

[Cite as *State v. Perander*, 2015-Ohio-1752.]

**IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY**

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| STATE OF OHIO | : | |
| | : | |
| Plaintiff-Appellee | : | C.A. CASE NO. 26182 |
| | : | |
| v. | : | T.C. NO. 13CR941 |
| | : | |
| RODNEY W. PERANDER | : | (Criminal Appeal from |
| | : | Common Pleas Court) |
| Defendant-Appellant | : | |
| | : | |

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OPINION

Rendered on the 8th day of May, 2015.

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FROELICH, P.J.

{¶ 1} Rodney Perander was found guilty by a jury in the Montgomery County Court of Common Pleas of kidnapping, with a firearm specification, and domestic violence. He was sentenced to three years on the kidnapping, with an additional three years of actual incarceration for the firearm specification, and he was sentenced to 180 days in jail for

domestic violence, to be served concurrently with the sentence on the kidnapping.

{¶ 2} On appeal, Perander challenges the sufficiency of the evidence in support of his domestic violence conviction, claims that he was denied the effective assistance of counsel, and asserts that cumulative error deprived him of a fair trial. For the following reasons, we reject Perander's arguments and affirm the trial court's judgment.

{¶ 3} The charges against Perander were based on allegations by his ex-wife and sometimes live-in girlfriend that, in the early morning hours of March 23, 2013, while in possession of a gun, Perander had prevented her from leaving their residence, threatened her physically and sexually, put the gun in her mouth, and hit her with the gun over a period of two to three hours. On April 19, 2013, Perander was indicted on kidnapping (R.C. 2905.01(A)(3)), with a firearm specification, and domestic violence (R.C. 2919.25(A)). While the charges were pending, Perander filed a motion to suppress some of the statements he made to the police. The trial court held a hearing on the motion, and it granted part of Perander's motion to suppress, finding that some of his statements had been made when an officer asked additional questions after Perander had invoked his right to counsel. In other respects, the motion to suppress was overruled. The matter went to trial by a jury in March 2014; Perander was convicted and sentenced as described above.

{¶ 4} Perander raises five assignments of error on appeal. The first three assignments of error are closely related; they state:

The State presented insufficient evidence of complainant's status as a family member to support the charge of domestic violence.

Because the State presented insufficient evidence of status as a family member, the court erred in giving an instruction concerning this

status and on domestic violence.

The court erred in failing to dismiss the charge of domestic violence upon a motion for acquittal.

{¶ 5} Pernader's first three assignments of error are based on his argument that there was insufficient evidence supporting the jury's conclusion that Perander and the complainant were "family members" for purposes of the domestic violence statute, R.C. 2919.25(A).

{¶ 6} R.C. 2919.25 provides, in pertinent part:

(A) No person shall knowingly cause or attempt to cause physical harm to a family or household member.

* * *

(F)(1) "Family or household member" means any of the following:

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;

* * *

(b) The natural parent of any child of whom the offender is the other natural parent or is the putative other natural parent.

(2) "Person living as a spouse" means 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} The undisputed testimony at trial was that Perander and the complainant, Tori

Neal, had married in September 2010, divorced in September 2011, resumed their romantic relationship and moved back in together (at Perander's father's house) in November 2012, and continued to live together in March 2013 at the time of the incident for which Perander was charged. Neal did testify, however, that "approximately a month before March, we had kind of went our separate ways in the house, like we were staying in separate rooms * * * He was doing his thing and I was doing mine." She also stated that, at that point (March 2013), she no longer had hope that their romantic relationship would work out. Neither Perander nor Neal paid rent to Perander's father, but Neal testified that she helped with household expenses and the care of Perander's father as much as she was able. Perander likewise testified that, by January 2013, the relationship was deteriorating and he began to sleep in a different bedroom in the house. Moreover, in early March 2013, Perander began dating another woman.

{¶ 8} Perander argues that he and Neal "were not living as husband and wife," but as "roommates," when the alleged offenses occurred in March 2013. He contends that the term "former spouse," as used in the statute, "would only indicate an attempt to protect such persons in cases of offenses occurring prior to the end of such a relationship." As best we understand, Perander contends that the term "former spouse" refers only to someone who was a spouse at the time of the offense, but is a former spouse at the time of prosecution. Perander does not cite any authority for his narrow interpretation of the term "former spouse."

{¶ 9} We interpret the intent of legislation by studying the plain language of the statute. *State v. Pawelski*, 178 Ohio App.3d 426, 2008-Ohio-5180, 898 N.E.2d 85, ¶ 21 (2d Dist.); *In re Adoption of Coppersmith*, 145 Ohio App.3d 141, 147, 761 N.E.2d 1163 (2d Dist.

2001). In doing so, words should be given their ordinary meaning. *Pawelski* at ¶ 21. If the language of the statute in question is clear and definite, we must apply the statute as it is written. *Id.*, citing *Coppersmith and Bailey v. Republic Engineered Steels, Inc.*, 91 Ohio St.3d 38, 741 N.E.2d 121 (2001). In our view, the term “former spouse” is clear, definite, and unambiguous.

{¶ 10} “Former spouse,” if he or she has resided or does reside with the offender, is within the definition of “family or household member.” Therefore, the domestic violence statute explicitly prohibits assault against a former spouse. We reject Perander’s suggestion that any additional characteristics of the relationship, such as the timing of the divorce or a change in marital status since the time of the alleged domestic violence, can reasonably be inferred from the use of the term “former spouse.” Using the plain, ordinary meaning of this term, there is no question that Neal was Perander’s former spouse and that she did reside or had resided with him.

{¶ 11} Moreover, even if we were to assume for the sake of argument that Neal did not satisfy the definition of “former spouse,” as Perander suggests, the jury might have concluded on other grounds that Neal was a “family or household member” at the time of the offense. The jury could have reasonably concluded that Neal was a “person living as a spouse” who was cohabiting with the offender; neither the sharing of a bedroom nor conjugal relations is a prerequisite to a finding of cohabitation. See *State v. Williams*, 79 Ohio St.3d 459, 465, 683 N.E.2d 1126 (1997); *State v. Hazel*, 2d Dist. Clark No. 2011 CA 16, 2012-Ohio-835, ¶ 15-16.

{¶ 12} The State’s evidence supported findings of shared familial and/or financial responsibilities and consortium, including Neal’s contributions to some household

expenses, as she was able, her caring for Perander's father, and her ongoing companionship and friendship with Perander. A "person living as a spouse" also encompasses one "who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question"; there can be little dispute that Neal satisfied this definition of a person living as a spouse. Perander's argument regarding the sufficiency of the evidence is without merit, because the evidence established several bases on which the jury might have reasonably concluded that Neal satisfied the definition of a family or household member.

{¶ 13} Perander also suggests in his brief that the court's imposition of a concurrent sentence on the misdemeanor count of domestic violence raises a question as to whether the court believed that a familial relationship had been proven. The court had denied Perander's motion for acquittal and convicted him of domestic violence; Perander's speculation that the Court was subjectively unpersuaded of his guilt of domestic violence is unfounded and irrelevant. At most, it was within the court's discretion to impose a consecutive sentence; upon a finding of guilt of both the felony and misdemeanor offenses, there is no presumption in favor of consecutive sentences.¹ We cannot infer any uncertainty about Perander's guilt from the court's imposition of a concurrent sentence.

{¶ 14} Because Perander's argument that there was insufficient evidence of the complainant's status as a family or household member is without merit, we also reject his arguments that the trial court should not have instructed the jury on domestic violence and that the court should have dismissed that charge in response to his motion for acquittal.

¹ The issue of whether a trial court even has discretion to impose a misdemeanor sentence consecutively with a felony sentence is now pending before the Ohio Supreme Court. See *State v. Polus*, 140 Ohio St.3d 1413, 2014-Ohio-3785, 15 N.E.3d 882 (2014).

{¶ 15} The first, second, and third assignments of error are overruled.

{¶ 16} The fourth assignment of error states:

The Appellant was denied a fair trial due to the ineffectiveness of counsel.

{¶ 17} Under this assignment, Perander contends that his trial counsel was ineffective because he allowed a recording of voice messages left by Perander on the complainant's phone to be played for the jury at a slower speed than that which the accurate recordings reflected, thereby "artificially" making it appear to the jurors that Perander had been "highly intoxicated." Perander faults his attorney for failing to request a mistrial.

{¶ 18} "We review alleged instances of ineffective assistance of trial counsel under the two prong analysis set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and adopted by the Supreme Court of Ohio in *State v. Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). Pursuant to those cases, trial counsel is entitled to a strong presumption that his or her conduct falls within the wide range of reasonable assistance. *Strickland*, 466 U.S. at 688. To reverse a conviction based on ineffective assistance of counsel, it must be demonstrated that trial counsel's conduct fell below an objective standard of reasonableness and that his or her errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Id.*" *State v. Strickland*, 2d Dist. Montgomery No. 25673, 2014-Ohio-5451, ¶ 16.

{¶ 19} At trial, after the voicemail recordings were played, defense counsel objected on the basis that some of the recordings were not an "accurate depiction" of Perander's voice and were not consistent with the recording provided to counsel before trial. Counsel expressed concern that the speed of Perander's speech in some of the recordings might

suggest that Perander was impaired at the time of those recordings. The State conceded that the recording played at trial was not “at regular speed” and that there seemed to have been a mechanical problem in the transferring or copying of the messages. In response, the court immediately instructed the jury as follows:

We agree that what you just heard was not at the correct speed. There is something still mechanically wrong with the recording you just listened to. It’s not at the same speed as contained in the original recording, so there is a distortion of the speed of what you just heard.

So, what will happen is, at a later point in the trial, the parties will get an actual accurate recording at the accurate speed and then it will be replayed to you at a later point in the trial, perhaps when the detective takes the witness stand. * * *

{¶ 20} The recordings were, in fact, replayed during the detective’s testimony, at the proper speed. The detective testified that the earlier recording had not been played at the proper speed and that the second recording was a more accurate representation of Perander’s voice. Defense counsel stated “no objection to substituting the two discs.”

{¶ 21} In light of the State’s acknowledgement of a technical problem with some of the recordings, the trial court’s instruction to the jury immediately after the recordings were first played that some parts did not reflect an accurate depiction of Perander’s voice, the replaying of the recordings later in the trial, and the detective’s testimony that the latter recordings accurately reflected Perander’s voice, we cannot conclude that trial counsel was ineffective in failing to request a mistrial. Counsel’s handling of the situation did not fall below an objective standard of reasonableness, nor was his alleged error serious enough to

create a reasonable probability that, but for the error, the result of the trial would have been different. Perander was not denied the effective assistance of counsel.

{¶ 22} Moreover, a mistrial should only be declared when a fair trial is no longer possible. *State v. Engle*, 2d Dist. Montgomery No. 22934, 2009-Ohio-4787, ¶ 35, citing *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991). “The decision whether to grant a mistrial lies within the sound discretion of the trial court. *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, 796 N.E.2d 506. Under the circumstances presented, we are unpersuaded that a fair trial was impossible after the first playing of the recordings or that a mistrial would have been granted, if one had been requested.

{¶ 23} The fourth assignment of error is overruled.

{¶ 24} The fifth assignment of error states:

Cumulative errors deprived the Appellant of a fair trial.

{¶ 25} Perander does not identify specific cumulative error in his brief. He states, however, that “[b]y elevating this incident to the status of a domestic dispute, it gave the jury a rationale for an otherwise inexplicable event.” Stated differently, Perander claims: “The Appellant has no history of violence. However, the Complainant does. * * * In the context of the Appellant’s life, this purported incident is inexplicable. But, give it the context of a domestic dispute, and what was otherwise inexplicable becomes mundane.”

{¶ 26} Insofar as the primary issue discussed under this assignment of error seems to be Perander’s disagreement with the characterization of the offense as domestic violence, we infer that the cumulative errors to which he refers are those discussed in the first three assignments of error. For the reasons discussed above, we find no error, and thus no cumulative error.

{¶ 27} Perander also argues that this offense was “inexplicable” and “mundane” in light of his nonviolent history and that his conviction was somehow unfairly boot-strapped from the characterization of the offense as domestic violence. The jury’s verdict demonstrates its conclusion that Perander had knowingly caused or attempted to cause physical harm to Neal. Such conduct constitutes a criminal offense apart from the characterization of the victim as a family or household member. The jury was required to additionally determine whether the victim was a family or household member, and it concluded that she was. The finding that Neal was a family or household member did not eliminate the jury’s duty to also consider whether the evidence established that Perander had caused or attempted to cause harm.

{¶ 28} The fifth assignment of error is overruled.

{¶ 29} The judgment of the trial court will be affirmed.

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HALL, J. and WELBAUM, J., concur.

Copies mailed to:

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