[Cite as *State v. Phelps*, 2010-Ohio-1105.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-04-035
	:	O P I N I O N
- vs -		3/22/2010
	:	
STEPHEN R. PHELPS,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 08CR25540

Rachel A. Hutzel, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, OH 45036, for plaintiff-appellee

Darin S. Barber, 12 East Warren Street, Lebanon, OH 45036, for defendant-appellant

YOUNG, J.

{¶1} Defendant-appellant, Stephen R. Phelps, appeals from a judgment of the Warren County Court of Common Pleas convicting him of felony domestic violence and sentencing him to 17 months in prison.

{¶2} Appellant and his sister, Jolene Phelps, were living with their mother, Barbara Trisler, and their stepfather, Nicolas Trisler, in the city of Blanchester, Warren County, Ohio. On the morning of December 14, 2008, Nicolas jokingly told

Jolene that he was going to punch her in the nose. Upon overhearing the remark, appellant, who had been drinking, using drugs, and fighting with his girlfriend all night, walked over to Nicholas and told him that he (appellant) was the only person who was going to hit his sister. Appellant then grabbed Nicolas and threw him to the floor, causing Nicolas' leg to strike a coffee table. As a result of the attack, Nicholas sustained a large bruise on his leg, and the injury caused him to limp for two days. The police were called to the residence, and appellant was arrested.

{¶3} On January 16, 2009, appellant was indicted on one count of domestic violence in violation of R.C. 2919.25(A), which was elevated to a felony of the fourth degree due to appellant's prior conviction for domestic violence. A jury convicted appellant of that charge, and the trial court sentenced him to 17 months in prison.

{¶4} Appellant now appeals, raising one assignment of error in his initial brief and two additional assignments of error in a supplemental brief.

{¶5} Assignment of Error No. 1:

{¶6} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT ENTERED JUDGMENT CONVICTING HIM OF FOURTH-DEGREE FELONY DOMESTIC VIOLENCE BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO SHOW THAT HE HAD A PRIOR CONVICTION FOR DOMESTIC VIOLENCE."

{¶7} Appellant argues the trial court erred by entering judgment convicting him of fourth-degree felony domestic violence, because the state failed to present sufficient evidence to show that he had been previously convicted of domestic violence. We disagree with this argument.

{¶8} The relevant inquiry in reviewing an insufficient evidence claim is

whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Hancock,* 108 Ohio St.3d 57, 2006-Ohio-160, ¶34.

{¶9} Appellant was charged with domestic violence under R.C. 2919.25(A), which states, "No person shall knowingly cause or attempt to cause physical harm to a family or household member." Generally, a violation of R.C. 2919.25(A) is a misdemeanor of the first degree. R.C. 2919.25(D)(2). However, if the offender has been previously convicted of domestic violence, any law or ordinance substantially similar to domestic violence, or any offense of violence if the victim was a family or household member at the time of the offense, then a violation of R.C. 2919.25(A) is a felony of the fourth degree. R.C. 2919.25(D)(3).

{¶10} "When existence of a prior conviction does not simply enhance the penalty but transforms the crime itself by increasing its degree, the prior conviction is an essential element of the crime and must be proved by the state [beyond a reasonable doubt]." *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, ¶8. Therefore, since appellant's prior conviction is an element of the fourth-degree felony with which he was charged and convicted, the state was required to prove the prior conviction beyond a reasonable doubt. Id.

{¶11} R.C. 2945.75(B)(1) provides, "Whenever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction."

{¶12} In this case, the state introduced into evidence a certified copy of a

1998 judgment entry, labeled as Exhibit 1, showing that "Stephen R. Phelps" was convicted of domestic violence. In the 1998 case, the victim was "Jolene Phelps," and one of the witnesses was "Barbara Trisler." The state presented evidence in the current case showing that Jolene Phelps and Barbara Trisler are appellant's sister and mother, respectively. The state's evidence in the current case also showed that appellant's date of birth and the last four digits of his social security number are the same as those of the "Stephen R. Phelps" in the 1998 case. The state also introduced into evidence in the current case a certified copy of a 2004 judgment entry, labeled as Exhibit 2, showing that "Stephen R. Phelps" was convicted of domestic violence, and that the victim in that case was "Barbara Trisler," who, as we have already noted, was shown in the current case to be appellant's mother.

{¶13} When this evidence is examined in a light most favorable to the state, it is apparent that the state presented sufficient evidence to identify the "Stephen R. Phelps" named in the certified copies of the judgment entries from the prior cases as being the same "offender in the case at bar," i.e., appellant. See R.C. 2945.75(B)(1). Therefore, the state presented sufficient evidence to support appellant's conviction for fourth-degree felony domestic violence.

{¶14} Consequently, appellant's first assignment of error is overruled.

{¶15} First Supplemental Assignment of Error:

{¶16} "THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT WHEN IT ADMITTED STATE'S EXHIBIT 1 AND 2, IN THEIR ENTIRETY, INTO EVIDENCE."

{¶17} Second Supplemental Assignment of Error:

{¶18} "DEFENDANT-APPELLANT WAS PREJUDICED BY THE

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL."

{¶19} Appellant's supplemental assignments of error are interrelated and therefore will be addressed together.

{¶20} Appellant argues the trial court erred when it admitted state's Exhibits 1 and 2 in their entirety, because those exhibits contained evidence of his prior misconduct that was inadmissible under Evid.R. 404(B) and the admission of that evidence unfairly prejudiced his case.

{¶21} State's Exhibit 1 included not only a judgment entry showing that appellant had been convicted of domestic violence against Jolene in 1998, but also a temporary protection order and "fact sheet." The TPO contained a finding that the safety and protection of Jolene or other family or household members "may be impaired" by appellant's continued presence in the family's residence, and ordered appellant not to abuse Jolene or any other family or household member "by harming, attempting to harm, threatening, molesting, following, stalking, bothering, harassing, annoying, contacting or forcing sexual relations upon them." The fact sheet alleged that appellant was intoxicated at the time of the offense, had refused to leave when asked, and had assaulted Jolene causing her several injuries, and warned of the possible existence of outstanding warrants for appellant in other jurisdictions.

{¶22} State's Exhibit 2 included not only a judgment entry showing that appellant had been convicted of domestic violence against his mother in 2004, but also evidence that he had been convicted at the same time for possession of drug paraphernalia and marijuana. Exhibit 2 also included an "Intake Sheet" summarizing appellant's offense by stating, "[Appellant] released from prison 10 days ago – Came to mom's house high and told her to hand over money and keys to car or he would

wreck the house."

{¶23} Evid.R. 404(B) provides:

{¶24} "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."

{¶25} Appellant acknowledges that it was permissible for the state to introduce evidence of his prior convictions for domestic violence in order to obtain a conviction against him on the charge of fourth-degree felony domestic violence. However, he argues the trial court erred by admitting State's Exhibits 1 and 2 in their entirety, because those exhibits contain evidence regarding the specific details of his prior convictions for domestic violence that exceeded the amount of evidence necessary to prove the existence of the prior convictions, and "transform[ed] the matter into an Evid.R. 404(B) situation" by showing him to be a "mean drunk" and "addict" who was acting in conformity with that character at the time of the current offense.

{¶26} The state conceded during oral argument that some of the evidence contained in Exhibits 1 and 2 went beyond what was necessary to prove that appellant was the defendant named in the certified copies of the judgment entries in the 1998 and 2004 domestic violence cases. However, the state correctly points out that appellant failed to object to the admission of this evidence at trial, and argues the admission of the other acts evidence did not constitute plain error.

{¶27} Appellant acknowledges that his trial counsel failed to object to the admission of this evidence. However, citing *State v. Feathers*, Portage App. No.

2005-P-0039, 2007-Ohio-3024, ¶76, he requests that we address his supplemental assignments of error under the "regular standard of review" as if there had been a proper objection, because his trial counsel's failure to object to the evidence amounted to constitutionally ineffective assistance. We find this argument unpersuasive.

{¶28} In *Feathers* at ¶76, the court of appeals stated:

{¶29} "Feathers did not object to this testimony. However, in Feathers' third supplemental assignment of error, Feathers claims his trial counsel was ineffective for failing to object to this testimony. Therefore, we will address this assignment of error on the regular standard of review, as if there was a proper objection." See, also, id. at ¶63.

{¶30} Seizing upon this language, appellant requests that we review his supplemental assignment of error regarding the other acts evidence under the "regular standard of review," rather than a plain error standard of review. We decline to do so.

{¶31} Initially, we do not interpret *Feathers* as holding that a criminal defendant can avoid the harsh consequences of the plain error rule merely by raising on appeal a claim of ineffective assistance of trial counsel. Instead, a more reasonable interpretation of *Feathers* is that the court of appeals simply concluded that trial counsel had provided Feathers with constitutionally ineffective assistance in multiple ways, and therefore Feathers was entitled to a new trial. Thus, in order to prevail on his other acts claim, appellant must show that the trial court's failure to exclude this evidence amounted to plain error.

{¶32} Crim.R. 52(B) states, "Plain errors or defects affecting substantial rights

may be noticed although they were not brought to the attention of the court." For plain error to exist there must be a deviation from a legal rule; the deviation must be an obvious defect in the trial proceedings; and the deviation must have affected the defendant's "substantial rights," meaning the outcome of the trial would have been different absent the alleged error. *State v. Payne,* 114 Ohio St.3d 502, 505, 2007-Ohio-4642, ¶15-16.

{¶33} In this case, appellant cannot show that the outcome of his trial would have been different if the other acts evidence had not been admitted. Nicholas testified that appellant grabbed him and threw him down, causing him injury. Barbara testified that she did not actually see appellant grab Nicholas and throw him down, but did hear Nicholas hit the floor. Both Nicholas and Barbara were reluctant to testify against appellant, and both attempted to minimize appellant's culpability by blaming his conduct on his drug and alcohol addictions. The state's evidence also showed that appellant committed the offense after he had been drinking, using drugs, and fighting with his girlfriend all night.

{¶34} The state also introduced evidence of recorded telephone conversations between appellant and Barbara, in which appellant asked her not to testify against him and to encourage Nicholas not to testify against him either. He also encouraged Barbara to tell the prosecutor that she could not remember or recall what happened on the night in question, or to "take the fifth." He also asked Barbara to ask Nicholas to do the same. Appellant also advised Barbara that while she could be forced to come to court, she could not be forced to testify against him.

{¶35} Appellant also claims that his trial counsel provided him with constitutionally ineffective assistance of counsel by failing to object to the other acts

evidence. We disagree with this argument.

{¶36} To prevail on an ineffective assistance claim, a defendant must show that his trial counsel's performance fell below an objective standard of reasonableness *and* that there is a reasonable probability that, but for his counsel's performance errors, the outcome of his trial would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 687-694, 104 S.Ct. 2052. A "reasonable probability" is a probability sufficient to undermine confidence in the trial's outcome. Id.

{¶37} In this case, appellant cannot show that a reasonable probability exists that, but for his trial counsel's failure to object to the other acts evidence, the outcome of his trial would have been different, i.e., that the error undermines confidence in the outcome of his trial. Id.

{¶38} Therefore, appellant's first and second supplemental assignments of error are overruled.

{¶39} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.