[Cite as *State v. Jones*, 2010-Ohio-351.]

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

STATE OF OHIO	C.A. No. 24776
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
MARVIS K. JONES	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 09 01 0194

DECISION AND JOURNAL ENTRY

Dated: February 3, 2010

BELFANCE, Judge.

{¶1} Defendant-Appellant Marvis K. Jones appeals from the judgment of the Summit County Court of Common Pleas. For reasons set forth below, we affirm.

FACTS

{¶2} On September 21, 2007, Jones went out drinking with his live-in girlfriend R.H. In the early morning hours of September 22, 2007, after the couple was leaving an after-hours bar or club, Jones and R.H. began to argue. The altercation became physical and Jones punched and slapped R.H. in the face. There were no other known witnesses to the assault. R.H. walked several blocks to her neighbor's home and asked her to call 911. It is unknown where Jones went following the incident. The neighbor indicated that when R.H. appeared at her home she had blood on her face, reported that she could not hear out of one ear, and seemed to be "a little delirious." The police arrived and determined that R.H. needed medical attention and summoned an ambulance. R.H. told police that her boyfriend, Marvis Jones, beat her up. Police noted that

R.H. appeared intoxicated and woozy and admitted to drinking that night. R.H. required assistance getting into the ambulance. Police took photographs of her injuries. Paramedics noted that R.H. complained of neck pain, in addition to her other obvious injuries. While in the ambulance, R.H. had trouble maintaining consciousness.

{¶3} Upon arriving at the emergency room, R.H. was examined and other tests were conducted. R.H.'s blood alcohol level was .168. The physician concluded that R.H. had a laceration on her face requiring stitches, waxing and waning consciousness, a broken nose, and a ruptured eardrum. R.H. told the doctor that her boyfriend hit her. The doctor believed that her injuries were consistent with being punched with a fist and not consistent with a fall.

{¶4} Jones denied assaulting R.H, but admitted that she was his girlfriend for seven years and that he had lived with her. Jones indicated that he got along well with R.H.'s children and that they called him daddy.

{¶5} As a result of the incident, Jones was indicted for one count of domestic violence in violation of R.C. 2919.25(A), a third-degree felony, and one count of felonious assault in violation of R.C. 2903.11(A)(1), a second-degree felony. A jury found Jones guilty, and he was sentenced to a total of three years in prison. Jones has timely appealed raising two assignments of error for our review.

CRIM.R. 29 MOTION

{¶6} Jones argues in his first assignment of error that the trial court erred in overruling his Crim.R. 29 motion. Specifically he argues that the State failed to present sufficient evidence that Jones was the person who committed the offenses, and that the State failed to present sufficient evidence proving that Jones was a "family or household member" as contemplated by

R.C. 2919.25(A), (F). Jones does not argue that the evidence presented by the State supporting any other element was insufficient.

{¶7} "When reviewing the trial court's denial of a Crim.R. 29 motion, this [C]ourt assesses the sufficiency of the evidence 'to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt.'" *State v. Flynn*, 9th Dist. No. 06CA0096-M, 2007-Ohio-6210, at ¶8, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. In reviewing challenges to sufficiency, we must view the evidence in a light most favorable to the prosecution. *State v. Cepec*, 9th Dist. No. 04CA0075-M, 2005-Ohio-2395, at ¶5, citing *Jenks*, 61 Ohio St.3d at 279.

{¶8} The State must prove beyond a reasonable doubt the identity of the perpetrator of the crime. *Flynn* at ¶12. "The identity of a perpetrator may be established using direct or circumstantial evidence." Id.

{¶9} With respect to the events of September 22, 2007, R.H.'s neighbor of ten years testified on direct examination that

> "[R.H.] just said they were at a club, I guess he got upset that somebody – a male said hi to her and they just started arguing after that and I guess he hit her and I don't know how bad he beat her up, but it looked pretty bad to me, and he took her car and she walked all the way home from there and stopped at my place, asked me to call."

During direct examination, the neighbor does not specifically state who the "he" was who hit R.H. During cross-examination, the following dialogue occurred:

> "THE COURT: I have one clarifying question, when you keep saying 'he,' when she talked about 'she' meaning the alleged victim in this case, did she give you a name?
>
> "[R.H.'s Neighbor]: It was a nickname, I don't remember him by Marvis, I don't even remember what the nickname was, it was Poo or something like that, Poo was his name that she referred -- that was what they called him."

On redirect examination the State asked the neighbor if "[t]he nickname she referred to is the name that refers to Marvis Jones, that's who you believe she was referring to?" To which the neighbor replied, "That's him; yes."

{¶10} The 911 call made by the neighbor and played for the jury confirms the neighbor's testimony. While on the phone with the 911 operator, the neighbor asked R.H. who assaulted her and the neighbor told the 911 operator that R.H. responded that it was her boyfriend Marvis Jones.

{¶11} Further, Officer Joseph Bodnar of the Akron Police Department, one of the officers who responded to the 911 call, testified that "[R.H.] said she was in an argument with her live-in boyfriend, Mr. Marvis Jones, and they were in an argument after they were leaving a bar and he had beat her up." Jones argues that the statement given by R.H. to Officer Bodnar and presented to the jury cannot be sufficient because Officer Bodnar described R.H. as being "woozy" and intoxicated. However, Jones' argument bears upon the weight of the evidence and credibility, not sufficiency of the evidence. "[A]n 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." *Jenks*, 61 Ohio St.3d at 273. Thus, it is not our role to evaluate the weight of the evidence or the credibility of the testimony.

{¶12} While other witnesses presented by the State did not refer to R.H.'s attacker by name, instead referring to him only as her boyfriend, there was testimony from both Officer Bodnar and the neighbor articulating that R.H.'s attacker was her boyfriend and that her boyfriend's name was Marvis Jones. Therefore, we conclude that the State presented sufficient evidence that Jones committed the offenses.

{¶13} With respect to Jones' conviction for domestic violence, he contends that the State presented insufficient evidence to establish that he was a "family or household member" as required pursuant to R.C. 2919.25(A), (F). We disagree.

{¶14} R.C. 2919.25(A) provides that "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member." The statute defines "family or household member" to include a person "who is residing or has resided with the offender" and is "[a] spouse, a person living as a spouse, or a former spouse of the offender" R.C. 2919.25(F)(1)(a)(i). A "'[p]erson living as a spouse' means a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question." R.C. 2919.25(F)(2). The Supreme Court of Ohio has concluded

> "that the essential elements of 'cohabitation' are (1) sharing of familial or financial responsibilities and (2) consortium. Possible factors establishing shared familial or financial responsibilities might include provisions for shelter, food, clothing, utilities, and/or commingled assets. Factors that might 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." (Internal citations omitted.) *State v. Williams* (1997), 79 Ohio St.3d 459, 465.

{¶15} Evidence presented by the State included the testimony of Officer Bodnar who stated that R.H. "was in an argument with her live-in boyfriend, Mr. Marvis Jones, and they were in an argument after they were leaving a bar and he had beat her up." Officer Bodnar also stated that he believed that Jones and R.H. had known each other for five years.

{¶16} R.H.'s neighbor's testimony also provided evidence that Jones was a "family or household member" as contemplated by R.C. 2919.25(A), (F). The State elicited the following testimony from the neighbor:

> "Q. How long did you know that Mr. Jones was living with [R.H.] at the time?
>
> "A. Maybe just about two months or so.
>
> "Q. Okay. And when you indicate that he was living there, he was living there as a boyfriend?
>
> "A. Yes.
>
> "Q. Okay. How old were her children at that time?
>
> "A. Maybe around 12 and 13; yes, close to 12 and 13.
>
> "Q. Okay. So, it was the four of them living in the apartment together?
>
> "A. Yes.
>
> "Q. And from your dealings with [R.H.] and Mr. Jones, did you understand them to be intimate the way that a husband and wife would be intimate?
>
> "A. Yes.
>
> "Q. And did you see them take responsibility for the children the way a husband and wife would take responsibility for the children?
>
> "A. Yes."

{¶17} While the testimony of the State's witnesses did not address all the factors that could possibly be considered when evaluating cohabitation as articulated by the Supreme Court in *Williams*, we believe the evidence was sufficient for a jury to conclude that Jones and R.H. were cohabiting and thus Jones was "living as a spouse" and could be considered a "family or household member" under R.C. 2919.25(A), (F). Clearly there was evidence presented that Jones was living with R.H. for at least two months and therefore implicitly there were provisions for their shelter. The testimony of the neighbor also indicated that the couple shared responsibility for R.H.'s children. In light of the above, we believe sufficient evidence was

presented that the couple thus shared "familial or financial responsibilities[.]" *Williams*, 79 Ohio St.3d at 465. Further, the neighbor testified R.H. and Jones were boyfriend and girlfriend and were intimate, thus providing sufficient evidence to establish consortium. Id. Moreover, "[t]hese 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." Id.; see, also, *State v. Sudderth*, 9th Dist. No. 24448, 2009-Ohio-3363, at ¶12 (concluding there was sufficient evidence to establish that defendant was a family or household member when there was testimony that the defendant was living with the victim, the couple had been dating for three years, and that the victim was on the lease at the residence where the defendant lived). We therefore determine that the State presented sufficient evidence to establish that Jones was a family or household member as contemplated by R.C. 2919.25(A), (F).

PROSECUTORIAL MISCONDUCT

{¶18} Jones argues in his second assignment of error that the trial court erred when it overruled Jones' motion for a mistrial based upon statements made by the State during closing arguments. Specifically, Jones takes issue with the following statement made by the prosecutor during the rebuttal portion of the closing arguments: "If we are going to engage in speculation like the Defense wants to, maybe that's something that the Defense is hiding." Jones argues that the State is implying that the victim's failure to show up to testify was somehow caused by something Jones did or said.

{¶19} We review a trial court's decision to grant or deny a mistrial for an abuse of discretion. See, e.g., *State v. Halsell*, 9th Dist. No. 24464, 2009-Ohio-4166, at ¶6. An abuse of discretion "connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217,

219. Generally during closing argument, the prosecution is entitled to a certain amount of latitude. *State v. Smith* (1984), 14 Ohio St.3d 13, 13. "The test regarding prosecutorial misconduct in closing arguments is whether the remarks were improper and, if so, whether they prejudicially affected substantial rights of the defendant." Id. at 14. "'[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.'" *State v. Lott* (1990), 51 Ohio St.3d 160, 166, quoting *Smith v. Phillips* (1982), 455 U.S. 209, 219. If the prosecutor's comments were improper, "it must be clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would have found defendant guilty." *Smith*, 14 Ohio St.3d at 15. "[T]he prosecution must avoid insinuations and assertions which are calculated to mislead the jury." Id. at 14.

{¶20} In the case sub judice, during closing arguments Jones' counsel repeatedly reminded the jury that R.H. did not testify and implied that she did not testify because she no longer believed that the events occurred the way that she reported they did. Counsel stated that "[w]e do know we are here now years after that time when she's had more than enough time to think about what happened, and her actions are speaking louder than any words." Jones' counsel also commented on Jones' testimony, focusing on the fact that Jones admitted to his prior convictions and noting that "[t]here wasn't a single thing he hid from any of you." It was after comments such as the foregoing that the State, in rebuttal, made the following statement that Jones believes was improper: "If we are going to engage in speculation like the Defense wants to, maybe that's something that the Defense is hiding."

{¶21} This statement clearly does not directly accuse Jones of somehow preventing R.H. from testifying. Thus, any impropriety from the statement must be by implication. We also note that "'[i]solated comments by a prosecutor are not to be taken out of context and given their most

damaging meaning.'" *State v. Penix*, 9th Dist. No. 23699, 2008-Ohio-1051, at ¶25, quoting *State v. Hill* (1996), 75 Ohio St.3d 195, 204. Thus, while the statement could be interpreted in the manner contemplated by Jones, and if interpreted in such a way, the statement would be improper, we do not believe the trial court erred in denying Jones' motion for a mistrial.

{¶22} After Jones' counsel objected to the prosecution's statement and moved for a mistrial, the court denied the motion and issued the following curative instruction:

> "Ladies and gentlemen, this is closing argument. Both of the attorneys are given some latitude during closing argument. The facts are that we do not know where the alleged victim is. There is certainly no indication that the Defense had anything to do with that. I think the State's point was it's speculation as to where she's at."

"It is well established that a jury is presumed to follow a curative instruction given it by a trial judge." *State v. McKinney*, 9th Dist. No. 24430, 2009-Ohio-2225, at ¶23, quoting *Perillo v. Fricke*, 9th Dist. No. 08CA0044-M, 2009-Ohio-1130, at ¶15, citing *State v. Garner* (1995), 74 Ohio St.3d 49, 59. The curative instruction makes it very clear that there was no evidence supporting the idea that R.H.'s absence was in any manner linked to the conduct of Jones. Moreover, it is "clear beyond a reasonable doubt that, absent the prosecutor's comments, the jury would have found [Jones] guilty." *Smith*, 14 Ohio St.3d at 15. Thus, we conclude that the trial court did not abuse its discretion in denying Jones' motion for a mistrial.

CONCLUSION

{¶23} In light of the foregoing, we affirm the judgment of the Summit County Court of Common Pleas.

Judgment affirmed.

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 Appellant.

EVE V. BELFANCE
FOR THE COURT

CARR, J.
MOORE, P. J.
CONCUR

APPEARANCES:

BECKY L. DOHERTY, Attorney at Law, for Appellant.

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