence in violation of R.C. 2919.25(A) which, due to his four prior domestic violence convictions, was a third-degree felony. After a jury trial, appellant was convicted and

sentenced to serve five years in prison.

{¶3} Appellant now appeals from his conviction, raising four assignments of error. For ease of discussion, appellant's first and second assignments of error will be addressed together.

{¶4} Assignment of Error No. 1:

{¶5} "THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN APPELLANT'S CONVICTION FOR DOMESTIC VIOLENCE."

{¶6} Assignment of Error No. 2:

{¶7} "APPELLANT'S CONVICTION FOR THE OFFENSE OF DOMESTIC VIOLENCE WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶8} In his first and second assignments of error, appellant claims that the state provided insufficient evidence to support his domestic violence conviction and that his conviction was against the manifest weight of the evidence. In support of these claims, appellant argues that the state failed to prove M.H., the alleged victim, was a "family or household member." We disagree.

{¶9} As this court has previously stated, "a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency." *State v. Wilson,* Warren App. No. CA2006-01-007, 2007-Ohio-2298, ¶35; *State v. Urbin,* 148 Ohio App.3d 293, 2002-Ohio-3410, ¶31. In turn, while a review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct concepts, this court's determination that appellant's conviction was supported by the manifest weight of the evidence will be dispositive of the issue of sufficiency. *State v. Rigdon,* Warren App. No. CA2006-05-064, 2007-Ohio-2843, ¶30, citing *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52; see, e.g., *State v. Rodriguez,* Butler

App. No. CA2008-07-162, 2009-Ohio-4460, ¶62.

{¶10} A manifest weight challenge concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. *State v. Ghee,* Madison App. No. CA2008-08-017, 2009-Ohio-2630, ¶9, citing *Thompkins* at 387, 1997-Ohio-52. A court considering whether a conviction is against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of the witnesses. *State v. Hancock,* 108 Ohio St.3d 57, 2006-Ohio-160, ¶39; *State v. Lester,* Butler App. No. CA2003-09-244, 2004-Ohio-2909, ¶33; *State v. James,* Brown App. No. CA2003-05-009, 2004-Ohio-1861, ¶9. The credibility of witnesses and weight given to the evidence are primarily matters for the trier of fact to decide. *State v. Gesell,* Butler App. No. CA2005-08-367, 2006-Ohio-3621, ¶34; *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Upon review, the question is whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. *State v. Good,* Butler App. No. CA2007-03-082, 2008-Ohio4502, ¶25; *State v. Blanton,* Madison App. No. CA2005-04-016, 2006-Ohio-1785, ¶7.

{¶11} Appellant was charged with domestic violence in violation of R.C. 2919.25(A), which prohibits any person from "knowingly caus[ing] or attempt[ing] to cause physical harm to a family or household member."

{¶12} Pursuant to R.C. 2919.25(F)(1)(a)(i) and R.C. 2919.25(F)(2), a "family or household member" is, among others, "[a] a person living as a spouse" who "has resided with the offender" and who "otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question." Cohabitation, for purposes of R.C. 2919.25(F)(2), encompasses two essential elements;

namely, (1) the sharing of familial or financial responsibilities and (2) consortium. *State v. Williams*, 79 Ohio St.3d 459, 465, 1997-Ohio-79; *State v. Jewell*, Warren App. No. CA2003-09-086, 2004-Ohio-4315, ¶19. In determining whether two persons have cohabitated, "courts should be guided by common sense and by ordinary human experience." *State v. Woullard,* 158 Ohio App.3d 31, 2004-Ohio-3395, ¶73.

{¶13} At trial, M.H. testified that she, as well as her 11-month-old daughter, had been living with appellant, her then live-in boyfriend, in a Washington Court House apartment for approximately one month before the alleged incident occurred.[1] M.H. also testified that appellant took care of her daughter while she was working. On the other hand, although he never denied the pair shared an apartment, appellant testified that M.H. was his "former girlfriend" and that he did not watch over her child while she was at work.

{¶14} After a thorough review of the record, and based on the facts of this case, we find the jury did not clearly lose its way by finding M.H., the alleged victim, was appellant's "family or household member." As noted above, the state's evidence indicates appellant shared an apartment with M.H., his then live-in girlfriend, and that he watched over her infant daughter while she was at work. This evidence, if believed, is sufficient to establish the elements necessary to prove the pair was cohabitating at the time the offense. See, e.g., *Youngstown v. Dixon*, Mahoning App. No. 07 MA 105, 2009-Ohio-1013, ¶27; *State v. West*, Franklin App. No. 06AP-114, 2006-Ohio-5095, ¶14; *State v. Avery*, Stark App. No. 2004-CA-00010, 2004-Ohio-5226, ¶41. Therefore, because the state provided sufficient competent, credible evidence to support appellant's domestic violence conviction, appellant's first and second assignments of error are overruled.

{¶15} Assignment of Error No. 3:

{¶16} "THE TRIAL COURT COMMITTED PLAIN ERROR BY FAILING TO DISMISS THE CASE."

{¶17} In his third assignment of error, appellant argues that the trial court committed "plain error" by not dismissing his case when he "was not brought to trial within the timeframe specified by the Ohio Revised Code * * *." Appellant never challenged his prosecution as a violation of his speedy-trial rights in the trial court, and therefore, he waived the right to challenge this issue on appeal. See *State v. Grant*, Butler App. No. CA2003-05-114, 2004-Ohio-2810, ¶9; *State v. Turner*, 168 Ohio App.3d 176, 2006-Ohio-3786, ¶21-22; *State v. Glazer* (1996), 111 Ohio App.3d 769, 773; see, also, R.C. 2945.73(B). The plain error doctrine is inapplicable. *Turner*.

{¶18} Even if this issue was properly before this court, we find appellant's speedy-trial rights were not violated. As the record indicates, appellant was arrested on July 24, 2009 and tried 88 days later on October 20, 2009.[2] Therefore, even without taking the various alleged tolling events into consideration, appellant was brought to trial within the statutory speedy-trial time limits found within Ohio's speedy-trial statutes. See *State v. Palmer*, 112 Ohio St.3d 457, 2007-Ohio-374, ¶11; see, e.g., *State v. Cox*, Clermont App. No. CA2008-03-028, 2009-Ohio-928, ¶10-21. Accordingly, appellant's third assignment of error is overruled.

{¶19} Assignment of Error No. 4:

{¶20} "APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL."

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1. M.H.'s infant daughter was fathered by appellant's uncle, thereby making the child appellant's cousin.
2. Appellant claims that because he received 109 days of jail time credit he must have been arrested on this charge on July 3, 2009, whereas the state claims appellant was "arrested on July 4, 2009 for another Domestic Violence charge and was being held in jail pending his trial on that matter * * *." However, neither of the parties' claims are supported by the record. Instead, while appellant's sentencing does provide him with109 days of jail time credit, the record contains a "Receipt of Warrant by Executing Authority" that specifically states appellant was "arrested" on this domestic violence charge and brought to

{¶21} In his fourth assignment of error, appellant argues that his trial counsel was ineffective for failing to file a motion to dismiss "or otherwise make the trial court aware that [his] speedy trial rights had been violated * * *." However, even if a motion to dismiss had been filed, appellant's trial counsel was not ineffective because the state brought him to trial within the statutory speedy-trial time limit. Accordingly, appellant's fourth assignment of error is overruled.

{¶22} Judgment affirmed.

YOUNG, P.J., and HENDRICKSON, J., concur.

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the county jail on July 24, 2009.