[Cite as *State v. Moss*, 2009-Ohio-3866.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C. A. No. 24511
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
BRANDON L. MOSS	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 08 03 0896

DECISION AND JOURNAL ENTRY

Dated: August 5, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Brandon Moss, appeals from the decision of the Summit County Court of Common Pleas. This Court reverses.

I

{¶2} Appellant, Brandon Moss, and Stephanie Thomas, the victim herein, have dated on and off since 2004. On March 4, 2008, Thomas called 911, complaining that Moss had choked her in front of her young daughter. Akron police responded to the call. As a result of this reported incident, Moss was ultimately indicted on one count of domestic violence, in violation of R.C. 2919.25(A), a felony of the third degree, and one count of aggravated trespass, in violation of R.C. 2911.211, a misdemeanor of the first degree.

{¶3} Moss's case proceeded to trial before a jury on June 30, 2008. The jury convicted Moss on both counts and he was sentenced to two years of incarceration. Moss timely appealed his convictions. He has raised five assignments of error for our review.

II

ASSIGNMENT OF ERROR I

"PURSUANT TO [MOSS'S] CONSTITUTIONAL RIGHT TO DUE PROCESS, THE TRIAL COURT ERRED BY FAILING TO SUSTAIN [MOSS'S] OBJECTION TO REMOVING A JUROR FOR CAUSE WHERE NO SUCH CAUSE EXISTS, THEREBY ENTITLING [MOSS] TO A NEW TRIAL."

ASSIGNMENT OF ERROR II

"PURSUANT TO [MOSS'S] CONSTITUTIONAL RIGHT TO DUE PROCESS, THE TRIAL COURT EMPLOYED THE WRONG LEGAL STANDARD FOR EXAMINING THE SUITABILITY OF A JUROR, THEREBY ENTITLING [MOSS] TO A NEW TRIAL."

{¶4} In Moss's first and second assignments of error, he contends that the trial court violated his due process rights when it failed to sustain his objection regarding the removal of a juror for cause where no such cause existed and where it employed the wrong standard for examining the suitability of a juror. He contends that these errors entitle him to a new trial. We agree.

{¶5} The record reflects that the following exchange took place between Juror Paul Beasley and the prosecutor during voir dire.

Beasley: "Is there any problems [sic] with knowing the gentleman on trial?

The State: "Yes.

Beasley: "I do know him. From church.

The State: "You know him from your church?

Beasley: "Yes.

The State: "Okay. How well do you know him?

Beasley: "Pretty well. I saw him grow up."

{¶6} The conversation regarding Juror Beasley continued outside of the presence of the remaining jurors.

The State: "Are you familiar with [Moss's] run-ins with the law and his criminal problems?

Beasley: "No, I'm not.

The State: "Did you know he went to prison?

Beasley: "No, I didn't.

The State: "And do you know his family? They're very actively involved?

Beasley: "Yes, I do.

The State: "And have they talked at church about what they're going through with their son, asking you to pray for their son?

Beasley: "I heard about prayer, but I really didn't know what was going on, nothing like that.

The State: "Now the fact that you attend church with his family and you know him, you've known him since he was a child, certainly you have some sense of – of friendship with him and his family.

Beasley: "Yes.

The State: "And do you think it would be a difficult position for you to be put in being a juror having to determine his guilt on a criminal case?

Beasley: "Well, I would have to be fair. I don't think I would have a problem as far as being fair to that point. And I think they understand that as well, but, I mean, whichever way it goes, I don't really know. I never heard nothing, so I don't really know.

The court: "So what do you know about him?

Beasley: "Actually, I don't really know --- you mean --- about the case itself?

The court: "No, about the defendant.

Beasley: "Just when he went to church there and he actually growed up [sic], I'm pretty familiar with his parents as well. He went to college and he don't go as regular as he did, but still, I know him pretty well, you know. It's one of the members at the church. I thought he was out of town, college or somewhere. I don't know. I hadn't seen him for a little bit."

{¶7} The record reflects that after questioning all the jurors, the court instructed the jury regarding the parties' right to exercise four peremptory challenges. However, before the

parties exercised their peremptory challenges, the prosecutor moved to excuse three jurors, including Beasley, "for cause." With regard to Beasley, the prosecutor explained that she moved

> "to have [Beasley] excused for cause given the fact that he has a very close relationship with defendant's family. He knows the defendant. He testified the defendant grew up in his church, that he knew that the defendant went to college and he knew there was some point where the defendant was away, but he just assumed he was in college. He does have personal knowledge of the defendant. And I believe that that would be an inappropriate person to have when you're deliberating guilt because he will have personal knowledge of how the defendant was raised, how his religious beliefs are, how[.]"

The court interrupted the prosecutor, interjecting that it would grant the motion to remove Beasley over defense objection. The defense placed its objection to the removal on the record, stating:

> "One, the prosecutor has mischaracterized. When we voir dired this witness, he never indicated that he had a close relationship with the family. He said he knew the family and merely because they grew up in a church does not mean that he knows them and knows personally of him and how the family was raised.
>
> "And, additionally, I would submit that he's the only black juror that we have, and I would object on those grounds. It was a mischaracterization by the prosecutor; It's no different than when we have jury members who know members of the prosecutor or the staff or police enforcement. Mr. Beasley had indicated in chambers in voir dire that he has no difficulty being fair and impartial and he does not – that it would impact his ability to be a juror in this matter."

In response, the court stated:

> "My recollection is he said that he knew the family well, that they were raised in his church. I think --- I think the State has presented particularized grounds that satisfy the standards set forth in Batson, and so I'm going to excuse him."

{¶8} Generally matters of whether to excuse prospective jurors for cause are left to the sound discretion of the trial court. See *State v. Cornwell* (1999), 86 Ohio St.3d 560, 563. But whether the trial court made an error as a matter of law in applying the incorrect legal standard is a question that we review de novo. See *Med. Mut. of Ohio v. Schlotterer*, --- Ohio St.3d ---, 2009-Ohio-2496, at ¶13. "When a court's judgment is based on an erroneous interpretation of

the law, an abuse-of-discretion standard is not appropriate." Id., citing *Swartzentruber v. Orrville Grace Brethren Church*, 163 Ohio App.3d 96, 2005-Ohio-4264, at ¶6.

{¶9} "In addition to challenges [for cause], if there is one defendant, each party peremptorily may challenge *** four prospective jurors in felony cases[.]" Crim.R. 24(D). Pursuant to Crim.R. 24(E), "after the minimum number of jurors allowed by the Rules of Criminal Procedure has been passed for cause and seated on the panel," the parties may exercise their peremptory challenges. However, the Equal Protection Clause of the United States Constitution prohibits deliberate discrimination based on race by a prosecutor in his exercise of peremptory challenges. *Batson v. Kentucky* (1986), 476 U.S. 79, 89. This Court reviews whether a party exercised its peremptory challenges in a discriminatory manner under the clearly erroneous standard. *Hernandez v. New York* (1991), 500 U.S. 352, 364-65; see, also, *State v. Vinson*, 9th Dist. No. 23739, 2007-Ohio-6045, at ¶21.

{¶10} R.C. 2945.25 and Crim.R. 24 provide the reasons for which a juror in a criminal matter can be removed for cause. R.C. 2945.25 states, in relevant part:

> "A person called as a juror in a criminal case may be challenged for the following causes:
>
> "***
>
> "(B) That he is possessed of a state of mind evincing enmity or bias toward the defendant or the state; but no person summoned as a juror shall be disqualified by reason of a previously formed or expressed opinion with reference to the guilt or innocence of the accused, if the court is satisfied, from examination of the juror or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial[.]"

{¶11} As long as a trial court is satisfied, following additional questioning of the prospective juror, that the juror can be fair and impartial and follow the law as instructed, the court need not remove that juror for cause. See *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169; *State v. Bryan*, 101 Ohio St.3d 272, 2004-Ohio-971, at ¶¶87-100.

{¶12} In this matter, the court gave no indication that it was excusing Beasley because it was not satisfied that he could be fair and impartial and follow the law. Rather, the court expressly stated that it was excusing Beasley because the State had "presented particularized grounds that satisfy the standards set forth in *Batson*." Unlike challenges for cause, a peremptory challenge may be exercised for *any* racially-neutral reason. Had the State been exercising a peremptory challenge, through which it could excuse a juror for any non-racially discriminatory reason, the trial court's procedure would have been more appropriate. See *Batson*, 476 U.S. at 89. However, the record reflects that the State had moved to excuse Beasley "for cause." To do so, the court would have had to rely on additional questioning of the juror or "other evidence" concerning whether he could "render an impartial verdict according to the law and the evidence submitted [] at the trial." R.C. 2945.25(B). See *Berk*, 53 Ohio St.3d at 169; *Bryan*, supra, at ¶¶87-100. There was no such questioning in this matter.

{¶13} Further, the trial court clearly applied the lesser standard relative to a peremptory challenge, not the loftier standard applicable to a challenge for cause. This Court has held that the trial court's application of the incorrect standard warrants reversal. See *State v. Johnson*, 9th Dist. No. 24536, 2009-Ohio-3188, at ¶8, citing *State v. Boswell*, 121 Ohio St.3d 575, 2009-Ohio-1577, at ¶13 (holding that "[b]ased on the trial court's application of the incorrect standard of review, *Boswell* requires we remand Johnson's case to the trial court to hold a hearing and consider if a reasonable and legitimate basis exists for him to withdraw his plea"); *Peters v. Ohio Dept. of Commerce, Div. of Real Estate & Professional Licensing*, 9th Dist. No. 06CA0022, 2006-Ohio-5636, at ¶6 (finding that we could not address assignment of error on the merits because trial court applied the incorrect standard of review). Moss's first and second assignments of error are sustained.

ASSIGNMENT OF ERROR III

"PURSUANT TO THE EQUAL PROTECTION CLAUSE IN THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE TRIAL COURT ERRED BY FAILING TO SUSTAIN [MOSS'S] OBJECTION TO THE PROSECUTION'S PEREMPTORILY REMOVING THE ONLY AFRICAN AMERICAN JUROR, THEREBY ENTITLING [MOSS] TO A NEW TRIAL."

{¶14} In Moss's third assignment of error, he contends that pursuant to the Equal Protection Clause of the Fourteenth Amendment, the trial court erred by failing to sustain Moss's objection to the removal of the only African American juror. As we have already determined in our disposition of Moss's first and second assignments of error that Moss is entitled to a new trial, we need not address his third assignment of error.

ASSIGNMENT OF ERROR IV

"PURSUANT TO THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE ONE, SECTION 10 OF THE OHIO CONSTITUTION, THE TRIAL COURT ERRED TO THE PREJUDICE OF [MOSS] IN DENYING [MOSS'S] RULE 29 MOTION FOR ACQUITTAL ON THE CHARGES OF DOMESTIC VIOLENCE AND AGGRAVATED TRESPASS WHEN THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO SUSTAIN A CONVICTION."

ASSIGNMENT OF ERROR V

"PURSUANT TO ARTICLE FOUR SECTION 3 (B)(3) OF THE OHIO CONSTITUTION, THE VERDICT OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE PRESENTED AT TRIAL AND WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

{¶15} In Moss's fourth and fifth assignments of error, he contends that the trial court erred in denying his Crim.R. 29 motion for acquittal on the domestic violence and aggravated trespass charges when the State failed to present sufficient evidence to sustain the convictions. Further, he contends that his convictions were against the manifest weight of the evidence and were not supported by sufficient evidence.

{¶16} As an initial matter, we conclude that our resolution of Moss's first and second assignments of error only renders moot his challenges to the weight of the evidence. See *State v. Vanni*, 9th Dist. No. 08CA0023-M, 2009-Ohio-2295, ¶34. Our disposition of these assignments of error does not render moot Moss's challenges to the sufficiency of the evidence introduced at trial. The Ohio Supreme Court recently "distinguish[ed] between appellate court reversals based solely upon insufficiency of the evidence and those based on ordinary 'trial errors.'" *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, at ¶18, quoting *Lockhart v. Nelson* (1988), 488 U.S. 33, 40. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and Section 10, Article I of the Ohio Constitution protect a criminal defendant from multiple prosecutions for a single offense. Accordingly, notwithstanding some procedural defect by the trial court warranting reversal, the State remains entitled to "one, and only one, full and fair opportunity" to prosecute the defendant in regard to a single offense. *Richardson v. United States* (1984), 468 U.S. 317, 330. When a case is reversed on the basis of trial error, such as the improper receipt or rejection of evidence, the Double Jeopardy Clause does not prohibit retrial "'where the evidence offered by the State and admitted by the trial court-whether erroneously or not-would have been sufficient to sustain a guilty verdict[.]'" *Brewer* at ¶17, quoting *Lockhart*, 488 U.S. at 35.

{¶17} The *Brewer* court recognized the corollary, however, that the State is not entitled to retry a criminal defendant after reversal for trial court error if the State failed in the first instance to present sufficient evidence. Id. at ¶8. Accordingly, a defendant's assigned error that the conviction is based on insufficient evidence is not moot under these circumstances.

{¶18} Crim.R. 29(A) provides, in relevant part:

> "The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or

> more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case."
>
> "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." *State v. Galloway* (Jan. 31, 2001), 9th Dist. No. 19752, at *3, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶19} The test for sufficiency requires a determination of whether the State has met its burden of production at trial. *State v. Walker* (Dec. 12, 2001), 9th Dist. No. 20559. See, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring).

{¶20} Here, Moss was convicted of one count of domestic violence, in violation of R.C. 2919.25(A), a felony of the third degree, and one count of aggravated trespass, in violation of R.C. 2911.211, a misdemeanor of the first degree. While Moss alleges in his fourth and fifth assignments of error that he has challenged both his convictions on appeal, his brief reflects that he has not set forth an argument regarding his conviction for aggravated trespass, as required by App.R. 16(A)(7). Accordingly, we need only examine whether the State met its burden of production regarding Moss's conviction for domestic violence.

{¶21} R.C. 2919.25(A) prohibits a person from "knowingly caus[ing] or attempt[ing] to cause physical harm to a family or household member." R.C. 2919.25(F)(1)(a) defines, in pertinent part, a "[f]amily or household member" as "[a]ny 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[.]" Further, R.C. 2919.25(F)(2) defines "[p]erson 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*." (Emphasis added.)

{¶22} The record reflects that the State presented sufficient evidence to support Moss's conviction for domestic violence. The victim's mother, Rita Glenn, testified that her daughter has dated Moss off and on since 2004 and that the two lived together in 2005 as common-law spouses. Further, she testified that in 2005 she notarized a petition for a civil protection order for her daughter against Moss and that, at that time, the two were living together as spouses. The civil protection order, which was admitted into evidence, listed Thomas as "living as a spouse of [Moss]." Glenn also testified that she saw Thomas at some point during the evening of March 4, 2008 – after the incident - and observed that Thomas had a small bruise on her neck.

{¶23} Officer Kubasek testified that on March 4, 2008, he responded to a 911 call from Thomas. Upon arriving at the scene, he spoke with Thomas whom he described as "visibly shaken." Thomas informed him that Moss had come to her apartment and that he was upset about their recent break-up. She told the officer that Moss had "confronted her, grabbed her by her throat, [and] pushed her back on the bed." He also testified that Thomas informed him that once she broke free from Moss's grasp, "[s]he ran to her daughter's room *** and *** [Moss] left the apartment." The officer testified that he did not take photographs of Thomas because he did not see any visible injuries. He further explained that he has seen "instances where there were no visible injuries after someone's been strangled."

{¶24} The record reflects that the State presented evidence that Moss "knowingly cause[d] or attempt[ed] to cause physical harm to a family or household member." See R.C. 2919.25(A). Although Moss and Thomas were not living together at the time of the March 4, 2008, incident, the State presented evidence that the two lived together as spouses in 2005 –

which is within the five year time frame set forth in R.C. 2919.25(F)(2). Accordingly, we conclude that Moss's conviction for domestic violence was supported by sufficient evidence. His fourth and fifth assignments of error are overruled.

III

{¶25} Moss's first and second assignments of error are sustained. His third assignment of error is moot. Moss's fourth and fifth assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is reversed and the cause is remanded for a new trial.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

CARLA MOORE
FOR THE COURT

WHITMORE, J.
DICKINSON, J.
CONCUR

APPEARANCES:

ERIK FINK, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and HEAVEN R. DIMARTINO, Assistant Prosecuting Attorney, for Appellee.