[Cite as *State v. Sanders*, 2009-Ohio-5537.]

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

Appellee

v.

JOHN B. SANDERS, JR.

Appellant

C. A. No. 24654

APPEAL FROM JUDGMENT
ENTERED IN THE
COURT OF COMMON PLEAS
COUNTY OF SUMMIT, OHIO
CASE No. CR 08 09 3034

DECISION AND JOURNAL ENTRY

Dated: October 21, 2009

CARR, Judge.

{¶1} Appellant, John Sanders, Jr., appeals his conviction out of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} On September 23, 2008, Sanders was indicted on one count of domestic violence in violation of R.C. 2919.25(A), a felony of the fourth degree. At arraignment, Sanders pled not guilty, and the trial court issued a no contact order. On October 6, 2008, the trial court ordered that a temporary protection order issued on September 13, 2008, shall remain in effect. On October 21, 2008, a supplemental indictment was filed, charging Sanders with one count of domestic violence in violation of R.C. 2919.25(A), a felony of the third degree; and one count of violating a protection order in violation of R.C. 2919.27, a misdemeanor of the first degree.

{¶3} Prior to trial, the State dismissed the first count of domestic violence, and the remaining counts were renumbered. The matter proceeded to trial. At the conclusion of trial, the

jury found Sanders guilty of both domestic violence, a felony of the third degree, and violating a protection order. Sanders was sentenced accordingly. He has filed a timely appeal, raising four assignments of error for review. This Court consolidates some assignments of error to facilitate discussion.

II.

ASSIGNMENT OF ERROR I

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

ASSIGNMENT OF ERROR II

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

{¶4} Sanders argues that his convictions for domestic violence and violating a protection order are not supported by sufficient evidence and are against the manifest weight of the evidence. This Court disagrees.

{¶5} A review of the sufficiency of the State's evidence and the manifest weight of the evidence adduced at trial are separate and legally distinct determinations. *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600. "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." Id., citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook J., concurring). When reviewing the sufficiency of the evidence, this Court must review the evidence in a light most favorable to the prosecution to determine whether the evidence before the trial court was sufficient to sustain a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259, 279.

> "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." Id. at paragraph two of the syllabus.

{¶6} A determination of whether a conviction is against the manifest weight of the evidence, however, does not permit this Court to view the evidence in the light most favorable to the State to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶11. Rather,

> "an appellate court 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 must be reversed and a new trial ordered." *State v. Otten* (1986), 33 Ohio App.3d 339, 340.
>
> "Weight of the evidence concerns the tendency of a greater amount of credible evidence to support one side of the issue more than the other. *Thompkins*, 78 Ohio St.3d at 387. Further when reversing a conviction on the basis that it was against the manifest weight of the evidence, an appellate court sits as a 'thirteenth juror,' and disagrees with the factfinder's resolution of the conflicting testimony. Id." *State v. Tucker*, 9th Dist. No. 06CA0035-M, 2006-Ohio-6914, at ¶5.

This discretionary power should be exercised only in exceptional cases where the evidence presented weighs heavily in favor of the defendant and against conviction. *Thompkins*, 78 Ohio St.3d at 387.

{¶7} This Court has stated that "sufficiency is required to take a case to the jury[.] *** Thus, a determination that [a] conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." (Emphasis omitted.) *State v. Roberts* (Sept. 17, 1997), 9th Dist. No. 96CA006462.

{¶8} Sanders was charged with domestic violence in violation of R.C. 2919.25(A) which states that "[n]o person shall knowingly cause or attempt to cause physical harm to a

family or household member." R.C. 2919.25(D)(4) states that a violation of subsection (A) is a felony of the third degree if the offender has previously pled guilty to or been convicted of two or more offenses of domestic violence.

{¶9} R.C. 2901.22(B) states:

> "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶10} "Physical harm to persons" is defined as "any injury, illness, or other physiological impairment, regardless of its gravity or duration." R.C. 2901.01(A)(3).

{¶11} R.C. 2919.25(F)(1) defines "family or household member" as

> "(a) Any 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;
>
> "(ii) A parent or a child of the offender, or another person related by consanguinity or affinity to the offender;
>
> "(iii) A parent or a child of a spouse, person living as a spouse, or former spouse of the offender, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the offender.
>
> "(b) The natural parent of any child of whom the offender is the other natural parent or is the putative other natural parent."

A "person living as a spouse" includes "a person who is living or has lived with the offender in a common law marital relationship, who otherwise is cohabiting with the offender, or who otherwise has cohabited with the offender within five years prior to the date of the alleged commission of the act in question." R.C. 2919.25(F)(2).

{¶12} Sanders was also charged with violating a protection order in violation of R.C. 2919.27 which states that "[n]o person shall recklessly violate the terms of *** [a] protection

order issued or consent agreement approved pursuant to section 2919.26 or 3113.31 of the Revised Code[.]" Pursuant to R.C. 2901.22(C):

> "A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist."

{¶13} Prior to trial, the State informed the trial court that the victim, Stephanie Davis, had aligned herself with Sanders and adopted his version of events, contrary to her original statements to police and medical personnel. In the absence of surprise, the State acknowledged that it could not treat her as a hostile witness and so requested that Ms. Davis be called as a court's witness. The trial court agreed. Sanders has not raised this issue on appeal.

{¶14} Ms. Davis testified that, on September 12, 2008, she was engaged to Sanders and living with him. She testified that she was working as a dancer at a nightclub that evening when a client requested that he be allowed to choke her in exchange for money. Ms. Davis testified that when she refused, the client got angry, grabbed her by the throat, and threw her on a couch. She testified, however, that her client did not punch her. Ms. Davis testified that the incident upset her, so she called Sanders for a ride home and drank three beers and five shots of tequila over the next hour while waiting for him to arrive.

{¶15} Ms. Davis testified that, after Sanders picked her up, the two argued in the car about his lack of sympathy for her situation, her drinking, and money issues. She testified that she became angry and began kicking and "banging" her head. She testified that she has suffered from seizures her whole life and that she believed she was having a seizure in the car. She testified that she awoke on the ground next to the expressway, as Sanders cradled her head in his hands. Ms. Davis testified that she can say anything when coming out of a seizure, including

"you hit me." She testified that she does not remember what she told the police about the incident and does not remember speaking to EMS personnel or going into an ambulance. Although she initially denied having spoken with a police detective at the hospital, Ms. Davis testified that she gave the detective a statement. She identified only her name on the written statement because she testified that she can not read or write.

{¶16} Ms. Davis denied that Sanders hit her or grabbed her neck during their argument in the car. She testified that she may have broken her necklace while she was hitting her head in the car and as Sanders tried to hold her so she would not hurt herself. Ms. Davis testified that Sanders is missing his left hand.

{¶17} The State played recordings of several phone calls made by Sanders from jail over a three-day period after his arrest. Ms. Davis identified Sanders' and her own voice on the phone calls. She admitted that she and Sanders discussed this situation, that Sanders told her that a temporary protection order had been issued against him, and that Sanders told her that she needed to get both the protection order and the charges against him dropped. Ms. Davis admitted that she and Sanders agreed that it was a good thing that the police did not speak with a couple of witnesses who had stopped to help, although she could not explain why she said that. Ms. Davis further admitted that Sanders told her what he had told the police about the incident and that she agreed to tell the same story. She denied, however, that she and Sanders were concocting a story.

{¶18} Ms. Davis admitted that she and Sanders pretended during some of the phone calls that Sanders was talking to someone else. She conceded that they spoke about "Stephanie's" protection order and how "Stephanie" had to get the order revoked. The recording indicated that Ms. Davis at one point asked Sanders, "What made you do that to her?" She

alternately denied hearing those words, understanding the State's question, and knowing what she meant when she said them. On another occasion, however, Ms. Davis admitted that she told Sanders that before she went to speak with the municipal court judge about dropping the charges, she was "going to try to cover this up with as much makeup as I can[]" because "[y]ou really f***ed me up this time." She testified that she was in fact referring to some scratches she received during her seizure on the cement next to the expressway.

{¶19} During one call, Sanders told Ms. Davis to get "Stephanie" to get the charges dropped. Ms. Davis, however, failed to remain in character as a third person, and expressed her concern that the police would then "take it out on me." Ms. Davis admitted that Sanders tried to console her by telling her that even if she failed to appear at court to testify, "they can't do nothing; no witness, no case[.]" Ms. Davis testified that during one phone call, after she had been unsuccessful in getting the protection order and charges dropped, she yelled in frustration at Sanders that none of this would have happened if he had not put his hands on her. Nevertheless, she maintained that Sanders did not hit her on September 12, 2008, and that she has been trying to convince the State of this since Sanders' arrest.

{¶20} Patrolman Benjamin Knorr of the Norton Police Department ("NPD"), testified that on September 12, 2008, he responded to a 911 call regarding a situation on interstate 76 east. He testified that he observed Ms. Davis from approximately ten feet away. He testified that she was "very emotional" and had blood on her face.

{¶21} Officer Dan Beavers of the NPD testified that he responded to a dispatch regarding a "fight on the interstate" on September 12, 2008. He testified that two calls were made to 911 regarding the matter. He testified that, when he arrived on scene, he observed a woman who was "very emotional" and "crying;" standing beside a van. He identified the

woman as Stephanie Davis. Officer Beavers testified that Ms. Davis told him that she and her boyfriend had been arguing in his van, that she tried to jump out, and that her boyfriend pulled over to the berm, grabbed her by the neck, broke her necklace, and struck her face. The officer testified that Ms. Davis identified Sanders as her boyfriend and asserted that they were living together.

{¶22} Officer Beavers testified that Ms. Davis had a severe injury, specifically a bad gouge, on her bare right foot. When Ms. Davis asserted that she was epileptic and felt as though she was about to have a seizure, the officer called EMS. He testified that Ms. Davis walked to the ambulance when it arrived.

{¶23} Officer Beavers testified that he charged Sanders with domestic violence based on Ms. Davis' statements. He testified that he ascertained that Sanders also had prior domestic violence convictions. Finally, Officer Beavers testified that a temporary protection order issued against Sanders on September 13, 2008, as a result of his arrest.

{¶24} Detective John Canterbury of the NPD testified that on September 12, 2008, he was called to assist a domestic violence dispute on a highway. He testified that when he arrived on scene he saw a man sitting in a police cruiser and a woman in a van with Officer Beavers. He testified that the woman appeared "very distraught; crying, upset," that she had blood on her face, and that her right foot was bloody and mangled. The detective testified that he later left the scene to interview the victim at the hospital regarding her allegations of domestic violence, as well as the earlier assault at work. He testified that he spoke with Ms. Davis as she waited for a taxi to leave the hospital. Detective Canterbury testified that she acted confused and upset, that she clearly had been crying, and that she was intoxicated. He testified that Ms. Davis had dried

blood around her nose. He asserted that she did not want to discuss the work incident; rather, she only wanted to discuss the domestic violence.

{¶25} Detective Canterbury testified that Ms. Davis explained that her boyfriend was angry because she would not give him any money. He testified that Ms. Davis reported that Sanders tried to take her money, struck her in the face, grabbed her by the throat, and ripped off her necklace. According to the detective, Ms. Davis and Sanders fought as he drove, and Ms. Davis jumped out of the car after Sanders pulled to the side of the highway. Detective Canterbury testified that he wrote out Ms. Davis' statement for her because she said she was illiterate.

{¶26} Douglas Barker, a paramedic with the Norton Fire Department, testified that he responded on September 12, 2008, to a "domestic" on the interstate. He testified that he found a female on scene who reported that her boyfriend had hit her in the face with his fist. He testified that, after Ms. Davis walked to the ambulance, he cleaned her wounds, specifically, cuts to her toe and some facial bleeding. He testified that he also noticed a bruise on her right shin and some black and blue discoloration around her right eye. Mr. Barker testified that Ms. Davis told him that she cut her toe as she tried to kick Sanders after he hit her in the face. Mr. Barker described Ms. Davis as "emotionally upset" and "crying," although she was oriented to time and place.

{¶27} Mr. Barker testified that Ms. Davis denied having lost consciousness before EMS arrived. He testified that she had what appeared to be a grand mal seizure on the way to the hospital. He asserted that people are not mobile during seizures. He testified that Ms. Davis did not say anything during her seizure, although he conceded that someone suffering a seizure

might be prone to hallucinations. Mr. Barker testified that Ms. Davis was under the influence of alcohol when he treated her.

{¶28} Paula Miller, a dispatcher for NPD, testified that the department received two 911 calls on September 12, 2008, regarding a domestic violence incident on the highway. She discussed the two mechanisms for maintaining 911 calls. She testified that both systems had failed and that calls from several days, including September 12, 2008, had been lost and could not be reproduced. She was certain that the department had received two calls regarding this incident because the dispatcher on duty typed both calls into the CAD (computer-aided dispatch) system.

{¶29} Sanders testified in his own defense at trial. He admitted that he and Ms. Davis were involved in a romantic relationship and that they were living together on the date of the incident. He admitted that he had prior convictions for domestic violence against an ex-wife. The trial court admitted into evidence certified copies of two such convictions, as presented by the State. In addition, Sanders admitted that he was immediately aware that a temporary protection order issued soon after his arrest. He admitted that he violated that order by repeatedly speaking with Ms. Davis during phone calls he made to her from jail.

{¶30} Sanders testified regarding the underlying incident as follows. On September 12, 2008, he received a call from Ms. Davis between 7:30 and 8:00 p.m., during which she alleged that a client at work had tried to rape her and she asked Sanders to pick her up. When he arrived at the nightclub, Ms. Davis was intoxicated and upset. They argued about a utility bill that had to be paid. Sanders testified that, as he drove, he was "bitching" at Ms. Davis for being "so drunk" and "all this stuff just happening to her." He testified that he saw "marks and stuff" on her and asked what the client did to her. As Ms. Davis started "shaking and kicking," Sanders

heard her car door open and he tried to grab her to prevent her from exiting the vehicle. He explained that he lost the fingers on his left hand when he was four years old. He testified that, while he has a very limited ability to grasp with his left palm, he did not even maintain his left arm on the steering wheel as he grabbed for her. He testified that he pulled over and Ms. Davis fell out of the car. He denied punching her.

{¶31} Sanders testified that Ms. Davis began seizing on the ground, and he called 911. He asserted that the lost 911 tapes would bear out his story. He testified that Ms. Davis was on her back, kicking so hard that she kicked her shoes off. He testified that she was "kind of" speaking.

{¶32} Sanders testified that, when the police arrived on scene, they handcuffed him, placed him in the cruiser, and asked for his statement. He testified that he was arrested for domestic violence and presented with a copy of a temporary protection order against him. He claimed, however, that he did not know where Ms. Davis was. Accordingly, he testified that the first time he called the home they shared, he expected that his neighbor who sometimes takes care of his apartment would answer. He testified that after Ms. Davis answered the phone, however, he discussed the incident with her.

{¶33} Sanders admitted that he called Ms. Davis numerous times from jail. He admitted explaining to her that she had to go speak with the judge and prosecutor to try to get the protection order and charges dropped. He admitted that he was deceitful during those phone calls, when he spoke to Ms. Davis as though she were a third person. He further admitted suggesting to Ms. Davis that she not show up to testify in court because "no witness, no case[.]" He explained that he believed Ms. Davis was being forced to testify against him against her will.

{¶34} Sanders testified that he told the police everything he asserted at trial. The State questioned Sanders regarding the many discrepancies between the written statement he gave to the police and his testimony at trial.

{¶35} Although there was some conflicting evidence in this case, this Court will not disturb the trial court's factual determinations because the trier of fact is in the best position to determine the credibility of the witnesses during trial. *State v. Crowe*, 9th Dist. No. 04CA0098-M, 2005-Ohio-4082, at ¶22. In addition, this Court will not overturn the trial court's verdict on a manifest weight of the evidence challenge only because the trier of fact chose to believe certain witness' testimony over the testimony of others. Id.

{¶36} This is not the exceptional case, where the evidence weighs heavily in favor of Sanders. The weight of the evidence supports the conclusion that Sanders committed domestic violence. The evidence supports the conclusion that he hit Ms. Davis, his live-in girlfriend, in the face during an argument. Ms. Davis reported as much to the police and medical personnel. Several officers and a paramedic observed blood on her face after the incident. Ms. Davis identified her voice on recorded phone calls with Sanders, in which she accused him of causing injuries to her face. Sanders admitted that he had multiple prior domestic violence convictions. Certified copies of those convictions were admitted into evidence.

{¶37} The weight of the evidence also supports the conclusion that Sanders violated a protection order. A certified copy of the protection order admitted into evidence indicated it was served on Sanders by personal service. Sanders signed the waiver of hearing notice on the order and indicated that he agreed to be bound by the terms of the order. Sanders admitted that he was aware of the protection order when he continued to call Ms. Davis from jail. He discussed the protection order with Ms. Davis during their phone calls and told her to get it removed. Sanders

admitted at trial that he violated the protection order at least twice after the first time he called the home he shared with Ms. Davis and she answered.

{¶38} A thorough review of the record compels this Court to find no indication that the trier of fact lost its way and committed a manifest miscarriage of justice in convicting Sanders of domestic violence and violating a protection order. This Court concludes that Sanders' convictions are not against the manifest weight of the evidence. Having concluded that Sanders' convictions are not against the weight of the evidence, this Court further necessarily concludes that there was sufficient evidence to support the trial court's verdict. Sanders' first and second assignments of error are overruled.

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED IN ALLOWING HEARSAY TESTIMONY."

{¶39} Sanders argues that the trial court erred by admitting hearsay testimony. This Court disagrees.

{¶40} This Court has stated:

> "Generally, '[a] trial court possesses broad discretion with respect to the admission of evidence.' *State v. Patel*, 9th Dist. No. 24030, 2008-Ohio-4693, at ¶8. However, the trial court does not have discretion to admit hearsay into evidence. Moreover, if 'a court's judgment is based on an erroneous interpretation of the law, an abuse-of-discretion standard is not appropriate.' *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, at ¶13. Whether evidence is admissible because it falls within an exception to the hearsay rule is a question of law, thus, our review is de novo. *State v. Denny*, 9th Dist. No. 08CA0051, 2009-Ohio-3925, at ¶4." *Monroe v. Steen*, 9th Dist. No. 24342, 2009-Ohio-5163, at ¶11.

{¶41} Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). Evid.R. 803 sets out numerous hearsay exceptions, including excited utterances and statements for purposes of medical diagnosis or treatment. Evid.R. 803(2) states that "[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" is not excluded by the hearsay rule. Evid.R. 803(4) exempts "[s]tatements 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."

{¶42} Sanders argues that the trial court erred by allowing Officer Beavers to testify that Ms. Davis told him that Sanders grabbed her by the neck and struck her in the face. The trial court informed defense counsel that it had overruled his objection to Officer Beaver's testimony because it was admissible pursuant to the excited utterance exception to the hearsay rule. Patrolman Knorr, Officer Beavers, Detective Canterbury, and Mr. Barker all testified that they observed that Ms. Davis was very emotional, distraught, crying, and upset at the scene where she was bruised, bloody, and disheveled after leaving Sanders' vehicle on the highway. Given the temporal proximity of Ms. Davis' statements to the startling event giving rise to her injuries, it was reasonable for the trial court to conclude that she was still under the stress of excitement caused by that event when she made her statements. Accordingly, the trial court did not err by allowing Officer Beavers to testify to Ms. Davis' statements regarding the incident.

{¶43} Sanders further argues that the trial court erred by allowing the "hearsay testimony" of the paramedic, Mr. Barker. Sanders does not identify the specific testimony he opposes. The trial court informed defense counsel that it had overruled his objection to Mr. Barker's testimony because it was admissible pursuant to the exception to the hearsay rule regarding statements for purposes of medical diagnosis or treatment. Mr. Barker testified that he gathered information from Ms. Davis in connection with the medical treatment he provided to

her. Although Sanders fails to identify the portion of the record regarding Mr. Barker's challenged testimony, this Court cannot conclude that the trial court erred by allowing the paramedic to testify as to Ms. Davis' statements made during his diagnosis or treatment of her injuries. In addition, based on the corroborative testimony of the police and medical personnel that Ms. Davis was very emotional, distraught, and crying on the scene when she made her statements, this Court cannot conclude that the trial court erred by admitting the paramedic's testimony pursuant to the excited utterance exception to hearsay. Sanders' third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

> "THE TRIAL COURT ERRED IN NOT ACCEPTING DEFENSE'S RECOMMENDED JURY INSTRUCTIONS[.]"

{¶44} Sanders argues that the trial court erred by refusing to present his proposed jury instruction regarding the quantity and quality of evidence. This Court disagrees.

{¶45} This Court reviews a trial court's decision to give or decline to give a particular jury instruction for an abuse of discretion under the facts and circumstances of the case. *State v. Evans*, 9th Dist. No. 07CA0057-M, 2008-Ohio-4772, at ¶12, citing *State v. Wolons* (1989), 44 Ohio St.3d 64, 68. "A trial court's failure to give a proposed jury instruction is only reversible error if the defendant demonstrates that the trial court abused its discretion, and that the defendant was prejudiced by the court's refusal to give the proposed instruction." *Azbell v. Newark Grp., Inc.*, 5th Dist. No. 07 CA 00001, 2008-Ohio-2639, at ¶52, citing *Jaworowski v. Med. Radiation Consultants* (1991), 71 Ohio App.3d 320, 327. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion demonstrates "perversity of will, passion, prejudice, partiality, or moral

delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. Id. "[P]rejudicial error occurs only if the alleged instructional flaw cripples the entire jury charge." *Jaworowski*, 71 Ohio App.3d at 327-28.

{¶46} A jury charge "should be a plain, distinct and unambiguous statement of the law as applicable to the case ***." *Marshall v. Gibson* (1985), 19 Ohio St.3d 10, 12. In this case, the trial court instructed the jury pursuant to the Ohio Jury Instructions ("OJI") as follows:

> "In resolving disputed issues of fact, you should not permit your decision concerning any particular question to be determined merely by the number or quantity of witnesses or exhibits that one side or the other has introduced into evidence. The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence, but which witnesses and which evidence you find sufficiently believable and trustworthy."

{¶47} Citing to a case out of the United States District Court for the Southern District of Ohio, Sanders proposed the additional following language: "You may find that the testimony of a smaller number of witnesses as to any fact is more credible than the testimony of a large number of witnesses to the contrary." Sanders argues that "[b]y not presenting the more expanded jury instruction, the trial court committed prejudicial and reversible error." Sanders fails, however, to set forth how the failure to give his requested jury charge prejudiced him or why the standard OJI charge was insufficient. As the body of Sanders' brief contains no analysis as to why the trial court's refusal to give the more expansive instruction constitutes prejudicial and reversible error, he has not demonstrated any error necessitating reversal. Sanders' fourth assignment of error is overruled.

III.

{¶48} Sanders' assignments of error are overruled. The judgment of the Summit County

Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

DONNA J. CARR
FOR THE COURT

DICKINSON, P. J.
BELFANCE, J.
CONCUR

APPEARANCES:

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

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