[Cite as *State v. Abernathy*, 2015-Ohio-1363.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. William B. Hoffman, J
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 2014CA00120
JUSTIN ROBERT ABERNATHY	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Stark County Court of Common Pleas, Case No. 2014-CR-0160
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	April 6, 2015

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO Stark County Prosecutor BY: RONALD MARK CALDWELL 110 Central Plaza South Canton, OH 44702	GEORGE URBAN 116 Cleveland Avenue North Canton, OH 44702

Gwin, P.J.

{¶1} Appellant Justin Robert Abernathy ["Abernathy"] appeals his conviction and sentence after a jury trial in the Stark County Court of Common Pleas for one count of domestic violence in violation of R.C. 2919.25(A), a felony of the third degree due to two prior convictions for domestic violence.

Facts and Procedural History

{¶2} Kelsey Pike and Abernathy had been living together, and had a one-year-old child together. Toward the end of January 2014, the two decided to move out of their residence. Abernathy decided that he was not going with her, but was instead moving elsewhere, hence breaking off the relationship. This announcement led to an intense argument on the night of January 24, 2014. The argument upset Kelsey greatly, so she called the police even though Abernathy had gone to sleep. When the police from the Stark County Sheriff's Office arrived, Kelsey answered the door and told the deputies that Abernathy was asleep. They nonetheless directed Kelsey to wake him up so that they could question him and determine that everything was all right. Once the deputies ascertained that this was the case, they left.

{¶3} The next day, Kelsey awoke and drove to her mother's home, the home where she was going to move. When she returned to her residence, she found Abernathy and a friend moving his belongings but not hers. Abernathy told Kelsey that they were not going to help her move. This upset Kelsey leading to another intense argument between her and Abernathy.

{¶4} During the argument, Kelsey texted and called her father, Thomas Pike, on her cell phone, asking him to come to her home. Pike responded by telling her that

she should call the police, and that he would not come over there unless the police were at the home. During the exchange of texts, Pike asked his daughter if Abernathy had hit her. Kelsey texted back, "Yep." Pike then called 911 and notified the police of the situation at his daughter's home. After calling the police, Pike proceeded to his daughter's home.

{¶5} When Pike got there, Abernathy was coming out of the house. Pike, worried that there might be a gun in the house, asked Abernathy what was going on and tried to keep everyone calm. He then had their conversation move inside the house, where he talked to Abernathy and Kelsey about the anger problems. Shortly thereafter, the police knocked on the door. Abernathy said that he was not going to go to jail, looked out the window to make sure it was the police, and then ran to the other end of the house. Pike tackled him. The police were let inside, and they told Pike to get off Abernathy. Pike did not do so immediately. The police then pulled Pike off Abernathy, handcuffing him in order to secure the scene.

{¶6} Having secured the scene, Deputy Hallock spoke with Kelsey. She was upset and crying. Kelsey told the deputy that she and Abernathy had been arguing earlier in the day about personal matters, and that Abernathy struck her on her leg during the argument. Kelsey was wearing shorts, and Deputy Hallock observed a large red mark on her leg. He then asked Kelsey to fill out a domestic violence form, which she refused. Meanwhile, Deputy Caldwell interviewed Abernathy, who denied doing anything. Based on this information, the deputies arrested Abernathy, based on department policy for being the primary aggressor in this domestic violence situation.

{¶7} According to Hallock, Kelsey told him that Abernathy struck her while she was sitting on the couch, striking her on the left thigh "With an open hand that caused raised, you can see where the strike happened and then the puffiness and redness, swelling area of where the fingers and the palm would have struck."

{¶8} During her direct examination, the trial court declared Kelsey a “court’s witness” pursuant to Evid. R. 614. (T. at 114-115).

{¶9} Kelsey testified that she took a notarized statement recanting the verbal statements she had made to the police to the prosecutors prior to Abernathy’s preliminary hearing in Canton Municipal Court. Kelsey testified the prosecutors assured her they would pass the statement on to the judge. At trial, Kelsey testified that, in response to her father questioning her if Abernathy had struck her, she told her father that she had been struck purely as an incentive for her father to come to her house. Kelsey later testified the argument was "never physical" and she was never threatened. Kelsey denied sending the text message to her father indicating that Abernathy had hit her. (T. at 116). Kelsey testified that she told the officers at the scene that Abernathy’s phone had hit her in the leg. (T. at 111). Kelsey denied telling the police that Abernathy struck her with an open palm on the leg. (T. at 111). However, Kelsey admitted that she had told the officers that the argument “got physical.” (T. at 110).

{¶10} The jury found Abernathy guilty of the charged offense, and the trial court sentenced him to a prison term of 30 months.

Assignments of Error

{¶11} Abernathy raises two assignments of error,

{¶12} "I. APPELLANT WAS DENIED HIS RIGHTS TO DUE PROCESS AND OF ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 10 AND 16 OF THE OHIO CONSTITUTION, BECAUSE HIS TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.

{¶13} "II. APPELLANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

I.

{¶14} In his first assignment of error, Abernathy argues that he was denied effective assistance of trial counsel. Specifically, Abernathy contends: 1).counsel failed to cross-examine the witnesses on numerous discrepancies, or highlight the discrepancies for the jury; 2). Counsel failed to object to Thomas Pike testifying as to Abernathy's state of mind during the arrest; 3). Counsel failed to object to text messages allegedly sent from Kelsey to her father Thomas Pike; 4). Counsel failed to object to Thomas Pike's testimony about Abernathy's two prior domestic violence convictions and reference to Abernathy as "homeboy"; 5). Counsel failed to object to Deputy's testifying as to what Kelsey told them at the scene; and 6). Counsel failed to object to Deputy Hallock testimony regarding the specifics of the injury to Kelsey regarding what kind of supposed strike would have caused it, and what the mark corresponds to.

{¶15} The standard for reviewing claims for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674(1984). Ohio adopted this standard in the case of *State v. Bradley*, 42 Ohio St.3d

136, 538 N.E.2d 373(1989). These cases require a two-pronged analysis in reviewing a claim for ineffective assistance of counsel.

{¶16} First, we must determine whether counsel's assistance was ineffective; i.e., whether counsel's performance fell below an objective standard of reasonable representation and volatile of any of his essential duties to the client.

{¶17} Recently, the United States Supreme Court discussed the prejudice prong of the *Strickland* test,

> With respect to prejudice, a challenger must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id., at 694, 104 S.Ct. 2052. It is not enough "to show that the errors had some conceivable effect on the outcome of the proceeding." Id., at 693, 104 S.Ct. 2052. Counsel's errors must be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id., at 687, 104 S.Ct. 2052.
>
> "Surmounting Strickland's high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. ——, ——, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at

> 689–690, 104 S.Ct. 2052. Even under de novo review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." Id., at 689, 104 S.Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S.Ct. 2052.

Harrington v. Richter, __U.S.__, 131 S.Ct. 770, 777-778, 178 L.Ed.2d 624(2011).

1). Failure to cross-examine.

{¶18} Abernathy argues that his defense counsel should have been more aggressive in cross-examining witnesses.

{¶19} The strategic decision not to cross-examine witnesses is firmly committed to trial counsel's judgment. *See,* State *v. Brown*, 38 Ohio St.3d 305, 319, 528 N.E.2d 523, 540(1988), and the record does not show here that counsel's decision was unreasonable. Furthermore, Abernathy has not shown how he was prejudiced by counsel's decision not to cross-examine the witnesses concerning any perceived discrepancies concerning who arrived first on the scene, or whether Thomas Pike

encouraged Kelsey to speak with the police. *State v. Otte,* 74 Ohio St.3d 555, 565, 1996-Ohio-108, 660 N.E.2d 711(1996).

2). Failure to object to state-of-mind evidence.

{¶20} Abernathy also takes issue with counsel's failure to object to Pike's testimony about Abernathy's state of mind. The challenged testimony, however, was Pike testifying that Abernathy did not know the police were on the way when he confronted him inside the home.

{¶21} "'The failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel.'" *State v. Fears*, 86 Ohio St.3d 329, 347, 715 N.E.2d 136(1999), *quoting State v. Holloway*, 38 Ohio St.3d 239, 244, 527 N.E.2d 831(1988) *Accord, State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶233. A defendant must also show that he was materially prejudiced by the failure to object. *Halloway*, 38 Ohio St.3d at 244, 527 N.E.2d 831.

{¶22} Abernathy has not shown how he was materially prejudiced by counsel's decision not to object to this testimony. Abernathy has failed to demonstrate that there exists a reasonable probability that, had trial counsel objected to this evidence, the result of his case would have been different. The result of the trial was not unreliable nor was the proceedings fundamentally unfair because of the failure of defense counsel to object to Pike's testimony that Abernathy did not know the police were on the way when he confronted him inside the home.

3). Counsel failed to object to text messages allegedly sent from Kelsey to her father Thomas Pike.

{¶23} Counsel did object to screen shots of the text messages Kelsey sent to her father Thomas Pike. (T. 10-12; 222). The trial court granted a motion in limine and reserved ruling until Kelsey testified. However, the trial court noted that although the text messages may be hearsay, they could be admissible for impeachment purposes. (T. at 12). The trial court subsequently declared Kelsey a court witness pursuant to Evid. R. 614. (T. at 114-115).

{¶24} Evid.R. 614(A) provides that the court may on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called. The decision as to whether to call a witness on its own motion under Evid.R. 614(A) is within the court's discretion, and will be reversed only when the court has abused its discretion. *State v. Forehope*, 71 Ohio App.3d 435, 441, 594 N.E.2d 83(5th Dist. 1991).

{¶25} Evid.R. 613(B) provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is admissible if both of the following apply:
>
> (1) If the statement is offered solely for the purpose of impeaching the witness, the witness is afforded a prior opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement or the interests of justice otherwise require;
>
> (2) The subject matter of the statement is one of the following:
>
> (a) A fact that is of consequence to the determination of the action other than the credibility of a witness;

(b) A fact that may be shown by extrinsic evidence under Evid.R. 608(A), 609, 616(A), or 616(B);

(c) A fact that may be shown by extrinsic evidence under the common law of impeachment if not in conflict with the Rules of Evidence.

{¶26} As our brethren in the Tenth District have observed,

Evid.R. 613(B), thus, allows introduction of extrinsic evidence of a prior statement only after a proper foundation has been laid through direct or cross-examination in which: " ' "(1) the witness [here Teague] is presented with the former statement; (2) the witness is asked whether he made the statement; (3) the witness is given an opportunity to admit, deny or explain the statement; and (4) the opposing party is given an opportunity to interrogate the witness on the inconsistent statement." '"State *v. Kulasa*, 10th Dist. No. 11AP–826, 2012–Ohio–6021, ¶ 12, *quoting State v. Mack*, 73 Ohio St.3d 502, 514–15 (1995), *quoting State v. Theuring,* 46 Ohio App.3d 152, 155 (1st Dist.1988). If a witness denies making a prior inconsistent statement, a proper foundation has been laid, and if, in addition, the prior inconsistent statement does not relate to a collateral matter, extrinsic evidence is admissible. *Kulasa* at ¶ 19. If a witness admits having made the contradictory statements, however, then extrinsic evidence of the prior inconsistent statement is not admissible. *In re M.E.G.,* 10th Dist. No. 06AP–1256, 2007–Ohio–4308; *State v. Hill*, 2d Dist. No. 20028, 2004–Ohio-2048, ¶ 40. A trial court's ruling on an Evid.R. 613(B) issue, like other evidentiary rulings, is reviewed for an abuse of

> discretion. *Kulasa* at ¶ 13, *citing*, *inter alia, State v. Reiner*, 89 Ohio St.3d 342, 357–58 (2000).

State v. Ferguson, 10th Dist., Franklin No. 12AP–1003, 2013-Ohio-4798, ¶15.

{¶27} Evid.R. 607 states:

> The credibility of a witness may be attacked by any party except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage. This exception does not apply to statements admitted pursuant to Rules 801(D)(1)(A), 801(D)(2), or 803.

{¶28} Abernathy does not challenge the trial court's decision to permit the state to treat Kelsey as a court witness. Thus, pursuant to Evid. R. 607, the state could use Kelsey's prior statement for impeachment purposes. Accordingly, counsel was not ineffective in falling to object to text messages allegedly sent from Kelsey to her father Thomas Pike.

4). Counsel failed to object to Thomas Pike's testimony about Abernathy's two prior domestic violence convictions and reference to Abernathy as "homeboy."

{¶29} Abernathy's two prior domestic violence convictions were admissible as elements of the third degree felony domestic violence with which Abernathy was charged. The Ohio Supreme Court has noted,

> Where a prior conviction elevates the degree of a subsequent offense, the prior conviction is an essential element that the state must prove beyond a reasonable doubt. *State v. Henderson* (1979), 58 Ohio

> St.2d 171, 173, 12 O.O.3d 177, 389 N.E.2d 494. Thus, Fry's two prior felony convictions elevated the current domestic-violence charges to third-degree felonies and were properly admitted. *See State v. Day* (1994), 99 Ohio App.3d 514, 517, 651 N.E.2d 52; *State v. Torres*, 6th Dist. No. WD–98–049, 1999 WL 173980, *3; *State v. Russell*, 12th Dist. No. CA–98–02–018, 1998 WL 778312, *2.

State v. Fry, 125 Ohio St.3d 163, 2010-Ohio-1017, 926 N.E.2d 1239(2010), ¶90.

{¶30} The trial court overruled defense counsel's objections to Abernathy's two prior domestic violence convictions. (T. at 6-9). Defense counsel mentioned Abernathy's two prior domestic violence convictions during opening argument. (T. at 97-98). The trial court instructed the jury concerning the two prior domestic violence convictions. (T. at 249-250).

{¶31} In light of the evidence that the jury had concerning Abernathy's two prior domestic violence convictions, Abernathy has failed to make a compelling argument that Thomas Pike's fleeting reference to Abernathy's "priors" was materially prejudicial. Abernathy has further failed to demonstrate that there exists a reasonable probability that, had trial counsel objected to this evidence, the result of his case would have been different.

{¶32} Thomas Pike's reference to "homeboy" was not to Abernathy; rather he testified that Abernathy would have one of his "homeboys" post his bail. (T. at 157). Nothing in the record before this Court suggests that the jury abandoned their oaths, their integrity or the trial court's instructions and found Abernathy guilty of the crime of

domestic violence because of Thomas Pike's fleeting use of the term "homeboy" to describe Abernathy's friends.

5). Counsel failed to object to Deputy's testifying as to what Kelsey told them at the scene.

{¶33} Extrinsic evidence of Kelsey's statements on the night of the incident was admissible under Evid.R. 613 only if the subject matter of her alleged inconsistent statements on that night concerned either (1) a "fact that is of consequence to the determination of the action other than the credibility of a witness," (Evid.R.613(B)(2)(a)); (2) a fact described in Evid.R. 608(A), 609, 616(A), or 616(B) (Evid.R.613(B)(2)(b)); or (3) "[a] fact that may be shown by extrinsic evidence under the common law of impeachment if not in conflict with the Rules of Evidence." (Evid.R.613(B)(2)(c).)

{¶34} In the case at bar, Kelsey testified and was subject to cross-examination. Kelsey denied making any statement to the police that Abernathy had struck her with an open palm on her leg. Kelsey was given the opportunity to explain her statement to the police. Kelsey's statement to the police that Abernathy had stuck her was a fact that was of consequence to the determination of the action. Thus, a proper foundation for the admissibility of Kelsey's statements to the deputies on the night of the incident was laid by the state. *State v. Ferguson*, 10th Dist., Franklin No. 12AP–1003, 2013-Ohio-4798, ¶15.

{¶35} Additionally, had counsel objected to the deputy's testimony at trial, the state would have argued the statements were admissible as an exception to the hearsay rule as excited utterances. 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."

{¶36} In the case at bar, Deputy Hallock testified that Kelsey was crying, distraught and upset when she talked to him. Their discussion occurred minutes after police had arrived at the scene, and the police had heard two males arguing as they approached the home. Inside, they found Abernathy and Thomas Pike engaged in a struggle.

{¶37} The evidence reflects that Kelsey's statements were made while she was still frightened and under the stress of a startling event and were not the product of reflective thought. *See State v. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 94, 96. Thus, the evidence supports admissibility of Kelsey's statements as excited utterances. *State v. Fry,* 125 Ohio St.3d 163, 2010-Ohio-10117, 926 N.E.2d 1239(2010), ¶100.

{¶38} Accordingly, counsel was not ineffective in failing to object to Kelsey's statements to Deputy Hallock.

6). Counsel failed to object to Deputy Hallock testimony regarding the specifics of the injury to Kelsey.

{¶39} Deputy Hallock testified as a fact witness. He testified that the injury he observed was consistent with what Kelsey had told him had occurred. The jury was shown photographs of the injury from which they were able to draw their own conclusions as to the cause of the injury on Kelsey's leg. Kelsey testified that there was a mark on her leg that was evident in the photographs. (T. at 112-113).

{¶40} "'The failure to object to error, alone, is not enough to sustain a claim of ineffective assistance of counsel.'" *State v. Fears*, 86 Ohio St.3d 329, 347, 715 N.E.2d 136(1999), *quoting State v. Holloway*, 38 Ohio St.3d 239, 244, 527 N.E. 2d 831(1988). *Accord, State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, 892 N.E.2d 864, ¶233. A defendant must also show that he was materially prejudiced by the failure to object. *Halloway*, 38 Ohio St.3d at 244, 527 N.E.2d 831.

{¶41} Because the jury was given photographs of the injury and Kelsey admitted to the injury, we find Abernathy was not materially prejudiced by the failure to object to Deputy Hallock's characterization of the injury he observed on Kelsey's leg on the night of the incident. As we have previously addressed, Kelsey's statements concerning her injury made to Deputy Hallock were admissible as excited utterances.

7). Conclusion.

{¶42} Having reviewed the record that Abernathy cites in support of his claim that he was denied effective assistance of counsel, we find Abernathy was not prejudiced by defense counsel's representation of him. The result of the trial was not unreliable nor were the proceedings fundamentally unfair because of the performance of defense counsel. Abernathy has failed to demonstrate that there exists a reasonable probability that the result of his case would have been different. Because we have found no instances of prejudice in this case, we find Abernathy has not demonstrated that he was prejudiced by trial counsel's performance.

{¶43} Accordingly, for the foregoing reasons, Abernathy's first assignment of error is overruled in its entirety.

II.

{¶44} Abernathy's second assignment of error challenges the sufficiency of the evidence; and contends his conviction is against the manifest weight of the evidence produced by the state at trial.

{¶45} Our review of the constitutional sufficiency of evidence to support a criminal conviction is governed by *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), which requires a court of appeals to determine whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id.; see also *McDaniel v. Brown*, 558 U.S. 120, 130 S.Ct. 665, 673, 175 L.Ed.2d 582(2010) (reaffirming this standard); *State v. Fry*, 125 Ohio St.3d 163, 926 N.E.2d 1239, 2010–Ohio–1017, ¶146; *State v. Clay*, 187 Ohio App.3d 633, 933 N.E.2d 296, 2010–Ohio–2720, ¶68.

{¶46} Weight of the evidence addresses the evidence's effect of inducing belief. *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997), *superseded by constitutional amendment on other grounds as stated by State v. Smith,* 80 Ohio St.3d 89, 684 N.E.2d 668, 1997-Ohio–355. Weight of the evidence 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. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue, which is to be established before them. Weight is not a question of mathematics, but

depends on its effect in inducing belief." (Emphasis sic.) Id. at 387, 678 N.E.2d 541, quoting Black's Law Dictionary (6th Ed. 1990) at 1594.

{¶47} When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "'thirteenth juror'" and disagrees with the fact finder's resolution of the conflicting testimony. Id. at 387, 678 N.E.2d 541, quoting *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). However, an appellate court may not merely substitute its view for that of the jury, but must find that "'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*, supra, 78 Ohio St.3d at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720–721 (1st Dist. 1983). Accordingly, reversal on manifest weight grounds is reserved for "'the exceptional case in which the evidence weighs heavily against the conviction.'" Id.

> "[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts.
>
> * * *
>
> "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment."

Seasons Coal Co., Inc. v. Cleveland, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978).

{¶48} To find Abernathy guilty of domestic violence the trier of fact would have to find beyond a reasonable doubt that he knowingly caused or attempted to cause physical harm to a family or household member. R.C. 2919.25(A). Physical harm to persons is defined as "any injury, illness, or other physiological impairment, regardless of its gravity or duration." "Family or household member" includes "A spouse, a person living as a spouse, or a former spouse of the offender" R.C. 2919.25(F)(1)(a)(i). A "person living as a spouse" includes "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." R.C. 2919.25(F)(2).

{¶49} Abernathy does not dispute that at all relevant times Kelsey was his wife. Abernathy also agrees that he and Kelsey were living together at all relevant times.

{¶50} The state presented the testimony of Deputy Hallock who described the injuries he observed on Kelsey. The jury viewed photos of the marks on Kelsey and the jury saw the text messages between Kelsey and her father in which she asked him to come to the house and claimed that Abernathy had hit her.

{¶51} Viewing the evidence in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that Abernathy committed the crime of domestic violence. We hold, therefore, that the state met its burden of production regarding each element of the crime of domestic violence

and, accordingly, there was sufficient evidence to submit the charge to the jury and to support Abernathy's conviction.

{¶52} Although Kelsey testified that she had lied to the police about Abernathy striking her, "the reviewing court must determine whether the appellant or the appellee provided the more believable evidence, but must not completely substitute its judgment for that of the original trier of fact 'unless it is patently apparent that the fact finder lost its way.'" *State v. Pallai,* 7th Dist. Mahoning No. 07 MA 198, 2008-Ohio-6635, ¶31, *quoting State v. Woullard,* 158 Ohio App.3d 31, 2004-Ohio-3395, 813 N.E.2d 964 (2nd Dist. 2004), ¶ 81. In other words, "[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe." *State v. Dyke,* 7th Dist. Mahoning No. 99 CA 149, 2002-Ohio-1152, at ¶ 13, *citing State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125(7th Dist. 1999).

{¶53} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212(1967), paragraph one of the syllabus; *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶118. *Accord, Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Marshall v. Lonberger*, 459 U.S. 422, 434, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

{¶54} The jury as the trier of fact was free to accept or reject any and all of the evidence offered by the parties and assess the witness's credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or

sufficiency of the evidence". *State v. Craig*, 10th Dist. Franklin No. 99AP-739, 1999 WL 29752 (Mar 23, 2000) *citing State v. Nivens*, 10th Dist. Franklin No. 95APA09-1236, 1996 WL 284714 (May 28, 1996). Indeed, the jury need not believe all of a witness' testimony, but may accept only portions of it as true. *State v. Raver,* 10th Dist. Franklin No. 02AP-604, 2003-Ohio-958, ¶21, *citing State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964); *State v. Burke,* 10th Dist. Franklin No. 02AP-1238, 2003-Ohio-2889, *citing State v. Caldwell*, 79 Ohio App.3d 667, 607 N.E.2d 1096 (4th Dist. 1992). Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks*, supra.

In *Cross v. Ledford,* 161 Ohio St. 469, 477, 120 N.E. 2d 118 (1954), the Supreme Court further cautioned,

> The mere number of witnesses, who may support a claim of one or the other of the parties to an action, is not to be taken as a basis for resolving disputed facts. The degree of proof required is determined by the impression which the testimony of the witnesses makes upon the trier of facts, and the character of the testimony itself. Credibility, intelligence, freedom from bias or prejudice, opportunity to be informed, the disposition to tell the truth or otherwise, and the probability or improbability of the statements made, are all tests of testimonial value. *Where the evidence is in conflict, the trier of facts may determine what should be accepted as the truth and what should be rejected as false*. See *Rice v. City of Cleveland*, 114 Ohio St. 299, 58 N.E.2d 768.

161 Ohio St. at 477-478. (Emphasis added).

> A fundamental premise of our criminal trial system is that "the jury is the lie detector." *United States v. Barnard,* 490 F.2d 907, 912 (9th Cir. 1973) (emphasis added), cert. denied, 416 U.S. 959, 94 S.Ct. 1976, 40 L.Ed.2d 310 (1974). Determining the weight and credibility of witness testimony, therefore, has long been held to be the "part of every case [that] belongs to the jury, who are presumed to be fitted for it by their natural intelligence and their practical knowledge of men and the ways of men." *Aetna Life Ins. Co. v. Ward,* 140 U.S. 76, 88, 11 S.Ct. 720, 724-725, 35 L.Ed. 371 (1891).

United States v. Scheffer (1997), 523 U.S. 303, 313, 118 S.Ct. 1261, 1266-1267(1997).

{¶55} We find that this is not an "'exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins,* 78 Ohio St.3d at 387, 678 N.E.2d 541, *quoting Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717. The jury neither lost their way nor created a miscarriage of justice in convicting Abernathy of the charges.

{¶56} Based upon the foregoing and the entire record in this matter, we find Abernathy's conviction was not against the sufficiency or the manifest weight of the evidence. To the contrary, the jury appears to have fairly and impartially decided the matters before them. The jury as a trier of fact can reach different conclusions concerning the credibility of the testimony of the witnesses. This court will not disturb the jury's finding so long as competent evidence was present to support it. *State v. Walker*, 55 Ohio St.2d 208, 378 N.E.2d 1049 (1978). The jury heard the witnesses, evaluated the evidence, and was convinced of Abernathy's guilt.

{¶57} Finally, upon careful consideration of the record in its entirety, we find that there is substantial evidence presented which if believed, proves all the elements of domestic violence as charged in the Indictment beyond a reasonable doubt.

{¶58} Abernathy's second assignment of error is overruled.

{¶59} The judgment of the Stark County Court of Common Pleas is affirmed.

By Gwin,, P.J.,

Hoffman, J., and

Wise, J., concur