[Cite as *State v. Martin*, 2015-Ohio-1106.]

COURT OF APPEALS
DELAWARE COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. W. Scott Gwin, P.J.
Plaintiff - Appellee	:	Hon. Patricia A. Delaney, J.
	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	
RODNEY MARTIN	:	Case No. 14 CAA 03 0016
	:	
	:	
Defendant - Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING: Appeal from the Delaware County Court of Common Pleas, Case No. 13 CR I 08 0392

JUDGMENT: Affirmed in Part; Reversed and Remanded in Part

DATE OF JUDGMENT: March 23, 2015

APPEARANCES:

For Plaintiff-Appellee

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Baldwin, J.

{¶1} Appellant Rodney Martin appeals a judgment of the Delaware County Common Pleas Court convicting him of domestic violence (R.C. 2919.25(A)) and sentencing him to five years community control. Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On the night of August 24, 2013, Kendis Martin went to a nightclub with a friend. When she arrived home, she went to the refrigerator to eat leftover garlic barbecue wings from Rooster's, as they were her favorite food from her favorite restaurant. She discovered that the wings were gone.

{¶3} Kendis went to the bedroom where her husband, appellant, was asleep. She asked him if he ate the wings, and he admitted that he did. She began yelling and cursing at appellant, and an argument ensued.

{¶4} Kendis went to the living room to watch television. They continued to yell at each other. Appellant came to the living room and accused Kendis of cheating on him. He tried to pull Kendis to the bedroom where their teenage daughters were less likely to hear the argument, and a struggle ensued. Appellant pulled off Kendis' leggings when he tried to pull her off the couch. At some point in the struggle, Kendis ended up with a scratch on her neck.

{¶5} Kendis went to her cell phone to call 911. Appellant grabbed the phone from her. She tried to call 911 on her daugthers' phone, but the phone required a password. She went to the girls' room to get the password, then dialed 911. She told the dispatcher, "My husband just choked me."

{¶6} Deputy Matthew Fletcher and Deputy Chadwick Sloan of the Delaware County Sheriff's Department were dispatched to the scene. When they arrived, Dep. Fletcher saw Kendis standing on the balcony of her apartment. She was upset, nervous, crying, and rubbing the right side of her neck. She told Dep. Fletcher that appellant chocked her by putting his hands around her neck. The deputy observed a scratch on her neck and photographed the scratch. Kendis also gave police a written statement.

{¶7} Meanwhile, Deputy Chadwick Sloan spoke to appellant inside the apartment. Appellant told Dep. Sloan that he came home from work and drank two 24 oz. "tall boy" beers. Appellant stated that when Kendis came home and discovered that he had eaten her wings, an argument ensued. He told the deputy that he said to her, "What happened, did your boyfriend piss you off tonight?" The argument became physical, with both pushing and shoving each other.

{¶8} Appellant was arrested. While being led to the police cruiser, he apologized to Kendis.

{¶9} Appellant was indicted by the Delaware County Grand Jury with one count of domestic violence in violation of R.C. 2919.25(A), a felony of the third degree because appellant had two prior convictions of domestic violence. Appellant moved to dismiss, arguing that the prior convictions could not be used to enhance the charge because his pleas in those cases had been entered without a proper waiver of counsel. The trial court agreed as to one of the prior convictions, and the indictment was amended to reflect a felony of the fourth degree due to one prior conviction.

{¶10} The case proceeded to jury trial. At trial, Kendis testified that although she knew what she previously told police and the grand jury, when she thought about the incident on the night in question, it did not play out the way she previously reported. She testified that she was not sure appellant put his hands on her neck, but she did admit that the scratch on her neck resulted from the altercation with appellant.

{¶11} Appellant was convicted as charged and sentenced to five years of community control, including a residential sanction of sixty days jail time. He assigns eight errors:

{¶12} "I. RODNEY MARTIN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS ATTORNEY REPEATEDLY FAILED TO OBJECT TO INADMISSIBLE, OUT-OF-COURT STATEMENTS, FAILED TO OBJECT TO THE STATE IMPROPERLY TREATING ITS WITNESS AS HOSTILE, AND FAILED TO REQUEST AN INSTRUCTION REGARDING THE DISTINCTION BETWEEN IMPEACHMENT AND SUBSTANTIVE EVIDENCE.

{¶13} "II. THE TRIAL COURT ERRED WHEN IT SUGGESTED TO THE STATE THAT IT SHOULD ADMIT KENDIS MARTIN'S WRITTEN STATEMENT AS SUBSTANTIVE EVIDENCE UNDER THE EXCITED-UTTERANCE HEARSAY EXCEPTION, IN VIOLATION OF OHIO HEARSAY LAW, THE CONFRONTATION CLAUSE, AND THE DUE PROCESS CLAUSE.

{¶14} "III. THE TRIAL COURT ERRED BY NOT ORDERING THE STATE TO PROVIDE THE BILL OF PARTICULARS THAT HAD BEEN REQUESTED, IN VIOLATION OF R.C. 2941.01.

{¶15} "IV. THE STATE'S MISCONDUCT DURING TRIAL DENIED RODNEY THE RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW, IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION.

{¶16} "V. RODNEY MARTIN'S RIGHT TO CONFRONTATION AND DUE PROCESS WERE VIOLATED WHEN THE TRIAL COURT IMPROPERLY PREVENTED DEFENSE COUNSEL FROM ASKING KENDIS IF SHE BELIEVED THAT RODNEY WAS TRYING TO HURT HER.

{¶17} "VI. THE TRIAL COURT VIOLATED R.C. 2929.19 AND R.C. 2967.191, AND RODNEY'S RIGHT TO DUE PROCESS, WHEN IT DENIED RODNEY'S MOTION FOR JAIL TIME CREDIT WITH NO BASIS.

{¶18} "VII. THE TRIAL COURT VIOLATED RODNEY MARTIN'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN IT ENTERED A JUDGMENT OF CONVICTION FOR DOMESTIC VIOLENCE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶19} "VIII. THE TRIAL COURT VIOLATED RODNEY'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL WHEN, IN THE ABSENCE OF SUFFICIENT EVIDENCE, THE COURT FOUND RODNEY GUILTY OF DOMESTIC VIOLENCE IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND SECTION 16, ARTICLE I OF THE OHIO CONSTITUTION."

I.

{¶20} In his first assignment of error, appellant argues that counsel was ineffective for failing to object to hearsay, failing to object to the state treating Kendis as a hostile witness, and failing to request an instruction regarding the distinction between impeachment and substantive evidence.

{¶21} A properly licensed attorney is presumed competent. *State v. Hamblin*, 37 Ohio St.3d 153, 524 N.E.2d 476 (1988). Therefore, in order to prevail on a claim of ineffective assistance of counsel, appellant must show counsel's performance fell below an objective standard of reasonable representation and but for counsel's error, the result of the proceedings would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984); *State v. Bradley* , 42 Ohio St.3d 136, 538 N.E.2d 373 (1989). In other words, appellant must show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Id*.

{¶22} Appellant first argues that counsel was ineffective for failing to object to Dep. Fletcher's testimony regarding statements made to him by Kendis at the apartment. Dep. Fletcher testified concerning what Kendis told him about the argument between herself and appellant. He also testified that she stated that appellant placed his hands around her neck, held her down, and began to choke her. He testified that Kendis told him her neck hurt.

{¶23} Under Evid.R. 803(2), excited utterances are not excluded by the hearsay rule, even though the declarant is available as a witness. An excited utterance is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

{¶24} Dep. Fletcher testified that he arrived at the apartment about three minutes after receiving the dispatch call. Kendis was standing on the balcony of the apartment. He testified that she was upset and nervous, and she was crying. Because the state laid the foundation for the admission of Kendis' account of the incident as an excited utterance, counsel was not ineffective for failing to object.

{¶25} Appellant next argues that counsel was ineffective for failing to object to hearsay regarding statements made by appellant's daughters. Specifically, Dep. Fletcher testified that the daughters told him that they heard appellant and Kendis arguing, and they heard Kendis said, "Don't put your hands on me."

{¶26} One of the daughters testified at trial that she heard her parents arguing. While she did not testify that she heard Kendis tell appellant not to put his hands on her, Kendis testified at trial that appellant tried to pull her off the couch and she fought back, and appellant told Dep. Sloan that they were pushing and shoving each other. Therefore, appellant has not demonstrated a reasonable probability of a change in the outcome of the trial had appellant objected.

{¶27} Appellant argues that counsel was ineffective for failing to object to Dep. Sloan's statement, "Deputy Fletcher came out soon and told me that the children had confirmed the story of the mother, Mrs. Martin." Tr. 215. The State agrees that this was improperly admitted hearsay. However, one of the daughters testified at trial and corroborated her mother's testimony concerning the argument and her use of the girls' cell phone to call 911. Appellant has not demonstrated a reasonable probability of a change in the outcome had counsel objected.

{¶28} Appellant argues that counsel was ineffective for failing to object to the State impeaching Kendis with her prior statement without a showing of surprise and affirmative damage required by Evid. R. 607(A).

{¶29} Kendis testified at trial that she was not sure if appellant put his hands on her neck. Counsel then impeached her with her prior statements to police that appellant grabbed her by the throat and choked her. Counsel failed to object, and appellant now argues that the State cannot demonstrate surprise because Kendis testified at the arraignment that she had not been choked.

{¶30} Appellant has not demonstrated a reasonable probability of a change in the outcome had appellee not questioned Kendis concerning her prior statements that appellant had choked her. Her prior statements that appellant had choked her were properly admitted by way of Dep. Fletcher's testimony and the 911 call. Therefore, the evidence was merely cumulative of other properly admitted evidence.

{¶31} Appellant next argues that counsel was ineffective for failing to request a jury instruction regarding the distinction between impeachment evidence and substantive evidence. The trial court concluded that because evidence of Kendis' prior statements were before the jury both as substantive evidence through Dep. Fletcher's testimony and the 911 call, and as impeachment evidence through Kendis' testimony, an instruction on using the evidence in different ways would be confusing to the jury, and counsel for appellant agreed that an instruction regarding impeachment would be confusing. Tr. 244. Appellant has not demonstrated that the result of the trial would have been different had the instruction been given, as her prior statements were properly before the jury as substantive evidence.

{¶32} Finally, appellant argues that counsel was ineffective for failing to object to the admission of the written statement given by Kendis at the scene as inadmissible hearsay.

{¶33} The State sought to introduce the written statement Kendis gave to police solely to demonstrate that she was not as intoxicated as she claimed to be, because her handwriting was very legible. The court then suggested that the State introduce the written statement as an excited utterance. The court ultimately admitted the statement as an excited utterance.

{¶34} Appellant argues that the written statement was not an excited utterance, as a written statement provides time for reflective thought. However, appellant has not demonstrated that even had the written statement been excluded as substantive evidence, the result of the proceeding would have been different. The written statement was merely cumulative of Kendis' trial testimony on every point except whether appellant grabbed her by the throat. However, evidence that she told Dep. Fletcher and the 911 dispatcher that appellant grabbed her by the throat was properly admitted through Dep. Fletcher's testimony and the 911 call.

{¶35} The first assignment of error is overruled.

II.

{¶36} In his second assignment of error, appellant argues that the court erred in admitting Kendis' written statement as an excited utterance.

{¶37} Appellant failed to object to admission of the written statement as an excited utterance, and therefore we must find plain error to reverse. Evid. R. 103. In order to prevail under a plain error analysis, appellant bears the burden of

demonstrating that the outcome of the trial clearly would have been different but for the error. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978). Notice of plain error "is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *Id*. at paragraph three of the syllabus.

{¶38} A written statement is often inadmissible as an excited utterance because the very act of writing implies reflective thought. E.g., *State v. Nixon*, 12th Dist. Warren No. CA2011-11-116, 2012-Ohio-1292, ¶15 (ability to produce a coherent written statement demonstrates that the statement "was the product of reflective thought instead of one made from impulse while under the stress of excitement"); *State v. Scarl,* 11th Dist. Portage No. 2002-P-0091, 2003-Ohio-3493, ¶63 (trial court erred in admitting written statement as excited utterance where victim was upset, but able to gather her thoughts and produce a coherent written statement).

{¶39} In the instant case, Dep. Fletcher testified that Kendis was still upset when she wrote the statement. He testified that she was anxious, but had stopped crying and was trying to focus on writing the statement. However, even if the court erred in admitting the statement as an excited utterance, the error does not rise to the level of plain error. As discussed in the first assignment of error, the written statement was merely cumulative of Kendis' trial testimony on every point except whether appellant grabbed her by the throat, and evidence that she told Dep. Fletcher and the 911 dispatcher that appellant grabbed her by the throat was properly admitted through Dep. Fletcher's testimony and the 911 call. Appellant has not demonstrated that the result of the trial would have been different but for admission of the written statement.

{¶40} The second assignment of error is overruled.

III.

{¶41} In his third assignment of error, appellant argues that the court erred in failing to order the State to provide him with a bill of particulars.

{¶42} Appellant requested a bill of particulars on September 4, 2013. The State responded on September 10, 2013, that appellant was not entitled to a bill of particulars because the nature of the offense was provided in the indictment. The indictment states that on August 25, 2013, appellant did knowingly cause or attempt to cause physical harm to Kendis Martin, a family or household member, and that he had previously pleaded guilty to or been convicted of domestic violence in Delaware Municipal Court Nos. 05CRB0274 and 06CRB01734.

{¶43} Although Crim.R. 7 provides a criminal defendant with the right to obtain a bill of particulars, the failure to provide such does not automatically constitute reversible error. See *State v. Cossack*, 7th Dist. Mahoning App. No. 03 MA 110, 2005-Ohio-2784, ¶ 34. An appellate court may only reverse a conviction for a failure to provide a timely requested bill of particulars if appellant demonstrates that his "lack of knowledge concerning the specific facts a bill of particulars would have provided him actually prejudiced him in his ability to fairly defend himself." *State v. Chinn*, 85 Ohio St.3d 548, 569, 1999-Ohio-288.

{¶44} Appellant has not demonstrated prejudice in his ability to fairly defend himself. The indictment provided appellant with the general nature of the offense, the date of the offense, and the prior convictions which the State intended to use to elevate the degree of the offense. Further, on September 20, 2013, the State certified that all

discoverable materials had been provided to appellant, and the State supplemented discovery on October 4, 2013. The transcript of the proceedings does not demonstrate that appellant was in any way prejudiced in his ability to defend himself by the State's failure to provide the requested bill of particulars.

{¶45} The third assignment of error is overruled.

IV.

{¶46} In his fourth assignment of error, appellant argues that the prosecutor committed misconduct by making the jury aware that Kendis had been the victim of appellant's previous conviction of domestic violence, by claiming to be surprised when Kendis testified that she had not been choked, by introducing hearsay evidence and arguing it as substantive evidence of guilt, and by failing to provide him with a bill of particulars.

{¶47} The test for prosecutorial misconduct is whether the prosecutor's comments and remarks were improper and if so, whether those comments and remarks prejudicially affected the substantial rights of the accused. *State v. Lott*, 51 Ohio St.3d 160, 555 N.E.2d 293 (1990). In reviewing allegations of prosecutorial misconduct, it is our duty to consider the complained of conduct in the context of the entire trial. *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986).

{¶48} Appellant first argues that the prosecutor committed misconduct by questioning Kendis concerning appellant's prior conviction:

{¶49} "Q. You're aware of a prior, in 2005, a prior domestic violence conviction against your husband; is that correct?

{¶50} "A. Yes.

{¶51} "Q. And you were the victim in that?

{¶52} "MS. RIGGINS: Objection.

{¶53} "THE COURT: Sustained."

{¶54} Tr. 140.

{¶55} Appellant's past conviction was an element of the offense, and the trial court sustained the objection to the question concerning the identity of the victim of that offense before the witness answered. The court further instructed the jury to not speculate on why the Court sustained the objection to any question or what the answer might have been, and to not draw any inference or speculate on the truth of any suggestion which was included in a question that was not answered. Tr. 271. Appellant has not demonstrated prejudice from this question.

{¶56} Appellant next argues that the prosecutor committed misconduct in representing to the court that he was surprised by Kendis testifying that appellant had choked her, as she had testified at the arraignment that he had not choked her.

{¶57} At the time the court questioned the prosecutor concerning a showing of surprise, the prosecutor had already questioned her without objection concerning her past statements that appellant choked her. The prosecutor told the judge that he thought she would minimize it, but he didn't think she would "flat out say it just never happened." Tr. 146-147. At appellant's arraignment, Kendis testified, "He didn't choke me, but I felt like he could've because it's happened before. He did try to grab at me, and that's why I had the scratches and abrasions." Arr. Tr. 10. At trial, she testified that she was not sure if he put his hands on her neck. Tr. 107. Therefore, the prosecutor's statement to the court that he thought she would minimize the choking but not flat out

deny it happened is supported by her arraignment testimony, as while she denied the choking at the arraignment, she did testify that he tried to grab at her neck, leading to the scratches and abrasions.

{¶58} As discussed in the first assignment of error, Kendis' prior statements that appellant had choked her were properly admitted by way of Dep. Fletcher's testimony and the 911 call. Therefore, the evidence with which the prosecutor impeached her testimony was merely cumulative of other properly admitted evidence, and appellant has not demonstrated prejudice.

{¶59} Appellant next argues that the prosecutor introduced hearsay evidence and argued it as substantive evidence of guilt, specifically the oral statements Kendis made to Dep. Fletcher and her written statement.

{¶60} As discussed in the first assignment of error, the oral statements Kendis made to Dep. Fletcher were admissible as excited utterances pursuant to Evid. R. 803(2). Therefore, the prosecutor did not commit misconduct in seeking admission of these statements and arguing such as evidence of guilt. Although the written statement may not have been admissible as an excited utterance, the trial court had admitted the statement as such, and the prosecutor therefore did not commit misconduct in arguing that the statement provided evidence of guilt based on the court's ruling. Further, as discussed in the second assignment of error, the written statement was merely cumulative of other properly admitted evidence in the case, and appellant therefore has not demonstrated prejudice.

{¶61} Finally, appellant argues that the prosecutor committed misconduct in not providing a bill of particulars upon request. As discussed in the third assignment of

error, appellant has not demonstrated prejudice. The indictment provided appellant with the general nature of the offense, the date of the offense, and the prior convictions which the State intended to use to elevate the degree of the offense. Further, on September 20, 2013, the State certified that all discoverable materials had been provided to appellant, and the State supplemented discovery on October 4, 2013. The transcript of the proceedings does not demonstrate that appellant was in any way prejudiced in his ability to defend himself by the State's failure to provide the requested bill of particulars.

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

V.

{¶63} In his fifth assignment of error, appellant argues that the court improperly limited his cross-examination of Kendis Martin, in violation of Evid. R. 611(B) and his constitutional right to confront witnesses.

{¶64} Appellant asked Kendis, "In your heart of hearts, do you believe Rodney was trying to hurt you out of this incident?" Tr. 136. The State's objection was sustained. Appellant then asked, "Do you think from what you observed that Rodney was trying to hurt you in this situation?" Tr. 137. The State's objection was sustained. Appellant then rephrased the question, "Without talking about what would have been in his mind, from what you observed, did you think that he was trying to hurt you?" Tr. 137. The objection was again sustained.

{¶65} A defendant's right to cross-examine the State's witnesses is guaranteed by both the Confrontation Clause of the Sixth Amendment to the United States Constitution and Article I, Section 10 of the Ohio Constitution. *Douglas v. Alabama*, 380

U.S. 415, 418, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965); *State v. Self*, 56 Ohio St.3d 73, 78, 564 N.E.2d 446 (1990). As a general rule, cross-examination is permitted "on all relevant matters and matters affecting credibility." Evid. R. 611(B). The scope of cross-examination lies within the sound discretion of the trial court, viewed in relation to the particular facts of the case. *State v. Slagle*, 65 Ohio St.3d 597, 605, 605 N.E.2d 916, 925 (1992). This exercise of discretion will not be reversed in the absence of a clear showing of an abuse of discretion. *Id*. An abuse of discretion implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140, 1142 (1983).

{¶66} Appellant argues that whether Kendis believed he was trying to hurt her was "critically important" and "cut to the core of this case." However, the charge of domestic violence required the State to prove that appellant acted knowingly. Knowingly is defined by R.C. 2901.22(B), which provides that "[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." Whether appellant subjectively was trying to hurt her, and whether Kendis believed he was trying to hurt her, was irrelevant to the mental state of knowingly and called for speculation on Kendis' part. The trial court did not abuse its discretion in sustaining the State's objections to this line of questioning on cross-examination.

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

VI.

{¶68} In his sixth assignment of error, appellant argues that the trial court erred in overruling his motion for jail time credit.

{¶69} On March 10, 2014, appellant filed a motion for jail time credit. In an attached memorandum, appellant claimed he was entitled to two days of jail time credit for time served on the instant case. The trial court overruled the motion. At the sentencing hearing, counsel for appellant told the court that the PSI improperly stated that he had zero days of jail credit, when he actually had two days.

{¶70} Appellant's community control sanction required him to serve sixty days in the Delaware County Jail. R.C. 2949.08 provides for jail time credit as follows:

> (A) When a person who is convicted of or pleads guilty to a felony is sentenced to a community residential sanction in a community-based correctional facility pursuant to section 2929.16 of the Revised Code or when a person who is convicted of or pleads guilty to a felony or a misdemeanor is sentenced to a term of imprisonment in a jail, the judge or magistrate shall order the person into the custody of the sheriff or constable, and the sheriff or constable shall deliver the person with the record of the person's conviction to the jailer, administrator, or keeper, in whose custody the person shall remain until the term of imprisonment expires or the person is otherwise legally discharged.
>
> (B) The record of the person's conviction shall specify the total number of days, if any, that the person was confined for any reason arising out of the offense for which

> the person was convicted and sentenced prior to delivery to the jailer, administrator, or keeper under this section. The record shall be used to determine any reduction of sentence under division (C) of this section.

{¶71} If appellant served two days of jail time on the instant case, he was entitled to jail time credit for that time. The trial court erred in summarily overruling his motion for jail time credit.

{¶72} The sixth assignment of error is sustained.

VII. & VIII.

{¶73} In his seventh and eighth assignments of error, appellant argues that the judgment of conviction is against the manifest weight and sufficiency of the evidence.

{¶74} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a thirteenth juror and "in reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in evidence the jury 'clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *State v. Thompkins*, 78 Ohio St. 3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, quoting *State v. Martin*, 20 Ohio App. 3d 172, 175, 485 N.E.2d 717 (1983).

{¶75} An appellate court's function when reviewing the sufficiency of the evidence is to determine 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. Jenks*, 61 Ohio St. 3d 259, 574 N.E.2d 492, paragraph two of the syllabus (1991).

{¶76} Appellant was convicted of domestic violence as defined by R.C. 2919.25(A), "No person shall knowingly cause or attempt to cause physical harm to a family or household member."

{¶77} At trial, Kendis Martin testified that on the night of August 24, 2013, she went to a nightclub with a friend. When she arrived home, she went to the refrigerator to eat leftover garlic barbecue wings from Rooster's, as they were her favorite food from her favorite restaurant. She discovered that the wings were gone. She then went to the bedroom where her husband, appellant, was asleep. She asked him if he ate the wings, and he admitted that he did. She began yelling and cursing at appellant, and an argument ensued.

{¶78} She testified that she went to the living room to watch television. She and appellant continued to yell at each other. Appellant came to the living room and accused Kendis of cheating on him. He tried to pull Kendis to the bedroom where their teenage daughters were less likely to hear the argument, and a struggle ensued. Appellant pulled off Kendis' leggings when he tried to pull her off the couch. She testified that she was not sure appellant put his hands on her neck, but she did admit that the scratch on her neck resulted from the altercation with appellant.

{¶79} Kendis went to her cell phone to call 911. Appellant grabbed the phone from her. She tried to call 911 on her daugthers' phone, but the phone required a password. She went to the girls' room to get the password, then dialed 911.

{¶80} In the 911 call, Kendis stated that her husband had choked her. Deputy Fletcher testified that Kendis told him that appellant choked her by putting his hands around her neck. The deputy observed a scratch on her neck and photographed the scratch. Further, when the deputies arrived on the scene, Dep. Fletcher observed Kendis rubbing her neck.

{¶81} The evidence was sufficient, if believed by the jury, to support a conviction of domestic violence. The judgment is therefore not against the sufficiency of the evidence.

{¶82} Appellant argues that Kendis is not a credible witness, and that she was intoxicated on the night in question. However, the jury was in a better position than this Court to determine whether they believed Kendis lied to police or whether she lied in court concerning whether appellant put his hands on her neck and tried to choke her. Her statement to police was corroborated by the photographs of the scratch on her neck. She further testified at trial that the scratch on her neck was a result of the altercation with appellant. Further, while Kendis testified that she was very intoxicated at the time of the altercation, Dep. Flether testified that he noted only a slight odor of alcohol about her and no evidence of intoxication. The judgment is not against the manifest weight of the evidence.

{¶83} The seventh and eighth assignments of error are overruled.

{¶84} The judgment of the trial court overruling appellant's motion for jail time credit is reversed, and this cause is remanded to the Delaware County Common Pleas Court for a computation of jail time credit. The judgment of conviction and sentence is affirmed in all other respects. Costs are assessed to appellant.

By: Baldwin, J.

Gwin, P.J. and

Delaney, J. concur.