[Cite as *State v. Long*, 2011-Ohio-1050.]

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

STATE OF OHIO Appellee v. JOSHUA H. LONG Appellant	C.A. No. 25249 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 08 09 3039

DECISION AND JOURNAL ENTRY

Dated: March 9, 2011

DICKINSON, Presiding Judge.

INTRODUCTION

{¶1} As Joshua Long was driving Adeana Haught to a friend's house, he allegedly hit her in the head, threatened to kill her, and pushed her out of his truck. The Grand Jury indicted him for domestic violence and disrupting public services. A jury convicted him of domestic violence, a felony of the third degree because he had two similar prior convictions. The trial court sentenced him to five years in prison. He has appealed, arguing that the jury's determination that he had two qualifying prior convictions and that he and Ms. Haught were cohabiting at the time of the alleged assault were not supported by sufficient evidence and are against the manifest weight of the evidence. He has also argued that the trial court incorrectly failed to give an instruction on the definition of cohabiting and that it incorrectly allowed a witness to testify about battered woman syndrome. We affirm because Mr. Long's conviction is supported by sufficient evidence and is not against the manifest weight of the evidence, the trial

court's jury instructions were not plain error, and the trial court correctly allowed the expert witness to testify.

SUFFICIENCY AND MANIFEST WEIGHT

{¶2} Mr. Long's first assignment of error is that his conviction was not supported by sufficient evidence and is against the manifest weight of the evidence. Under Rule 29(A) of the Ohio Rules of Criminal Procedure, a defendant is entitled to a judgment of acquittal on a charge against him "if the evidence is insufficient to sustain a conviction . . . ." Whether a conviction is supported by sufficient evidence is a question of law that this Court reviews de novo. *State v. Thompkins*, 78 Ohio St. 3d 380, 386 (1997); *State v. West*, 9th Dist. No. 04CA008554, 2005-Ohio-990, at ¶33. We must determine whether, viewing the evidence in a light most favorable to the prosecution, it could have convinced the average finder of fact of his guilt beyond a reasonable doubt. *State v. Jenks*, 61 Ohio St. 3d 259, paragraph two of the syllabus (1991). When a defendant argues that his convictions are against the manifest weight of the evidence, however, we "must 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[s] must be reversed and a new trial ordered." *State v. Otten*, 33 Ohio App. 3d 339, 340 (1986).

{¶3} Mr. Long has argued that there was insufficient evidence to prove that his 2002 conviction for aggravated assault was against a family or household member. Under Section 2919.25(A) of the Ohio Revised Code, "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member." "If the offender previously has pleaded guilty to or been convicted of two or more offenses of domestic violence or two or more violations or

offenses of [aggravated assault] involving a person who was a family or household member at the time of the violations or offenses, a violation of division (A) or (B) of this section is a felony of the third degree . . . ." R.C. 2919.25(D)(4).

{¶4} "[If] a prior conviction elevates the degree of a subsequent offense, the prior conviction is an essential element that the state must prove beyond a reasonable doubt." *State v. Fry*, 125 Ohio St. 3d 163, 2010-Ohio-1017, at ¶90. The State, therefore, had to prove that the woman Mr. Long assaulted in the 2002 case was a family or household member. Section 2919.25(F)(1)(a) defines "[f]amily or household member," in part, 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[.]" Under Section 2919.25(F)(2), "'[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."

{¶5} The Ohio Revised Code does not define "cohabiting." The Ohio Supreme Court, however, has held that its "essential elements . . . are (1) sharing of familial or financial responsibilities and (2) consortium." *State v. Williams*, 79 Ohio St. 3d 459, paragraph two of the syllabus (1997). "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." *Id*. at 465. The Supreme Court has cautioned that "[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*.

{¶6} "The burden of [production for] establishing cohabitation is not substantial." *Dyke v. Price*, 2d Dist. No. 18060, 2000 WL 1546555 at *3 (Oct. 20, 2000)). Reviewing courts "should be guided by common sense and ordinary human experience." *Id*. (quoting *State v. Young*, 2d Dist. No. 16985, 1998 WL 801498 at *3 (Nov. 20, 1998). The Ohio Supreme Court has emphasized that "it is a person's determination to share some measure of life's responsibilities with another that creates cohabitation." *State v. Carswell*, 114 Ohio St. 3d 210, 2007-Ohio-3723, at ¶35.

{¶7} Viewing the evidence in a light most favorable to the State, we conclude there was sufficient evidence from which the jury could find that Mr. Long and the woman he assaulted in the 2002 case were cohabiting. The State presented testimony from Sergeant Theresa Davis, the officer who investigated the incident that resulted in Mr. Long's 2002 conviction. Sergeant Davis testified that she received a dispatch about a woman who was having problems with her boyfriend. When she arrived at the trailer where the incident had occurred, a woman told her that she had just been in an altercation with Mr. Long, who she described as her "live-in boyfriend." She found Mr. Long laying on a mattress in one of the bedrooms. There were clothes scattered around the room, some of which were the woman's and some of which were Mr. Long's. According to Sergeant Davis, she spoke to the woman and Mr. Long separately and they both indicated that the trailer was their residence. She also recalled that Mr. Long told her while he was being handcuffed that he wanted her out of his home. From the evidence that Mr. Long and the woman shared possession of the trailer and the same bedroom, the jury could have reasonably inferred that they "shar[ed] . . . familial or financial responsibilities and . . . consortium." *State v. Williams*, 79 Ohio St. 3d 459, paragraph two of the syllabus (1997).

{¶8} Mr. Long has also argued that the court incorrectly let Sergeant Davis testify. He has noted that, at the beginning of the trial, he objected "to any hearsay testimony that would come in" regarding what the woman Mr. Long assaulted told Sergeant Davis. Mr. Long, however, has not directed this Court to any specific answer that Sergeant Davis gave that contained inadmissible hearsay. "It is not the duty of this Court to search the record for evidence to support defendant's argument of an alleged error." *State v. Porter*, 9th Dist. No. 18384, 1997 WL 803070 at *4 (Dec. 24, 1997). Accordingly, we will not address his argument. See App. R. 16(A)(7) (providing that an appellant's brief must contain citations to the parts of the record on which he relies).

{¶9} Mr. Long has next argued that there was insufficient evidence to prove that he was convicted of domestic violence in 2008 because the judgment entry for that offense does not identify the crime for which he was convicted. He has noted that the judgment entry does not identify the offense by name, degree, or statute number. Under Rule 32(C) of the Ohio Rules of Criminal Procedure, "[a] judgment of conviction shall set forth the plea, the verdict, or findings, upon which each conviction is based, and the sentence." The Ohio Supreme Court has interpreted that rule to require four elements: (1) the plea, verdict, or finding of the court on which the conviction is based; (2) the sentence; (3) the signature of the judge; and (4) entry on the journal by the clerk of court. *State v. Baker*, 119 Ohio St. 3d 197, 2008-Ohio-3330, at syllabus.

{¶10} Although the 2008 judgment entry does not indentify the offense by name or statute number, it provides that Mr. Long has been found guilty of count number one. That count is identified in the complaint and in an arrest warrant for that case as domestic violence.

Accordingly, there was sufficient evidence from which the jury could find that Mr. Long had been convicted of domestic violence in 2008.

{¶11} Mr. Long has also argued that there was insufficient evidence that he and Ms. Haught were cohabiting at the time of his alleged assault. According to Ms. Haught, she met Mr. Long at a bar that they frequented. They started dating and eventually moved in together. Although they moved frequently, they had lived together for 14 months at the time of the assault. Ms. Haught testified that Mr. Long and she shared household duties, shared a bed, engaged in other activities like a married couple, and that they took turns paying their bills, depending on who had money at the time. We, therefore, conclude there was sufficient evidence from which the jury could find that Mr. Long and Ms. Haught cohabited. The trial court correctly denied Mr. Long's motion for judgment of acquittal under Rule 29 of the Ohio Rules of Criminal Procedure. To the extent that his first assignment of error is that his domestic violence conviction is not supported by sufficient evidence, it is overruled.

{¶12} Mr. Long has next argued that his conviction is against the manifest weight of the evidence. He has noted that, when Ms. Haught gave specifics about the bills she paid while she was living with Mr. Long, she answered that she had only paid for truck insurance, cigarettes, food, and cable. He has also noted that her testimony conflicted with the testimony he offered about their living arrangements. According to Mr. Long, he has never lived with Ms. Haught and left her for another woman months before the alleged incident. He said that he continued giving Ms. Haught rides, however, because he felt bad about having cheated on her. He testified that, at the time of the alleged assault, he was living by himself in a house that he had been hired to repair for the owner. A friend of Mr. Long's corroborated most of his story, testifying that Mr. Long had lived with him since 2002. The friend explained that, although Mr. Long might

leave for ten days or so, he always came back. The friend also testified that Mr. Long received mail at his house and paid him rent.

{¶13} The woman with whom Mr. Long had cheated on Ms. Haught testified that Mr. Long and Ms. Haught lived together and that Mr. Long sometimes referred to Ms. Haught as his wife. She also testified that, the night before the alleged assault, she slept in a spare bedroom at the house Mr. Long and Ms. Haught shared. In light of the consistency of her story with Ms. Haught's, we conclude the jury did not lose its way when it determined that Mr. Long and Ms. Haught were family or household members at the time of the assault. To the extent that Mr. Long's first assignment of error is that his conviction is against the manifest weight of the evidence, it is overruled.

JURY INSTRUCTIONS

{¶14} Mr. Long's second assignment of error is that the trial court incorrectly instructed the jury about domestic violence and that the jury's verdict form was deficient. Regarding the court's jury instructions, Mr. Long has argued that it incorrectly failed to identify his prior convictions as necessary elements to enhance the domestic violence charge. He has also argued that the court failed to adequately define what "person living as a spouse" means. Because Mr. Long did not object to the jury instructions at trial, he has forfeited all but plain error. Crim. R. 52(B). Although Rule 52(B) of the Ohio Rules of Criminal Procedure permits appellate courts to take notice of plain errors, such notice is to be taken "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Long*, 53 Ohio St. 2d 91, 97 (1978). In order to prevail on a claim of plain error, Mr. Long must show that, "but for the error, the outcome of the trial clearly would have been otherwise." *State v. Murphy*, 91 Ohio St. 3d 516, 532 (2001) (quoting *State v. Campbell*, 69 Ohio St. 3d 38, 41 (1994)).

{¶15} Mr. Long's argument that the trial court failed to adequately instruct the jury about his prior convictions is without merit. The court specifically told the jury that, "[i]f your verdict is guilty, you will separately determine whether the State has proven beyond a reasonable doubt that the defendant had previously been convicted of or pled guilty to domestic violence and/or aggravated assault against a family or household member." Although Mr. Long also seems to have argued that the court was required to explicitly tell the jury that the prior convictions were "essential elements" of the domestic violence charge, he has not cited any authority in support of his contention, let alone established plain error.

{¶16} Mr. Long's argument that the trial court incorrectly defined "person living as a spouse" is also without merit. According to Mr. Long, the court should have defined "cohabiting" using the explanation the Ohio Supreme Court gave in *State v. Williams*, 79 Ohio St. 3d 459 (1997). As we explained earlier, the State presented sufficient evidence under *Wallace* to support a finding that Mr. Long and Ms. Haught were cohabiting at the time of the alleged assault. Mr. Long has not demonstrated that the outcome of his trial would have been different if the court had defined cohabiting using its language. See *State v. Wallace*, 9th Dist. No. 06CA008889, 2006-Ohio-5819, at ¶12 (concluding that trial court's failure to define cohabiting for jury was not plain error). To the extent that Mr. Long's second assignment of error is that the trial court incorrectly instructed the jury, it is overruled.

VERDICT FORM

{¶17} Mr. Long has also argued that the jury's verdict form did not comply with Section 2945.75(A)(2) of the Ohio Revised Code. Under that section, "[if] the presence of one or more additional elements makes an offense one of more serious degree . . . [a] guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional

element or elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged." See also *State v. Pelfrey*, 112 Ohio St. 3d 422, 2007-Ohio-256, at syllabus.

{¶18} Mr. Long has argued that the verdict form was deficient under Section 2945.75(A)(2) because it did not state the degree of the offense of which he was found guilty. The form, however, contained findings by the jury that Mr. Long "has been previously convicted of . . . domestic violence" and "has been previously convicted of . . . aggravated assault against a family or household member." Accordingly, it complied with the requirement under Section 2945.75(A)(2) that it contain the additional elements needed to enhance Mr. Long's conviction. To the extent that Mr. Long's second assignment of error is that the jury's verdict form was deficient, it is overruled.

BATTERED-WOMAN SYNDROME TESTIMONY

{¶19} Mr. Long's third assignment of error is that the trial court incorrectly allowed a witness to testify regarding battered-woman syndrome. He has argued that the testimony did nothing to assist the jury in its decision and was more prejudicial than probative.

{¶20} The Ohio Supreme Court has held that testimony about battered-woman syndrome may be offered by the State in its case-in-chief in limited circumstances. *State v. Haines*, 112 Ohio St. 3d 393, 2006-Ohio-6711, at ¶65. Specifically, if a "victim's credibility is challenged upon cross-examination during the state's case-in-chief, the state may introduce expert testimony regarding battered-woman syndrome to aid the trier-of-fact in determining the victim's state of mind, e.g., to explain why she returned to the defendant despite his aggressions toward her." *Id.* Before the State may offer such rehabilitative evidence, however, it must set forth an evidentiary foundation showing that the witness at hand is, in fact, a battered woman.

Id. at ¶46-47. "[T]he party seeking to introduce battered woman syndrome evidence must lay an appropriate foundation substantiating that the conduct and behavior of the witness is consistent with the generally recognized symptoms of the battered woman syndrome, and that the witness has behaved in such a manner that the jury would be aided by expert testimony which provides a possible explanation for the behavior." *Id.* at ¶47 (quoting *State v. Stringer*, 897 P.2d 1063, 1070 (Mont. 1995)).

{¶21} While the Supreme Court has rejected "a set of rigid foundational requirements," it has imposed two specific limitations on the admission of cycle of violence and battered-woman-syndrome testimony. *State v. Haines*, 112 Ohio St. 3d 393, 2006-Ohio-6711, at ¶47. First, there must be evidence generally establishing the cycles of a battering relationship. *Id.* at ¶48. Second, the couple at issue must have "go[ne] through the battering cycle at least twice." *Id.* at ¶49 (quoting *State v. Koss*, 49 Ohio St. 3d 213, 216 (1990)). In addition, to avoid prejudice to the defendant, "experts who are called to testify in domestic violence prosecutions must limit their testimony to the general characteristics of a victim suffering from the battered woman syndrome. The expert may also answer hypothetical questions regarding specific abnormal behaviors exhibited by women suffering from the syndrome, but should never offer an opinion relative to the alleged victim in the case." *Id*. at ¶56 (quoting Matthew P. Hawes, *Removing the Roadblocks to Successful Domestic Violence Prosecutions: Prosecutorial Use of Expert Testimony on the Battered Woman Syndrome in Ohio*, 53 Clev. St. L. Rev. 133, 158 (2005-06)).

{¶22} Ms. Haught testified that, in February 2008, Mr. Long grabbed her hair and choked her, resulting in his 2008 domestic violence conviction. She testified that she stayed in a relationship with him following the incident because she loved him and thought he would change if he went to anger management classes. Ms. Haught also testified that, a few weeks before Mr.

Long assaulted her in his truck, he slammed her to the floor, injuring her back. She said she did not report the incident to the police because she loved Mr. Long. Ms. Haught also testified that she and Mr. Long had fought four times during the week before the incident in the truck and that the bruises appearing in the photographs of her arms that had been admitted were from those fights. Ms. Haught further testified that a bite mark on her body had been caused by Mr. Long in the winter of 2007.

{¶23} The expert witness who testified about battered-woman syndrome gave general information about the women's shelter where she works, the difficulty women who have experienced domestic violence have talking about it, the cycle of violence she has observed in domestic violence situations, and a diagram she described as the "Power and Control Wheel." She explained that she had never met or interviewed Ms. Haught and had not read any of the police reports in the case. She also explained that her testimony was only to try "to help people understand what [battered women] go through."

{¶24} The battered-woman syndrome testimony offered in this case met the *Haines* criteria. Mr. Long's lawyer attacked Ms. Haught's credibility on cross-examination on a number of grounds, asking her about the different addresses she gave the police for herself, whether she actually lived with Mr. Long, why she stayed with Mr. Long even though she knew he was engaging in an affair with another woman, whether she got upset when Mr. Long called her by the other woman's name, whether she got into fights and blacked-out when she drank, and whether she had previously requested a no contact order regarding Mr. Long. The State laid a foundation that Ms. Haught had been assaulted by Mr. Long and had gone through at least two cycles of violence. In addition, the expert who testified made only generalized statements about victims of battered-woman syndrome and did not offer an opinion regarding the evidence in this

case. Accordingly, we conclude the trial court correctly allowed the testimony about battered-woman syndrome.

{¶25} Mr. Long has also argued that the trial court incorrectly failed to instruct the jury about the limits of the expert's testimony. Because he did not object to the jury instructions, he has forfeited all but plain error. Crim. R. 52(B).

{¶26} In *State v. Haines*, 112 Ohio St. 3d 393, 2006-Ohio-6711, the Ohio Supreme Court wrote that "[t]rial courts should tailor the scope of the state's questioning and should also ensure that jurors are instructed as to the limits of the expert's testimony." *Id*. at ¶57. The Court, however, did not provide any guidance about what such instructions should contain. In *Haines*, the trial court had improperly allowed an expert witness to testify that the facts of the case were "very consistent with what we see in a Battered Woman's Syndrome scenario." *Id*. at ¶25. A limiting instruction in that case, therefore, was necessary. Unlike in *Haines*, the expert's testimony in this case adhered to the guidelines set out by the Ohio Supreme Court. Accordingly, because the battered-woman syndrome testimony in this case was proper and the Supreme Court has not indicated what an instruction about the limits of such testimony should include, we conclude the trial court's failure to give a limiting instruction was not plain error. Mr. Long's third assignment of error is overruled.

CONCLUSION

{¶27} Mr. Long's domestic violence conviction is supported by sufficient evidence and is not against the manifest weight of the evidence. The trial court correctly instructed the jury and correctly allowed an expert witness to testify about battered-woman syndrome. Furthermore, the jury's verdict form was not deficient. The judgment of the Summit County

Common Pleas Court 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.

CLAIR E. DICKINSON
FOR THE COURT

CARR, J.
BELFANCE, J.
CONCUR

APPEARANCES:

RICHARD P. KUTUCHIEF, Attorney at Law, for Appellant.

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