**[Cite as *State v. Bell*, 2009-Ohio-6302.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

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JOURNAL ENTRY AND OPINION
**No. 92308**

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## STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

## TYRANCE BELL

DEFENDANT-APPELLANT

**JUDGMENT:**
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510028

**BEFORE:** Blackmon, J., McMonagle, P.J., and Sweeney, J.

**RELEASED:** December 3, 2009

**JOURNALIZED:**

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PATRICIA ANN BLACKMON, J.:

**{¶ 1}** Appellant Tyrance Bell appeals his conviction for domestic violence and assigns the following five errors for our review:

> **"I. The trial court erred in permitting the state to impeach its own witness with a prior inconsistent statement and in admitting that, as well as other hearsay statements as substantive evidence."**
>
> **"II. The trial court erred by denying appellant's motion for acquittal pursuant to Crim.R. 29 when the evidence was insufficient to sustain a conviction for domestic violence."**
>
> **"III. Appellant's conviction is against the manifest weight of the evidence."**
>
> **"IV. Appellant was denied effective assistance of counsel in violation of Amendments VI and XIV, United States Constitution; and Article I, Section 10, of Ohio's Constitution."**
>
> **"V. The combined effect of the trial court's errors denied appellant a fair trial."**

**{¶ 2}** Having reviewed the record and pertinent law, we affirm Bell's conviction. The apposite facts follow.

## Facts

**{¶ 3}** The Cuyahoga County Grand Jury indicted Bell for two counts of felonious assault, one count of kidnapping, and one count of domestic violence. The charges arose from Bell's altercation with the victim, who was his fiancée.

**{¶ 4}** The evidence showed that on April 19, 2008, at around 4:30 p.m., Bell and the victim got into an argument, which escalated to physical violence causing the victim to call 911. According to the responding officers, when they arrived, the victim was hysterical and crying. She did not appear to be intoxicated. She told the officers that she and Bell got into an argument over babysitting his nephews, who were at the scene. Bell attacked her in the bedroom, where he attempted to throw a fan at her. The officers observed a hole in the wall and a broken fan on the floor underneath. The victim also told the officers that Bell choked her and poked her in the top of her head with a knife. As he retreated downstairs, he stabbed the hallway wall with a knife and yelled, "I'll kill you."

**{¶ 5}** The officers observed that the bedroom indicated a struggle occurred. Along with the broken fan, the officers saw the mattress was hanging off the box springs. The officers recovered a bent kitchen knife from the living room and observed stab marks in the stair hallway. Officer Woods noted the victim had a swollen face and a red neck, and he could see red spots on her scalp where Bell allegedly poked her with the knife.

**{¶ 6}** At trial, the victim denied that Bell threatened to harm her with a knife. She claimed that the knife the officers found was used by Bell to cut out damaged drywall in the living room. She also denied that Bell touched

her. When confronted with a recording of her 911 call, she acknowledged that she could be heard telling Bell to get off of her, but she claimed Bell was simply trying to grab the phone from her. She claimed she lied to the 911 operator and the officers because she was intoxicated and angry at Bell for bringing his ex-girlfriend to the house. She denied sustaining any injuries, including a swollen eye depicted on a photograph taken of her at the time. She stated that in spite of the events on April 19, 2008, she and Bell still intended to be married.

**{¶ 7}** Pursuant to defense counsel's motion for acquittal, the court dismissed the felonious assault and kidnapping charges, but allowed the jury to consider the domestic violence charge. The jury found Bell guilty. The trial court sentenced him to two years of community control.

**Prior Inconsistent Statements**

**{¶ 8}** In his first assigned error, Bell claims the trial court erred by allowing the state to impeach the victim's credibility with her prior inconsistent written and oral statements.

**{¶ 9}** We initially note that defense counsel failed to object to the admission of the statements. Therefore, absent plain error, he has waived the issue on appeal. Plain error does not exist unless the appellant establishes that the outcome of the trial clearly would have been different but

for the trial court's allegedly improper actions.[1] We conclude plain error did not occur.

**{¶ 10}** The admission or exclusion of relevant evidence lies within the sound discretion of the trial court.[2] In order to find an abuse of that discretion, we must determine the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment.[3] We conclude the trial court did not abuse its discretion.

**{¶ 11}** Bell claims the court improperly allowed the state to impeach the victim with her prior inconsistent statements without first showing either "surprise" or "affirmative damage" as required by Evid.R. 607(A). Evid.R. 607(A) provides in pertinent part:

> **"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 Evid.R. 801(D)(1)(a), 801(D)(2), or 803.***" (Emphasis added).

**{¶ 12}** We conclude the victim's statements were admissible pursuant to Evid.R. 803, which is an exception to the requirements of Evid.R. 607(A).

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[1] *State v. Waddell* (1996), 75 Ohio St.3d 163, 166, 1996-Ohio-100.

[2] *State v. Sage* (1987), 31 Ohio St.3d 173, 180.

[3] *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217.

Evid.R. 803 provides that excited utterances are exceptions to the hearsay rule. Bell claims the statements are not excited utterances because the victim unsuccessfully attempted to stop the police from responding to her 911 call. According to Bell, this indicates that the victim was no longer under the stress of the event. We disagree.

**{¶ 13}** For an alleged excited utterance to be admissible, four prerequisites must be satisfied: (1) an event startling enough to produce a nervous excitement in the declarant, (2) the statement must have been made while still under the stress of excitement caused by the event, (3) the statement must relate to the startling event, and (4) the declarant must have personally observed the startling event.[4]

**{¶ 14}** We conclude all four prerequisites were met. The physical altercation was a startling enough event to produce nervous excitement in the victim. Although she did try to stop the police from responding to her 911 call, the officers' observations of her demeanor indicate that she was still under the stress of the altercation. The officers testified that Bell was hysterical; it was difficult to calm her down. She was very loud and crying. The officers stated the 911 call was a priority call because of the fact the

[4] *State v. Brown* (1996), 112 Ohio App.3d 583, 601.

victim reported the assailant had a knife. Therefore, the officers were at the scene within minutes of the call.

**{¶ 15}** The victim's statements also related to the startling event. Because she was the victim, she was also a witness to the event. Consequently, the victim's prior statements were properly admitted as excited utterances. Accordingly, Bell's first assigned error is overruled.

**Insufficient Evidence**

**{¶ 16}** In his second assigned error, Bell claims the evidence was insufficient to support his domestic violence conviction because there was no evidence that he lived with the victim. We disagree.

**{¶ 17}** The sufficiency of the evidence standard of review is set forth in *State v. Bridgeman*[5] as follows:

> **"Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt."**[6]

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[5](1978), 55 Ohio St.2d 261, syllabus.

[6]See, also, *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 23; *State v. Davis* (1988), 49 Ohio App.3d 109, 113.

**{¶ 18}** *Bridgeman* must be interpreted in light of the sufficiency test outlined in *State v. Jenks*,[7] in which the Ohio Supreme Court held:

> **"An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence submitted 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.)"**

**{¶ 19}** R.C. 2919.25 states in pertinent part:

> **"(A) No person shall knowingly cause or attempt to cause physical harm to a family or household member.**
>
> **"* * *"**
>
> **"(F) As used in this section * * * of the Revised Code:**
>
> **"(1) 'Family or household member' means any of the following:**

[7](1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

**"(a) Any of the following who is residing or has resided with the offender:**

**"(I) A spouse, a person living as a spouse, or a former spouse of the offender; * * *."**

**{¶ 20}** Bell contends there was no evidence presented that at the time of the altercation, he lived at the home with the victim. On direct examination, the victim, in response to the state's question regarding who lived with her, stated that Bell and her dog did. However, the question did not indicate it was asked relevant to the time of the altercation. However, on cross-examination, the following colloquy occurred:

**"Q. You live with Tyrance Bell, and your dog, you said; correct?"**

**"A. Yes."**

**"Q. But, since this incident, you haven't been living with Tyrance Bell; correct?"**

**"A. No."**

**"Q. Because he's in jail, right?"**

**"A. Right, right."**

**"Q. But, when he's not in jail, on this, you guys, the two of you, live together; correct?"**

**"A. Yes."**[8]

[8]Tr. 188-189.

**{¶ 21}** Her responses to these questions place into context when she lived with Bell. According to the above, she lived with Bell until he was placed in jail for the domestic violence charge arising out of the altercation. However, pursuant to R.C. 2919.25, merely living together is not enough to establish domestic violence.

**{¶ 22}** R.C. 2919.25 clarifies and defines a "person living as a spouse" as "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." In order to prove that a victim and the offender are "cohabitating," and thus prove that the victim is a "person living as a spouse," the state must demonstrate that the relationship between the victim and the offender is as stated in *State v. Williams*:[9]

> **"[T]he essential elements of 'cohabitation' are (1) sharing of familial or financial responsibilities and (2) consortium. R.C. 2919.25(E)(2) and related statutes. Possible factors establishing shared familial or financial responsibilities might include provisions for shelter, food, clothing, utilities, and/or commingled assets. Factors that might**

[9](1997), 79 Ohio St.3d 459, 1997-Ohio-79.

**establish consortium include mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship, and conjugal relations. These factors are unique to each case and how much weight, if any, to give to each of these factors must be decided on a case-by-case basis by the trier of fact."[10]**

**{¶ 23}** When applying the above elements to the circumstances constituting the victim-offender relationship, courts "should be guided by common sense and ordinary human experience."[11]

**{¶ 24}** In the instant case, the victim and Bell were engaged to be married. Bell had keys to the home as evidenced by the victim's testimony that she asked for his keys after their argument. She also testified that when she left for her hair appointment, Bell told her he would be "home"[12] when she returned, so they could barbecue together. According to the victim, Bell was also in the process of repairing the drywall in the living room. She

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[10]*State v. Williams*, 79 Ohio St.3d at 465.

[11]*State v. Woullard*, 158 Ohio App.3d 31, 2004-Ohio-3395; *State v. Rinehart*, 4th Dist. No. 01CA2620, 2002-Ohio-6143, at ¶27, citing *State v. Colter* (Mar. 17, 2000), 2nd Dist. No. 17828.

[12]Tr. 201.

responded "yes" when defense counsel asked her "[H]e's supposedly fixing up your home, the two of yours [sic] home, right?"

**{¶ 25}** The victim also testified that because she and Bell did not have children, they usually had his nephews over for the weekend. Considering all of these statements together and utilizing common sense, there was sufficient evidence that Bell and the victim were cohabiting.

**{¶ 26}** Bell also argues that his conviction was not supported by sufficient evidence because only hearsay statements made by the victim support the conviction. However, as we discussed in the first assigned error, the statements were properly admitted.

**{¶ 27}** Bell also argues that his conviction was not supported by sufficient evidence because only hearsay statements made by the victim support the conviction. However, as we discussed in the first assigned error, the statements were properly admitted. Accordingly, Bell's second assigned error is overruled.

## Manifest Weight of the Evidence

**{¶ 28}** In his third assigned error, Bell contends his conviction is against the manifest weight of the evidence. We disagree.

**{¶ 29}** In *State v. Wilson*,[13] the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

> **"The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. Id. at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. Id. at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be against the manifest weight of the evidence. Id. at 387, 678 N.E.2d 541. 'When a court of appeals reverses a judgment of a trial court on the basis**

[13]113 Ohio St.3d 382, 2007-Ohio-2202.

> **that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony.' Id. at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652."**

**{¶ 30}** However, "an appellate court may not merely substitute its view for that of the jury, but must find that the jury, in resolving conflicts in the evidence, clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered."[14] Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction."[15]

**{¶ 31}** Bell contends the evidence was against the manifest weight because the victim recanted her original statements to the police. However, the jury was permitted to weigh the victim's testimony at trial against the statements made by the victim at the scene, along with her 911 call, and testimony by the responding officers. We conclude the jury, as the trier of

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[14] *State v. Thompkins*, at 387.

[15] Id.

fact, did not lose its way creating a miscarriage of justice in finding the victim's original version of what transpired to be more credible.

**{¶ 32}** Bell also argues the photograph does not show the victim's face was swollen and that Officer Wood failed to take photographs of the victim's red neck and red spots on her scalp, injuries he contended he observed. It appears from the photograph that the right side of the victim's face is swollen. However, as admitted by Officer Wood, the Polaroid camera he used to take the photograph produced low quality photographs. In fact, this is the reason he did not photograph the top of the victim's head and the red area on her neck. He knew the camera would be unable to pick up those details. However, the jury was still able to consider the officer's testimony in which he said the top of the victim's head was red, consistent with being poked in the head with a knife. He also testified that her neck was red, consistent with her statement that Bell choked her.

**{¶ 33}** Bell argues, however, the other responding officer, Officer Dimaria, testified that he noticed swelling to the victim's face, but did not notice any injuries to her neck or top of her head. Officer Dimaria also stated, however, that he did not come into close proximity with the victim because his concern was securing the house. Bell also contends that Officer Dimaria testified to observing beer cans on the porch and in the kitchen,

which would support the victim's claim she was intoxicated when she made the 911 call and when she made the statements to the police. However, simply because there were empty beer cans does not necessarily support the victim's contention she was intoxicated. The beer could have been consumed on a different day and may have not been consumed only by her.

**{¶ 34}** Lastly, Bell contends the knife did not have blood on it, which contradicts the victim's statement that he poked her with it. The key word here is "poked." The victim did not state that Bell stabbed her with the knife. Also, Officer Wood did not testify there was blood dripping from the victim's scalp. He testified that the scalp area had red spots. Moreover, after poking her with the knife, Bell used the knife to stab the drywall in the hallway, which could have wiped any trace of blood from the tip. Accordingly, Bell's third assigned error is overruled.

**Ineffective Assistance of Counsel**

**{¶ 35}** In his fourth assigned error, Bell contends his counsel was ineffective for failing to object to the state's use of the victim's prior inconsistent statements, which were hearsay.

**{¶ 36}** We review a claim of ineffective assistance of counsel under the two-part test set forth in *Strickland v. Washington*.[16] Under S*trickland*, a

[16](1984), 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052.

reviewing court will not deem counsel's performance ineffective unless a defendant can show his lawyer's performance fell below an objective standard of reasonable representation and that prejudice arose from the lawyer's deficient performance.[17] To show prejudice, a defendant must prove that, but for his lawyer's errors, a reasonable probability exists that the result of the proceedings would have been different.[18] Judicial scrutiny of a lawyer's performance must be highly deferential.[19]

**{¶ 37}** We already addressed Bell's argument regarding the admission of the victim's prior statements and have determined counsel's failure to object did not result in prejudicial error. Therefore, Bell has not shown that but for his attorney's error, the result of the proceedings would have been different. Accordingly, Bell's fourth assigned error is overruled.

**Cumulative Effect of Errors**

**{¶ 38}** In his fifth assigned error, Bell claims the cumulative effect of the above errors deprived him of a fair trial. We disagree.

**{¶ 39}** Pursuant to the doctrine of cumulative error, a judgment may be reversed where the cumulative effect of errors deprives a defendant of his

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[17] *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph one of syllabus.

[18] Id. at paragraph two of syllabus.

[19] *State v. Sallie*, 81 Ohio St.3d 673, 674, 1998-Ohio-343.

constitutional rights, even though the errors individually do not rise to the level of prejudicial error.[20] Because we have not found any instances of error in this case, the doctrine of cumulative error is inapplicable. Accordingly, Bell's fifth assigned error is overruled.

Judgment affirmed.

It is ordered that appellee recover of appellant its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

PATRICIA ANN BLACKMON, JUDGE

JAMES J. SWEENEY, J., CONCURS;
CHRISTINE T. McMONAGLE, P.J.,
CONCURS IN JUDGMENT ONLY

[20] *State v. Garner*, 74 Ohio St.3d 49, 64, 1995-Ohio-168, certiorari denied (1996), 517 U.S. 1147, 116 S.Ct. 1444, 134 L.Ed.2d 564; *State v. DeMarco* (1987), 31 Ohio St.3d 191, paragraph two of the syllabus.