[Cite as *State v. Gwen*, 2011-Ohio-1512.]

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

STATE OF OHIO Appellee v. JEFFREY L. GWEN Appellant	C.A. No. 25218 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 09 04 1240

DECISION AND JOURNAL ENTRY

Dated: March 30, 2011

MOORE, Judge.

{¶1} Appellant, Jeffrey L. Gwen, appeals from the judgment of the Summit County Court of Common Pleas. This Court affirms in part, reverses in part, and remands for resentencing.

I.

{¶2} Gwen was arrested on March 24, 2009, based on an incident that occurred at the home of Monee Fannin. As a result of the incident, on April 28, 2009, Gwen was indicted on one count of domestic violence in violation of R.C. 2919.25(A), a felony of the third degree, and illegal use or possession of drug paraphernalia, in violation of R.C. 2925.14(C)(1), a fourth degree misdemeanor. He pleaded not guilty and the matter proceeded to a jury trial on December 28, 2009. The jury found Gwen guilty on both counts. The trial court sentenced him to one year of incarceration.

{¶3} Gwen timely filed a notice of appeal. He raises eight assignments of error for our review. We have combined some of the assignments of error to facilitate our discussion.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT OVERRULED [GWEN'S] CRIM. R. 29(A) MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR ILLEGAL USE OR POSSESSION OF DRUG PARAPHERNALIA[.]"

ASSIGNMENT OF ERROR VII

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT OVERRULED [GWEN'S] CRIM. R. 29(A) MOTION FOR JUDGMENT OF ACQUITTAL BECAUSE THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION FOR DOMESTIC VIOLENCE[.]"

{¶4} In his first and seventh assignments of error, Gwen contends that his convictions for illegal use or possession of drug paraphernalia and domestic violence were based on insufficient evidence. We do not agree.

{¶5} Crim.R. 29(A) provides that a trial court "shall order the entry of a judgment of acquittal * * * if the evidence is insufficient to sustain a conviction of such offense or offenses." When considering a challenge to the sufficiency of the evidence, the court must determine whether the prosecution has met its burden of production. To determine whether the evidence in a criminal case was sufficient to sustain a conviction, an appellate court must view that evidence in a light most favorable to the prosecution:

> "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 crime proven

beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus.

{¶6} In *State v. Brewer*, "[t]he Ohio Supreme Court emphasized that the interest in the administration of justice dictates that the appellate court review the issue of sufficiency in consideration of all evidence presented by the state in its case in chief, whether such evidence was properly admitted or not." *State v. Freitag*, 9th Dist. No. 09CA0030, 2009-Ohio-6370, at ¶9, citing *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, at ¶19.

Domestic Violence

{¶7} Gwen was convicted of domestic violence in violation of R.C. 2919.25(A), which provides that "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member." "Physical harm to persons" is defined as "injury, illness, or other physiological impairment, regardless of its gravity or duration." R.C. 2901.01(A)(3). Gwen challenges the evidence presented as to whether he knowingly caused or attempted to cause Fannin harm.

{¶8} Vincent Tersigni, a patrolman employed with the Akron Police Department, testified that on March 24, 2009, he and his partner responded to a 911 call regarding a domestic violence fight at 809 Mercer Avenue. Dispatch had advised that the female was upset and had left the house and that the male was still in the house. When Officer Tersigni arrived at the residence, he and his partner walked up to the doorway and saw a male, later identified as Gwen, sitting on the couch. Officer Tersigni began talking to Gwen in the doorway of the house. Gwen mentioned that there had been an argument in the house between him and his girlfriend.

{¶9} The female, later identified as Monee Fannin, walked up to the house minutes later. She looked upset, slightly excited, and was crying. Officer Tersigni observed an injury under her left eye that included redness and swelling. He also observed broken capillaries in her

eye. When Officer Tersigni asked Fannin what happened, she said that her boyfriend, Gwen, threw her on the couch and was rubbing his arm in her face and that it caused the redness and swelling under her eye. She said that Gwen punched her in the stomach and it was then that she was able to run out of the house and call 911. Fannin stated that she had an injury on her stomach that she did not wish to show the officers. Officer Tersigni asked Fannin if she would like to press charges and she said yes. Officer Tersigni's partner placed Gwen in handcuffs.

{¶10} Officer Tersigni asked Fannin to fill out a victim statement card. Fannin asked if Gwen was going to jail, and Officer Tersigni responded that he would because she wanted to press charges. Fannin replied that she did not want to press charges now because she needed someone to pick her daughter up at school the next day. Officer Tersigni testified that Fannin became uncooperative with the officers once she realized that Gwen was going to be arrested and would not be available to pick up their daughter.

{¶11} Officer Tersigni and his partner escorted Gwen out of the house. He then called his sergeant because in a domestic situation with injuries it is standard procedure to call a supervisor to take pictures of the victim, injuries, and the scene. When the sergeant arrived, the officers knocked on the door and asked to speak with Fannin, but she would not open the door or speak to the officers. Prior to Gwen being arrested and taken out of the home, Fannin had said that she would fill out a statement.

{¶12} At trial Monee Fannin testified that on March 24, 2009, she was living at 809 Mercer Avenue with their four children. She and Gwen had been in a relationship for two years. Prior to that point they did not have a romantic relationship and were simply "friends." Gwen was not living with her because she lives in AMHA property and the lease does not allow him to live with her. Fannin admitted that she called 911 and told the dispatcher that her boyfriend had

jumped on her and punched her in the face and lip but claims that she just said those things because she was angry and wanted to hurt him. Fannin's testimony at trial is inconsistent with her initial statements to Officer Tersigni and her statements on the 911 call.

{¶13} Circumstantial and direct evidence "possess the same probative value[.]" *Jenks*, 61 Ohio St.3d at paragraph one of the syllabus. "Furthermore, if the State relies on circumstantial evidence to prove any essential element of an offense, it is not necessary for 'such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction.'" (Internal quotations omitted.) *State v. Tran*, 9th Dist. No. 22911, 2006-Ohio-4349, at ¶13, quoting *State v. Daniels* (June 3, 1998), 9th Dist. No. 18761, at *2.

{¶14} After viewing the evidence in the light most favorable to the State, we conclude that the trier of fact could reasonably find that the State met its burden of production and presented sufficient evidence that Gwen knowingly caused or attempted to cause Fannin harm. *Jenks*, 61 Ohio St.3d at paragraph two of the syllabus. Accordingly, this portion of Gwen's seventh assignment of error is overruled.

Drug Paraphernalia

{¶15} Gwen was convicted of Illegal Use or Possession of Drug Paraphernalia in violation of R.C. 2925.14(C)(1), which provides that "[n]o person shall knowingly use, or possess with purpose to use, drug paraphernalia." Drug paraphernalia is defined as

> "any equipment, product, or material of any kind that is used by the offender, intended by the offender for use, or designed for use, in propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body, a controlled substance in violation of this chapter." R.C. 2925.14(A).

"Drug paraphernalia" includes "[a] scale or balance for weighing or measuring a controlled substance[.]" R.C. 2925.14(A)(6).

{¶16} In addition, R.C. 2925.14(B) provides that in "determining if any equipment, product or material is drug paraphernalia, a court or law enforcement officer shall consider, in addition to other relevant factors," the following twelve enumerated factors. The factors include: "[a]ny statement by the owner, or by anyone in control, of the equipment, product, or material, concerning its use;" "[t]he existence of any residue of a controlled substance on the equipment, product, or material;" and "[e]xpert testimony concerning the use of the equipment, product, or material." R.C. 2925.14(B)(1)/(4)/(12).

{¶17} Gwen contends that while Officer Tersigni testified that he smelled a strong odor of marijuana in the home, he also testified that he saw no evidence of any marijuana in the house, and that the marijuana smell could have come from outside of the home. Gwen also contends that the officers did not test the residue on the scale that appeared to look and smell like marijuana.

{¶18} Officer Tersigni testified that the home had a strong odor of marijuana, as if someone had just finished smoking marijuana. He is familiar with the smell of marijuana based on his training and experience in the academy as well as his experience on the force. Gwen told Officer Tersigni that he had been smoking marijuana that day. When Officer Tersigni's partner placed Gwen in handcuffs, he searched him for any weapons or paraphernalia. The search was conducted in Officer Tersigni's presence and a small black digital scale, with what appeared to be marijuana residue, was recovered from Gwen's front pocket. Although the residue was never tested, Officer Tersigni testified that testing is usually reserved for cases with larger quantities of drugs or for cases dealing with crack or other drugs, as opposed to marijuana.

{¶19} In addition, Gwen testified in his own behalf and admitted that the small digital scale was his and that he had smoked marijuana prior to the police arriving at the residence. Gwen further admitted that the scale was used as drug paraphernalia.

{¶20} Gwen contends that there was insufficient evidence to support the drug paraphernalia conviction because Officer Tersigni testified that he saw no evidence of marijuana in the house, that the marijuana smell could have come from outside of the home, and because the officers did not test the residue on the scale that appeared to look and smell like marijuana. The cases cited by Gwen in his brief are distinguishable from this case. In *State v. Spicer*, 12th Dist. No. CA2009-02-036, 2009-Ohio-6173, the court reversed a conviction involving crack cocaine or powder cocaine, not a drug like marijuana with a recognizable odor. In addition, the officer in *Spicer* never testified as to his experience and familiarity with the drug. Here, Officer Tersigni testified that he is able to recognize the smell of marijuana due to his training and experience in the academy as well as his contact with it while he has been on the police force for four years. He testified that he comes in contact with marijuana several times a week.

{¶21} In *Newburgh Hts. v. Moran*, 8th Dist. No. 84316, 2005-Ohio-2610, the appellate court reversed the conviction because there was no evidence that the defendant had used the pipe nor was there any evidence that the pipe contained residue from any illegal substance. Here, Officer Tersigni testified that the scale had residue which looked and smelled like marijuana.

{¶22} Moreover, in the above cited cases, the defendant had not admitted to the officers that he had used the drugs, and had not testified at trial that the evidence was in fact drug paraphernalia.

{¶23} We conclude that after viewing the evidence in the light most favorable to the State, the trier of fact could reasonably find that the State met its burden of production and

presented sufficient evidence that Gwen knowingly possessed drug paraphernalia. *Jenks*, 61 Ohio St.3d at paragraph two of the syllabus. Accordingly, Gwen's first assignment of error is overruled.

Prior Convictions of Domestic Violence

{¶24} Pursuant to R.C. 2919.25(D)(4), domestic violence is a felony of the third degree if "the offender previously has pled guilty to or been convicted of two or more offenses of domestic violence * * *." R.C. 2919.25(D)(4). Thus, the State was required to prove beyond a reasonable doubt that Gwen either pled guilty or was convicted in the prior two cases. Gwen contends that there was insufficient evidence that Gwen had two prior convictions of domestic violence, and thus his conviction could not be enhanced to a felony of the third-degree. We agree.

> "Whenever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction." R.C. 2945.75(B)(1).

{¶25} "Ohio courts have held that R.C. 2945.75 provides one means of proving a prior conviction but not the only one. * * * These cases indicate that despite a technical error in a judgment entry or in absence of one, the State can prove existence of a prior conviction through testimony at trial that links the defendant to a prior conviction." *State v. Ferguson*, 3d Dist. No. 4-02-14, 2003-Ohio-866 at ¶20, quoting *State v. Harrington*, 3d Dist. No. 8-01-20, 2002-Ohio-2190.

{¶26} In *Harrington*, the "court found that the incomplete judgment entry was insufficient to prove a prior conviction when there was no testimony that the defendant in the first case is the same person as the defendant in the present case." *Ferguson* at ¶21. The judgment entry was incomplete because it did not contain the jury's verdict of guilt or the court's

findings. *Harrington* at ¶12. In addition, the testifying victim never made an in-court identification of the defendant. Id. However, in a subsequent case, the third district found an incomplete judgment entry sufficient to prove a prior conviction when "there was direct testimony by [the police officer] that the defendant in this case was the same person convicted in the prior case." *Ferguson* at ¶21. "Although the judgment entry is not complete in that the trial court's finding of guilt is not evidenced, the testimony of the officer from his personal knowledge of the verdict is sufficient to overcome this flaw." Id at ¶19.

{¶27} Here, the State introduced into evidence State's Exhibit Three, which was a document purportedly showing a prior conviction for domestic violence menacing, M-4, at the Akron Municipal Court, case #2000CRB11746. Gwen's name is listed and the entry shows that he originally entered a plea of "not guilty" on October 2, 2000. The certified copy of the journal entry contains a handwritten notation reflecting Domestic Violence Menacing, a fourth degree misdemeanor. The handwritten notation next to "Count One" appears as follows: "2/01 [illegible word] to D.V.-M4 Menacing." The document shows that Gwen was ordered to complete a Time Out Program and pay $140.00 for a charge of contempt. Gwen testified that he was never convicted of the domestic violence charge. He purports that he entered the Time Out Program, and that the charge was to be dismissed upon completion of the program.

{¶28} Upon review of the record, it is unclear how the court disposed of the case. Portions of the handwritten note in the margin are illegible. The court did not indicate whether the defendant entered a plea, was found guilty, or if the case was disposed of by other means. Unlike *Ferguson*, there was no direct testimony that the defendant was convicted of or pled guilty to domestic violence. Thus, the State failed to prove that Gwen had previously pled guilty to or been convicted of two or more offenses of domestic violence. R.C. 2919.25(D)(4).

Accordingly, we affirm Gwen's conviction of domestic violence, but reverse the enhancement of that offense from a felony of the fourth degree to a felony of the third degree because the state presented insufficient evidence that defendant had two or more prior domestic violence convictions. This portion of Gwen's seventh assignment of error is sustained.

ASSIGNMENT OF ERROR III

"THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ADMITTED INTO EVIDENCE A 911 CALL MADE BY THE ALLEGED VICTIM[.]"

{¶29} In his third assignment of error, Gwen contends that the trial court committed reversible error when it admitted into evidence a 911 call made by Fannin. We do not agree.

{¶30} This Court reviews evidentiary rulings regarding hearsay for an abuse of the trial court's discretion. *State v. Patel*, 9th Dist. No. 24030, 2008-Ohio-4693, ¶8. The trial court correctly ruled that the taped statement qualified as an excited utterance and did not constitute inadmissible hearsay. "To be admissible under Evid.R. 803(2) as an excited utterance, a statement must concern 'some occurrence startling enough to produce a nervous excitement in the declarant,' which occurrence the declarant had an opportunity to observe, and must be made 'before there had been time for such nervous excitement to lose a domination over his reflective faculties. * * * '" *State v. Huertas* (1990), 51 Ohio St.3d 22, 31, quoting *Potter v. Baker* (1955), 162 Ohio St. 488, paragraph two of the syllabus. See, also, *State v. Kinley* (1995), 72 Ohio St.3d 491, 497; *State v. Simko* (1994), 71 Ohio St.3d 483, 490.

{¶31} Here, the trial court did not abuse its discretion when it admitted the 911 call because Fannin's statements related "to a startling event or condition made while [she] was under the stress of the excitement caused by the event or condition." Evid.R. 803(2). Gwen argues that Fannin was not under the stress of the excitement caused by the event because she

testified that she made a false 911 call, after she had calmed down, and that she pretended to cry during the call.

{¶32} This Court has previously held that an alleged assault victim's statements to officers and paramedics were admissible under the excited utterance exception despite the defendant's claim that such statements were a result of reflective thought. In *State v. Hoehn*, 9th Dist. No. 03CA0076-M, 2004-Ohio-1419, the record demonstrated that the victim's statements were made within four hours of the alleged offenses, the alleged victim was physically upset when she made the statements, and there was no evidence that officers or paramedics were coercive in their questioning of the alleged victim.

{¶33} Here, Fannin's trial testimony was not consistent with the statements made during the 911 call or those made to the police officers immediately after the event. Fannin testified that she made the 911 call within five minutes of the event and that she was still upset when she made the call. Although she attempted to explain her reasons for crying and sobbing on the 911 call by saying that she was pretending, she did acknowledge that she can be heard crying and sobbing on the call. Furthermore, Officer Tersigni testified that when he arrived on scene, Fannin was still crying and told the officer that the injury beneath her eye was the result of Gwen throwing her onto the couch and rubbing his arm on her face.

{¶34} There is evidence in the record from which the trial court could reasonably have believed that Fannin was under the stress of the excitement when she made the 911 call. The court did not err in admitting it into evidence under Evid.R. 803(2). Accordingly, Gwen's third assignment of error is overruled.

ASSIGNMENT OF ERROR IV

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ADMITTED INTO EVIDENCE A JOURNAL ENTRY OF [GWEN'S] PRIOR CONVICTION FOR DOMESTIC VIOLENCE IN VIOLATION OF CRIM. R. 32(C) AND *STATE V. BAKER*, 119 OHIO ST.3D 197, 893 N.E.2D 163, 2008-OHIO-3330[.]"

{¶35} Gwen argues that the trial court erred when it admitted into evidence a journal entry from Akron Municipal Court that did not comport with Crim.R. 32(C) and *State v. Baker*, 119 Ohio St.3d 197, 2008-Ohio-3330. We do not agree.

{¶36} This Court recently wrote that where the statutory language requires proof that the defendant has previously been convicted of or pleaded guilty to an offense, that "the General Assembly placed 'convicted' on equal footing with a guilty plea[.]" *State v. McCumbers*, 9th Dist. No. 25169, 2010-Ohio-6129, at ¶12 (considering similar language in R.C. 2941.14.13(A), quoting *State ex rel. Watkins v. Fiorenzo* (1994), 71 Ohio St.3d 259, 260. Thus, "the word 'convicted' refers only to a determination of guilt and not a judgment of conviction. Contrary to [Gwen's] argument, compliance with Criminal Rule 32(C) is not a prerequisite to proving a prior offense for purposes of increasing a subsequent charge * * *." (Citations omitted.) *McCumbers* at ¶13. This Court found that

> "[t]his is true for two reasons. First, the State may prove a prior conviction using evidence other than the sentencing entry from the prior case. Second, for the above described reasons, this Court believes that the General Assembly did not intend for the State to prove prior convictions by proving that the courts in each prior case had included all the elements required for satisfaction of Criminal Rule 32(C)." Id.

{¶37} Accordingly, Gwen's fourth assignment of error is overruled.

ASSIGNMENT OF ERROR V

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ADMITTED INTO EVIDENCE A JOURNAL ENTRY OF [GWEN'S] PRIOR CONVICTION FOR DOMESTIC VIOLENCE WHEN THE JOURNAL ENTRY WAS DEFECTIVE[.]"

{¶38} Gwen argues that the trial court erred when it admitted into evidence a journal entry that he contends was defective because it improperly identified the domestic violence conviction as a minor misdemeanor rather than a first degree misdemeanor. We do not agree.

{¶39} Gwen presents no authority for the proposition that a typographical error of the level of offense renders the conviction to be null and void and inadmissible. Courts have held that where a trial court fails to state in the verdict and judgment entry the degree of the crime charged it results in a conviction for the least degree of the crime charged, in this case, a misdemeanor of the first degree. *State v. Lantz*, 5th Dist. No. 01 CA 38, 2002-Ohio-3838, at ¶60. Moreover, Gwen testified in his own behalf and confirmed that he was convicted of domestic violence with regard to the journal entry at issue. Thus, any error in the admission of this journal entry would be harmless. Crim.R. 52(A). *State v. Campbell*, 9th Dist. No. 24668, 2010-Ohio-2573. Gwen's fifth assignment of error is overruled.

ASSIGNMENT OF ERROR VI

> "THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT ADMITTED INTO EVIDENCE, JOURNAL ENTRIES OF DEFENDANT'S PRIOR CONVICTIONS FOR DOMESTIC VIOLENCE IN VIOLATION OF EVID. R. 803(22)[.]"

{¶40} Gwen contends that journal entries of his prior convictions were both inadmissible under Evid.R. 803(22) because they were not punishable by imprisonment in excess of one year and they were not introduced for the purposes of impeachment. We do not agree.

{¶41} Arguably, the journal entries were hearsay under Evid.R. 801(C) because they were statements being offered "to prove the truth of the matter asserted."

> "Hearsay is not admissible except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio." Evid.R. 802.

{¶42} Exhibits 3 and 4 are certified public documents that were self-authenticated pursuant to Evid.R. 902(4). The documents were generated by the Municipal Court of Akron and, therefore, were admissible pursuant to Evid.R. 803(8)(a) as public records. See *State v. Dominguez* (Jan. 29, 1999), 1st Dist. No. C-980148 (noting that the public record exception applies to court documents). As Gwen's convictions were not asserted to show character, were relevant to the charges against him, fall within the hearsay exception of Evid.R. 803(8), and were elements of the charges against Gwen, we conclude that the trial court did not commit error in allowing the prior convictions into evidence. See *State v. Renz* (Dec. 21, 1984), 2d Dist. No. 1103.

{¶43} Thus, Gwen's sixth assignment of error is overruled.

ASSIGNMENT OF ERROR II

> "[GWEN'S] CONVICTION FOR ILLEGAL USE OR POSSESSION OF DRUG PARAPHERNALIA IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE[.]"

ASSIGNMENT OF ERROR VIII

> "[GWEN'S] CONVICTION FOR DOMESTIC VIOLENCE IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE[.]"

{¶43} In his second and eighth assignments of error, Gwen contends that his convictions for illegal use or possession of drug paraphernalia and domestic violence were against the manifest weight of the evidence. We do not agree.

{¶44} When a defendant asserts that his conviction is against the manifest weight of the evidence,

> "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.

This discretionary power should be invoked only in extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant. Id.

Domestic Violence

{¶45} Fannin testified that on March 24, 2009, after dropping her children off at her sister's, she came home to find another woman standing in the doorway of her house talking to Gwen. She claims that she was outraged when she saw this other woman, and asked the other woman why she was there. When the woman could not answer, Fannin hit her. A fight allegedly ensued between the two for five to ten minutes. Gwen unsuccessfully tried to break up the fight.

{¶46} Fannin testified that the other woman left in a car, and Fannin followed in her car because she wanted to continue fighting her, but that she lost her. She claims that she drove around trying to calm down for about five minutes, and then called 911 and told them that her boyfriend had jumped on her. Fannin testified that the statement she made to the police dispatcher was a lie. She explained that she made a false 911 call because she wanted to "punish" Gwen for having another woman in her home. Fannin acknowledged that she told the 911 dispatcher that her boyfriend had jumped on her and punched her in the face and lip, but explained that she just said those things because she was angry and wanted to hurt him like she had been hurt. She claims that in the 911 call she was not sobbing, but that she was angry and

that she was pretending to cry. She continued driving around until a police officer called her and told her to return to the house. She testified that she did not recall whether she had any injuries at this point.

{¶47} When Fannin arrived at her home, she apologized to the officers for calling them and said she had been fighting another woman and wanted to get Gwen in trouble. She told the officers that the 911 call had been a lie. She testified that she did not tell the officers about the fact that the other woman was there without her permission, or about following the other woman, because the police never asked. She claims that she never agreed to write out a statement for the police. She admitted that she told the officers that she did not want Gwen arrested because she needed him to pick her daughter up from the bus stop the next day. Officer Tersigni testified that Fannin never mentioned another woman or told him that the 911 call had been a lie.

{¶48} Gwen testified in his own behalf that he was at Fannin's home with another girlfriend, Tika Jews. Fannin allegedly came home and a fight ensued on the front lawn. Fannin left in her car to chase Jews, and subsequently called Gwen and said "you're going to pay. I'm going to call the police." The police arrived roughly fifteen minutes later. He explained that there was an altercation between his "girlfriends." According to Officer Tersigni's testimony, Gwen never mentioned the plural form of "girlfriend" or that there was another girl at the residence.

{¶49} The evidence presented a trial shows that Gwen threw Fannin on the couch and injured her eye by rubbing his arm on her face. Officer Tersigni attested that, immediately after the incident, Fannin had a visible injury to her eye which she stated was the result of Gwen rubbing his arm in her face. The officer also attested that Fannin told him that Gwen had punched her in the stomach.

{¶50} The officer's testimony is consistent with the 911 call, wherein Fannin stated that her boyfriend had jumped on her and punched her in the face. Fannin did not deny making those statements on the 911 call, but instead said that she had lied about what had occurred because she was angry that her boyfriend had another woman at her house.

{¶51} Fannin's testimony at trial is inconsistent with her initial statements to Officer Tersigni and her statements on the 911 call. Officer Tersigni testified that Fannin became uncooperative with the officers once she realized that Gwen was going to be arrested and would not be available to pick up their daughter from the bus stop.

{¶52} The evidence essentially created a question of credibility between Officer Tersigni's testimony and Fannin's testimony. This Court has held that, "in reaching its verdict, the jury is free to believe all, part, or none of the testimony of each witness." *State v. Jackson* (1993), 86 Ohio App.3d 29, 33. Furthermore, "[t]he weight to be given the evidence and the credibility of the witness[es] are primarily for the trier of the facts[;]" in this case, the jury. Id., citing *State v. Richey* (1992), 64 Ohio St.3d 353, 363. The 911 tape was submitted to the jury as evidence, and the jury had the opportunity to listen and determine whether she was crying or not. "'The jury did not lose its way simply because it chose to believe the State's version of the events, which it had a right to do.'" *State v. Feliciano*, 9th Dist. No. 09CA009595, 2010-Ohio-2809, at ¶50, quoting, *State v. Morten*, 2d Dist. No. 23103, 2010-Ohio-117, at ¶28.

Drug Paraphernalia

{¶53} Incident to the domestic violence arrest, officers found the small digital scale on Gwen's person. Officer Tersigni testified that the home had a strong odor of marijuana and that Gwen told the officer that he had been smoking marijuana that day. In addition, Gwen testified in his own behalf and admitted that the small digital scale was his and that he had smoked

marijuana prior to the police arriving at the residence. Gwen further admitted that the scale was used as drug paraphernalia.

{¶54} Accordingly, upon review of the record, we do not conclude that "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." *Otten*, 33 Ohio App. 3d at 340. Gwen's second and eighth assignments of error are overruled.

III.

{¶55} Gwen's first, second, third, fourth, fifth, sixth and eighth assignments of error are overruled. Gwen's seventh assignment of error is sustained only with regard to the prior convictions. The remainder of the assignment of error is overruled. The judgment of the Summit County Court of Common Pleas is affirmed in part, reversed in part, and the matter is remanded for resentencing consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

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 equally to both parties.

CARLA MOORE
FOR THE COURT

DICKINSON, P. J.
CONCURS, SAYING:

{¶56} I agree with the majority's judgment and with most of its opinion. I write separately to note my disagreement with the majority's statement that it has applied an abuse of discretion standard of review to Mr. Gwen's third assignment of error. A trial court does not have discretion to receive hearsay evidence. That said, the trial court did not err by allowing into evidence Ms. Fannin's call to 911.

CARR, J.
CONCURS IN PART, AND DISSENTS IN PART, SAYING:

{¶57} I respectfully dissent in regard to the majority's conclusion that the State failed to prove that Gwen had previously been convicted of two or more domestic violence offenses. The majority implies that Exhibit Three is insufficient because it does not comply with Crim.R. 32(C). I would conclude that Exhibit Three is sufficient because it clearly evidences a conviction. The journal entry identifies the underlying offense, domestic violence menacing, and that Gwen was sentenced to 30 days in jail, suspended; Time Out; as well as fees and costs. There can be no sentence without a conviction. The fact that the journal entry is illegible to show if Gwen pleaded or was found guilty is irrelevant in light of our case law which provides

that a prior conviction for enhancement purposes does not have to meet the requirements of Crim.R. 32(C). In considering what constituted a prior conviction for enhancement purposes under R.C. 4511.19(G)(1)(c), which contains language similar to R.C. 2919.25(D)(4), this Court held that "to constitute a prior conviction *** a prior determination of guilt is what is contemplated by the statute and not a judgment of conviction." *State v. Monteleone*, 9th Dist. No. 10CA009751, 2010-Ohio-5064, at ¶10.

APPEARANCES:

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