[Cite as *State v. Walburg*, 2011-Ohio-4762.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
v.	:	No. 10AP-1087 (C.P.C. No. 09CR-7083)
Damon L. Walburg,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on September 20, 2011

Ron O'Brien, Prosecuting Attorney, and *Steven L. Taylor,* for appellee.

Clark Law Office, and *Toki Michelle Clark,* for appellant.

APPEAL from the Franklin County Court of Common Pleas.

BRYANT, P.J.

{¶1} Defendant-appellant, Damon L. Walburg, appeals from a judgment of the Franklin County Court of Common Pleas finding him guilty, pursuant to jury verdict, of one count of kidnapping in violation of R.C. 2905.01, one count of felonious assault in violation of R.C. 2903.11, and one count of domestic violence in violation of R.C. 2919.25. Because (1) sufficient evidence and the manifest weight of the evidence support defendant's convictions, (2) the trial court did not err in instructing the jury on the domestic

violence charge or in denying defendant's motion for a mistrial, and (3) the trial court did not abuse its discretion in excluding evidence of a witness's prior convictions, we affirm.

I. Facts and Procedural History

{¶2} By indictment filed November 25, 2009, defendant was charged with one count of kidnapping, a felony of the first degree, one count of felonious assault, a felony of the second degree, and one count of domestic violence, a misdemeanor of the first degree. The charges arose out of an incident which began on November 15, 2009.

{¶3} In the days prior to November 15, 2009, defendant and the victim, who were in a relationship, had been staying at the home of defendant's mother on Willowgate Road in Grove City, Ohio; defendant was using his mother's car at that time, as she was away on a trip to Florida. On November 15, the couple went to a bar that was not far from defendant's residence on Ridgeway Avenue in Columbus. While at the bar, both defendant and the victim consumed alcohol. Although each stated he or she was not drunk, defendant testified the victim was intoxicated and stumbled when she stood up.

{¶4} At the bar, defendant encountered a friend who bought some beers for defendant and the victim. According to defendant, the victim, while on the phone with her sister, became engaged in a heated verbal exchange with another woman at the bar. Before a confrontation could ensue, defendant took the victim to his residence on Ridgeway, dropped her off, and left. Although defendant testified he planned to take the victim to her sister's house when he returned to Ridgeway, the victim denied it.

{¶5} Defendant went back to the bar, played a game of pool with his friend, and brought his friend back to Ridgeway to show him a bike defendant was trying to sell him. By contrast, the victim testified defendant and his friend came back looking for Viagra

pills. The victim stated defendant could not find the pills, swore at her and accused her of taking them. When the victim asked defendant how long he was going to be, he said, "[W]hy bitch. You ain't got nowhere to go." (Tr. 64.) Defendant left with his friend; the victim, deciding she would leave, started to pack her bags.

{¶6} According to the victim, defendant came back from dropping off his friend and began to go through her bags, removing certain items and telling her she could not take them with her. Although the parties gave differing testimony concerning the events which followed, both testified that an altercation ensued. The victim testified defendant hit, kicked, and fell on her, hit her with a glass vase, dragged her through broken glass, tied her hands behind her back, and electrically shocked her. Defendant testified he hit, kicked and restrained the victim only to prevent her from stabbing him, and he denied ever electrically shocking her. Both testified the altercation ended when defendant's mother called wanting her car returned.

{¶7} The two drove to Willowgate in the morning hours on Monday, November 16, where defendant told his mother the couple's injuries were the result of a bar fight. Defendant and the victim stayed at Willowgate for the next three days. When the victim complained to defendant's mother about a pain in her side, defendant's mother suggested they call the emergency squad, but the victim declined. After defendant left on Wednesday morning to do some work, defendant's mother overheard the victim talking to her sister on the telephone about how she and defendant "had got into it." (Tr. 320-21.) Defendant's mother then insisted the victim call the emergency squad, and an ambulance transported the victim to Grant Hospital.

{¶8} The jury resolved the conflicting evidence against defendant and returned verdicts finding defendant guilty of each crime charged in the indictment.

II. Assignments of Error

{¶9} Defendant appeals, assigning the following errors:

> ASSIGNMENT OF ERROR NO. 1:
>
> THE TRIAL COURT ERRED WHEN IT RULED THAT PAST CONVICTIONS ARE INADMISSIBLE TO IMPEACH A WITNESS PURSUANT TO EVID. R. 609, WHERE THE CONVICTION IS OVER TEN YEARS, YET THE SENTENCE FOR THAT CONVICTION IS SERVED WITHIN THAT TEN YEAR TIME FRAME, ON THE BASIS THAT THE PROBATIVE VALUE IS OUTWEIGHED BY PREJUDICE.
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> ASSIGNMENT OF ERROR NO. 2:
>
> THE TRIAL COURT ERRED WHEN IT DETERMINED THAT THE OFFENSE OF POSSESSION OF CRIMINAL TOOLS IS NOT A CRIME OF DISHONESTY.
>
> ASSIGNMENT OF ERROR NO. 3:
>
> THE TRIAL COURT ERRED WHEN IT RULED THAT COHABITATION FOR PURPOSES OF A DOMESTIC VIOLENCE CHARGE IS A JURY QUESTION, SIMPLY BECAUSE A WITNESS SAYS THEY LIVE AT A PARTICULAR LOCATION.
>
> ASSIGNMENT OF ERROR NO. 4:
>
> THE CONVICTION OF APPELLANT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> ASSIGNMENT OF ERROR NO. 5:
>
> THE TRIAL COURT ERRED WHEN IT FAILED TO GRANT THE DEFENDANT'S MOTIONS FOR ACQUITTAL.

> ASSIGNMENT OF ERROR NO. 6:
>
> THE TRIAL COURT ERRED WHEN IT REFUSED TO GRANT THE DEFENDANT'S MOTION FOR MISTRIAL AFTER A WITNESS STATED THAT DEFENDANT HAD COMMITTED BAD ACTS.

For ease of discussion, we address defendant's assignments of error out of order.

III. Fifth Assignment of Error – Crim.R. 29 and Sufficiency of Evidence

{¶10} Defendant's fifth assignment of error contends the trial court erred in denying his Crim.R. 29 motions for acquittal at the close of the state's evidence, at the close of all the evidence, and after the jury returned its verdicts.

{¶11} Pursuant to Crim.R. 29(A), a court "shall order the entry of a judgment of acquittal of one or more offenses * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." Because a Crim.R. 29 motion questions the sufficiency of the evidence, "[w]e apply the same standard of review to Crim.R. 29 motions as we use in reviewing the sufficiency of the evidence." *State v. Hernandez,* 10th Dist. No. 09AP-125, 2009-Ohio-5128, ¶6; *State v. Tenace,* 109 Ohio St.3d 255, 2006-Ohio-2417, ¶37.

{¶12} Whether evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Sufficiency is a test of adequacy. Id. The evidence is construed in the light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus; *State v. Conley* (Dec. 16, 1993), 10th Dist. No. 93AP387. When reviewing the sufficiency of the evidence, the court does not weigh the credibility of the witnesses. *State v. Yarbrough,* 95 Ohio St.3d 227, 2002-Ohio-2126, ¶79.

{¶13} R.C. 2905.01 governs the offense of kidnapping and states that "[n]o person, by force, threat, or deception * * * shall remove another from the place where the other person is found or restrain the liberty of the other person" for the purpose of either facilitating the commission of a felony or flight thereafter, or terrorizing or inflicting serious physical harm on the victim or another. R.C. 2903.11(A) addresses felonious assault and states that "[n]o person shall knowingly * * * [c]ause serious physical harm to another." In defining domestic violence, 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." "Family or household member" means a person living as a spouse who resides with the offender. R.C. 2919.25(F)(1)(a). A "person living as a spouse" includes a person who is cohabitating with the offender. R.C. 2919.25(F)(2).

{¶14} The state presented the victim's testimony. She stated that when defendant returned to Ridgeway after dropping off his friend, defendant picked her up, threw her over to the couch, straddled her and started hitting her. As he continued to hit her, she unsuccessfully tried to get him to stop, pulled out the knife she had on her, and stabbed him twice. Defendant discarded the knife, threw the victim to the floor, and fell onto her back, repeating the action "like a wrestler would do to someone." (Tr. 68.) He then pulled her hands behind her back, tied them with a belt and some rope, and continued falling on her. When defendant finally stood, he started kicking her side, face, head, and back, hitting her all over her body. After striking her with a glass vase and causing the vase to shatter, defendant picked up the victim by her arms and dragged her through the shattered glass.

{¶15} While the victim's hands were bound behind her back, defendant "stuck a plug in the wall and snatched it from whatever it was attached to and like had a jug of water on [her] and stuck it to [her] hair, the plug, so it shocked [her]" three times, hurting her. She stated he kept her hands tied for about five hours, but took breaks during the beating so he could try to stop the bleeding from his own cuts. During the ordeal, he made comments to her like, "I should kill you and put you on the side of Sunbury Road and nobody [sic] ever find you." (Tr. 85, 88.) When it was time to take his mother's car home, defendant freed the victim's hands.

{¶16} The victim's treating physician upon entering the emergency room stated the victim rated her pain as seven on a scale of one to ten. The victim had a subconjunctival hemorrhage in her left eye, multiple broken ribs, a collapsed lung, a transversal fracture of the upper surface of her mouth, some minimally displaced nasal fractures, a lacerated liver, and bruising. The doctor testified the most common cause of a liver laceration is blunt force injury.

{¶17} The state's evidence, if believed, was sufficient to support each charge against defendant. In the beginning of the altercation, defendant threw the victim onto the couch, straddled her and hit her with a closed fist, mainly hitting her on the "left side of [her] face like in the eye," as a result of which the victim suffered a subconjunctival hemorrhage in her left eye. He followed that action with body-slamming the victim. Such evidence is sufficient to support the felonious assault charge, as defendant knowingly caused serious physical harm to the victim. See *State v. Messer-Tomak*, 10th Dist. No. 07AP-720, 2008-Ohio-2285, ¶11, 13 (concluding sufficient evidence supported felonious assault conviction where evidence showed defendant initiated the attack by punching the

victim with a closed fist and the victim suffered serious harm). See also R.C. 2901.01(A)(5) (defining serious physical harm).

{¶18} Defendant then tied the victim's hands with a belt and some rope and, while she was restrained, kicked, hit, and jumped on her, electrically shocked her, and threatened her life. Such evidence is sufficient to support a "restraint" kidnapping conviction, as defendant used force to restrain the victim's liberty for the purpose of terrorizing her or inflicting serious physical harm on her. See *State v. Hughes*, 10th Dist. No. 05AP-1287, 2006-Ohio-5411, ¶20, discretionary appeal not allowed, 112 Ohio St.3d 1493, 2007-Ohio-724 (concluding sufficient evidence supported the kidnapping charge where the "defendant restrained [the victim] for the purpose of terrorizing her," as "his actions, taken in a dark home, [were] accompanied by threats of duct taping the women and killing them").

{¶19} Finally, the evidence also was sufficient to support defendant's domestic violence conviction. In addition to the victim's testimony about the injuries she suffered at defendant's hands, the victim testified she and defendant started living together shortly after they began dating in August of 2007 or 2008, and she affirmed she was living at Ridgeway as of November 2009. She stated she shared the Ridgeway residence with defendant, kept clothes there, and stayed there overnight. If believed, the victim's testimony is sufficient to establish she and the defendant were cohabitating at the time of the offense, such that she was a family or household member for purposes of R.C. 2919.25(F). See *State v. West*, 10th Dist. No. 06AP-114, 2006-Ohio-5095, ¶14, discretionary appeal not allowed, 112 Ohio St.3d 1492, 2007-Ohio-924 (concluding sufficient evidence supported trier of fact's finding that the victim was a family or

household member for purposes of domestic violence statute where the victim testified the two were boyfriend and girlfriend and she lived at his house with him).

{¶20} Because the evidence, when viewed in the light most favorable to the state, is sufficient to support defendant's convictions, the trial court properly overruled defendant's Crim.R. 29 motions. Defendant's fifth assignment of error is overruled.

IV. Fourth Assignment of Error – Manifest Weight

{¶21} Defendant's fourth assignment of error contends his convictions are against the manifest weight of the evidence. Defendant attacks the witnesses' credibility and asserts the manifest weight of the evidence supports his self-defense theory.

{¶22} Sufficiency of the evidence and manifest weight of the evidence are distinct concepts; they are "quantitatively and qualitatively different." *Thompkins* at 386. When presented with a manifest weight argument, we weigh the evidence in a limited fashion to determine whether sufficient competent, credible evidence permits reasonable minds to find guilt beyond a reasonable doubt. *Conley*. *Thompkins* at 387 (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony").

{¶23} In the manifest weight analysis the appellate court considers the credibility of the witnesses and determines whether the jury "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The jury may take

note of any inconsistencies and resolve them accordingly, "believ[ing] all, part or none of a witness's testimony." *State v. Raver,* 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶24} Defendant's testimony contradicted the victim's, as defendant stated that after he came back from dropping off his friend, the victim was sitting downstairs smoking a cigarette. Defendant told her "let's go," since he was going to take her to her sister's house. He turned out the kitchen light, and when he returned from the kitchen, she "ran up on [him]." (Tr. 356, 358.) The victim told him that "if [he] didn't want to be bothered with [her], [he] should have left [her] alone a long time ago," and she stabbed him. (Tr. 359.)

{¶25} According to defendant, he reached down to his side to discover a handful of blood. He grabbed the victim's hands where she still held the knife, and the two fell back over a table and chair. Defendant stood up, realized he had pulled a groin muscle, and fell backwards. When the victim got up and came after him with the knife, he kicked her midsection to prevent her from stabbing him again. She stepped back and came at him again, so he kicked her a second time, causing her to hit the table and fall. She came at him yet again with the knife, so he hit her eye. He then grabbed her arm and, while trying to shake the knife out of her hand, he "was elbowing her on the side of her face." (Tr. 371.)

{¶26} Defendant stated that once he succeeded in knocking the knife out of the victim's hand, she reached over on the coffee table, grabbed a glass candy dish, and tried to hit him with it. He blocked it by hitting her arm, "it broke and apparently it must have hit her." (Tr. 372.) The glass from the broken candy dish being scattered on the floor, the victim picked up a piece of glass; defendant grabbed her arm and fell on top of her. The

victim fell onto the glass, and they struggled on the floor for a moment. Defendant said the whole encounter up to that point lasted maybe five or six minutes.

{¶27} Defendant testified he believed the victim was trying to kill him, and he feared for his life because she would not stop the attack on him. Because the victim still had a piece of glass in her hand, defendant took a belt from his work table and looped the belt around her hands to restrain her. He stated he did not tie or secure the belt but simply held on to the end of the belt until "she stopped showing so much aggressiveness; and then [he] got up." (Tr. 377-78.) He said he restrained her for "a minute maybe," with her hands in front of her body, but he never used a cord to shock her, explaining that stripped wires lying around the house were not uncommon because of his job. He also stated that, immediately after the incident, the victim calmed down, cleaned up the house and found him fresh clothes to wear. Defendant suffered two stab wounds to his side.

A. Kidnapping

{¶28} Defendant claims he did not kidnap the victim, as she voluntarily went to his mother's house with him. Defendant further contends he did not prevent the victim from going to the hospital; to the contrary, he asserts, she did not want to go to the hospital because a warrant had issued for her arrest. He added she was always free to leave or use the telephone, noting he pretty much stayed away from her while they were at Willowgate. Defendant's mother corroborated that, while she was present, the victim stayed in the spare bedroom and defendant stayed in the basement. Defendant's mother stated nothing indicated the victim was being held against her will at Willowgate.

{¶29} The victim admitted she had a warrant for her arrest at the time of the incident but denied the warrant influenced her desire to go to the hospital. Moreover,

contrary to defendant's testimony, the victim testified defendant forced her to go to his mother's house, he never really left her side while she was there, and his presence left her too afraid to tell anybody she needed medical attention. The victim admitted the house had a telephone but she said could not get to it because she could not get out of bed.

{¶30} If the jury believed the victim's version of events, as it was entitled to do, then credible, competent evidence demonstrated defendant terrorized the victim or inflicted serious physical harm on her, or both, while he restrained her liberty. Although defendant claimed he restrained the victim only for a small period of time, his restraining the victim's movement for "some period of time" was enough to satisfy the restraint element of the kidnapping charge. *State v. Elmore*, 111 Ohio St.3d 515, 2006-Ohio-6207, ¶49, cert. denied (2007), 551 U.S. 1133, 127 S.Ct. 2974 (concluding defendant restrained the victim for some time, so as to satisfy kidnapping charge, where he tied her hands and later untied them when she complained they were bound too tightly). Moreover, the victim told the doctor when she arrived at the hospital that her boyfriend, among other things, stripped an electrical cord and electrically shocked her. She stated she would pass out, and he would pour water or alcohol on her to shock her again, a version of events the victim reported at the hospital and to the jury. As such, defendant's kidnapping conviction was not against the manifest weight of the evidence.

B. Felonious Assault

{¶31} Defendant contends his felonious assault conviction is against the manifest weight of the evidence because he resorted to self-defense to protect himself from the

victim, noting the victim admitted to stabbing him. Defendant claims the doctor's testimony supports the conclusion that he acted in self-defense.

{¶32} To prove self-defense, defendant had the burden to establish, by a preponderance of the evidence, he (1) was not at fault in creating the situation giving rise to the altercation, (2) had a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force, and (3) did not violate any duty to retreat or avoid the danger. *State v. Puckett*, 10th Dist. No. 06AP-330, 2006-Ohio-5696, ¶22, citing *State v. Robbins* (1979), 58 Ohio St.2d 74, paragraph two of the syllabus. Defendant was only permitted to use such force as was reasonably necessary to protect himself from the imminent use of unlawful force. Id., citing *Akron v. Dokes* (1986), 31 Ohio App.3d 24, 25.

{¶33} To support his defense of self-defense, defendant asserts the victim was exceptionally violent on the night of the incident, quite possibly as a result of smoking crack cocaine. Defendant testified the victim started the fight by stabbing him, and he never struck her other than to prevent her from stabbing or killing him. Although the victim admitted to smoking crack cocaine on the night of the incident, she claimed not only that she smoked crack cocaine with defendant but that defendant started the fight when he threw her onto a couch and punched her with a closed fist. On weighing the testimony, the jury reasonably could have concluded, as it was entitled to do, that the victim was the more credible witness and defendant was the initial aggressor.

{¶34} Even if the jury believed defendant's version of who was the initial aggressor, the jury could have questioned whether defendant used more force than was reasonably necessary to protect himself. Defendant testified that all of the victim's injuries

occurred as a result of the two struggling over the knife, in the course of which they fell over furniture; he then kicked her twice, punched her once, and elbowed her in the face a couple of times. The victim, however, suffered multiple broken ribs, a bloody and blackened eye, nasal fractures, a fracture of the upper surface of her mouth, a collapsed lung and lacerated liver.

{¶35} Although the victim's doctor testified many of the victim's injuries could have been the result of falling over furniture, he stated it would have taken a great deal of force to lacerate her liver. To that end, the doctor testified it would be "hard to believe" the victim's injuries were the result of the other person's acting in self-defense, noting "[s]he got beat on pretty hard." (Tr. 190.) The doctor admitted he could not say whether the victim's injuries were the result of an offensive or defensive attack, but he added that her injuries were consistent with those sustained in a high speed crash or falling from a two to three story building.

{¶36} We cannot say the jury clearly lost its way in rejecting defendant's self-defense argument. The jury was required to assess the credibility of the witnesses and determine which version of the events it believed. The victim's testimony, the extent of her injuries, and the testimony of the treating physician provide competent, credible evidence upon which the jury could find defendant failed to prove by a preponderance of the evidence that he acted in self-defense.

C. Domestic Violence

{¶37} Finally, concerning the domestic violence charge, defendant contends the victim was not a family or household member within the meaning of the statute because the victim never cohabitated with defendant. The victim testified she had been living with

defendant at Ridgeway for the one to two years prior to the night of the incident, and she told the detective investigating the case that her injuries happened at Ridgeway where she lived with defendant. The testimony, however, was not undisputed.

{¶38} On cross-examination, the victim stated that even though she lived at Ridgeway, she did not use it as her mailing address, the utility bills were not in her name, and she did not have a key to the house. She stated that, even if defendant were not at Ridgeway, she sometimes was there, but only with his permission. Defendant's son testified the victim did not live at his father's house on Ridgeway, "but she would be there all the time," kept clothes there and stayed overnight. Defendant testified that when the victim returned from visiting her mother in Atlanta, she first went to stay with her sister but then stayed with him for a few days at Ridgeway. He stated she was supposed to stay with him for three or four days before she returned to Atlanta.

{¶39} In *State v. Williams*, 79 Ohio St.3d 459, 1997-Ohio-79, the Supreme Court of Ohio held that the offense of domestic violence, as expressed in R.C. 2919.25, "arises out of the relationship of the parties rather than their exact living circumstances." Id. at paragraph one of the syllabus. The essential elements of "cohabitation are: (1) sharing familial or financial responsibilities and (2) consortium." Id. at paragraph two of the syllabus. "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. Each case is unique 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.*

Colter (Mar. 17, 2000), 2d Dist. No. 17828, quoting *State v. Young* (Nov. 20, 1998), 2d Dist. No. 16985 (concluding that in determining whether two persons cohabitated for purposes of R.C. 2919.25(F), " 'courts should be guided by common sense and ordinary human experience' ").

{¶40} The victim testified defendant became angry with her if she did not fulfill household duties properly. She explained that "if the ice trays wasn't filled, he would go crazy." (Tr. 59.) Similarly, if she returned from being out of town and the house was dirty, her job was to clean it. She also stated that when she attempted to pack her bags to leave, defendant would not let her take anything she had bought, explaining "if I bought soap or whatever or I might try to take whatever I may have bought, like groceries or whatever, he would take everything." (Tr. 65.) With that evidence, the jury reasonably could have concluded that, since defendant expected the victim to perform household duties and the victim contributed financially toward the household in buying soap and groceries, the two were sharing certain familial or financial responsibilities.

{¶41} The victim further testified she had known defendant for 25 years. They became romantically involved for the first time when she was 19 and started dating seriously in 2007 or 2008. Defendant's son testified the victim's children came to Ridgeway, although they did not stay overnight there. Defendant's son and sister understood the victim to be defendant's girlfriend. Defendant testified that while the victim was visiting her mother in Atlanta, defendant talked to her on the telephone everyday. Based on that evidence, the jury reasonably could have found consortium due to the victim and defendant's long time relationship, solace, comfort, and aid of each other.

Such evidence indicates the incident between defendant and the victim was not "stranger" violence. *Williams* at 462.

{¶42} With that evidence, the jury did not clearly lose its way in concluding the victim was a family or household member under R.C. 2919.25(F). Although the evidence indicated the victim did not use Ridgeway as her permanent address, the evidence also indicated she, while dating defendant, lived there with him. Accordingly, the record contains competent, credible evidence on which the jury reasonably could conclude defendant and the victim were cohabitating for purposes of the domestic violence statute. See *State v. Williams* (Oct. 6, 2000), 2d Dist. No. 99 CA 72 (noting that although the defendant and the victim did not maintain a "traditional" lifestyle, as neither were employed nor had a residence, the couple stayed together at the house of various friends and families, borrowed family members' cars to transport each other, and spent the money they had on food for each other, so that the two "shared their familial and financial responsibilities, insofar as they had any").

{¶43} In the end, defendant's assignment of error reduces to his argument that the jury should not have believed the victim's testimony on the three charges, given her prior convictions and the inconsistencies in her testimony. Even if the record displayed reasons not to believe the victim's testimony, her testimony was not unbelievable, especially in light of the extensive injuries she suffered. The jury did not clearly lose its way when it believed the victim's testimony to the extent it found defendant guilty of kidnapping, felonious assault, and domestic violence. Defendant's fourth assignment of error is overruled.

V. Third Assignment of Error – Jury Instructions

{¶44} Defendant's third assignment of error asserts the trial court erred when it failed to instruct the jury on the above-noted *Williams* factors that define cohabitation under the domestic violence statute. Generally, whether two people are cohabitating is a question of fact for the jury to resolve. *State v. McQueen*, 10th Dist. No. 09AP-195, 2009-Ohio-6272, ¶25, discretionary appeal not allowed, 124 Ohio St.3d 1540, 2010-Ohio-1557, citing *State v. Miller* (1995), 105 Ohio App.3d 679.

{¶45} Although defendant moved for acquittal contending the state presented no evidence the victim was a family or household member, defendant did not object to any portion of the court's jury instruction on domestic violence, including the trial court's instruction premised on the general R.C. 2919.25(F) definition of "family or household member." According to the court's instruction, a family or household member is a person living as a spouse who is residing, or has resided, with the defendant, while a person living as a spouse is one who is cohabitating with the defendant or who has cohabitated with the defendant within the last five years. (Tr. 535-36.)

{¶46} "As a general rule, the failure to object at trial or to request specific jury instructions waives," or forfeits, "all but plain error with respect to the jury instructions given." *State v. Johnson*, 10th Dist. No. 08AP-652, 2009-Ohio-3383, ¶37, discretionary appeal not allowed, 123 Ohio St.3d 1426, 2009-Ohio-5340, citing *State v. Hartman*, 93 Ohio St.3d 274, 289, 2001-Ohio-1580. See also *State v. Braden*, 98 Ohio St.3d 354, 2003-Ohio-1325, ¶75, cert. denied, 540 U.S. 865, 124 S.Ct. 182, citing Crim.R. 30(A); *State v. Long* (1978), 53 Ohio St.2d 91, paragraphs one and two of the syllabus; Crim.R. 52(B). Because defendant did not request a more in depth instruction on the "family or

household member" element of the domestic violence charge, or object to the domestic violence instruction, defendant has forfeited all but plain error review on appeal.

{¶47} Pursuant to Crim.R. 52(B), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." This rule places three limitations on a reviewing court's decision to correct an error despite the absence of a timely objection at trial: (1) "there must be an error, i.e., a deviation from a legal rule," (2) the error must be plain, so that it constitutes "an 'obvious' defect in the trial proceedings," and (3) the error must have affected "substantial rights" such that "the trial court's error must have affected the outcome of the trial." *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68. The decision to correct a plain error is discretionary and should be made "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id., quoting *Long* at paragraph three of the syllabus.

{¶48} A defendant generally "is entitled to have the jury instructed on all elements that must be proved to establish the crime with which he is charged." *State v. Adams* (1980), 62 Ohio St.2d 151, 153. Even so, the "[f]ailure of a court to separately and specifically instruct the jury on every essential element of each crime with which an accused is charged does not per se constitute plain error under Crim.R. 52(B)." Id. at paragraph two of the syllabus. "If [a] term is one of common usage and is actually used in that sense, the failure to define the term does not mandate a reversal." *State v. Watkins*, 10th Dist. No. 01AP-1376, 2002-Ohio-5080, ¶39, citing *State v. Riggins* (1986), 35 Ohio App.3d 1, 8.

{¶49} The trial court's domestic violence jury instruction tracked nearly verbatim the language of the statute. See R.C. 2919.25. Indeed, defendant does not contend the trial court failed to specifically instruct the jury on each element of domestic violence. Rather, defendant contends the trial court erred by not providing the jurors with the *Williams* factors defining cohabitation. Although *Williams* defined cohabitation, the term "is not an essential element of domestic violence" as it "is just one of the two ways in which the victim can be qualified as a 'person living as a spouse.' " *State v. Wallace*, 9th Dist. No. 06CA008889, 2006-Ohio-5819, ¶11, citing *State v. Jensen*, 11th Dist. No. 2005-L-193, 2006-Ohio-5169, ¶18. Moreover, a common sense understanding of the word cohabitation embodies many of the factors announced in *Williams*; the term is one of common usage and the trial court used the term in its ordinary sense when instructing the jury. The jury instruction on domestic violence was not misleading, and defendant does not explain how the definition used prejudiced his case. See *Hartman*. Defendant failing to demonstrate plain error, we overrule his third assignment of error.

VI. Sixth Assignment of Error – Mistrial

{¶50} Defendant's sixth assignment of error asserts the trial court erred in failing to grant his motion for a mistrial. The victim on cross-examination testified defendant took her home from the bar, not because she was intoxicated but because someone called him about some business. When defendant on cross-examination asked the victim whether defendant worked as a cable installer, she stated he worked in "[c]able, electric, gas, water." (Tr. 129.) On redirect-examination, the prosecution similarly asked the victim the nature of defendant's business. She responded that "he does illegal cable, illegal gas, illegal electric, illegal water, puts up cameras illegally, sells powder cocaine at the bar

when he goes." (Tr. 147.) After the victim made the above statement, defendant objected, moved to strike the victim's testimony and moved for a mistrial. The court sustained the objection but denied the request for a mistrial.

{¶51} "In general, evidence of an individual's other criminal acts, which are independent from the offense for which the individual is on trial, is inadmissible in a criminal trial." *State v. Jordan*, 10th Dist. No. 05AP-1330, 2006-Ohio-5208, ¶32, citing *State v. Wilkinson* (1980), 64 Ohio St.2d 308, 314; Evid.R. 404(B). A court reviewing a trial court's decision on a motion for mistrial defers to the judgment of the trial court, as it is in the best position to determine whether the circumstances warrant a mistrial. *State v. Glover* (1988), 35 Ohio St.3d 18, 19. We thus review a trial court's decision for an abuse of discretion. *Columbus v. Aleshire,* 187 Ohio App.3d 660, 2010-Ohio-2773, ¶42, citing *State v. Sage* (1987), 31 Ohio St.3d 173, 182.

{¶52} "A mistrial should not be ordered in a criminal case merely because some error or irregularity has intervened, unless the substantial rights of the accused or the prosecution are adversely affected." *State v. Reynolds* (1988), 49 Ohio App.3d 27, 33. A trial court should only declare a mistrial when "the ends of justice so require and a fair trial is no longer possible." *State v. Franklin* (1991), 62 Ohio St.3d 118, 127, cert. denied, 504 U.S. 460, 112 S.Ct. 2315 (citations omitted). To determine whether the defendant was deprived of a fair trial, we must determine whether, "absent the improper remark[], the jury would have found the appellant guilty beyond a reasonable doubt." *Aleshire,* citing *State v. Maurer* (1984), 15 Ohio St.3d 239, 267.

{¶53} Before the trial began, the court instructed the jury that, if an objection were sustained, the jury was to "completely disregard the question and the answer" and "not to

consider either for any purpose whatsoever." (Tr. 27.) The court reiterated its curative instruction immediately after it sustained the objection to the victim's testimony and in the jury instructions at the end of the trial. The jury is presumed to have followed the trial court's instruction. *State v. Noling*, 98 Ohio St.3d 44, 2002-Ohio-7044, ¶39; *State v. Rowe* (1993), 92 Ohio App.3d 652, 672-73, jurisdictional motion overruled, 69 Ohio St.3d 1403. Because the victim's reference to defendant's criminal occupations was an isolated reference, the trial court immediately sustained defendant's objection, and the court instructed the jury to disregard the question and response, the trial court did not abuse its discretion in denying defendant's motion for a mistrial. *State v. McCree*, 8th Dist. No. 87951, 2007-Ohio-268, ¶40 (determining the trial court did not err in overruling the defendant's motion for a mistrial because the witness's reference to the defendant's criminal history was an isolated reference, the trial court properly struck the testimony and the court advised the jury to disregard it); *State v. Woodward*, 10th Dist. No. 03AP-398, 2004-Ohio-4418, ¶35 (determining court's prompt remedial actions after prejudicial testimony prevented finding that the trial court abused its discretion in denying a motion for a mistrial).

{¶54} Defendant's sixth assignment of error is overruled.

VII. First Assignment of Error – Prior Convictions

{¶55} Defendant's first assignment of error asserts the trial court erred when it excluded the victim's prior convictions which defendant sought to introduce in an attempt to impeach her credibility.

{¶56} Subject to Evid.R. 403, parties may attack the credibility of a witness with evidence that the witness has been convicted of a crime if the crime was punishable by

death or imprisonment in excess of one year. Evid.R. 609(A)(1). Evidence of a conviction is inadmissible if "more than ten years has elapsed since the date of the conviction or of the release of the witness from confinement, or the termination of * * * probation * * * imposed for that conviction, whichever is the later date." Evid.R. 609(B).

{¶57} At the beginning of trial, the state represented to the court that the victim had Florida felony drug possession convictions from 1999 and 2000. The Bureau of Criminal Identification & Investigation ("BCI") report of the victim's criminal history indicates the victim was arrested in Florida in November 1999 for felony drug possession; the charge description states "possession rock cocaine." The next entry, which has the same charge tracking number as the November 1999 arrest, indicates that on April 13, 2000 the victim was charged with felony drug possession; the charge description states "controlled substance without prescription." Id. The last entry, also on April 13, 2000, reflects that the victim was sentenced to one year and six months of probation on the felony drug possession charge, rendering the conviction potentially admissible under Evid.R. 609(A)(1). Despite defendant's request to admit the evidence, the court stated that, even if the conviction fell within the ten-year timeframe, it was excluding the conviction because the prejudicial effect of the drug conviction outweighed its probative value.

{¶58} Defendant contends the trial court erred in excluding the Florida felony drug conviction because the credibility of the state's primary witness was critical in this case. Defendant acknowledges the trial court indicated it may have admitted the conviction if it were more recent, but contends "the fact that [the victim] smoked crack cocaine and

admitted to it on the day of the offense alleviate[d] any reluctance the court may have had" about the prejudicial effect of the evidence. (Appellant's brief, 5-6.)

{¶59} "Evid.R. 609 as amended in 1991 makes clear that Ohio trial judges have discretion to exclude prior convictions where the court determines that the probative value of the evidence outweighs the danger of unfair prejudice or confusion of the issues, or of misleading the jury." *State v. Goney* (1993), 87 Ohio App.3d 497, 501, citing *State v. Wright* (1990), 48 Ohio St.3d 5 (noting "[t]he trial judge possesses broad discretion under Evid.R. 609 to determine the admissibility of prior convictions for impeachment purposes"). See also Evid.R. 403(A). Similarly, evidence, although relevant, "may be excluded if its probative value is substantially outweighed by considerations of undue delay, or needless presentation of cumulative evidence." Evid.R. 403(B).

{¶60} Here, the trial court did not abuse its discretion in concluding the prejudicial effect of the victim's Florida felony drug possession conviction outweighed its probative value. Not only was the Florida conviction very close to the ten-year limit, but the trial court allowed defendant to impeach the witness's credibility with her more recent convictions for receiving stolen property, attempted forgery and theft. Although the prior drug conviction may have added a different dimension to her more recent convictions, the victim admitted she used crack even on the day of the incident at issue. On this record, the trial court did not abuse its discretion in refusing to admit the victim's felony drug possession conviction. Defendant's first assignment of error is overruled.

VIII. Second Assignment of Error – Possession of Criminal Tools Conviction

{¶61} Defendant's second assignment of error contends the trial court erred in refusing to allow defendant to impeach the victim's credibility with evidence of the victim's

prior conviction for possession of criminal tools. The record reveals that in November 2008 the victim was arrested for forgery involving a forged check and a forged Ohio identification card. The BCI sheet indicates defendant pled guilty in February 2009 to a first-degree misdemeanor count of attempted forgery and first-degree misdemeanor count of possession of criminal tools. Id. Although the offenses were not punishable by imprisonment of more than a year, the trial court permitted defendant to impeach the victim's character with her conviction for attempted forgery as an offense of dishonesty under Evid.R. 609(A)(3). The court did not allow defendant to use the victim's conviction for possession of criminal tools, noting it is not a "theft offense." (Tr. 22.)

{¶62} For the purpose of attacking the credibility of a witness, and notwithstanding Evid.R. 403(A) but subject to Evid.R. 403(B), evidence that any witness "has been convicted of a crime is admissible if the crime involved dishonesty or false statement." Evid.R. 609(A)(3). "Evid.R. 609(A)(3) 'does not attempt to delineate precisely which offenses may be characterized as supporting convictions involving "dishonesty or false statement." ' " *State v. McCrackin*, 12th Dist. No. CA2001-04-096, 2002-Ohio-3166, ¶34, quoting Weissenberger's Ohio Evidence (2002), 258, Section 609.5.

{¶63} In determining whether a crime involves dishonesty or false statement, the court should consider whether "by definition, [the crime] contain[s] either an element of deception identical to that in a theft offense or the making of a false statement." *State v. Lumpkin* (Feb. 25, 1992), 10th Dist. No. 91AP-567; *State v. Johnson* (1983), 10 Ohio App.3d 14, 16 (concluding theft was inherently a dishonest act as common sense dictates that stealing is dishonest); *State v. Taliaferro* (1981), 2 Ohio App.3d 405 (determining attempted forgery, petty theft, and attempted receiving stolen property are also offenses

involving dishonesty); *State v. Evans*, 9th Dist. No. 07CA0057-M, 2008-Ohio-4772, ¶9, discretionary appeal not allowed, 120 Ohio St.3d 1526, 2009-Ohio-614 (concluding the trial court properly excluded the witness's prior conviction for obstruction of official business pursuant to Evid.R. 609(A)(3) because "the crime of obstruction of official business does not have deceit, dishonesty or false statement as an element").

{¶64} The elements of the crime of possession of criminal tools do not inherently involve a dishonest act. The crime involves: (1) possessing or having under one's control, (2) any substance, device, instrument, or article, (3) with the purpose to use it criminally. R.C. 2923.24. While the actor may intend to use the device to eventually commit a crime involving a dishonest act or false statement, one can commit the crime of possession of criminal tools without ever committing a dishonest act. See *State v. Williams*, 10th Dist. No. 04AP-279, 2004-Ohio-6254, ¶14-15, discretionary appeal not allowed, 105 Ohio St.3d 1472, 2004-Ohio-6254 (concluding sufficient evidence supported possession of criminal tools conviction where screwdriver, flashlight, and pair of gloves were found in the car defendant was traveling in, and state presented evidence linking the tools to the attempted burglary); *State v. Diorio*, 7th Dist. No. 05 MA 230, 2007-Ohio-3401, ¶10-11 (deciding individual found with a large sum of money, while playing a dice game, was properly charged with possession of criminal tools as the evidence was sufficient to show he possessed the money with the intent to use it to gamble); *State v. Tell*, 8th Dist. No. 84790, 2005-Ohio-1178, ¶22 (determining evidence was sufficient to support possession of criminal tools conviction where evidence demonstrated defendant possessed a vehicle with the intent to use it to transport and conceal marijuana).

{¶65} In the final analysis, possession of criminal tools lacks the requisite dishonesty because the offender commits the crime simply by possessing the item. While the crime requires the offender to possess the item with the purpose to use it criminally, the substance of the other crime the individual commits with the item is the one that may involve dishonesty or a false statement, if at all. The trial court did not err in concluding defendant's conviction for possession of criminal tools is not a crime of dishonesty or false statement.

{¶66} Based on the foregoing, defendant's second assignment of error is overruled.

XI. Disposition

{¶67} Having overruled all six of defendant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BROWN and DORRIAN, JJ., concur.