[Cite as *State v. Williams*, 2013-Ohio-726.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-11-1084

Appellee — Trial Court No. CR0201002871

v.

Nolan Williams — **DECISION AND JUDGMENT**

Appellant — Decided: March 1, 2013

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Brenda J. Majdalani, Assistant Prosecuting Attorney, for appellee.

Sarah K. Skow, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Nolan Williams appeals a March 30, 2011 judgment of the Lucas County Court of Common Pleas. The judgment convicted him of the offense of felonious assault (a violation of R.C. 2903.11(A)(1) and a second-degree felony) and imposed sentence. The conviction is based upon a guilty verdict in a bench trial. The court sentenced

appellant to serve eight years in prison and ordered him to pay costs, including the costs of prosecution, assigned counsel, supervision, and confinement.

{¶ 2} Appellant asserts five assignments of error on appeal:

Assignments of Error

I. The trial court deprived Mr. Williams of a fair trial when it erroneously admitted the 911 hearsay call in violation of Mr. Williams' due process and confrontation rights.

II. The trial court violated Mr. Williams' state and federal due process rights to a fair trial when it admitted improper and prejudicial other bad acts evidence in contravention of Evid.R. 404(B).

III. There is insufficient evidence to sustain Mr. Williams' conviction.

IV. The trial court violated Mr. Williams' due process right to a fair trial when it failed to consider the lesser offense of aggravated assault because he provided the mitigating circumstances of provocation and sudden passion.

V. The trial court failed to make an explicit finding on the record, regarding Mr. Williams' present and future ability to pay appointed counsel's fees, and failed to notify Mr. Williams on the record and in open court that it was imposing appointed counsel's fees, supervision costs, and confinement costs as set forth in its March 30, 2011 judgment entry.

{¶ 3} The Lucas County Grand Jury indicted appellant on October 19, 2010. The indictment charged that appellant "did knowingly cause serious physical harm to another, in violation of §2903.11(A)(1) of the Revised Code, felonious assault." The victim of the alleged offense was appellant's wife, Joanna Williams. The date of the offense was October 8, 2010. Appellant and Joanna Williams married on May 7, 2010.

911 Call

{¶ 4} Under Assignment of Error No. I, appellant contends that he was denied his right to confront witnesses against him at trial as guaranteed by the Sixth Amendment of the United States Constitution, Article I, Section 10 of the Ohio Constitution, and due process of law by the trial court's admitting into evidence the contents of a 911 call at trial. A neighbor made the 911 call, but did not testify at trial.

{¶ 5} The United States Supreme Court considered the Sixth Amendment right to confront witnesses in the context of 911 calls in *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006). The court considered "when statements made during a 911 call * * * are 'testimonial' and thus subject to the requirements of the Sixth Amendment's Confrontation Clause." *Id.* at 817.

{¶ 6} In *State v. Jones*, Slip Opinion No. 2012-Ohio-5677, the Ohio Supreme Court reviewed decisions of the United States Supreme Court in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), *Davis*, and *Hammon v. Indiana* (consolidated with *Davis)* and the analysis required to determine whether statements during police interrogation are testimonial and subject to the requirements of

the Confrontation Clause. The court identified a primary-purpose test used to make that determination. *Jones* at ¶ 145. The test provides:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Id*., quoting *Davis*, 547 U.S. at 822.

{¶ 7} Appellant and Mrs. Williams resided at 2212 Walnut, Toledo, Ohio. The record is clear that the altercation between them on October 8, 2010, began in the house on Walnut. At some point in the altercation, Mrs. Williams ran from the house and outside to the street. Appellant followed.

{¶ 8} Appellant argues that he did not strike Mrs. Williams when they were outside of the house and that there was no ongoing emergency when the neighbor (who was outside) called 911. Appellant argues that the purpose of the 911 call was to establish past events and that the neighbor was not describing events as they happened.

{¶ 9} The state responds that the neighbor was clearly reporting an on-going emergency involving domestic violence and made the call to secure emergency police assistance. The 911 call proceeded as follows:

Operator: Toledo 911. (yelling in background)

Caller: Can I have the police at 2216 Walnut St.? This man is beating this lady up real good * * *

Operator: 2216 Walnut?

Caller: Yes

Operator: Does she need medical attention?

Caller: Yes, she does.

Operator: What is your name?

Caller: My name is Fonda, I stay next door. (Yells out: I'm calling the police right now.)

Operator: Any weapons that you can tell? (yelling in background)

Caller: He's just beating her . . .

Operator: Can you give me a description of him, white, black or hispanic?

Caller: Black * * *

Operator: What's he wearing?

Caller: He's got on jeans and a shirt, they stay next door to me * * * (yelling in the background)

Operator: OK police are on notified * * * I'm gonna transfer you over to medical (more yelling in background)

{¶ 10} Appellant admitted at trial that he chased Mrs. Williams into the street and that his objective was to bring her back to the house. Appellant restrained Mrs. Williams outside as she was trying to get away. Appellant testified that after he stopped her, he punched Mrs. Williams in the knees from behind to make her legs buckle. He testified he did this to permit him to push her back to the porch. Appellant testified that Mrs. Williams was screaming with her voice at a level of 7, 8, or 9 on a scale of 1 to 10 while outside.

{¶ 11} Appellant testified that it was nice out and everyone, including the neighbor, was outside. Appellant testified that he was aware that a neighbor was calling 911. According to appellant, the woman who called 911was "hollering and screaming and she was louder than Joanna."

{¶ 12} In our view, the audio recording of the 911 call discloses that the woman caller was excited by events. There was contemporaneous yelling in the background during the call. The neighbor described the incident as ongoing.

{¶ 13} The evidence at trial was that Mrs. Williams was yelling for help and remained in the grasp of appellant at the time of the call. Both Mrs. Williams and the neighbor caller were yelling at the time of the call. This was not a call to report a historical event.

{¶ 14} Viewed objectively, the primary purpose of the statements by the neighbor in the 911 call was to seek police assistance to aid Mrs. Williams in an ongoing emergency involving domestic violence. We conclude that statements in the 911 call

were nontestimonial and, therefore, not subject to the requirements of the Sixth Amendment's Confrontation Clause.

{¶ 15} Appellant, citing *State v. Storch*, 66 Ohio St.3d 280, 612 N.E.2d 305 (1993), argues that the right of confrontation under Article I, Section 10 of the Ohio Constitution extends beyond protections afforded under the Sixth Amendment and barred use of the 911 call at trial. In response, the state argues that *Storch* does not apply, citing this court's decision in *State v. Johnson*, 6th Dist. No. L-05-1001, 2006-Ohio-1232, ¶ 30-31. Appellant asserts that *Johnson* was wrongly decided.

{¶ 16} The *Storch* decision concerned use of out of court statements by a small child who was the victim of sexual abuse. The child was age three at the time of the alleged offense. Out of court statements by the child were admitted into evidence at trial to prove the child had been raped. In the decision, the Ohio Supreme Court compared rights to confront witnesses against criminal defendants under both state and federal constitutional law.

{¶ 17} In *Johnson*, citing *Storch* as authority, the appellant argued that Article I, Section 10 of the Ohio Constitution provides a greater constitutional right to confront witnesses than afforded under the Sixth Amendment. The appellant argued that in order to use an out of court statement of a witness against a defendant at trial the Ohio Constitution requires a showing that the witness is unavailable to testify at trial. *Id*. at ¶ 24.

{¶ 18} The *Johnson* decision concerned statements that were excited utterances under Evid.R. 803(2) and statements for purposes of medical diagnosis or treatment under Evid.R. 803(4). *Id.* at ¶ 30. In the decision, this court recognized that the statements in the case were by adults and were of the type firmly rooted in hearsay exceptions recognized in Ohio that applied without regard to the declarant's availability. *Id*. We also recognized that the central holdings in *Storch* revolved around Evid.R. 807 (statements by children in abuse cases) that includes an availability requirement. *Id.* at ¶ 31. Paragraph one of the syllabus in *Storch* addresses the right of confrontation under Article I, Section 10 of the Ohio Constitution but is limited in focus to Evid.R. 807 circumstances:

> Evid.R. 807 accords with the right of confrontation guaranteed by both Section 10, Article I of the Ohio Constitution and the Sixth Amendment of the Constitution of the United States. Storch, paragraph one of the syllabus.

{¶ 19} In limiting *Storch* to Evid.R. 807 statements, we approved and followed decisions of the Fourth and Ninth Appellate Districts in *State v. Johnson*, 4th Dist. No. 94CA2004 , 1995 WL 764319 (Dec. 26, 1995) and *State v. Clifford*, 9th Dist. No. 20871, 2002-Ohio-4531, at ¶ 58. *Id.*

{¶ 20} Before and after *Storch*, the Ohio Supreme Court has issued opinions holding that "Section 10, Article I provides no greater right of confrontation than the Sixth Amendment." *State v. Self*, 56 Ohio St.3d 73, 79, 564 N.E.2d 446 (1990); *State v.*

Arnold, 126 Ohio St.3d 290, 2010-Ohio-2742, 933 N.E.2d 775, ¶ 12, quoting *Self*. *Self* held that use at trial of videotaped deposition testimony of a child sexual abuse victim did not violate confrontation rights under Article I, Section 10. *Self* at paragraph one of the syllabus. *Arnold* concerned statements made by child abuse victims to interviewers at child advocacy centers. The court held that where the purpose of the child's statement was for medical diagnosis and treatment the statement is nontestimonial and admissible without offending the Confrontation Clause. *Arnold* at paragraph two of the syllabus. The Ohio Supreme Court in *Arnold* did not cite or distinguish *Storch* in its decision.

{¶ 21} We view the Ohio Supreme Court's decision in *Arnold*, that the Ohio Constitution affords no greater right of confrontation of witnesses than that afforded under the Confrontation Clause of the Sixth Amendment with regard statements made for purposes of medical diagnosis and treatment, as consistent with our analysis in *Johnson*, both with respect to statements for purposes of medical diagnosis and treatment as well as statements that constitute excited utterances. We conclude that appellant's argument that Article I, Section 10 of the Ohio Constitution provides a greater right to confront witnesses than afforded under the Confrontation Clause of the Sixth Amendment with respect to the 911 call in this case is without merit.

Evid.R. 803(2)

{¶ 22} With regard to appellant's argument that statements in the 911 call were inadmissible hearsay, we agree with the state that the trial court did not abuse its discretion in admitting audio recording and printed transcript of the 911 call under the

hearsay exception for excited utterances under Evid.R. 803(2). In *State v. Boles*, 190 Ohio App.3d 431, 2010-Ohio-5503, 942 N.E.2d 417, ¶ 34 (6th Dist.), this court set forth the requirements to establish admissibility of a statement as an excited utterance under Evid.R. 803(2):

> In *State v. Duncan* (1978), 53 Ohio St.2d 215, 7 O.O.3d 380, 373 N.E.2d 1234, the Ohio Supreme Court established a four-part test to determine whether a hearsay statement is admissible under Evid.R. 803(2). Id. at paragraph one of the syllabus, approving and *following Potter v. Baker* (1955), 162 Ohio St. 488, 55 O.O. 389, 124 N.E.2d 140, paragraph two of the syllabus. Under this test, the proponent of the statement must establish that (1) there was an event startling enough to produce a nervous excitement in the declarant, (2) the statement must have been made while under the stress of excitement caused by the event, (3) the statement must relate to the startling event, and (4) the declarant must have had an opportunity to personally observe the startling event. Id.

{¶ 23} We review a trial court's admission of a statement as an excited utterance under Evid.R. 803(2) under an abuse of discretion standard. *Duncan* at 219.

{¶ 24} The audio recording and testimony at trial demonstrates that the neighbor witnessed appellant struggling with his wife outside and forcing her back to the house against her will. Appellant testified to both his wife and the caller being excited and yelling as the events transpired. The audio recording discloses nervous excitement by the

caller. The call concerned the altercation between appellant and his wife outside which admittedly was in view of the caller. We find no abuse of discretion on hearsay grounds to the trial court's admission of the 911 call into evidence as the statements in the call come within the exception for excited utterances under Evid.R. 803(2).

{¶ 25} We find Appellant's Assignment of Error No. I not well-taken.

{¶ 26} Under Assignment of Error No. II, appellant contends that the trial court erred in admitting into evidence exhibits and testimony concerning applications for protection orders by Mrs. Johnson against appellant. Mrs. Johnson secured the issuance of two civil protective orders against appellant from the Domestic Relations Division of the Lucas County Court of Common Pleas. One was based upon an incident that occurred on July 4, 2010. The other was based on the October 8, 2010 incident involved in this case.

{¶ 27} The first protection order was issued on July 9, 2010, and dismissed, by agreement, on September 17, 2010. The September 17, 2010 dismissal order was state's exhibit No. 6 at trial. The second civil protective order was issued on January 13, 2011, after a hearing. A copy of the order was state's exhibit No. 7. Both exhibits were placed in evidence at trial.

{¶ 28} Appellant argues that evidence relating to the issuance of the July 9, 2010 protective order constituted evidence of other bad acts. Appellant argues the evidence was inadmissible under Evid.R. 404(B) because its only purpose was to show character, a use prohibited by Evid.R. 404(B). Appellant argues that the evidence concerning the

proceedings for the January 13, 2011 protective order was irrelevant. Appellant raised no objection to this evidence at trial and asserts this assignment of error as plain error.

{¶ 29} Ohio recognizes a presumption with respect to a trial court's consideration of evidence at bench trials:

> [T]he trial court is presumed to consider "'only the relevant, material, and competent evidence in arriving at its judgment unless it affirmatively appears to the contrary.'" *State v. Post*, 32 Ohio St.3d 380, 384, 513 N.E.2d 754 (1987), quoting *State v. White*, 15 Ohio St.2d 146, 151, 239 N.E.2d 65 (1968). *State v. Powell*, 132 Ohio St.3d 233, 2012-Ohio-2577, 971 N.E.2d 865, ¶ 195.

{¶ 30} We have reviewed the transcript of appellant's trial and find no affirmative indication that the trial court improperly considered evidence of the civil protective order proceedings in arriving at its judgment in this case. We, therefore, cannot conclude that the admission of the evidence affected the trial court judgment.

{¶ 31} Additionally, absent an affirmative showing in the record rebutting the presumption that the trial court considered only relevant, material, and competent evidence in arriving at its judgment, a ruling on admissibility of evidence in a bench trial presents no issue reviewable as plain error. *In re B.K.*, 10th Dist. No. 12AP-343, 2012-Ohio-6166, ¶ 16; *State v. Hawthorne*, 7th Dist. No. 04 CO 56, 2005-Ohio-6779, ¶ 27.

{¶ 32} We find appellant's Assignment of Error No. II not well-taken.

{¶ 33} Appellant contends under Assignment of Error No. III that the evidence at trial was insufficient to support a conviction for felonious assault in violation of R.C. 2903.11(A)(1). Appellant argues that the evidence at trial was insufficient to establish an essential element of the offense—that the victim suffered serious physical harm.

Sufficiency of the Evidence

{¶ 34} Sufficiency of the evidence is "'the legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support a jury verdict.'" *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997), quoting Black's Law Dictionary (6 Ed.1990) 1433. In *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), the Ohio Supreme Court outlined the analysis required to apply this standard:

> An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. (*Jackson v. Virginia* [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.) *Id*. at paragraph two of syllabus.

{¶ 35} R.C. 2903.11 sets forth the elements of the crime of felonious assault:

> R.C. 2903.11 Felonious Assault
>
> No person shall knowingly do either of the following:
>
> Cause serious physical harm to another or to another's unborn

{¶ 36} R.C. 2901.01 provides the definition of "serious physical harm" as used in the statute:

> 2901.01 Definitions
>
> As used in the Revised Code:
>
> * * *
>
> (5) "Serious physical harm to persons" means any of the following:
>
> (a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
>
> (b) Any physical harm that carries a substantial risk of death;
>
> (c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;
>
> (d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

{¶ 37} Appellant contends that the evidence at trial was insufficient to establish beyond a reasonable doubt that Mrs. Johnson suffered serious physical harm under any of the definitions of physical harm set forth in R.C. 2901.01(A)(5). The state argues the evidence supported a conclusion that Mrs. Williams suffered serious physical harm within the meaning of R.C. 2901.01(A)(5), that is, "physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain." We agree.

{¶ 38} Mrs. Williams testified that on October 8, 2010, appellant drove her to her sister's house. At some point she and her sister went inside the house. Appellant, still outside, started knocking at the door. Neither Mrs. Williams nor her sister answered the door and appellant left. Later appellant returned. This time Mrs. Williams' sister answered the door, but then slammed the door in appellant's face. Mrs. Williams left with appellant.

{¶ 39} Mrs. Williams testified that when they got home, appellant told her he was going to teach her "about respect" and, without provocation, appellant grabbed her up by the neck from a couch and started punching her. According to Mrs. Williams, she fought back and during the course of the altercation appellant threw her to the floor and began banging her head into the floor. Appellant also continued to punch and choke her.

{¶ 40} Mrs. Williams testified that she ran outside to escape the attack and broke her toe. Appellant admitted at trial that he chased after her outside, restrained her, and acted in an effort to force her back to the house against her will.

{¶ 41} At the hospital, Mrs. Williams was determined to have suffered a broken toe, a brain hemorrhage, and many bruises and scratches. She had blood in her left eye from being poked in the eye by appellant in the struggle.

{¶ 42} Mrs. Williams was hospitalized for three days due to her injuries, including treatment in the intensive care unit. A CAT Scan revealed the existence of a subarachnoid hemorrhage of the brain that turned out not to be life threatening. There was testimony at trial that such bleeding is consistent with injuries caused from banging a person's head against the floor.

{¶ 43} Viewing the evidence at trial in a light most favorable to the prosecution, we believe that a rational trier of fact could have found the essential elements of felonious assault proven beyond a reasonable doubt. This includes the fact that the victim suffered physical harm involving acute pain of such duration as to result in substantial suffering or that involves prolonged or intractable pain.

{¶ 44} We find Assignment of Error No. III not well-taken.

{¶ 45} In Assignment of Error No. IV, appellant argues that the trial court denied appellant's right under due process of law to a fair trial by failing to consider a conviction for a lesser included offense of aggravated assault. Appellant argues that evidence of the existence of mitigating circumstances that appellant allegedly acted under the influence

of sudden passion brought on by provocation occasioned by Mrs. Williams warranted a conviction for the lesser offense.

{¶ 46} There is no indication in the record that the trial court did not consider the alleged provocation and sudden passion and decided that the evidence was insufficient to convict on the lesser offense of aggravated assault. In a bench trial, a trial court is presumed to know the law and to have considered lesser offenses supported by the evidence. *State v. Rister*, 6th Dist. No. L-09-1191, 2012-Ohio-516, ¶ 15; *In re D.L.B.*, 12th Dist. No. CA2011-09-019, 2012-Ohio-3045, ¶ 22-23.

{¶ 47} We find Assignment of Error No. IV not well-taken.

{¶ 48} Appellant argues under Assignment of Error No. V that the trial court erred by imposing obligations to pay the cost of appointed counsel, supervision costs, and confinement costs in the sentencing judgment. The parties agree that the trial court failed to mention imposition of court costs for these costs at the sentencing hearing, but imposed the costs in the sentencing judgment. In *State v. Joseph*, 125 Ohio St.3d 76, 2010-Ohio-954, 926 N.E.2d 278, ¶ 22-24, the Ohio Supreme Court held that failure to orally notify a criminal defendant at the time of sentencing that the court was imposing an obligation to pay court costs and, nevertheless, imposing the costs in the sentencing judgment violates the requirement under Crim.R. 43(A) that a criminal defendant must be present at every stage of trial including sentencing.

{¶ 49} As we recently explained in *State v. Robinson*, 6th Dist. No. L-10-1369, 2012-Ohio-6068, ¶ 79, imposition of a sentence in a sentencing judgment entry different

than the sentence announced by the court at the time of sentencing violates a defendant's right to be present at sentencing and requires a remand for resentencing:

> Crim.R. 43(A) provides that "the defendant must be physically present at every stage of the criminal proceeding and trial, including * * * the imposition of sentence." Because a defendant is required to be present when sentence is imposed, it constitutes reversible error for the trial court to impose a different sentence in its judgment entry than was announced at the sentencing hearing in defendant's presence. Thus, "'if there exists a variance between the sentence pronounced in open court and the sentence imposed by a court's judgment entry, a remand for resentencing is required.'" *State v. Hardison*, 6th Dist. No. L-10-1282, 2011-Ohio-4859, ¶ 9, quoting *State v. Pfeifer*, 6th Dist. No. OT-10-013, 2011-Ohio-289, ¶ 8. *See also State v. Quinones*, 8th Dist. No. 89221, 2007-Ohio-6077, ¶ 5.

{¶ 50} Because of the variance here, we conclude that the March 30, 2011 judgment is invalid to the extent the judgment imposes an obligation to pay the costs of supervision, confinement, and court appointed counsel and requires a remand for resentencing on those matters.

{¶ 51} As to the second issue raised in this assignment of error, we acknowledge that our decisions recognize, under R.C. 2941.51(D), a sentencing court must enter a finding that the criminal defendant has the means to pay some part of the cost of attorney services rendered to him and that the determination of ability to pay must be supported by

evidence in the record. *State v. Jobe*, 6th Dist. No. L-07-1413, 2009-Ohio-4066, ¶ 80; *State v. Knight*, 6th Dist. No. S-05-007, 2006-Ohio-4807, ¶ 6-7. Due to our determination of the invalidity of the sentencing judgment with respect to imposition of costs of appointed counsel, however, we do not reach the issue of whether the trial court failed to make the required determination of ability to pay or whether sufficient evidence existed in the record to support such a conclusion.

{¶ 52} We find appellant's Assignment of Error No. V well-taken.

{¶ 53} For the foregoing reasons, the judgment of the Lucas County Court of Common Pleas is affirmed in part and reversed in part. We affirm the judgment as to conviction. We affirm the judgment as to sentence except to the extent it imposes an obligation on appellant to pay costs of appointed attorney counsel, costs of confinement, and costs of supervision. We reverse the judgment to the extent it imposes an obligation to pay those costs and remand the case for resentencing on those matters. We further order that the state pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed in part
and reversed in part.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE