[Cite as *State v. Warman*, 2017-Ohio-8994.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
Plaintiff-Appellee	:	Hon. Craig R. Baldwin, J.
	:	
-vs-	:	
	:	Case No. 16-CA-30
CHARLES F. WARMAN	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Licking County Court of Common Pleas, Case No.15CR786
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	November 15, 2017

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
PAULA SAWYERS Licking County Prosecutor's Office 20 S. 2nd Street Newark, OH 43055	STEPHEN WOLFE 1350 W. 5th Avenue, Suite 124 Columbus, OH 43212

Gwin, P.J.

{¶1} Appellant Charles Warman ["Warman"] appeals his convictions and sentences after a jury trial in the Licking County Court of Common Pleas on four counts of Domestic Violence and the special findings that he had a prior Domestic Violence conviction, thus enhancing all of the charges to felonies of the fourth degree. We have previously overruled Warman's sole assignment of error. *See, State v. Warman*, 5th Dist. Licking No. 164-CA-030, 2016 -Ohio- 7754.

{¶2} This Court granted, in part, Warman's motion to reopen pursuant to App.R. 26(B).

Facts and Procedural History

Count II: Nov. 19 – Nov. 22, 2015.

{¶3} Amanda Peroco testified that on November 21, 2015, while inside her home she heard a male voice and a female voice causing a disturbance. 1T. at 121. She opened her bedroom window to hear a man's voice "raised, screaming obscenities at her." T. at 122. Ms. Peroco heard the woman say, "That she already had a concussion and then he said that he wanted her to feel how she made him feel." 1T. at 122. Ms. Peroco then called 9-1-1. 1T. at 122. Ms. Peroco was not able to get a close enough view to be able to identify the male. 1T. at 125.

{¶4} Officer John Purtee of the Newark Police Department responded to the 9-1-1 call on November 21, 2015. 1T. at 189. Officer Purtee found F. W. hiding behind the back of a pickup truck in the street. 1T. at 190. Officer Purtee photographed F.W.'s injuries. (1T. at 195).

{¶5} Officer Purtee testified that F.W. was "extremely scared." 1T. at 190. F.W. told Officer Purtee that her household or family member Charles Warman had been questioning her about a supposed sexual act that she supposedly engaged in with "Jake." 1T. at 192. F.W. claimed that she had been struck in the legs with a large pole. Id. The couple then drove to Jake's house so that Charles Warman could confront Jake. Id. F.W. told Officer Purtee that Charles had a "mud paddle that they use to mix drywall mud" that he carried with him to the house. Id. at 192-193. At some point, F.W. ran back to the street with Charles chasing her. 1T. at 193.

Count I: Nov. 21, 2015.[1]

{¶6} F.W. testified that Charles "was swinging the mud paddle telling me he was going to beat me with it" as he chased her around the car. 1T. at 223. F.W. began running down the road; however, she fell down. F. W. testified that Charles "stood over me with the mud paddle and he looked like he was going to beat me with it…" 1T. at 223.

Count III: Nov. 4 – Nov. 7, 2015.[2]

{¶7} On November 7, 2015, Dr. Peter Kamhout at the Licking Memorial Hospital treated F.W. 1T. at 129. Dr. Kamhout testified that F.W. reported that she had been struck in the head, the neck, the sides of the head, the back, the left rib area, the left hip and multiple areas to her leg and left hip. 1T. at 130. She was diagnosed with a

[1] The date for Count I of the Indictment was amended from "Nov. 22, 2015" to "Nov. 21, 2015" by Judgment Entry filed Apr. 20, 2016.

[2] The date for Count III of the Indictment was amended from "Nov. 4, 2015" to "Nov. 4, 2015 - Nov. 7, 2015" by Judgment Entry filed Apr. 20, 2016. We further note that it appears that a scrivener's error in the trial court's entry mistakenly refers to Count IV of the Indictment; however, the Motion to Amend the Indictment filed Apr. 20, 2016 clearly asks that the date for Count III of the Indictment be amended, not Count IV. The jury was correctly instructed concerning the dates alleged for each count in the indictment. 2T. at 356; 358; 359; 360.

concussion and bruising. 1T. at 131. F.W.'s medical records were admitted into evidence. State's Exhibit 3; 1T. at 129; 258-259.

{¶8} Gina Born, an emergency room nurse at Licking Memorial Hospital testified that she was the triage nurse on November 7, 2015. She observed numerous injuries on Ms. Warman's body. State's Exhibit 4(A) – 4(R). Nurse Born testified that F.W. told her that she had been beaten by her household or family member. 1T. at 139.

Count IV – Aug. 28, 2015 – Oct. 23, 2015.

{¶9} Grace Marston testified that she is a registered nurse employed by CTEC Adult Education. 1T. at 148. Nurse Marston testified that F.W. began classes on August 31, 2015 and graduated in October 2015. 1T. at 149. Nurse Marston testified that F.W. came to class on September 24, 2015 with visible injuries to her forehead. 1T. at 151. This was not the first time F.W. came to class with injuries. Sometime between August 31, 2015 and September 3, 2015, F.W. came to class with a black eye. 1T. at 152. At the time, F.W. denied any domestic violence. 1T. at 154. However, sometime between November 6, 2015 and November 13, 2015, F.W. appeared at the school and told Nurse Marston that Charles had caused her injuries. 1T. at 155; 158; 214.

{¶10} Two employees from the Home Depot where F.W. worked testified. Tiffany McClanahan testified that F.W. worked at the Home Depot between August and October 2015. 1T. at 161; 208. During that time she notice various bruising on F.W.

{¶11} Karen Wambsganss testified that she also noticed bruising to F.W.'s body toward the end of September 2015. 1T. at 168 – 169.

{¶12} F.W. testified that she told the employees that she fell or got hurt because she did not want to tell them Charles was hitting her. 1T. at 209. F.W. admitted that on

November 7, 2015, she called Officer Purtee to tell him that she had lied about Charles hitting her earlier that day. 1T. at 226; 241. She claimed that Charles had told her what to do to make everything go away. Id.

The Defense Case.

{¶13} Ernest Warman, Charles' father testified that he worked with Charles on November 4, 2015 and November 6, 2015 in Baltimore, Ohio. 1T. at 272-273. He testified that F.W. was not with them on either day.

{¶14} Vickie Harper testified that she was living with the Warman's in November 2015. Ms. Harper testified that F.W. told her that she had to pack her stuff and leave right away. 1T. at 282. She testified,

> I asked her what had happened and she said that they had ran into an old friend and that Charles got mad because the old friend had admitted that she had done something that she claimed that she didn't do, and so he started chasing her with a mud paddle and she skidded across the pavement.

1T. at 282.

{¶15} Officer Jonathan Bell of the Newark Police Department testified concerning an email that he had sent to Officer Evans, in which he stated that F.W. had told him that she had lied to the officers to get Charles into trouble because Charles was cheating on her. 2T. at 300.

{¶16} Atida Stuck testified that she used to date Charles. 2T. at 303. She testified that she and Charles were together running errands on November 3, 2015. 2T. at 305.

She further testified that she went to Charles' house to do laundry on November 5, 2015. Ms. Stuck testified that she did not see F.W. during any of those times. 2T. at 308.

{¶17} Veronica Rine testified that she has known Charles for 12 years. 2T. at 312. Ms. Rhine testified that Charles stayed with her on November 6 – 7, 2015. 2T. at 316. She observed Charles speak with F.W. over the telephone and did not witness any threatening or menacing behavior. 2T. at 317.

{¶18} Mary Berry testified that she is Charles' aunt. 2T. at 320. She testified that F.W. was staying with her in Gallipolis in mid to late November 2015. 2T. at 321; 324. Ms. Rhine testified that she overheard F.W. tell the police over the telephone "none of it was true. She made it up. It was an act of jealousy." 2T. at 327.

The verdict.

{¶19} The jury convicted Warman of four counts of domestic violence and the special finding that he had a prior conviction, thus elevating each charge to a felony of the fourth degree.

{¶20} The trial court sentenced Warman to one year on each count, consecutively.

Direct Appeal.

{¶21} On appeal, Warman, through counsel raised one assignment of error,

> "I. IT WAS HARMFUL ERROR FOR THE TRIAL COURT TO DENY APPELLANT'S PARTIAL MOTION FOR ACQUITTAL WHEN THE STATE'S EVIDENCE THAT APPELLANT HAD A PRIOR CONVICTION FOR DOMESTIC VIOLENCE DID NOT COMPORT WITH STATE V. BAKER AND CRIMINAL RULE 32."

State v. Warman, 5th Dist. Licking No. 16-CA-30, 2016-Ohio-7754, ¶7. We overruled the assignment of error and affirmed the trial court's decision. Id.

{¶22} On February 6, 2017, Warman filed a pro se motion to re-open his direct appeal pursuant to App. R. 26(B). Warman raised six potential assignments of error. By Judgment entry filed March 27, 2017, we found Warman had raised "a genuine issue as to whether [he] was deprived of the effective assistance of counsel on appeal" in three areas. We held,

> Accordingly, we remand this case to the trial court to appoint counsel for Warman. The issues to be addressed are whether appellate counsel was ineffective and the appellant prejudiced by the failure of counsel to address the issues of whether 1). The trial court erred in instructing the jury on flight and, if so, whether Warman was prejudiced by the trial court's instruction on flight; 2). Whether the trial court erred by admitting "other acts" evidence and, if so, whether Warman was prejudiced by the admission; and 3). Whether any of the four counts of domestic violence were allied offenses of similar import subject to merger into a single conviction and imposition of a sentence that is appropriate for the offense chosen for sentencing. *State v. Whitfield*, 124 Ohio St.3d 319, 922 N.E.2d 182, 2010–Ohio–2.

Judgment Entry filed Mar. 27, 2017.

Assignments of Error

{¶23} Warman has raised the following assignments of error,

{¶24} "I. THE TRIAL COURT'S JURY INSTRUCTION ON FLIGHT WAS NOT PLAIN ERROR.

{¶25} "II. THE TRIAL COURT DID NOT ERR BY ADMITTING "OTHER ACTS" EVIDENCE.

{¶26} "III. NONE OF THE COUNTS WERE ALLIED OFFENSES OF SIMILAR IMPORT.

{¶27} "IV. APPELLANT WAS PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL."

I.

{¶28} In his First Assignment of Error, Warman concedes, "Because trial counsel did not object to the instruction, the issue is waived on appeal absent plain error. It cannot be said that the outcome of the trial would have been different had the jury not been given the flight instruction, so there is no plain error. Thus appellate counsel was not ineffective for failing to raise the first issue that this Court has asked counsel to address." Appellant Brief at 3-4.

{¶29} Accordingly, Warman's first assignment of error as noted in our March 27, 2017 Judgment Entry is overruled.

II.

{¶30} In his Second Assignment of Error, Warman concedes, "Because [F.W.'s] testimony was limited to the time periods between August and November, 2015, all of her testimony was regarding the charges in the indictment, not prior abuse. As such, there was no "other acts" testimony. If there was no other acts testimony, then it would be

impossible to say that appellate counsel was ineffective for failing to raise the issue on appeal." Appellant's Brief at 4.

{¶31} Accordingly, Warman's second assignment of error as noted in our March 27, 2017 Judgment Entry is overruled.

III.

{¶32} In his Third Assignment of Error, Warman concedes, "each of these four counts was for a separate injury that occurred at a different time. Only two of the time periods (those in counts one and two) overlap, and those are referring to two separate attacks — one with fists, one with a mud paddle. This was not a situation where Appellant was charged with both domestic violence and assault for one action. When referring to separate injuries that occurred at different times, it is clear that they are not allied offenses, and thus appellate counsel was not ineffective for failing to address it." Appellant's Brief at 5-6.

{¶33} Accordingly, Warman's third assignment of error as noted in our March 27, 2017 Judgment Entry is overruled.

IV.

{¶34} In his fourth assignment of error, Warman noted that our remand did not include a directive to address the effectiveness of trial counsel; he is raising the issue because prior appellate counsel was also Warman's trial counsel. Therefore, he could not be expected to raise a claim of ineffective assistance of counsel on himself.

{¶35} Without citation to the record where the errors were alleged to have occurred, Warman contends that his trial counsel was ineffective for failing to object to repeated hearsay statements of F.W. during Officer Purtee's testimony[3].

{¶36} Evid.R. 801 (D) (1) deals with prior statements of a witness. According to the Staff Notes accompanying the Rule, "[t]here are three types of statements by a witness which may qualify as non-hearsay under this subdivision and may be admissible as non-hearsay to prove the matters asserted in such prior statements. The rule does not limit the use of such statements for either impeachment or rehabilitative purposes. The statements may be used as substantive evidence of the matters asserted. The three categories are (a) prior inconsistent statements of a witness if made under oath subject to cross-examination, (b) prior consistent statements offered to rebut charges of recent fabrication or improper motive, and (c) prior identification by a witness."

{¶37} "Hearsay" is 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. Evid.R. 801(C). Hearsay is generally not admissible unless it falls within one of the exceptions to the rule against hearsay. Evid.R. 802, 803, 804; *State v. Steffen*, 31 Ohio St.3d 111, 509 N.E.2d 383(1987). Statements constitute hearsay only if they were offered to prove the truth of the matters asserted in those statements. If those statements were offered for some other purpose, they are not inadmissible hearsay. *State v. Davis*, 62 Ohio St.3d 326, 344, 581 N.E.2d 1362(1991).

{¶38} "The hearsay rule…is premised on the theory that out-of-court statements are subject to particular hazards. The declarant might be lying; he might have

[3] App. R. 16(A)(7); *State ex rel. Physicians Commt. for Responsible Medicine v. Ohio State Univ. Bd. of Trustees,* 108 Ohio St.3d 288, 2006-Ohio-903, ¶ 13.

misperceived the events which he relates; he might have faulty memory; his words might be misunderstood or taken out of context by the listener. And the ways in which these dangers are minimized for in-court statements-the oath, the witness' awareness of the gravity of the proceedings, the jury's ability to observe the witness' demeanor, and, most importantly, the right of the opponent to cross-examine-are generally absent for things said out of court." *Williamson v. United States*, 512 U.S. 594, 598,114 S.Ct. 2431, 2434(1994).

{¶39} Evid. R. 803 Hearsay exceptions; availability of declarant immaterial provides,

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> **(1) Present sense impression.** A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness.
>
> **(2) Excited utterance.** A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
>
> **(3) Then existing, mental, emotional, or physical condition.** A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief

to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

{¶40} An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Evid.R. 803(2). A four-part test is applied to determine the admissibility of statements as an excited utterance:

(a) That there was some occurrence startling enough to produce a nervous excitement in the declarant, which was sufficient to still his reflective faculties and thereby make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, and thus render his statement of declaration spontaneous and unreflective,

(b) That the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had been time for such nervous excitement to lose a domination over his reflective faculties so that such domination continued to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs,

> (c) That the statement or declaration related to such startling occurrence or the circumstances of such starling occurrence, and
>
> (d) That the declarant had an opportunity to observe personally the matters asserted in his statement or declaration.

State v. Jones, 135 Ohio St.3d 10, 2012-Ohio-5677, 984 N.E.2d 948, ¶166 (citations omitted). The statement need not be made during the course of the startling event. Rather, it is only necessary that the declarant still appeared nervous or distraught and that there was a reasonable basis for continuing to be emotionally upset. In addition, we note that there is no specific amount of time after which a statement can no longer be considered as an excited utterance and not the result of reflective thought. *State v. Taylor,* 66 Ohio St.3d 295, 612 N.E.2d 316 (1993).

{¶41} Our review of Officer Purtee's trial testimony reveals that he spoke to F.W. on November 21, 2015. 1T. at 189. He was dispatched for a domestic violence call. Id. F.W. was hiding behind a truck and was extremely scared. Id. at 190.

{¶42} After speaking to other witnesses, Officer Purtee returned to speak to F.W. 1T. at 191. Officer Purtee testified,

> She's still visibly afraid. So, she's locked in the back, she's looking around out the windows making sure that nobody's coming. I tried to reassure her that she was safe in my car. It took her awhile to calm down.

1T. at 191. The statements that Officer Purtee attributes to F.W. all concern the attack that had just occurred. 1T. at 192- 193.

{¶43} In the case at bar, F.W. had just been assaulted. Clearly, this was a startling event. Second, F.W.'s statements to Officer Purtee were made while she was still under

the stress of the startling occurrence. The series of events in the case at bar clearly establishes an excited utterance exception to the hearsay rule.

{¶44} As the evidence of F.W.'s statements was admissible as an exception to the hearsay rule, trial counsel was not ineffective in failing to object.

{¶45} Warman's fourth assignment of error is overruled.

{¶46} The judgment of the Licking County Court of Common Pleas is sustained.

By Gwin, P.J.,

Wise, John, J., and

Baldwin, J., concur

_____

HON. W. SCOTT GWIN

_____

HON. JOHN W. WISE

_____

HON. CRAIG R. BALDWIN

WSG:clw 1102

[Cite as *State v. Warman*, 2017-Ohio-8994.]

IN THE COURT OF APPEALS FOR LICKING COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
CHARLES F. WARMAN	:	
Defendant-Appellant	:	CASE NO. 16-CA-30

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Licking County Court of Common Pleas is sustained. Costs to appellant.

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HON. W. SCOTT GWIN

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HON. JOHN W. WISE

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HON. CRAIG R. BALDWIN