[Cite as *State v. Davis*, 2010-Ohio-555.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
WASHINGTON COUNTY

STATE OF OHIO,	:	Case No. 09CA28
	:	
Plaintiff-Appellee,	:	
	:	DECISION AND
v.	:	JUDGMENT ENTRY
	:	
TERREL C. DAVIS,	:	
	:	**Released 2/16/10**
Defendant-Appellant.	:	

APPEARANCES:

Teresa D. Schnittke, Lowell, Ohio, for appellant.

James E. Schneider, WASHINGTON COUNTY PROSECUTOR, and Alison L. Cauthorn, WASHINGTON COUNTY ASSISTANT PROSECUTOR, Marietta, Ohio, for appellee.

Harsha, J.

{¶1} After a jury found Terrel Davis guilty of domestic violence, Mr. Davis contends that his conviction was against the manifest weight of the evidence because the State failed to establish that he caused or attempted to cause his wife physical harm. Specifically, he argues that the jury lost its way in believing Mrs. Davis's testimony that Mr. Davis choked, struck, and bit her. However, we leave credibility determinations to the finder of fact. Moreover, Mrs. Davis's testimony is consistent with the testimony of a witness who heard a woman being choked in the Davises' hotel room and a police officer who observed blood "pouring" from Mrs. Davis's mouth and smeared on her face. Because the jury could reasonably return a guilty verdict based on the State's version of events, we cannot say that the jury clearly lost its way and

created a manifest miscarriage of justice.

{¶2} Next, Mr. Davis argues that the trial court relied upon a factor that is not supported by the evidence in imposing a greater-than-minimum sentence for his domestic violence conviction. He claims that there is no evidence to support the court's finding that he caused Mrs. Davis "serious psychological harm." However, Mrs. Davis testified to being scared, hurt, and sad after this incident with her husband, and Patrolman Michael Stump testified that she was "hysterical" and crying at the scene. Thus, the court's finding was not against the manifest weight of the evidence. Nor did the court abuse its discretion in considering this factor when imposing its sentence.

{¶3} Mr. Davis also contends the court erred by finding that his conduct was more serious than that normally constituting domestic violence because his relationship with his wife facilitated the offense. We agree. A trial court may not elevate the seriousness of an offense by pointing to a fact that is also an element of the offense itself. Here the record does not support a finding that Mr. Davis and Mrs. Davis had any relationship beyond that required for his domestic violence conviction, i.e. the couple was married and resided together or had children together. Because the trial court relied upon an improper factor, we vacate his sentence for domestic violence and remand for resentencing.

I. Facts

{¶4} The Washington County Grand Jury indicted Mr. Davis on two counts of domestic violence based upon two separate incidents involving Lila Davis, his wife, who was pregnant with the couple's fourth child at the time both of these incidents occurred. At trial, the jury found Mr. Davis guilty of the lesser included offense of disorderly

conduct for a September 7, 2008 incident, and the trial court ordered him to pay the costs of prosecution. He does not appeal that conviction and sentence.

{¶5} The second incident occurred on December 5, 2008. Mrs. Davis testified that she left her husband after the September 7 incident. However, when the furnace in the house she was renting broke, she went to stay with Mr. Davis in his room at the Budget Lodge in Belpre, Ohio. In the early morning of December 5, she woke up when Mr. Davis screamed from outside and kicked the door open. He grabbed a dish filled with candy and "slung it everywhere." When she reached for the phone, Mr. Davis pulled the cord out of the wall and wrapped it around her throat. Mrs. Davis testified that he hit her on the head with the phone receiver, pinned her between the two beds in the room, and bit her face for "a couple minutes" until it bled. She put a finger inside his cheek and "pulled it to try to get him to let go" of her cheek, but he just hit her head with the back of his hand. He "busted" her lip, and it was "just bleeding everywhere." They screamed at each other during the incident, and she told him she couldn't breathe. Mrs. Davis testified that a police officer ultimately pulled Mr. Davis off of her. In spite of her injuries, she did not go to the hospital for medical treatment. On cross-examination, Mrs. Davis admitted that she did not mention Mr. Davis choking her in her written statement for police. She testified, "I was -- my blood pressure was so high, * * * my pulse was so high, I was scared and I was hurt and I was sad and I just didn't know what all to write. How do you write all that in one -- one little page like that?"

{¶6} Another hotel patron, Andrew Offenberger, testified that he called the police after he heard pounding and screaming coming from the Davises' room. He heard a male voice saying "I'm going to fucking kill you, bitch." Offenberger "heard a

female responding 'I can't breathe. Get off of me. Get off of me,' in a gurgled sound." He testified that it was "[a]s if she was being choked." He also heard multiple sounds that he "believed to be strikes."

{¶7} Patrolman Stump of the Belpre Police Department testified that he responded to the scene, where Offenberger directed him to the Davises' room. There, Stump heard screaming and yelling noises, including a female crying "Stop, stop." Although the department's preferred policy was to have two officers respond to domestic violence calls, based on the intensity of noise from the room Stump feared that someone would be harmed and "immediately began striking the door" with his flashlight to get the occupants' attention. After Mr. Davis opened the door, Stump ordered him onto the walkway because Davis was intoxicated and "extremely agitated." He "had trouble following orders[,]" so Stump held a taser on him until backup arrived.

{¶8} The room was "in disarray," with pillows, blankets, and other items on the floor. Stump observed the phone "laying ripped out of the wall" in between the beds. He saw a female, i.e. Mrs. Davis, lying between the beds in the room. "She had blood pouring out of her mouth. Her shirt was covered with blood." She had blood "smeared on her face[,]" and Stump "couldn't tell where the injury was at." Stump testified that Mrs. Davis "was hysterical, crying, bleeding, * * * just, due to the situation, she was -- she was pretty upset." Mr. Davis had dried blood around his mouth, but Stump did not see any injuries. The couple continued to yell at each other while Stump waited for an emergency squad to arrive. Due to a miscommunication between Stump and another officer, no one took photographs of Mrs. Davis's injuries.

{¶9} Mr. Davis testified that he had "[q]uite a bit" to drink before this incident

occurred. He "drank till about almost -- last call" and got a ride back to the hotel room. He was "pretty sure [Mrs. Davis] was awake" when he returned to the room. Mr. Davis testified that "[t]he rest of that night, it was – it's pretty – it's pretty blurry to me. I can't lie. I was intoxicated." However, he remembered trying to call his mother and that Mrs. Davis ripped the phone out and threw it. He also recalled answering the door for the police, looking behind him, and seeing Mrs. Davis on the floor. But he denied injuring Mrs. Davis. He testified that he had blood around his mouth due to chapped lips. Mr. Davis stipulated that he had two previous convictions for domestic battery in West Virginia.

{¶10} The jury found Mr. Davis guilty of domestic violence for the December 5 incident. After the trial court sentenced him to three years in prison, Mr. Davis filed this appeal.

II. Assignments of Error

{¶11} Mr. Davis assigns the following errors for our review:

I. APPELLANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

II. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THE FOLLOWING FACTORS, MAKING THIS OFFENSE MORE SERIOUS THAN THE NORM, WERE PRESENT IN THIS CASE: (1) THE DEFENDANT'S RELATIONSHIP TO THE VICTIM FACILITATED THE OFFENSE, AND (2) THE DEFENDANT CAUSED SERIOUS PSYCHOLOGICAL HARM.

III. Manifest Weight of the Evidence

{¶12} In his first assignment of error, Mr. Davis contends that his domestic violence conviction was against the manifest weight of the evidence. "In determining whether a criminal conviction is against the manifest weight of the evidence, an

appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed." *State v. Brown*, Athens App. No. 09CA3, 2009-Ohio-5390, at ¶24, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. A reviewing court "may not reverse a conviction when there is substantial evidence upon which the trial court could reasonably conclude that all elements of the offense have been proven beyond a reasonable doubt." *State v. Johnson* (1991), 58 Ohio St.3d 40, 42, 567 N.E.2d 266, citing *State v. Eskridge* (1988), 38 Ohio St.3d 56, 526 N.E.2d 304, at paragraph two of the syllabus.

{¶13} Even in our role as thirteenth juror we are constrained by the rule that the weight to be given evidence and the credibility to be afforded testimony are normally issues to be determined by the trier of fact. *State v. Frazier*, 73 Ohio St.3d 323, 339, 1995-Ohio-235, 652 N.E.2d 1000, citing *State v. Grant*, 67 Ohio St.3d 465, 477, 1993-Ohio-171, 620 N.E.2d 50. The fact finder "is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (per curiam). Thus, we will only interfere if the fact finder clearly lost its way and created a manifest miscarriage of justice.

{¶14} Mr. Davis was convicted of domestic violence, a third-degree felony, in violation of R.C. 2919.25(A) and former R.C. 2919.25(D)(4). R.C. 2919.25(A) provides: "No person shall knowingly cause or attempt to cause physical harm to a family or household member." Under R.C. 2901.01(A)(3), "physical harm" to a person includes

"any injury, illness, or other physiological impairment, regardless of its gravity or duration." Former R.C. 2919.25(D)(4) provided:

> If the offender previously has pleaded guilty to or been convicted of two or more offenses of domestic violence or two or more violations or offenses of the type described in division (D)(3) of this section involving a person who was a family or household member at the time of the violations or offenses, a violation of division (A) or (B) of this section is a felony of the third degree, and a violation of division (C) of this section is a misdemeanor of the first degree.[1]

{¶15} Mr. Davis contends that the State failed to show that he caused or attempted to cause physical harm to his wife. He argues that the jury lost its way in crediting the State's evidence of his wife's injuries, particularly the testimony of Mrs. Davis. According to Mr. Davis's version of events, although he was intoxicated and many of the details of this incident were "pretty blurry," he never injured or attempted to injure his wife. He argues that if he had actually choked Mrs. Davis, she would have put that in her written statement for police. He also contends that if he had bitten Mrs. Davis on the cheek, a responding officer would have mentioned it or there would be substantiating photographs or medical reports.

{¶16} As we explained in *State v. Murphy*, Ross App. No. 07CA2953, 2008-Ohio-1744, at ¶31:

> It is the trier of fact's role to determine what evidence is the most credible and convincing. The fact finder is charged with the duty of choosing between two competing versions of events, both of which are plausible and have some factual support. Our role is simply to insure the decision is based upon reason and fact. We do not second guess a decision that has some basis in these two factors, even if we might see matters differently.

{¶17} The jury chose not to believe Mr. Davis's version of events, and we will not substitute our judgment for that of the finder of fact under these circumstances. The

[1] R.C. 2919.25(D)(4) was amended effective April 7, 2009.

evidence reasonably supports the conclusion that Mr. Davis caused Mrs. Davis physical injury by choking, striking, and biting her. Mrs. Davis testified to this effect. Moreover, Offenberger testified that he heard: (1) Mr. Davis threaten to kill his wife; (2) Mrs. Davis complain that she couldn't breathe in a "gurgled sound" that was "[a]s if she was being choked"; and (3) sounds he "believed to be strikes." In addition, while Patrolman Stump did not specifically testify to seeing a bite mark on Mrs. Davis's face, he did see blood "pouring" from her mouth and smeared on her cheeks in such a manner that he "couldn't tell where the injury was at." Thus, after reviewing the entire record, we cannot say that the trier of fact lost its way or created a manifest miscarriage of justice when it found Mr. Davis guilty of domestic violence. Therefore, we overrule his first assignment of error.

IV. Sentencing

{¶18} In his second assignment of error, Mr. Davis contends that the trial court erred in imposing a greater-than-minimum sentence for his domestic violence conviction. In *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, the Supreme Court of Ohio proscribed a two-step analysis for appellate review of felony sentences. First, we "must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." *Kalish* at ¶4. If this first prong is satisfied, we must review the trial court's ultimate sentence under an abuse-of-discretion standard. Id.

{¶19} Sentencing courts are "no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences."

State v. Foster, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470, at paragraph seven of the syllabus. However, they must still consider R.C. 2929.11 and R.C. 2929.12 before imposing a sentence. *Kalish* at ¶13.

{¶20} Here, the trial court convicted Mr. Davis of domestic violence, a third-degree felony, and sentenced him to three years in prison. Under R.C. 2929.14(A)(3), the statutory prison term range for a third-degree felony is one to five years. Therefore, the trial court imposed a sentence within the permissible statutory range. Moreover, in its judgment entry, the court specifically noted that it considered R.C. 2929.11 and R.C. 2929.12. Mr. Davis cites no failure of the trial court to comply with any "applicable rules and statutes," and we have found none from our review of the record. Thus, we find that his sentence is not clearly and convincingly contrary to law.

{¶21} Next, we must determine whether the trial court abused its discretion in selecting Mr. Davis's sentence. "The term 'abuse of discretion' connotes more than an error of law or of judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144, citing *Steiner v. Custer* (1940), 137 Ohio St. 448, 31 N.E.2d 855; *Conner v. Conner* (1959), 170 Ohio St. 85, 162 N.E.2d 852; and *Chester Twp. v. Geauga Cty. Budget Commt.* (1976), 48 Ohio St.2d 372, 358 N.E.2d 610. As we explained in *State v. Davis*, Highland App. No. 06CA21, 2007-Ohio-3944, at ¶42:

> "'An "abuse of discretion" has * * * been found where a sentence is greatly excessive under traditional concepts of justice or is manifestly disproportionate to the crime or the defendant. *Woosley v. United States* (1973), 478 F.2d 139, 147. * * * Where the severity of the sentence shocks the judicial conscience or greatly exceeds penalties usually exacted for similar offenses or defendants, and the record fails to justify and the trial court fails to explain the imposition of the sentence, the appellate court's [sic] can reverse the sentence. [Id.] This by no means

> is an exhaustive or exclusive list of the circumstances under which an appellate court may find that the trial court abused its discretion in the imposition of [a] sentence in a particular case.'" [*State v. Elswick*, Lake App. No. 2006-L-075, 2006-Ohio-7011], at ¶49, quoting *State v. Firouzmandi*, Licking App. No. 2006-CA-41, 2006-Ohio-5823, at ¶56.

{¶22} Mr. Davis acknowledges that the trial court was not required to make findings or state reasons for imposing a more than minimum sentence. However, the trial court did make specific findings in its judgment entry and Davis argues some of them are not supported by the record. Thus, he contends the trial court abused its discretion by relying on factors that were not present when it imposed a greater-than-minimum sentence.

{¶23} First, Mr. Davis contests the trial court's finding under R.C. 2929.12(B)(2), that his conduct was more serious than conduct normally constituting domestic violence because he caused Mrs. Davis "serious psychological harm." He argues that the State presented no expert testimony on Mrs. Davis's mental condition and that Mrs. Davis's testimony did not justify the court's finding. However, because the existence of serious harm may be apparent from the realm of common experience, the State need not present expert testimony in appropriate situations. See *State v. Hruby*, Ottawa App. No. OT-04-026, 2005-Ohio-3863, at ¶72, citing *State v. Ramirez* (1994), 98 Ohio App.3d 388, 396, 648 N.E.2d 845. See, also, *State v. Braxton*, Franklin App. No. 04AP-725, 2005-Ohio-2198, at ¶26. Here, Mrs. Davis testified that after the incident, she was scared, hurt, and sad, and the trial court was in the best position to view Mrs. Davis and scrutinize her demeanor, gestures, and voice inflections to determine her sincerity. *Seasons Coal Co.*, supra, at 80. Moreover, Patrolman Stump testified that when he saw Mrs. Davis, she "was hysterical, crying, bleeding, * * * just, due to the situation, she

was -- she was pretty upset." Therefore, the trial court's finding that Mr. Davis caused Mrs. Davis "severe psychological harm" was not against the weight of the evidence. Nor did the court act unreasonably, arbitrarily or unconscionably in applying this factor when it sentenced Mr. Davis.

{¶24} Next, Mr. Davis contends that the trial court improperly found that under R.C. 2929.12(B)(6), his conduct was more serious than conduct normally constituting domestic violence because his relationship with the victim facilitated the offense. We agree. A trial court may not elevate the seriousness of an offense by pointing to a fact that is also an element of the offense itself. *State v. Schlecht*, Champaign App. No. 2003-CA-3, 2003-Ohio-5336, at ¶52 (finding that the trial court could not consider an element of the charged offense as "an aggravating circumstance justifying a greater than minimum sentence" under R.C. 2929.12(B)). Under R.C. 2919.25(A), a defendant is guilty of domestic violence if he knowingly causes or attempts to cause physical harm to "a family or household member." Under R.C. 2919.25(F)(1)(a)(i), a "family or household member" includes a spouse of the offender who "is residing or has resided with the offender." Under R.C. 2919.25(F)(1)(b), a "family or household member" also includes a "natural parent of any child of whom the offender is the other natural parent * * *."

{¶25} Here, the record does not support a finding that Mr. Davis and Mrs. Davis had any relationship beyond that required for his domestic violence conviction, i.e. Mrs. Davis was his wife/mother of his children and lived with him. Even though it has discretion in choosing an appropriate sentence, when a court considers an improper sentencing factor, it has committed an abuse of discretion. See *State v. Fisher*,

Washington App. No. 08CA37, 2009-Ohio-2915, at ¶¶7,10-14. Thus, the trial court abused its discretion in finding that Mr. Davis's relationship with his wife facilitated the domestic violence offense, causing it to be more serious than a normal act of domestic violence. Accordingly, we sustain Mr. Davis's second assignment of error to the extent he challenges this finding, vacate his sentence, and remand to the trial court for resentencing.

{¶26} However, we stress that our decision does not necessarily require that the trial court impose a lighter sentence on remand. The trial court may determine that, taken together, the pertinent sentencing factors still warrant a three-year sentence for Mr. Davis's domestic violence conviction. Our decision simply mandates that, in determining his sentence, the trial court may not rely upon an improper factor, i.e. that Mr. Davis's relationship with his wife facilitated this crime.

V. Conclusion

{¶27} We overrule Mr. Davis's first assignment of error. And we overrule his second assignment of error to the extent he challenges the trial court's finding of severe psychological harm. However, we sustain his second assignment of error to the extent he challenges the trial court's finding that his relationship with the victim facilitated the domestic violence offense. We vacate Mr. Davis's sentence for domestic violence and remand this matter for resentencing.

JUDGMENT AFFIRMED IN PART,
REVERSED IN PART,
AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART and that the CAUSE IS REMANDED. Appellant and Appellee shall split the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Washington County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Abele, J. & Kline, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.