[Cite as *Cleveland Hts. v. Cohen*, 2015-Ohio-1636.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 101349

CITY OF CLEVELAND HEIGHTS

PLAINTIFF-APPELLEE

vs.

AVI COHEN

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED

Criminal Appeal from the
Cleveland Heights Municipal Court
Case No. CRB 1302210

BEFORE: E.A. Gallagher, J., Keough, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: April 30, 2015

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EILEEN A. GALLAGHER, J.:

{¶1} Defendant-appellant Avi Cohen appeals his convictions for child endangering in violation of R.C. 2919.22(A) and disorderly conduct in violation of Cleveland Heights Codified Ordinance ("CHCO") 509.03(a)(1). He contends that the trial court violated his due process rights by convicting him of disorderly conduct — an offense with which he had not been charged — and that his convictions for child endangering and disorderly conduct were not supported by sufficient evidence. We agree that Cohen's convictions for disorderly conduct and child endangering were not supported by sufficient evidence and, therefore, reverse his convictions.

{¶2} Cohen's convictions arose out of a domestic dispute involving Cohen and his wife, Perel Cohen ("Perel"), at their home on the evening of November 19, 2013. The couple had been married for 20 years and have four children together. Two of the couple's children, A.C., then age 13, and E.C., then age 10, were at home at the time of the dispute.

{¶3} On November 20, 2013, Cohen was charged with domestic violence in violation of R.C. 2919.25(A) and child endangering in violation of R.C. 2919.22(A) in a complaint filed in the Cleveland Heights Municipal Court.[1] Cohen pled not guilty, and on January 16, 2014, the case proceeded to a bench trial.

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[1]The complaint alleged that on November 19, 2013, Cohen "did * * * knowingly cause or attempt to cause physical harm to a family or household member, to-wit: during the course of a domestic disturbance, Avi Cohen assaulted his wife, Perel G. Cohen, by pushing her down, choking her with a forearm while on top of her and elbowing her in the forehead and nose area causing visible injury" and "being the parent of a child under eighteen years of age * * * did create a substantial risk

{¶4} Perel and the two police officers who responded at the scene — Officers Trhlin and Desgravise with the Cleveland Heights Police Department — testified on behalf of the city. Perel testified that on the evening of November 19, 2013, she and Cohen were having an argument regarding her visits to a local gym. She testified that she and Cohen had been arguing for the past couple of weeks about text messages she had been receiving from persons at her gym and that Cohen had asked her to go to another gym but that she had refused. Perel testified that when Cohen saw her in her gym clothing, they started arguing again. Perel testified that Cohen told her, "I want a divorce" and "I'm taking the kids." Perel testified that after Cohen said this, she "got very angry" and "went ballistic"; "I just went nuts. I went absolutely nuts."

{¶5} Perel testified that Cohen then went upstairs and told their two children to gather some clothing because he was taking them away for the night. Perel testified that when Cohen went upstairs, she started running after him "lunging at him" and "jump[ing] on his back, constantly" "to hold him down" and stop him from taking their children. Perel testified that she "acted irate" because she was "out of control," "didn't want them to leave" and "was scared of getting a divorce."

{¶6} Perel testified that each time she jumped on his back, Cohen "kept pushing me off, pushing me off, pushing me off." She described Cohen's actions as a "normal response" to get her off his back but that she "went back again and * * * went back

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to the health or safety to said child, by violating a duty of care, protection, or support, to-wit: during the course of a domestic disturbance, Avi Cohen assaulted his wife Perel G. Cohen with two of their shared children present * * *."

again" until Cohen "was just getting worn." She described Cohen as a "father protecting his cubs" and testified that, although she did not view Cohen's actions as being "protecting" at the time, he was simply "trying to protect the kids and pull them out of that situation."

{¶7} At some point during the dispute with Cohen, Perel sustained injuries to her forehead and nose. Perel testified that after Cohen left with the children, she went upstairs to her bedroom to call police because she wanted her children back. She testified that as she entered her bedroom, which was full of mirrors, she realized for the first time that she had a bump on the middle of her forehead and that her face was bleeding. Perel testified that her injuries must have occurred when Cohen was upstairs in their son's room, getting pajamas for him. Perel testified that one of the times Cohen pushed her off his back, she "probably slipped" on the hardwood floor in her gym socks and "fell off backwards," "[r]ight into the wall * * * [and] [i]nto the corner of [her son's] closet," hitting her head on the top corner of the closet and causing her injuries.[2] Perel denied that her husband ever hit her or choked her. She testified that he was just "trying to get me off his back so he could handle the kids." When asked whether Cohen had "ever done anything like this before," Perel testified, "Never. I think that's why he was scared."

[2]Although Perel testified that A.C. and E.C. were in the room for at least part of the time while she was upstairs with Cohen, jumping on his back, it is unclear from her testimony whether the children were in the room when her injuries occurred.

{¶8} Perel testified that she called the police "just [as] a first response" "to help me get my kids back." She testified that when the police officers arrived, she spoke with them and they photographed her injuries. She testified that she did not remember if she told the officers that Cohen had struck or choked her, had elbowed her in the forehead and nose, had pushed her down and had been on top of her or had otherwise assaulted her during their dispute. With respect to her injuries, the only thing she could recall telling the officers was that she had hit her head on the closet and had a headache. When shown the photographs taken by the officers, Perel denied that her face was black and blue or that her head was swollen following the incident. She claimed that her nose was simply red from crying and that her face was smeared with blood and eye makeup because the officers had not permitted her to wash her face prior to photographing her. She testified that she was not seriously injured and went to work the following day.

{¶9} Perel testified that, unbeknownst to her husband, she had recently begun taking medication for ADHD. She claimed that the medication caused her to act in an uncharacteristically aggressive, argumentative and defensive manner and that, as a result, she "was just not [her]self" at the time of the incident. She further testified that one of the officers was "very assertive" with her, pressuring her to make a domestic violence report. She testified that she told the officers that she did not "feel the need to report anything" and refused to sign anything.

{¶10} Officers Trhlin and Desgravise responded to the domestic disturbance call at the Cohen home that evening. Officer Trhlin testified that when he arrived on the scene,

he spoke with Perel. Over Cohen's objection,[3] Officer Trhlin testified that Perel told him that when she came home from the gym, she had an argument with her husband regarding texting or speaking with another man. Officer Trhlin further testified that Perel told him that her husband had assaulted her — pushing her to the ground, choking her with his forearm and elbowing her in the forehead — and that two of their children had been in the home, but in another bedroom, at the time of the incident. On cross-examination, Officer Trhlin testified that Perel never told him that she had done anything to her husband during the altercation.

{¶11} Officer Desgravise testified that when he arrived on the scene, he encountered Perel with "blood all over her face." He testified that she was "really frantic," "crying and yelling that her husband attacked her and beat her up." He testified that Perel told Officer Trhlin that her husband threw her to the ground, choked her and elbowed her in the face. He further testified that Perel was upset about the children being taken away and told him that she wanted her children back. With respect to where the children were at the time of the incident, Officer Desgravise testified that Perel told him only that two of the children were in the house when the incident occurred and that Cohen had thereafter taken the children and left.

{¶12} Both officers testified that they observed lacerations and/or abrasions on Perel's forehead and nose and substantial swelling of her nose. Officer Desgravise

[3]Although Cohen objected to the officer's testimony on hearsay grounds, the trial court permitted Officer Trhlin to testify regarding what Perel told the officers as "[p]art of the investigation."

photographed Perel's injuries. Officer Trhlin testified that Perel was "checked out" by paramedics in the rescue squad but that she declined transport to the hospital. He further testified that Perel told him that she did not want to pursue charges and that he signed the complaint.

{¶13} At the close of the city's case, Cohen moved for acquittal pursuant to Crim.R. 29. The trial court denied the motion. Cohen and his daughter A.C. then testified in Cohen's defense.

{¶14} Cohen testified that he left work the evening of November 19 after he received a phone call from one of his children advising him that his wife had just come home from the gym. He testified that there were some things he had heard about the gym he did not like and that he had previously told his wife he did not want her going back to the gym. Cohen testified that when he came home and saw his wife, he told her: "I can't deal with this any more[.] I want a divorce. I can't live here anymore, and I'm taking the kids with me." He testified that his decision had not been made "out of the blue" and that Perel had been acting "unusually" and "really crazy for a period of time."

{¶15} He testified that Perel told him that she did not want a divorce and did not want him to take the kids and that she then began jumping on him repeatedly. He testified that "downstairs, upstairs, on the stairs * * * over and over," Perel "kept jumping on my back," "constantly, * * * lunging at me," and that every time she jumped on his back, Cohen pushed her off, and she fell onto the floor. Cohen testified that he was not sure exactly how he pushed Perel off him. He testified that Perel "is strong, she goes to

the gym a lot" but that somehow he "threw her off." He testified, "[i]t was just a matter of getting her off me and trying to free myself to continue to get the kids, get their stuff and get out of the house." He claimed that there was "no aggression" on his part, that he was just pushing his wife off and defending himself when she jumped on his back.

{¶16} With respect to Perel's injuries, Cohen testified that Perel's injury to the middle of her face occurred when Perel hit her head on their son's closet "the last time that she fell off." Cohen claimed that he was standing in the doorway of his son's room when Perel jumped on his back again and he pushed her off. He testified that she fell backwards into the wall, then "slipped" or "bounced" off the wall and fell forward into the closet door. Although he was not sure exactly how Perel's injuries occurred, he acknowledged on cross-examination that he must have pushed Perel "pretty hard" for her to "bounce off [the] wall and hit the closet door." With respect to Perel's other injuries, Cohen testified that it was "possible" that he elbowed her while pushing her off his back and speculated that the injuries Perel sustained "on the front" "probably happened" when she fell on the floor. He testified that he saw that Perel was bleeding and considered whether he should stop and take care of her before leaving but that Perel then came at him again, pushing him into a window at the end of the hallway and breaking it. He testified that he then ran downstairs where the children were waiting and left the home with them. When he learned that charges had been filed against him, Cohen turned himself in.

{¶17} With respect to where in the house the children were at the time Perel's injuries occurred, Cohen's testimony was unclear. He testified that "right before [Perel]

cut herself," A.C., who had already collected her belongings, was giving her brother a hug, saying "don't worry, it's going to be okay." He testified that E.C. was not crying but was "confused" because he had "no clue what was going on."

{¶18} A.C., the couple's then 13-year-old daughter, also testified. She testified that she was upstairs when she heard her parents arguing downstairs. She testified that she heard her father tell her mother that he was going to take the kids and that he wanted a divorce. She further testified that she heard her mother pleading with her father not to leave and not to take the kids. She testified that her father then came upstairs and told her and her brother to get their belongings together because the three of them were going to leave for the night. A.C. testified that she first went to her room and collected her belongings and then went to her brother's bedroom to help him. At some point, her parents came into her brother's bedroom.

{¶19} A.C. testified that while her father was in her brother's bedroom, standing next to her, her mother jumped on his back. She testified that she saw her mother jump on her father's back "three times or two times or something like that" and that her father "was just trying to walk away from it." She testified that her brother had already left the room and that she was approximately three feet in front of her brother's closet, heading out of the room, when she heard a fall. She turned around and saw her mother on the floor. A.C. testified that her mother was holding her head like she fell into the closet. A.C. testified that she did not see any blood or other signs of injury on her mother and that she never saw her father elbow her mother in the face, get on top of her, choke her or

anything like that. A.C. testified that her father then told her to take the keys and go to the car. She testified that she followed her father's instructions, took her brother to the car and that her father followed her out.

{¶20} The trial court found Cohen not guilty of domestic violence in violation of R.C. 2919.25(A), but guilty of the lesser included offense of disorderly conduct under CHCO 509.03(a)(1). The trial court also found Cohen guilty of child endangering in violation of R.C. 2919.22(A). With respect to its verdicts on the domestic violence and disorderly conduct offenses, the trial court explained:

> All right. Based on the evidence that I've heard, there clearly was violence that took place in that home on that evening, November 19th of 2013. The question is who was the aggressor in this case, and that's pretty much what it comes down to. And as I consider the testimony that was given by the wife and the husband in this case for Avi Cohen and Perel Cohen, I don't think that their testimony is completely credible.
>
> Based on what was stated to the police at the time of the incident and [sic] the testimony here today is not credible in my judgment. But one thing that is clear, is that Mr. Cohen, by his own admission, did push his wife into the wall, according to his testimony, and caused her allegedly to bounce off the wall and then hit this closet, and that is an act certainly of disorderly conduct. So I'm not going to find you guilty of domestic violence, Mr. Cohen, but clearly you were a voluntary participa[nt] in the violence that took place on that evening.
>
> You may not have been the aggressor initially and may not have been the aggressor throughout the entire incident, but clearly you were while in the bedroom of your son the aggressor by pushing your wife, according to your own testimony, into a wall, and then causing her to strike the corner of your son's closet and to injure herself in a very significant way. Whether or not you elbowed her, whether or not you did all these other things that she told the police at that time, the evidence is questionable about that, but clearly you were engaged in disorderly conduct.

So I am going to find you guilty of that lesser included offense of disorderly conduct. That's a third degree misdemeanor.

{¶21} The trial court provided no explanation of its verdict on the child endangering charge. The trial court sentenced Cohen to a six-month suspended jail term and one year of probation. He also imposed a $1,000 fine, which was suspended except for $200 on the disorderly conduct charge and $100 on the child endangering charge.

{¶22} Cohen appealed his convictions, raising four assignments of error:

> ASSIGNMENT OF ERROR I:
> Avi Cohen's child endangering conviction is not supported by legally sufficient evidence as required by state and federal due process.
>
> ASSIGNMENT OF ERROR II:
> The trial court erred and violated Avi Cohen's due process rights when it found him guilty of disorderly conduct which is not a lesser included offense of the offense charged, domestic violence in violation of R.C. 2919.25(A).
>
> ASSIGNMENT OF ERROR III:
> Avi Cohen's disorderly conduct conviction is not supported by legally sufficient evidence as required by state and federal due process.
>
> ASSIGNMENT OF ERROR IV:
> The trial court committed error and denied Avi Cohen's right to a fair trial when, after finding Cohen not guilty of domestic violence, it found him guilty of disorderly conduct.

Child Endangering

{¶23} In his first assignment of error, Cohen argues that his conviction for child endangering in violation of R.C. 2919.22(A) was not supported by sufficient evidence and should, therefore, be vacated. We agree.

Sufficiency of the Evidence

{¶24} A challenge to the sufficiency of the evidence supporting a conviction requires a determination of whether the city has met its burden of production at trial. *State v. Starks*, 8th Dist. Cuyahoga No. 91682, 2009-Ohio-3375, ¶ 25. When reviewing sufficiency of the evidence, an appellate court must 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. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 77, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. In a sufficiency inquiry, an appellate court does not assess whether the city's evidence is to be believed but whether, if believed, the evidence admitted at trial supported the conviction. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997) *Jenks* at paragraph two of the syllabus. In considering whether the evidence at trial was sufficient to support a defendant's convictions, "[a]n appellate court must review 'all of the evidence' admitted at trial," including the evidence offered by defense. (Emphasis sic.) *State v. Tate*, 140 Ohio St.3d 442, 2014-Ohio-3667, 19 N.E.3d 888, ¶ 18 (appellate court was required to consider the defendant's own testimony in evaluating sufficiency of evidence to support his convictions following bench trial), quoting *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.E.2d 560 (1979). Because it is presumed in a bench trial that the trial court will consider only admissible evidence, *see, e.g., State v. Warren*, 8th Dist. Cuyahoga No. 83823, 2004-Ohio-5599, ¶ 47, citing *State v. Davis*, 63 Ohio St.3d 44, 584 N.E.2d 1192 (1992); *State v. Crawford*, 8th Dist. Cuyahoga No. 98605,

2013-Ohio-1659, ¶ 61, when assessing the sufficiency of the evidence following a bench trial, an appellate court properly considers only admissible evidence.

{¶25} R.C. 2919.22(A) provides, in relevant part:

> No person, who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support.

Proof of recklessness is also required. *State v. McGee*, 79 Ohio St.3d 193, 680 N.E.2d 975 (1997), syllabus ("The existence of the culpable mental state of recklessness is an essential element of the crime of endangering children under R.C. 2919.22(A)."). A "[s]ubstantial risk" is "a strong possibility, as contrasted with a remote or significant possibility, that a certain result may occur or that certain circumstances may exist." R.C. 2901.01(A)(8). "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result, or is likely to be of a certain nature." R.C. 2901.22(C). Thus, to support a conviction for child endangering under R.C. 2919.22(A), it must be established, beyond a reasonable doubt, that Cohen (1) recklessly (2) created a substantial risk to the health or safety of one or more of his children (3) by violating a duty of care, protection or support.

{¶26} Cohen argues that his conviction for child endangering should be overturned because none of the witnesses who testified at trial "even hinted at any risk to the health or safety of the children" — "let alone a substantial one created by Avi Cohen" — and the city failed to present "a shred of evidence that Mr. Cohen violated a duty of

care, protection, or support to his children." The city maintains that sufficient evidence existed to support Cohen's conviction based on: (1) Cohen's testimony that the altercation between him and his wife "occurred all over the house" while "his wife was with the children"; (2) A.C.'s testimony that she was upstairs gathering her belongings when her mother jumped on her father's back; (3) evidence that Perel's injuries resulted from a "violent scene" in which she "was pushed[] and at the very least hit her head on the closet, fell forward and sustained a laceration of her face as well as a swollen nose" and (4) evidence that the altercation "affected the children." We disagree.

{¶27} R.C. 2919.22(A) is "'aimed at preventing acts of omission or neglect'" involving a child. *State v. Bennett*, 7th Dist. Mahoning No. 12 MA 223, 2013-Ohio-5524, ¶ 19, quoting *State v. Newman*, 4th Dist. Ross No. 94CA2079, 1995 Ohio App. LEXIS 3713 (Aug. 18, 1995). As such, it is not necessary to show an actual injury or a pattern of physical abuse by the defendant in order to support a conviction under R.C. 2919.22(A). *Id.*, citing *State v. Kamel*, 12 Ohio St.3d 306, 308, 466 N.E.2d 860 (1984). A child endangering conviction may be based upon isolated incidents or even "a single rash decision" in which a parent recklessly puts his or her child's health or safety at risk. *State v. James*, 12th Dist. Brown No. CA2000-03-005, 2000 Ohio App. LEXIS 5905, *6-7. However, "'[t]o prove the requisite "substantial risk" element, * * * there must be some evidence beyond mere speculation as to the risk of harm that could potentially occur due to a single imprudent act.'" *State v. Hughes*, 3d Dist. Shelby No.

17-09-02, 2009-Ohio-4115, ¶ 21, quoting *Middletown v. McWhorter*, 12th Dist. Butler No. CA2006-03-068, 2006-Ohio-7030, ¶ 11.

{¶28} After a thorough review of the record, we find that the evidence, when viewed in a light most favorable to the prosecution, does not support a finding beyond a reasonable doubt that Cohen recklessly created a substantial risk to E.C. or A.C.'s health or safety by violating a duty of care, protection or support.

{¶29} There has been no claim that A.C. or E.C. was in any way part of the altercation involving their parents. There is no evidence in the record that the children were at any risk of harm — much less a substantial risk of harm — to their mental or physical health or safety as a result of Cohen's actions that evening. Perel, Cohen and A.C. each testified that the couple began arguing in the kitchen while the children were in another room. As Cohen was heading upstairs to assist the children with collecting their belongings, Perel began jumping on Cohen's back and Cohen began pushing her off. At that time, the children were already upstairs. The witnesses testified that Perel continued to jump on Cohen's back and that Cohen continued to push her off once the couple and A.C.[4] were upstairs in E.C.'s bedroom. Although A.C. testified that she saw her mother jump on her father's back and her father push her mother off him two or three times, the city presented no evidence that Cohen's action in pushing Perel off his back presented a substantial risk to A.C.'s health or safety. Cohen, Perel and A.C. all testified that Cohen's actions were directed at "protecting" the children — not harming them.

[4]A.C. testified that her brother had left his room before her.

{¶30} Although we have little doubt that (1) hearing one's parents argue about getting a divorce and leaving the family's home and (2) viewing the type of inappropriate and irresponsible behavior exhibited by the parents in this case could have an emotional impact on a child, we cannot say, based on the record before us, that the city met its burden of proof. Simply because the two children were present in the home at the time of the altercation, may have witnessed part of the dispute and may have been (understandably) upset or confused by their parents' words and actions does not establish that Cohen violated a duty of care, protection or support to his children or that he, with heedless indifference to the consequences of his actions, perversely disregarded a known risk and thereby created a substantial risk to the health or safety of his children. As such, the evidence was insufficient to support Cohen's conviction for child endangering pursuant to R.C. 2919.22(A). We sustain Cohen's first assignment of error and reverse his conviction for child endangering.

Disorderly Conduct

{¶31} Cohen's second, third, and fourth assignments of error relate to his conviction for disorderly conduct. In his second assignment of error, Cohen contends that disorderly conduct under CHCO 509.03(a)(1) is not a lesser included offense of domestic violence under R.C. 2919.25(A) and that the trial court, therefore, violated his due process rights by convicting him of disorderly conduct. In his third and fourth assignments of error, Cohen argues that, even assuming disorderly conduct under CHCO 509.03(a)(1) was a lesser included offense of domestic violence under R.C. 2919.25(A),

(1) his conviction for disorderly conduct under CHCO 509.03(a)(1) was not supported by sufficient evidence and (2) the trial court could not reasonably find Cohen not guilty of domestic violence under R.C. 2919.25(A) but guilty of disorderly conduct under CHCO 509.03(a)(1) based on the particular facts of this case. Accordingly, we must first consider whether disorderly conduct under CHCO 509.03(a)(1) is a lesser included offense of domestic violence under R.C. 2919.25(A).

Lesser Included Offense

{¶32} When a lesser included offense is included within the offense charged in a complaint or indictment, the defendant may be found guilty of the lesser included offense even though the lesser included offense was not separately charged in the complaint or indictment. Crim.R. 31(C); *see also* R.C. 2945.74; *State v. Lytle*, 49 Ohio St.3d 154, 157, 551 N.E.2d 950 (1990). Lesser included offenses need not be separately charged because when an indictment or complaint charges a greater offense, "'it necessarily and simultaneously charges the defendant with lesser included offenses as well.'" *State v. Smith*, 121 Ohio St.3d 409, 2009-Ohio-787, 905 N.E.2d 151, ¶ 15, quoting *Lytle* at 157.

{¶33} In determining whether one offense is a lesser included offense of another, a court must consider whether: (1) "one offense carries a greater penalty than the other," (2) "some element of the greater offense is not required to prove commission of the lesser offense" and (3) "the greater offense as statutorily defined cannot be committed without the lesser offense as statutorily defined also being committed." *State v. Evans*, 122 Ohio

St. 3d 381, 2009-Ohio-2974, 911 N.E.2d 889, paragraph two of the syllabus, clarifying *State v. Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294 (1988).[5]

{¶34} R.C. 2919.25(A) provides: "No person shall knowingly cause or attempt to cause physical harm to a family or household member." "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." R.C. 2901.22(B).

{¶35} CHCO 509.03(a)(1) provides:

> No person shall recklessly cause inconvenience, annoyance or alarm to another, by * * * [e]ngaging in fighting, in threatening harm to persons or property, or in violent or turbulent behavior.

{¶36} It is undisputed that the first two prongs of the *Evans* test are met in this case. The offenses of domestic violence and disorderly conduct carry different penalties — i.e., disorderly conduct under CHCO 509.03(a)(1) is a third-degree misdemeanor while domestic violence under R.C. 2919.25(A) is a first-degree misdemeanor — and domestic violence under R.C. 2919.25(A) includes elements that are not required to prove disorderly conduct under CHCO 509.03(a)(1) — e.g., domestic violence requires the victim to be a "family or household member" whereas anyone can be the victim of disorderly conduct. Where a potential issue arises is with respect to the third prong of the *Evans* test — i.e., whether domestic violence under R.C. 2919.25(A), as statutorily

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[5]In clarifying *Deem,* the Ohio Supreme Court in *Evans* removed the word "ever" from the third prong of the test (the second prong of the test under *Deem*) which had previously stated: "the greater offense cannot, as statutorily defined, *ever* be committed without the lesser offense, as statutorily defined, also being committed." (Emphasis added.) *Evans* at ¶ 25.

defined, "cannot be committed" without disorderly conduct under CHCO 509.03(a)(1), as defined under the CHCO, also being committed.

{¶37} The third prong of the *Evans* test requires that we examine the elements of the two offenses and compare them in the abstract to determine whether one element is the functional equivalent of the other. *Evans* at ¶ 25. The proper overall focus is on the nature and circumstances of the offenses as defined, rather than on the precise words used to define them. *Id.* at ¶ 22. This step focuses on whether the language used in defining the greater offense puts the offender on notice that a charge for that offense could also result in prosecution for the lesser offense. *Id.* The facts of the case are irrelevant to our determination of whether disorderly conduct, as defined in the CHCO, is necessarily included in the greater offense of domestic violence under R.C. 2919.25(A), as statutorily defined. *Id.* at ¶ 13.

{¶38} As the parties point out, there is a split among appellate districts as to whether disorderly conduct is a lesser included offense of domestic violence under R.C. 2919.25(A). Certain appellate districts have held that disorderly conduct as statutorily defined is a lesser included offense of domestic violence under R.C. 2919.25(A) as statutorily defined. *See, e.g., In re S.W.*, 2d Dist. Montgomery No. 24525, 2011-Ohio-5291, ¶ 29-37; *State v. Maynard*, 4th Dist. Washington No. 10CA43, 2012-Ohio-786, ¶ 27; *State v. Golding*, 11th Dist. Lake No. 2008-L-049, 2009-Ohio-1437, ¶ 41; *State v. Berry*, 12th Dist. Warren No. CA2006-11-133, 2007-Ohio-7082, ¶ 20. Other appellate districts have held that disorderly conduct as

statutorily defined is not a lesser included offense of domestic violence under R.C. 2919.25(A) as statutorily defined. *See, e.g., State v. Poppe,* 3d Dist. Auglaize No. 2-04-40, 2006-Ohio-1994, ¶ 31-32; *State v. Blasdell*, 155 Ohio App.3d 423, 2003-Ohio-6392, 801 N.E.2d 853, ¶ 16-23 (7th Dist.).[6]

{¶39} Those courts that have held that disorderly conduct is not a lesser included offense of domestic violence under R.C. 2919.25(A) have typically reached that conclusion based on the theory that a person could attempt to cause harm to another without the victim's knowledge (the "unaware victim hypothetical"), in which case the victim could not have suffered inconvenience, annoyance or alarm as a result of the offender's actions. As the Seventh District explained in *Blasdell*:

> "One may attempt to cause physical harm to another without his or her knowledge, in which case the victim will not have suffered inconvenience, annoyance, or alarm. We concede that, in most cases, the actions by which one causes or attempts to cause physical harm to another may also cause inconvenience, annoyance, or alarm to that person. But a victim might be wholly unaware of an attempt to cause physical harm where, for example, the perpetrator throws an object at the victim, who is not looking at the perpetrator, but misses his target, and thus the victim suffers no inconvenience, annoyance, or alarm." [*State v. Schaefer*, 2d Dist. Greene No. 99CA88, 2000 Ohio App. LEXIS 1828 (April 28, 2000).]
>
> Since a situation exists where an offender could commit domestic violence but not commit disorderly conduct, the second *Deem* element[7]

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[6] These cases involve an analysis of disorderly conduct as statutorily defined in R.C. 2917.11(A)(1). However, disorderly conduct as defined in CHCO 509.03(a)(1) is identical to disorderly conduct as defined in R.C. 2917.11(A)(1).

[7]The "second *Deem* element" is the same as the third prong of the *Evans* test, except that under *Deem* "the greater offense [could] not, as statutorily defined, *ever* be committed without the lesser offense, as statutorily defined, also being committed," whereas the third prong of the *Evans* test provides that "the greater offense cannot as statutorily defined be committed without the lesser

> cannot be met. [*State v. Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68, 759 N.E.2d 1240,] requires us to look at whether a set of factual circumstances exists whereby the greater offense could *ever* be committed without the lesser offense also being committed. Because such a factual scenario exists, disorderly conduct is not a lesser included offense of domestic violence.

(Emphasis sic.) *Blasdell* at ¶ 21-22.

{¶40} In addition to the unaware victim hypothetical, Cohen argues that the third prong of the *Evans* test cannot be met because an individual could conceivably commit domestic violence under R.C. 2919.25(A) without committing disorderly conduct under CHCO 509.03(a)(1) in situations such as where a defendant picks up a bat and threatens his or her spouse but because the spouse did not take the threat seriously, the spouse did not suffer any inconvenience, annoyance or alarm as a result (the "did-not-take-the-threat-seriously hypothetical").

{¶41} In *Shaker Hts v. Mosely*, 113 Ohio St.3d 329, 2007-Ohio-2072, 865 N.E.2d 859, the Ohio Supreme Court considered whether disorderly conduct under R.C. 2917.11(A)(1) was a lesser included offense of domestic violence under R.C. 2919.25(C), which provides: "No person, by threat of force, shall knowingly cause a family or household member to believe that the offender will cause imminent physical harm to the family or household member." *Id.* at ¶ 20. In holding that disorderly conduct under R.C. 2917.11(A)(1) is a lesser included offense of domestic violence under R.C. 2919.25(C), the court specifically distinguished cases, including *Blasdell* and *Schaefer*, in which domestic violence was charged under R.C. 2919.25(A). *Id.* at ¶ 17. The court

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offense as statutorily defined also being committed." *See supra* fn.5.

observed that for domestic violence charged under R.C. 2919.25(C) (unlike domestic violence charged under R.C. 2919.25(A)), the victim must "believe" that the offender is going to cause him or her imminent physical harm, i.e., that the victim must be aware of the offender's conduct to support a conviction under R.C. 2919.25(C). *Id.* As such, the court reasoned, the throw-from-behind-that-misses-its-target hypothetical did not apply in cases involving domestic violence charged under R.C. 2919.25(C). *Id.* at ¶ 16-17. The court, however, made no explicit ruling regarding whether disorderly conduct under R.C. 2917.11(A)(1) is a lesser included offense of domestic violence under R.C. 2919.25(A).

{¶42} However, *Blasdell* and the other cases cited above that have held that disorderly conduct is not a lesser included offense of domestic violence under R.C. 2919.25(A), were decided before the *Deem* test was clarified in *Evans*. Prior to *Evans*, the *Deem* test provided:

> An offense may be a lesser included offense of another if (i) the offense carries a lesser penalty than the other; (ii) the greater offense cannot, as statutorily defined, *ever* be committed without the lesser offense, as statutorily defined, also being committed; and (iii) some element of the greater offense is not required to prove the commission of the lesser offense.

(Emphasis added.) *Deem*, 40 Ohio St.3d 205, 533 N.E.2d 294, at paragraph 3 of the syllabus.

{¶43} As explained previously, in *Evans*, the Ohio Supreme Court "clarif[ied]" the *Deem* test by deleting the word "ever" from the requirement that "the greater offense cannot as statutorily defined be committed without the lesser offense, as statutorily

defined, also being committed." *Evans*, 122 Ohio St. 3d 381, 2009-Ohio-2974, 911 N.E.2d 889, ¶ 25. The court explained that this change was made "to ensure that * * * implausible scenarios * * * advanced by parties to suggest the remote possibility that one offense could conceivably be committed without the other also being committed" would not "derail a proper lesser included offense analysis." *Id.* at ¶ 24-25.

{¶44} We believe that the unaware victim and did-not-take-threat-seriously hypotheticals are the very types of "implausible scenarios" and "remote possibilit[ies]" that the *Evans* court sought to address in clarifying the *Deem* test. We, therefore, conclude that the existence of such possibilities does not preclude disorderly conduct under CHCO 509.03(a)(1) from being a lesser included offense of domestic violence under R.C. 2919.25(A). *See In re S.W.*, 2011-Ohio-5291 at ¶ 37 ("[T]he holding in *Evans* undermines our rationale in *Schaefer*, to the extent that we relied on the possibility that a victim may, in some instances, be wholly unaware of an attempt to cause physical harm. Unless the evidence in a particular case demonstrates that the victim was unaware, there is now no basis to hold that the minor misdemeanor form of disorderly conduct that R.C. 2917.11(A)(1) prohibits cannot be a lesser included offense of domestic violence, in violation of R.C. 2919.25(A) under the second prong of *Deem*.").

{¶45} We find that the language used in R.C. 2919.25(A) provides sufficient notice to an offender that a charge for that offense could also result in prosecution for disorderly conduct under CHCO 509.03(a)(1). As a general matter, a person cannot knowingly cause or attempt to cause physical harm to a family member or a member of

one's household without at the same time recklessly causing that family member or household member inconvenience, annoyance or alarm by engaging in fighting, by threatening harm to persons or property or by violent or turbulent behavior. "'[I]t is not significant that the common elements of these two offenses were not stated in identical language * * * because these common elements are implicit in the conduct that constitutes the offenses.'" *Mosely*, 113 Ohio St.3d 329, 2007-Ohio-2072, 865 N.E.2d 859, at ¶ 19, quoting *State v. Burgess*, 79 Ohio App.3d 584, 588, 607 N.E.2d 918 (12th Dist.1992); *see also Berry*, 2007-Ohio-7082 at ¶ 19 (applying *Mosely* to find that disorderly conduct under R.C. 2917.11(A)(1) is a lesser included offense of domestic violence under R.C. 2919.25(A)).

{¶46} Further, this court has previously held that disorderly conduct in violation of CHCO 509.03(a)(1) as defined in the CHCO is a lesser included offense of assault as statutorily defined in R.C. 2903.13. *State v. Lynch*, 8th Dist Cuyahoga No. 95770, 2011-Ohio-3062, ¶ 11-13; *see also State v. Miller*, 8th Dist. Cuyahoga No. 96781, 2012-Ohio-1191, ¶ 16 (disorderly conduct in violation of R.C. 2917.11(A)(1) is a lesser included offense of assault), citing *State v. Young*, 8th Dist. Cuyahoga No. 79779, 2002-Ohio-1274. The similarities between domestic violence as defined under R.C. 2919.25(A) and assault as defined under R.C. 2903.13 provide further support for our conclusion that disorderly conduct under CHCO 509.03(a)(1) is a lesser included offense of domestic violence under R.C. 2919.25(A). *See Maynard*, 2012-Ohio-786, ¶ 27.

Sufficiency of the Evidence

{¶47} In his third assignment of error, Cohen asserts that his conviction for disorderly conduct under CHCO 509.03(a)(1) was not supported by sufficient evidence. CHCO 509.03(a)(1) provides, in relevant part:

> No person shall recklessly cause inconvenience, annoyance or alarm to another, by * * * [e]ngaging in fighting, in threatening harm to persons or property, or in violent or turbulent behavior.

{¶48} Cohen argues that the city failed to present sufficient evidence that he acted with the requisite mens rea, i.e., that he *recklessly* caused inconvenience, annoyance or alarm to Perel. Cohen contends because he and Perel testified that Cohen "simply pushed his wife off his back as she continued to jump on him," he could not be said to have "perverse[ly] disregard[ed] a known risk" or to have been acting "with heedless indifference to the consequences" of his actions. Cohen also argues that the trial court erroneously concluded that he was "engaging in fighting" when he was "merely attempting to disengage himself from his wife" and that there was insufficient evidence to support his conviction for disorderly conduct because the city failed to prove that any annoyance, inconvenience or alarm Perel experienced was "caused by" his "engaging in fighting." Following a thorough review of the record, viewing the evidence in the light most favorable to the city, we agree that the evidence was insufficient to support Cohen's conviction for disorderly conduct.

{¶49} There are significant gaps in the city's evidence, particularly with regard to Cohen's state of mind and precisely what Cohen did and how he did what he did, that lead us to conclude that a rational trier of fact could not have found, beyond a reasonable

doubt, that Cohen recklessly caused inconvenience, annoyance or alarm to Perel by engaging in fighting, in threatening harm to persons or property or in violent or turbulent behavior as necessary to sustain his conviction for disorderly conduct under CHCO 509.03(a)(1).

{¶50} First, there was no evidence that Cohen at any point "threatened harm" to Perel (or to any other person or property) or "engag[ed] in fighting" or other "violent or turbulent behavior" that evening. To "engage" means "[t]o employ or involve one's self; to take part in." *Black's Law Dictionary* 528 (6th Ed.1990). To "fight" means "to give mutual blows" or "to be one of two or more combatants in physical combat." *The New Lexicon Webster's Dictionary of the English Language* 350 (Encyclopedic Ed.1989). "Violent" means "[m]oving, acting, or characterized, by physical force, especially by extreme and sudden or by unjust or improper force" or "characterized by the exercise or production of a very great force." *The New Lexicon Webster's Dictionary of the English Language* at 1099; *Black's Law Dictionary* at 1570. "Turbulent" means "'tumultuous behavior or unruly conduct characterized by violent disturbance or commotion.'" *State v. Walker*, 5th Dist. Stark No. 2013 CA 00204, 2014-Ohio-3693, ¶ 18, quoting *State v. Reeder*, 18 Ohio St.3d 25, 26, 479 N.E.2d 280 (1985).

{¶51} When viewed in the light most favorable to the city, the evidence at most establishes that (1) when Cohen pushed Perel off his back "the last time * * * she fell off," he pushed her off with sufficient force to cause her to "bounce" off the wall and slip or fall forward, hitting her head on the closet, and (2) at some point during the altercation,

Cohen elbowed Perel in the head as he was pushing her off his back. There was no evidence that Cohen was the aggressor at any point during the altercation with his wife, that he was at any time involved in any type of physical combat or intense, forceful interaction with Perel or that his actions in pushing Perel off his back were acts of aggression.[8] The witnesses testified that each time Cohen had physical contact with Perel that evening it was because Perel initiated the contact, "lunging at him" and "jumping on his back." A.C. testified that when she saw her mother jump on her father's back, her father "was just trying to walk away from it." Perel described Cohen's actions in pushing her as "a normal response" to get her off his back. Cohen testified that he was not sure exactly how he pushed Perel off him but that "[i]t was just a matter of getting her off me and trying to free myself." Thus, based on the record before us, Cohen's conduct cannot reasonably be said to have constituted "engaging in fighting" or "violent or turbulent behavior." *See, e.g., Chardon v. Patterson*, 11th Dist. Geauga No. 2006-G-2726, 2007-Ohio-1769, ¶ 16-38 (victim's testimony that defendant pushed the victim in the chest, causing victim to walk backward but not causing him to fall, was insufficient to establish that defendant engaged in "fighting" or "violent or turbulent behavior" under R.C. 2917.11(A)(1)).

[8]Although Officers Trhlin and Desgravise testified that Perel told them that Cohen attacked her, threw her to the ground, choked her and elbowed her in the forehead, their testimony could not be considered as substantive evidence of the truth of the matters asserted. *See infra* at ¶ 55-57. At trial, Perel denied that her husband attacked her and testified that she did not recall whether she made any such statements to the officers.

{¶52} Even if Cohen's actions in pushing Perel off his back could be deemed to constitute "engaging in fighting" or "violent or turbulent behavior," the city nevertheless failed to establish the requisite causal connection between such conduct and any annoyance, inconvenience or alarm experienced by Perel.

{¶53} Cohen, Perel and A.C. each testified that Cohen pushed Perel off his back numerous times (prior to "the last time that she fell off") and that each time, she "went back again" and jumped on his back. Although Officer Desgravise testified that Perel was "really frantic" and "crying and yelling" when he arrived at the Cohen residence, there was no evidence this was "caused by" Cohen's actions in pushing her off his back (or any other conduct by Cohen). To the contrary, Perel testified that she was "upset" and had called police because her husband told her he wanted a divorce and had taken their children away for the night, not because Cohen had pushed her, had been "fighting" with her, or had otherwise exhibited any "violent or turbulent behavior." *See, e.g.*, *Patterson* at ¶ 40-42 (insufficient evidence existed to support defendant's conviction for disorderly conduct where city failed to elicit any testimony from victim that defendant's push caused him "inconvenience, annoyance or alarm" "over and above that which he may have already been experiencing due to [defendant's] presence on [victim's] premises"); *State v. Fort*, 7th Dist. Mahoning No. 99-CA-219, 2003-Ohio-1075, ¶ 23 (although police officer testified that defendant caused an annoyance to neighbors and passersby, there was insufficient evidence to support defendant's disorderly conduct

conviction where no neighbor or other person testified they were annoyed, inconvenienced or alarmed by defendant's behavior).

{¶54} Finally, there was no evidence that Cohen acted with the requisite mental state. There is no evidence in the record that Cohen pushed Perel off his back with heedless indifference to whether his actions were likely to cause inconvenience, annoyance or alarm to her or that his actions were motivated by anything other than getting Perel off his back so he could continue his efforts to gather the children's belongings and leave with them for the night. Cohen testified that each time Perel jumped on him, "[i]t was just a matter of getting her off me and trying to free myself to continue to get the kids." Perel acknowledged that she was "out of control" that evening, and that in pushing her, Cohen just "trying to get [her] off his back so he could handle the kids."

{¶55} The dissent maintains that sufficient evidence existed to support Cohen's conviction for disorderly conduct based on the statements Perel made to police following the incident reasoning that such statements were admissible as substantive evidence under the excited utterance exception to the hearsay rule. We disagree. First, the state has not claimed that Perel's statements to the officers were admissible as an excited utterance, and there is nothing in the record that indicates that the trial court admitted the statements as substantive evidence based on that exception (or any other exception) to the hearsay rule. When Cohen objected to Officer's Trhlin's testimony regarding the statements Perel made to him following the incident on hearsay grounds, the trial court overruled the

objection, stating that the testimony would be allowed as "part of the investigation." "It is well-settled that statements offered by police officers to explain their conduct while investigating a crime are not hearsay because they are not offered for their truth, but rather, are offered as an explanation of the process of investigation." *State v. Warren*, 8th Dist. Cuyahoga No. 83823, 2004-Ohio-5599, ¶46; *see also State v. Bartolomeo*, 10th Dist. Franklin Nos. 08AP-969 and 08AP-970, 2009-Ohio-3086, ¶ 17.

{¶56} Further, a review of the record in this case does not support the admissibility of Perel's statements to police under the excited utterance exception. Ohio Evid.R. 803(2) provides that "[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" is admissible as an exception to the hearsay rule. Officer Trhlin offered no testimony that Perel was in an excited state when she made the statements regarding which he testified.[9] Although Officer Desgravise testified that Perel was "really frantic" and "crying and yelling that her husband attacked her and beat her up" when he arrived on the scene, he also testified that "[w]e didn't get much out of her initially." Officer Desgravise offered

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[9] Officer Trhlin testified:

At 2108 hours we responded to a domestic disturbance at that address. On scene we came in contact with Mrs. Perel Cohen. She was involved in a domestic disturbance with her husband. She explained that she came home from the gym. * * * When we spoke to Mrs. Cohen, she had explained that she came home from the gym and was involved in an argument with her husband in regard to texting and/or speaking to another male. She might or might not have been involved, and stated at the end of the disturbance he assaulted her, choking her with his forearm and also leaving abrasions on her face and nose area. She claimed that she did not want to pursue charges. However, I signed the complaint.

no testimony that Perel was still under the "stress of excitement caused by the event" when he testified that he heard Perel tell Officer Trhlin that "[h]er husband attacked her, threw her to the ground, choked her and elbowed her in the face."

{¶57} In addition, here, there was evidence of "intervening circumstances" that could have influenced Perel's statements to the police, i.e., Cohen taking the children away. *See* Staff Notes to Evid.R. 803; *compare Cleveland v. Amoroso*, 8th Dist. Cuyahoga No. 100983, 2015-Ohio-95, ¶ 44-45 (noting, in determining that the excited utterance exception applied, that there were no "intervening circumstances" that would prevent the victim's statements from falling under the exited utterance exception), citing *State v. Bennett*, 5th Dist. Delaware No. 98CAC02010, 1998 Ohio App. LEXIS 5744, *14 (Nov. 6, 1998). Officer Desgravise testified that Perel was upset about her children being gone. Perel testified that she called police because she wanted her children back. She testified that she was crying for her kids and that she told the police "over and over again" that she wanted her children back and wanted the police to get them for her. Based on the record before us, we do not believe that it has been established that Perel's statements to police were properly admissible for their truth under the excited utterance exception to the hearsay rule.

{¶58} For these reasons, we conclude that, when viewing the record in the light most favorable to the city, the record contains insufficient evidence to support Cohen's conviction for disorderly conduct. Cohen's conviction under CHCO 509.03(a)(1), therefore, must be overturned. Cohen's third assignment of error is sustained.

{¶59} Based on our resolution of Cohen's third assignment of error, his fourth assignment of error is moot.

{¶60} For the foregoing reasons, Cohen's convictions are hereby reversed and his sentences are vacated.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the trial court to carry this judgment into execution.

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

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EILEEN A. GALLAGHER, JUDGE

KATHLEEN ANN KEOUGH, P.J., CONCURS;
MARY J. BOYLE, J., CONCURS IN PART AND DISSENTS IN PART (WITH SEPARATE OPINION ATTACHED)

MARY J. BOYLE, J., CONCURRING IN PART AND DISSENTING IN PART:

{¶61} I concur with the majority's conclusion that the state failed to present sufficient evidence of child endangering. I also agree that disorderly conduct under CHCO 509.03(a)(1) is a lesser included offense of domestic violence under R.C. 2919.25(A). But I disagree with the majority's conclusion that the city failed to present sufficient evidence of disorderly conduct. In analyzing whether there was sufficient

evidence of disorderly conduct, it is my view that there was. Thus, I respectfully concur in part and dissent in part.

{¶62} In analyzing whether there was sufficient evidence of disorderly conduct, the majority fails to consider the police officers' testimony in this case, calling it impermissible hearsay. I disagree.

{¶63} The trial court permitted the officers' testimony regarding Perel's statements over Cohen's objection. The trial court overruled Cohen's objection, stating that it would allow the testimony because it was part of the investigation. But it is my view that this evidence should have also been admitted for the truth of the matter asserted under the excited utterance exception to the hearsay rule.

{¶64} Under Evid.R. 803(2), "[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" is not excluded by the hearsay rule. In order for testimony to be allowed into evidence under the excited utterance exception, the following elements must be met:

> (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.

State v. Boles, 190 Ohio App.3d 431, 2010-Ohio-5503, 942 N.E.2d 417, ¶ 34 (6th Dist.), citing *State v. Duncan*, 53 Ohio St.2d 215, 373 N.E.2d 1234 (1978).

{¶65} When determining whether a statement is an excited utterance, the court should consider: (a) the lapse of time between the event and the declaration; (b) the declarant's mental and physical condition; (c) the nature of the statement; and (d) the influence of intervening circumstances. *State v. Humphries*, 79 Ohio App.3d 589, 598, 607 N.E.2d 921 (12th Dist.1992), citing Staff Note to Evid.R. 803(2) and *Miles v. Gen. Tire & Rubber Co*., 10 Ohio App.3d 186, 190, 460 N.E.2d 1377 (10th Dist.1983). There is "no per se amount of time after which a statement can no longer be considered to be an excited utterance." *Taylor,* 66 Ohio St.3d at 303, 612 N.E.2d 316. "The central requirements are that the statement must be made while the declarant is still under the stress of the event and the statement may not be a result of reflective thought." *Id.*

{¶66} The facts in this case are very similar to a recent decision by this court, *Cleveland v. Amoroso*, 8th Dist. Cuyahoga No. 100983, 2015-Ohio-95. In *Amoroso*, the officer testified that when he arrived at the scene, the victim was "very upset," and "sitting down on the stairs, crying." *Id.* at ¶ 43. Although the officer did not see any visible injuries on the victim, the victim complained of wrist pain and throat pain. We held that the victim's statements were admissible under the excited utterance exception to the hearsay rule because the victim's statements to the officer were made while she was still under the stress of the nervous excitement caused by the abuse. *Id.* at ¶ 45.

{¶67} In *Amoroso*, we relied on a similar case from the Fifth District, *State v. Bennett*, 5th Dist. Delaware No. 98CAC02010, 1998 Ohio App. LEXIS 5744 (Nov. 6, 1998). In *Bennett*, when the police officer arrived, the victim was crying, very upset,

and complaining of pain in her right eye. The officer did not see any visible injuries on the victim, despite her complaining of pain. The victim then told the officer that the defendant had kicked her in her buttocks, forced her to the ground, and struck her on the right side of her head. The Fifth District found that the victim's statements to police fell under the excited utterance exception to the hearsay rule because she "was still under the stress of the event when she recounted the incident to police officers." *Id.* at *13. The victim in Bennett had even walked three blocks from her home (where the assault had occurred) to a gas station to call police from a pay phone; she initially met with police at the gas station. *Id.* at *13-14. The Fifth District still found that there were no intervening circumstances that would prevent the victim's statements from falling under the excited utterance exception to the hearsay rule. *Id.* at *14.

{¶68} This court has also previously held that a domestic violence victim's statements to police officers are admissible under the excited utterance exception to the hearsay rule if the facts establish that the parameters of the exception are met. In *State v. Fields*, 8th Dist. Cuyahoga No. 88916, 2007-Ohio-5060, the defendant argued that the victim's statements to police when they arrived at the scene were hearsay and should have been excluded. This court disagreed, stating:

> The victim's statements to Officer Lastuka fall within the excited utterance exception. Her assault was clearly a startling event. Officer Lastuka testified that upon entering the apartment, he saw the victim on the floor crying and bleeding, which shows she was still under nervous excitement. Officer Lastuka testified that she was still "upset and visibly shaken" while talking with him. Clearly, she was excited and upset throughout her discussion with the officer.

> Appellant argues that, even if the victim was under nervous excitement at some point, her statements to the police were too far removed from the time frame, especially during the second interview with Officer Lastuka. This argument fails. The victim's statements were made immediately after the alleged assault. Officer Lastuka testified that the victim was still upset during the first and second interviews, which occurred immediately after the assault. Throughout her discussion with the officer, she was still at the scene of the crime.
>
> It is not unreasonable to believe that the victim was notably upset and still under nervous excitement while being interviewed.

Fields at ¶ 53-55. *See also Cleveland v. Colon*, 8th Dist. Cuyahoga No. 87824, 2007-Ohio-269, *discretionary appeal not allowed* by *Cleveland v. Colon*, 114 Ohio St.3d 1426, 2007-Ohio-2904, 868 N.E.2d 680 (victim's statements to police officer that her ex-boyfriend assaulted her were admitted as excited utterances when the evidence established that when the officer arrived, the victim was sitting on a curb with a bruised and "bloodied face," and the officer described the victim's demeanor as being "upset and crying"); *State v. Sanchez*, 8th Dist. Cuyahoga Nos. 93569 and 93570, 2010-Ohio-6153 (victim's statements to police officer identifying her boyfriend as the person who caused her injuries were admitted as excited utterances when the evidence established that when the officer arrived, the victim was upset and crying, and "waving her hands, yelling, just carrying on in an upset manner").

{¶69} In this case, when the officers got to the home, Perel was "really frantic," she had blood all over her face, and was crying and yelling that her husband attacked her and beat her up. She told the officers that her husband threw her to the ground and choked her with his forearm while she was lying on her back, and that he struck her in the

face (one officer stated struck her in the face and elbowed her forehead and the other said elbowed her in the face). Perel further told the officers that she had severe pain in her nose. The officers stated that Perel's nose was visibly swollen and red, and that she had a cut on her forehead. Photos that the officers took were entered into evidence; the photos showed that Perel had a cut on her forehead and her nose appeared to be swollen, corroborating the officers' testimony.

{¶70} The majority states that there was evidence of "intervening circumstances" that could have influenced Perel's statements to police. Specifically, the majority finds that because Cohen took the children with him when he left the house, that fact amounted to an intervening circumstance, preventing the excited utterance exception from applying. I disagree that this would qualify as an intervening circumstance. The key question is whether the declarant was still under the stress of the event and whether the statement was the result of reflective thought. *Taylor*, 66 Ohio St.3d 295, 303, 612 N.E.2d 316. It is my view that Perel was still under the stress of being physically abused by Cohen and had not had time to reflect on the incident at that point when the officers arrived.

{¶71} Accordingly, I would find that Perel's statement to the officers were admissible under the excited utterance exception to the hearsay rule.

{¶72} When addressing Cohen's sufficiency arguments relating to disorderly conduct, the majority finds that there are "significant gaps in the city's evidence, particularly with regard to Cohen's state of mind and precisely what Cohen did and how he did what he did[.]" But according to the police officers' testimony, Perel told them

that Cohen threw her to the ground, choked her, and elbowed her in the face. Moreover, the photos further support the officers' testimony as to what Perel told them when they arrived. The evidence submitted is more than sufficient, if believed, to establish Cohen acted recklessly and that Cohen caused inconvenience, annoyance, and alarm to Perel by engaging in fighting or in violent or turbulent behavior.

{¶73} Thus, I would find that the city presented sufficient evidence of disorderly conduct and overrule Cohen's third assignment of error.

{¶74} Finally, because I would overrule Cohen's second and third assignments of error, Cohen's fourth assignment of error would also have to be addressed. In his fourth assignment of error, Cohen argues that (assuming that disorderly conduct is a lesser included offense of domestic violence and that the city presented sufficient evidence of disorderly conduct) it was improper for the factfinder to consider the lesser included offense of disorderly conduct. I disagree.

{¶75} The question of whether a particular offense should be submitted to the finder of fact as a lesser included offense involves a two-tiered analysis. *State v. Evans*, 122 Ohio St.3d 381, 2009-Ohio-2974, 911 N.E.2d 889, ¶ 13. The first tier, also called the "statutory-elements step," is a purely legal question wherein we determine whether one offense is generally a lesser included offense of the charged offense. *State v. Kidder*, 32 Ohio St.3d 279, 281, 513 N.E.2d 311 (1987). The second tier looks to the evidence in a particular case and determines whether "'a jury could reasonably find the defendant not guilty of the charged offense, but could convict the defendant of the lesser

included offense.'" *Evans* at ¶ 13, quoting *Mosely*, 113 Ohio St.3d 329, 2007-Ohio-2072, 865 N.E.2d 859, at ¶ 11. Only in the second tier of the analysis do the facts of a particular case become relevant. *Id.*

{¶76} Having already determined that disorderly conduct is a lesser included offense of domestic violence under the relevant subsections, the requirements of the first tier, therefore, are met. In analyzing the second tier, it is my view that the trial court did not err when it considered the lesser included offense of domestic violence because, in reviewing all of the evidence admitted at trial, I would conclude that a factfinder could reasonably find Cohen not guilty of domestic violence, but guilty of disorderly conduct. Thus, I would also overrule Cohen's fourth assignment of error.