[Cite as *State v. Jones*, 2010-Ohio-879.]

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

STATE OF OHIO Appellee v. MARK J. JONES Appellant	C.A. No. 24469 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 08 07 2172

DECISION AND JOURNAL ENTRY

Dated: March 10, 2010

WHITMORE, Judge.

{¶1} Defendant-Appellant, Mark Jones, appeals from his convictions in the Summit County Court of Common Pleas. This Court affirms.

I

{¶2} At approximately 11:00 p.m. on June 25, 2008, Jones went to the home of Pristina Sims, the mother of his two children, to question her about how she spent $10 he had given her earlier that day. After knocking loudly, Jones kicked in Sims' front door and went upstairs looking for her. A relative who was sleeping over that night called 911 once she awoke to the door being kicked open and saw a man come in the house. While there was contradictory testimony as to what occurred next, Sims sustained injuries to her right arm and upper body while she and Jones were upstairs in her bedroom. Police arrived and, based on their findings, called for an ambulance to evaluate Sims' injuries.

{¶3} Based on the foregoing events, Jones was indicted on the following offenses: one count of aggravated burglary in violation of R.C. 2911.11(A)(1), a first-degree felony; one count of domestic violence in violation of R.C. 2919.25(A), a first-degree misdemeanor; one count of domestic violence in violation of R.C. 2919.25(C), a fourth-degree misdemeanor; and one count of obstruction of official business, in violation of R.C. 2921.31(A), a second-degree misdemeanor. Following a jury trial, he was found guilty on all counts. Jones was sentenced to five years in prison for his aggravated burglary conviction and jail time on the remaining counts. Jones timely appealed his convictions, but failed to pay a deposit or seek a waiver of the deposit, so this Court dismissed his appeal.

{¶4} Jones filed an application for reopening under App.R. 26(B), arguing ineffective assistance of appellate counsel based on the dismissal of his direct appeal. On July 10, 2009, this Court granted his application for reopening. Jones asserts six assignments of error for our review, one of which incorporates his argument related to the ineffectiveness of his prior appellate counsel, as required by App.R. 26(B)(7) and this Court's July 10, 2009, journal entry. Some of his assignments of error have been rearranged to facilitate our analysis.

II

Assignment of Error Number One

"THE DEFENDANT'S CONVICTIONS WERE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

Assignment of Error Number Two

"THE TRIAL COURT ERRED IN OVERRULING THE DEFENDANT'S MOTIONS FOR ACQUITTAL AS THERE WAS INSUFFICIENT EVIDENCE TO CONVICT HIM OF THE CHARGES IN THIS CASE."

{¶5} In his first and second assignments of error, Jones argues that his convictions are based on insufficient evidence and are against the manifest weight of the evidence. Specifically,

he argues that there was no evidence that he entered Sims' house without permission or with the intent to physically harm her. Additionally, he maintains that there was no evidence to demonstrate that he caused physical harm to Sims or that he impeded police when they arrived at her home. Jones points to Sims' testimony that: (1) he was permitted to enter her house at any time; (2) she was not afraid of Jones when he entered her house that night; (3) Jones did not harm or threaten to harm her when he was there; and (4) she injured her arm when she fell in her room and hurt it further when the police handcuffed her. We disagree.

{¶6} A review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct determinations. *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600, at *1. "While the test for sufficiency requires a determination of whether the [S]tate has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." Id., citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). In order to determine whether the evidence before the trial court was sufficient to sustain a conviction, this Court must review the evidence in a light most favorable to the prosecution. *State v. Jenks* (1991), 61 Ohio St.3d 259, 274. Furthermore:

> "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." Id. at paragraph two of the syllabus; see, also, *Thompkins*, 78 Ohio St.3d at 386.

In *State v. Roberts*, this Court explained:

> "[S]ufficiency is required to take a case to the jury[.] *** Thus, a determination that [a] conviction is supported by the weight of the evidence will also be

> dispositive of the issue of sufficiency." (Emphasis omitted.) *State v. Roberts* (Sept. 17, 1997), 9th Dist. No. 96CA006462, at *2.

Accordingly, we address Jones' challenge to the weight of the evidence first, as it is dispositive of his claim of sufficiency.

{¶7} In determining whether a conviction is against the manifest weight of the evidence an appellate court:

> "[M]ust review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

A weight of the evidence challenge indicates that a greater amount of credible evidence supports one side of the issue than supports the other. *Thompkins*, 78 Ohio St.3d at 387. Further, when reversing a conviction on the basis that the conviction was against the manifest weight of the evidence, the appellate court sits as the "thirteenth juror" and disagrees with the factfinder's resolution of the conflicting testimony. Id. Therefore, this Court's "discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *State v. Martin* (1983), 20 Ohio App.3d 172, 175; see, also, *Otten*, 33 Ohio App.3d at 340.

{¶8} Jones was convicted of aggravated burglary under R.C. 2911.11(A)(1), which states that:

> "No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, *** [while] [t]he offender inflicts, or attempts or threatens to inflict physical harm on another[.]"

Jones' misdemeanor domestic violence convictions were for violations of R.C. 2919.25(A) and (C), which make it a criminal offense to "knowingly cause or attempt to cause physical harm to a

family or household member" and to "knowingly cause a family or household member to believe that the offender will cause imminent physical harm to the family or household member" by threat of force. A "family or household member" includes "[t]he natural parent of any child of whom the offender is the other natural parent[.]" R.C. 2919.25(F)(1)(b). Jones was also convicted of obstruction of official business, in violation of R.C. 2921.31(A), which prohibits any person "without privilege to do so and with purpose to prevent, obstruct, or delay the performance by a public official of any authorized act within the public official's official capacity, [from] do[ing] any act that hampers or impedes a public official in the performance of the public official's lawful duties."

{¶9} Before the presentation of any evidence and outside of the presence of the jury, the State requested that Sims be called as a court's witness based on its understanding that she intended to deny Jones had committed any of the offenses with which he was charged. The court declined to do so. Consequently, the State did not call Sims to testify in its case-in-chief. The State did call Marilyn Mullins, a relative of Sims, who testified to the following facts. Mullins spent the night at Sims' house on the night of June 25, 2008, because she had a class nearby the next morning. At approximately 10:30 p.m., she, Sims, and Sims' boyfriend, Tyler Colbert, decided to go to bed. Sims and Colbert went upstairs and Mullins slept on the couch in the living room. At approximately 11:00 p.m., Mullins "heard a crack [and] the door was kicked in[.]" She described the door as being "splintered, busted and broke" and stated "the lock *** had been busted from the molding."

{¶10} A man that Mullins did not recognize came into the living room and proceeded up the steps to the upper level of the house. Mullins took her cell phone out the back door into the yard and called 911 to report the intrusion. While on the phone with 911, she heard arguing and

loud noises coming from the upstairs of the house. Mullins heard Sims say "Mark, why did you kick in my door?" at which point Mullins realized the man who had entered the house was Jones, the father of Sims' two children. The State also played Mullins' 911 call where she reported that Sims and Jones were "whooping and hollering and raising hell[.]"

{¶11} Mullins remained on the phone with the 911 dispatcher until police were on the scene. Mullins testified the police arrived without any lights or sirens and first approached her in the backyard asking "where did [Jones] go?" to which she heard another voice reply "out the front door." At the same time, she saw a man who she assumed was Jones coming out the back door. Police yelled at the man to stop and followed him back into the house where they placed him in handcuffs.

{¶12} Police questioned Mullins inside, then she went outside to write a statement about what happened while police questioned Sims. Mullins then saw police bring Sims from the house in handcuffs and place her in the paddy wagon. After a discussion between police, Mullins, and Sims, police removed Sims' handcuffs, and she returned to her house. Mullins described Sims as a "nervous wreck" and stated she was "crying, [and] hurting" because Sims' arm had been injured. Mullins admitted, however, that she did not see who caused the injury or how it occurred. Mullins encouraged Sims to get further medical attention once she had been evaluated by the paramedics who were at the scene, but Sims declined to do so. Colbert took Sims to the hospital the next day for further evaluation. Mullins testified she did not give Jones permission to come into the house, but admitted on cross examination she did not live at or own the house where Sims resided.

{¶13} Officer Michael Radak testified that he responded to the 911 call of a burglary in progress. According to Officer Radak, he arrived with his lights off and parked next to Sims'

house. He approached the house and saw Jones coming out the front door toward the street, but then Jones turned around and re-entered Sims' house. Officer Radak ordered Jones to stop, but he did not. Officer Radak ran to the rear of the house while his partner followed Jones inside. When Officer Radak got to the rear of the house, he saw Jones exiting the back door. Officer Radak "gave [Jones] multiple commands again to stop" but instead, Jones turned around again and re-entered Sims' house through the back door. Officer Radak followed Sims inside where Sims had been detained and handcuffed by Officer Radak's partner. Officer Radak testified he was "very concerned considering [Jones' size, and that police] gave [Jones] multiple commands by multiple officers, [yet] he's doing the exact opposite and not complying with any of [their] orders[.]"

{¶14} Once handcuffed, Jones informed police that he came to Sims' house an hour earlier, entered through the back door, and went upstairs to talk to Sims. He said after he and Sims had been in a short argument, he left the house from the front door, which is when he saw the police. He admitted to seeing police in the front and back of the house.

{¶15} Officer Radak did not talk to Sims, but testified she was "very upset and crying" and that police "were having a hard time trying to get a statement from her" because she was "not very cooperative" and "wasn't talking much." On cross examination, Officer Radak admitted he did not specifically ask Jones whether he had called before coming over, had permission to enter Sims' house, or whether he had struck Sims that night.

{¶16} Officer Justin Winebrenner testified that when he arrived with Officer Radak he saw Jones walking out the front door of Sims' house. Officer Winebrenner gave Jones "a couple of commands" to come toward the officers, but instead, Jones turned around and started toward the house. Officer Winebrenner gave Jones "a couple more commands" telling him "do not go

into the house[,]" which Jones ignored as he re-entered the front door. Officer Winebrenner pursued Jones and after he entered the house, he next saw Jones was re-entering the house from the back door. Officer Radak, who was in the backyard, yelled at Jones to stop. Officer Winebrenner physically stopped Jones in the house and placed him in handcuffs. Upon entering the house, Officer Winebrenner saw "wood scattered all over" the front porch like "someone had kicked [in] the front door."

{¶17} According to Officer Winebrenner, Sims was upset, crying, and "very shaken up" when he entered the house and saw her in the living room. Sims' right forearm had "a couple of small scratches on it and [] appeared to be red" with "swelling to her right hand." Sims informed him that her right arm hurt and requested medical attention for it, at which point Officer Winebrenner called an ambulance. He also asked her if she would like Victim's Assistance to come to the house, as they generally aid the police with victims of domestic violence. Sims indicated she would like to talk to them.

{¶18} When Officer Winebrenner attempted to get a statement from Sims, she gave him differing versions of the night's events. Initially, she told him that she had fallen. Next, she indicated she tripped over the bed. She later stated that Jones had grabbed her by the arm and as she tried to swing at him, she fell backwards. Based on this information, Officer Winebrenner called his sergeant to the scene. Officer Winebrenner stated that, based on his past experience of responding to over 100 domestic violence calls, "most of the time the victims don't cooperate" and "are afraid to tell the truth" about what had happened, so he was not surprised by Sims' statements to him.

{¶19} Officer Winebrenner testified that Sims did not write a victim's statement because her arm was injured and hurt, but that after talking to the Victim's Assistance representative,

Sims said "she wanted to tell [Officer Winebrenner] the truth as to what really happened." Sims told Office Winebrenner that she was asleep in her bedroom with Colbert when she heard a loud bang, followed by footsteps coming up to her bedroom. Jones entered her bedroom and was very angry, asking her what she had done with the $10 he had loaned to her earlier that day. She told Jones she used the money to buy braids for her daughter's hair. Jones started punching her and she held her hands up to protect herself. She told Officer Winebrenner that Jones hit her in the head, arm, and back. Jones stopped hitting her when she told him the receipt and the braids were downstairs.

{¶20} Officer Winebrenner clarified that he was not present when his sergeant talked to Sims, nor did he see anyone force Sims to prepare or sign a victim's statement for police. Additionally, Officer Winebrenner identified several of the photographs that were taken of the damage to Sims' door and injuries to her arms. Officer Winebrenner also identified Sims as the other voice in excerpts of phone calls made by Jones from jail.

{¶21} During cross examination, Officer Winebrenner admitted that he only took photographs of Sims' arms, despite her statement to him that she was also hit in the head and back. He further admitted that police did not prepare a victim's statement on Sims' behalf or attempt to have her sign a victim's statement, which is often what they do in domestic violence cases where the victim is injured. Officer Winebrenner testified he signed the complaint charging Jones with domestic violence and aggravated burglary based on the statements he received from witnesses. He admitted, however, that Sims had the physical ability to sign her name to the complaint against Jones, but was unwilling to do so.

{¶22} Thomas Olenchnowicz, the paramedic who examined Sims, testified that he examined Sims' right arm based on her complaints of pain. He stated Sims told him "she was

involved in a fight with a man who hurt her right arm" but on cross examination admitted he could not recall whether Sims told him about the fight or if the police provided him with that information.

{¶23} The State concluded its presentation of evidence by playing excerpts of several inculpatory phone calls Jones made to unknown parties other than Sims while he was in jail. Throughout the calls, Jones expressed his relief that Sims was not going to press charges and his corresponding belief that the State was without any evidence to pursue the charges against him if Sims did not come to court to testify for the prosecution. Specifically, he stated that "they will drop the charges" as long as Sims did not testify or "press the issue to send [him] to jail." Jones indicated during the calls that Sims "kn[ew] it wasn't that serious" and therefore was not going to testify against him. He repeatedly stated he had "f***ed up" and was disappointed in himself for allowing himself "to do that bull****" to Sims. He remarked that his "anger is still f***ed up" and that he was in jail because "that's what happens when you lose control."

{¶24} Sims was Jones' only witness at trial. Sims testified that Mullins and Colbert were at her house on the night in question. Jones had called her between 11:30 p.m. - 12:00 a.m. to tell her that he was on his way over to her house. According to Sims, Jones was able to come and go from her house as long as he called beforehand. Because her air-conditioning was on and the phone connection was bad, Sims could not hear well and was unsure why Jones was coming.

{¶25} Sims and Colbert were talking in her room when she heard a knock at the door, followed by a loud noise. As she went down stairs, she met Jones coming up the steps asking her why she had lied to him about needing $10 for gas. She and Jones went upstairs into her bedroom to continue their discussion. At some point, Sims "flipped over off the bed and [] tried to break [her] fall" by putting her right arm out. According to Sims, Jones stayed in the doorway

to the room throughout their discussion and did not cause her any physical injury while they were together in her room. Sims offered to show Jones her gas receipt, so the two went downstairs. Sims testified the police came with "flashing sirens, [and] their lights on[,]" then appeared at her front and back door while she and Jones were looking for her receipt.

{¶26} Sims denied receiving any examination or treatment from paramedics at the scene and likewise indicated she told police she was not hurt or scared and was "fine." Sims told police she did not want them to take pictures, which caused the police sergeant to handcuff her, so she in turn let him take pictures of her arm. After the pictures were taken, Sims testified the sergeant "handcuffed [her], body slammed [her], made [her] urinate all on [her]self, put his knee on [her] back and pulled [her] up by the handcuffs, threw [her] through th[e] door, down the steps, and *** [said] 'put her in the paddy wagon.'" At that point, Sims began crying and became "hysterical" because she thought she was going to jail and was going to have her children taken away from her. Sims testified she was able to sign her name to a summons that night, but did not sign a complaint against Jones because he did not burglarize or trespass into her house, nor did he physically harm her.

{¶27} Upon cross examination, Sims confirmed that Jones is the father of two of her children. Sims stated she was "mad" at Jones for being "impatient" that night and kicking her door down. She admitted that he "has a temper" and tries to control her, but she "feel[s] no harm by it." Sims stated she told police that night that Jones had called her before coming over and that he was welcome to come to her house, even if he did kick the door down to get inside. Sims further testified that Mullins had been asleep on her living room couch since approximately 6:00 p.m., despite Mullins' testimony to the contrary.

{¶28} When questioned about statements she made to Jones during his calls to her from jail regarding the charges against him, Sims was unable to recall the details of any of those conversations. She did, however, recall telling Jones that her arm was broken, which she admitted was not true, but was done "to get sympathy or [] a reaction from him."

{¶29} Despite the conflicting evidence adduced at trial, the trier of fact was in the best position to judge the credibility of the witnesses. *State v. Smith*, 9th Dist. No. 23554, 2007-Ohio-5673, at ¶18. Accordingly, this Court will not reverse the trial court's verdict in a manifest weight challenge where the jury chose to believe certain witness testimony over the testimony of others. *State v. Crowe*, 9th Dist. No. 04CA0098-M, 2005-Ohio-4082, at ¶22. See, also, *State v. Swaby*, 9th Dist. No. 24528, 2009-Ohio-3690, at ¶12-20; *State v. Sanders*, 9th Dist. No. 24654, 2009-Ohio-5537, at ¶8-38 (affirming manifest weight challenges to convictions for domestic violence despite the victim recanting at trial previous statements of physical harm and testifying in support of the defendant).

{¶30} Based on the evidence in the record, we cannot conclude that the jury lost its way in convicting Jones of aggravated burglary, domestic violence, and obstruction of official business. The testimony revealed that Jones failed to respond to repeated commands from police to stop and allow them to speak to him as they arrived on the scene in response to Mullins' 911 call. Additionally, the evidence revealed that Jones kicked in the front door to Sims' house and proceeded to her bedroom, where he then hit her several times, injuring her arm and upper body. Moreover, Jones admitted in conversations from jail that he lost control when he went to Sims' house that night and was disappointed in what he had done to her. Accordingly, Jones' convictions are not against the manifest weight of the evidence.

{¶31} This Court's determination that the jury verdict is not against the manifest weight of the evidence necessarily includes a determination that the evidence is also sufficient to support Jones' convictions. *Roberts*, supra, at *2. Accordingly, Jones' first and second assignments of error are overruled.

Assignment of Error Number Six

> "THE DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL[.]"

{¶32} Jones argues that he was denied the effective assistance of counsel because his trial counsel failed to: (1) play phone calls made by Jones to Sims from jail in their entirety in order to put the brief segments played by the State in context; and (2) object to hearsay testimony from Officer Winebrenner. To the extent Jones also argues under App.R. 26(B)(7) and in response to this Court's July 2009 entry that his original appellate counsel was deficient and that he was prejudiced by his this deficiency, we agree, given that his counsel's performance resulted in the dismissal of his direct appeal. Consequently, this Court's prior judgment of dismissal dated January 22, 2008, is vacated.

{¶33} To determine whether Jones' right to effective trial counsel was violated, we employ the following two-step process:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland v. Washington* (1984), 466 U.S. 668, 687.

To show prejudice, Jones is required to prove to this Court that "there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different." *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph three of the syllabus.

{¶34} This Court has held that trial counsel's decision to admit or withhold certain evidence is a tactical one and does not equate to a claim for ineffective assistance of counsel. *State v. McCoy* (Jan. 30, 2002), 9th Dist. No. 20656, at *3, citing *State v. Clayton* (1980), 62 Ohio St.2d 45, 49. Jones does not elaborate as to what benefit he would have obtained at trial if his counsel played the calls he made to Sims in their entirety, nor does he explain how doing so would have produced a different result at his trial. In light of the other evidence adduced at trial, including inculpatory statements Jones made in phone calls to people other than Sims, Jones has failed to demonstrate how he was prejudiced by the admission of excerpts of his phone calls to Sims.

{¶35} Jones further maintains that his trial counsel was ineffective for failing to object on the basis of hearsay to Officer Winebrenner's testimony about what Sims told him when he arrived at her house. We have previously held that "trial counsel's failure to make objections is within the realm of trial tactics and does not establish ineffective assistance of counsel." *State v. Worthy*, 9th Dist. No. 23791, 2008-Ohio-1448, at ¶19, quoting *State v. Guenther*, 9th Dist. No. 05CA008663, 2006-Ohio-767, at ¶74. Furthermore, it is evident from the transcript that the trial court overruled Jones' frequent objections preceding and following that testimony about which he now complains. Therefore, it is apparent that his counsel's failure to object to the specific portion of Officer Winebrenner's testimony now challenged on appeal was merely a trial tactic and does not demonstrate that his counsel was deficient. *Worthy* at ¶19-21. Accordingly, Jones was not denied the effective assistance of counsel. *Bradley*, 42 Ohio St.3d at paragraph three of the syllabus. Jones' sixth assignment of error is overruled.

Assignment of Error Number Four

"THE COURT ABUSED ITS DISCRETION IN SENTENCING; (sic) UNCONSTITUTIONAL SENTENCING[.]"

{¶36} In his fourth assignment of error, Jones argues that the trial court erred because it "over-sentenced" him. Jones argues that his sentence was disproportionate to the evidence presented at trial and that when sentencing him, the court improperly relied on the prosecutor's allegation that Jones had helped forge a letter to submit to the court on his behalf, which caused the court to increase the sentence it imposed. Additionally, Jones alleges that the prosecutor's representations about a non-testifying witness, Colbert, improperly influenced the trial court to impose a sentence which is cruel and unusual. He maintains that his sentence is unconstitutional in that it violates the Eighth Amendment's prohibition against cruel and usual punishment and the Fourteenth Amendment's due process protections. We disagree.

{¶37} In *State v. Foster*, the Supreme Court found that Ohio's sentencing structure was unconstitutional to the extent that it required judicial fact-finding. *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, at paragraphs one through seven of the syllabus. In constructing a remedy, the Court excised the portions of the sentencing statutes it found to offend the Sixth Amendment and thereby granted full discretion to trial court judges to sentence defendants within the bounds prescribed by statute. See id. See, also, *State v. Dudukovich*, 9th Dist. No. 05CA008729, 2006-Ohio-1309, at ¶19. Additionally, *Foster* altered this Court's standard of review which was previously a clear and convincing error standard. *State v. Windham*, 9th Dist. No. 05CA0033, 2006-Ohio-1544, at ¶11. In a plurality opinion, the Ohio Supreme Court held that:

> "In applying *Foster* to the existing statutes, appellate courts must apply a two-step approach. First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard." *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, at ¶4.

Our review of the record reveals that Jones' sentence was within the applicable rules and statutes and was not contrary to law, as his sentence fell within the sentencing ranges set forth in R.C. 2929.14(A). Consequently, we review Jones' sentence under an abuse of discretion standard. Id. at ¶4.

{¶38} An abuse of discretion is more than an error in judgment or law; it implies an attitude on the part of the trial court that is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Furthermore, when applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court. *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶39} Post-*Foster,* it is axiomatic that "[t]rial courts have full discretion to impose a prison sentence within the statutory range and are no longer required to make findings or give their reasons for imposing maximum, consecutive, or more than the minimum sentences." *Foster* at paragraph seven of the syllabus. Therefore, post-*Foster*, trial courts are still required to consider the general guidance factors in their sentencing decisions. R.C. 2929.12(A) sets forth the general guidance factors associated with felony sentencing, including the seriousness of the conduct, the likelihood of recidivism, and "any other factors that are relevant to achieving those purposes and principles of sentencing." It does not, however, require the trial court to make a record of its rationale for imposing one sentence over another. See *State v. Estright*, 9th Dist. No. 24401, 2009-Ohio-5676, at ¶60.

{¶40} The sentencing transcript reveals that Jones was convicted of various drug and assault related criminal offenses at six different points in time, for which he had been sent to prison on five different occasions. To the extent Jones complains the trial court improperly considered statements the prosecutor made about Colbert, our review of the record requires us to

conclude otherwise. The record reveals that the prosecutor conveyed information to the trial court regarding a forged letter that Jones was involved in creating to aid him at sentencing. The letter stated that Jones was innocent of the charges and was written to appear as if it was sent from Colbert, who was in Sims' room when Jones arrived at her house the night of the offense. After reading the letter and shortly before announcing Jones' sentence, the trial court noted that despite Jones' repeated claims of innocence as to the underlying offenses, he did "not have much to say about coaching someone to forge a letter." In response, Jones stated "yes, I admitted to that."

{¶41} Jones has failed to demonstrate on appeal that the trial court improperly considered this matter when sentencing him to five years for his felony offense, in light of the range of three to ten years permitted by statute for his felony offense. R.C. 2929.14(A). Even if the trial court did consider this information, however, we conclude that doing so fits comfortably within the boundaries of "other [relevant] factors" that a court can consider at sentencing, particularly in light of Jones admitting to the conduct. R.C. 2929.12(A). Accordingly, the trial court did not abuse its discretion when sentencing Jones. Jones' fourth assignment of error is overruled.

Assignment of Error Number Five

"THE TRIAL COURT ERRED BY SENDING THE JAIL PHONE CALLS TO THE JURY ROOM WITH THE JURY DURING DELIBERATIONS[.]"

{¶42} In his fifth assignment of error, Jones argues that the trial court erred by permitting the audio recordings of the phone calls between him and Sims to go back with the jury during their deliberations. He alleges that doing so overemphasized their importance and violated his Fifth, Sixth, and Fourteenth Amendment rights. He further asserts that he was denied the right to an impartial jury given the process the court designed to ensure that the

excerpts of the recordings that were admitted into evidence were the only portions of the calls played during deliberations. We disagree.

{¶43} The Supreme Court has held that "there is no error in allowing the jury to view or hear for a second time an exhibit properly admitted into evidence." *State v. McGuire* (1997), 80 Ohio St.3d 390, 396. "Sending properly admitted evidence into jury deliberations rests within the sound discretion of the trial judge." Id. Accordingly, we incorporate by reference the abuse of discretion standard of review from Jones' fourth assignment of error into our analysis here.

{¶44} The record reveals that the trial court overruled Jones' objection to admitting into evidence the audio recordings of phone calls he made from jail, arguing that to do so would overstate their importance. The court overruled his objection and further noted that "[w]e will have to make sure that we go over with them the excerpts if they are permitted to hear them. We will have someone from our staff present when they are played to make sure of that." The prosecutor remarked that when a jury had requested to hear excerpts of a recording in previous cases, counsel for the parties were also present when the recording was played to ensure that only the excerpted portions were replayed for the jury to hear. The court again stated that it "[would] only permit the exact excerpts that were given for the jury to listen to." Jones' counsel did not object to the procedure outlined by the court for replaying the excerpted portions, despite his attempts to now challenge that process on appeal. Accordingly, he has forfeited his right to assign this issue as error on appeal and has not argued plain error. *State v. Payne*, 114 Ohio St.3d 502, 2007-Ohio-4642, at ¶23. Moreover, Jones' argument is based on speculation, as there is no evidence in the record to reflect that the jury ever requested the recordings be replayed during their deliberations. Consequently, his fifth assignment of error lacks merit and is overruled.

Assignment of Error Number Three

"THE TRIAL COURT ERRED IN ALLOWING HEARSAY TESTIMONY[.]"

{¶45} In his third assignment of error, Jones argues that the trial court erred by admitting hearsay evidence in two different instances. First, Jones argues that Officer Winebrenner's testimony that Sims told him "she is not going to take it anymore" was prejudicial and constitutes reversible error. Second, Jones argues that portions of phone calls that he made to Sims while in jail which were played by the State were inadmissible hearsay which prejudiced his trial. He argues that the court erred in overruling his objections, particularly given that Sims was available to testify and did so at trial. We disagree.

{¶46} This Court has previously stated that:

> "Generally, [a] trial court possesses broad discretion with respect to the admission of evidence. However, the trial court does not have discretion to admit hearsay into evidence. Moreover, if a court's judgment is based on an erroneous interpretation of the law, an abuse-of-discretion standard is not appropriate. Whether evidence is admissible because it falls within an exception to the hearsay rule is a question of law, thus, our review is de novo." (Internal citations and quotations omitted.) *Sanders* at ¶40, quoting *Monroe v. Steen*, 9th Dist. No. 24342, 2009-Ohio-5163, at ¶11.

Under Evid.R. 801(C), hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Under Evid.R. 802, hearsay is inadmissible unless it falls within an exception provided by the rules of evidence. The improper admission of hearsay statements can violate a defendant's Sixth Amendment right to confront the witnesses against him, where the original declarant of the offered statement is not subject to cross-examination by the defendant. See *State v. Madrigal* (2000), 87 Ohio St.3d 378, 384-85. Should hearsay statements be admitted improperly, however, such error does not necessarily require reversal of the outcome of the trial if it was harmless. See *Arizona v. Fulminante* (1991), 499 U.S. 279, 306-09. Crim.R. 52(A)

describes a harmless error as one "which does not affect substantial rights [and therefore] shall be disregarded." In order to find harmless error in a criminal matter, a reviewing court must find that the error was harmless beyond a reasonable doubt. *Chapman v. California* (1967), 386 U.S. 18, 24. "When determining whether the admission of evidence is harmless *** this Court must find 'there is no reasonable probability that the evidence may have contributed to the defendant's conviction.'" *State v. Walker*, 9th Dist. No. 06CA0006-M, 2006-Ohio-5479, at ¶25, quoting *State v. Hardin* (Dec. 5, 2001), 9th Dist. No. 3203-M, at *3, citing *State v. DeMarco* (1987), 31 Ohio St.3d 191, 195.

{¶47} At trial, Officer Winebrenner testified to several statements Sims made to him upon his arrival at her house. The trial court sustained Jones' objection to Officer Winebrenner's testimony that "[Sims] did say [Jones] ha[d] beaten her in the past" but permitted the balance of his statement "that [Sims] is not going to take it anymore." Even if the trial court erred by admitting the balance of Officer Winebrenner's statement, we conclude any such error was harmless.

{¶48} Based on the evidence adduced at trial and recounted in Jones' manifest weight challenge, we reject Jones' assertion that, but for the admission of this portion of Office Winebrenner's testimony, the result of his trial would have been different. Additionally, we note that, while Sims was not subject to cross-examination based on the State's decision not to call her in its case-in-chief, Jones called Sims as a witness in his defense. Consequently, Jones was afforded the opportunity to question Sims about her statement to Office Winebrenner in order to permit the jury to hear her version of the conversation. See, e.g., *Swaby* at ¶8 (concluding the admission of an officer's testimony about wife's statements to him was harmless error where wife did not testify for the prosecution, but was called by husband to testify in his defense).

{¶49} Jones also complains that the trial court erred in admitting portions of calls he made to Sims from jail because the calls constituted hearsay. Moreover, Jones alleges it was error to admit such hearsay testimony through Officer Winebrenner when Sims was available to testify at trial. Even assuming the trial court erred in admitting portions of Sims' conversations with Jones, in light of all the other evidence reviewed in connection with his manifest weight challenge, any alleged error was harmless. For the foregoing reasons, Jones' third assignment of error lacks merit. Accordingly, it is overruled.

III

{¶50} Jones' six assignments of error are overruled. This Court's prior judgment of dismissal dated January 22, 2008, is vacated. The judgment of the Summit County Court of Common Pleas is affirmed.

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.

BETH WHITMORE
FOR THE COURT

DICKINSON, P. J.
CONCURS

BELFANCE, J.
CONCURS IN JUDGMENT ONLY

APPEARANCES:

A. ELIZABETH CARGLE, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.