[Cite as *State v. Harris*, 2011-Ohio-3233.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio — Court of Appeals No. WD-10-020

Appellee — Trial Court No. 09 CR 405

v.

Juan Harris — **DECISION AND JUDGMENT**

Appellant — Decided: June 30, 2011

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, Melissa A. Schiffel and David E. Romaker, Jr., Assistant Prosecuting Attorneys, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

SINGER, J.

{¶ 1} This appeal is taken from a judgment issued by the Wood County Court of Common Pleas, following a jury verdict finding appellant guilty of domestic violence. Because we conclude that the trial court committed no prejudicial error, trial counsel was

not ineffective, and the verdict was not against the manifest weight of the evidence, we affirm.

{¶ 2} Appellant, Juan Harris, was indicted on one count of domestic violence, in violation of R.C. 2919.25(A). The charge stemmed from an argument and physical altercation between appellant and his girlfriend ("victim"), who allegedly was seriously injured. The couple's daughter was asleep in the house when the argument took place. After a jury trial was conducted on January 12, 2010, appellant was found guilty of that offense. On March 22, 2010, appellant was sentenced to 12 months incarceration at the Ohio Department of Rehabilitation and Correction ("ODRC").

{¶ 3} Appellant now appeals from that judgment, arguing the following four assignments of error:

{¶ 4} "First Assignment of Error

{¶ 5} "The trial court abused its discretion by calling [appellant's girlfriend] as the court's witness.

{¶ 6} "Second Assignment of Error

{¶ 7} "Appellant received ineffective assistance of counsel in violation of his rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, § 10 of the Constitution of the state of Ohio.

{¶ 8} "Third Assignment of Error

{¶ 9} "The trial court abused its discretion and erred to the prejudice of appellant at sentencing by imposing a prison term in excess of the minimum in violation of

appellant's right to due process under the Sixth and Fourteenth Amendments of the United States Constitution.

{¶ 10} "Fourth Assignment of Error

{¶ 11} "Appellant's conviction was against the manifest weight of the evidence."

I.

{¶ 12} In his first assignment of error, appellant claims that the trial court abused its discretion by calling the victim, appellant's girlfriend, as its own witness.

{¶ 13} Evid.R. 614(A) provides that a "court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called." Thus, at any party's suggestion, the trial court may call a witness who has recanted another prior statement favorable to that party. *State v. Arnold*, 189 Ohio App.3d 507, 2010-Ohio-5379, ¶ 43; *State v. Kiser*, 6th Dist. No. S-03-028, 2005-Ohio-2491, ¶ 13-15. Even prior to the enactment of the Rules of Evidence, a trial court had the authority and discretion to call individuals as witnesses of the court. *State v. Adams* (1980), 62 Ohio St.2d 151, paragraph four of the syllabus. Evid.R. 614(B) states that the court "*may* interrogate witnesses, in an impartial manner, whether called by itself or by a party." Thus, nothing in the rule requires the court to initiate the questioning after it calls an individual as a witness of the court. Rather, if the court so chooses to ask questions of a witness, it must do so in an impartial way.

{¶ 14} Furthermore, the state need not demonstrate surprise in order to cross-examine such a witness. *Kiser*, supra, at ¶ 15, citing *State v. Dacons* (1982), 5 Ohio App.3d 112. See, also, *State v. Apanovitch* (1987), 33 Ohio St.3d 19.

{¶ 15} A trial court "does not abuse its discretion in calling a witness as a court's witness when the witness's testimony would be beneficial to ascertaining the truth of the matter and there is some indication that the witness's trial testimony will contradict a prior statement made to police." *State v. Schultz*, 11th Dist. No. 2003-L-156, 2005-Ohio-345, ¶ 29. See, also, *State v. Lather*, 171 Ohio App.3d 708, 2007-Ohio-2399, ¶ 11. An abuse of discretion requires the court's action to be unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 16} In this case, the state requested the trial court to call the alleged victim, as its own witness since she had recanted her previous statements regarding appellant's actions which were the basis for the charges. Even though the trial court did not initiate the questioning of the victim, she was subject to cross-examination by both the state and appellant. Consequently, we cannot say that appellant was prejudiced by, or that the trial court abused its discretion in, calling the victim as its own witness.

{¶ 17} Accordingly, appellant's first assignment of error is not well-taken.

II.

{¶ 18} In his second assignment of error, appellant contends that his trial counsel was ineffective because counsel failed to request forensic evidence as to a knife allegedly

used to threaten the victim and for failing to object during the state's cross-examination of the victim.

{¶ 19} In order to prove ineffective assistance of counsel, a defendant must show (1) that defense counsel's representation fell below an objective standard of reasonableness and (2) that counsel's deficient representation was prejudicial to defendant's case. *State v. Bradley* (1989), 42 Ohio St.3d 136, paragraph two of the syllabus. See, also, *Strickland v. Washington* (1984), 466 U.S. 668, 694. Generally, debatable trial tactics do not constitute ineffective assistance of counsel. *State v. Hale*, 119 Ohio St.3d 118, 2008-Ohio-3426, ¶ 227; *State v. Phillips* (1995), 74 Ohio St.3d 72, 85. A trial counsel's "failure to make objections is within the realm of trial tactics and does not establish ineffective assistance of counsel." *State v. Evans*, 9th Dist. No. 23649, 2007-Ohio-5934, ¶ 27, citing *State v. Gumm* (1995), 73 Ohio St.3d 413, 428, modified on other grounds by *State v. Wogenstahl*, 75 Ohio St.3d 344.

{¶ 20} In this case, we cannot say that the statements made by the victim on cross-examination by the state were so prejudicial, that the failure to object constitutes ineffective assistance of counsel. Other evidence was presented that appellant had a prior domestic violence conviction and that during the current case, appellant had caused physical injuries to the victim. The additional information regarding the use of a knife, either for the current charge or at a previous time, did not negate the other facts from which the jury could have found appellant guilty. Moreover, appellant does not show how any type of "forensic" testing of the kitchen knives would have been helpful. If, in

fact, appellant had been at the victim's home in the past, appellant may have left fingerprints on the knife. Moreover, the victim testified at trial that she remembered seeing appellant with a knife, but that he had not harmed her with it. Consequently, the failure to request such testing may have been trial strategy, so the fact that no testing was done could be used to cast doubt on whether appellant had actually used the knife as the victim stated to police.

{¶ 21} Therefore, we cannot say that appellant demonstrated that trial counsel's representation fell below an objective standard of reasonableness or that any possible error would have been prejudicial to his case. Accordingly, appellant's second assignment of error is not well-taken.

III.

{¶ 22} In his third assignment of error, appellant agues that the trial court erred in imposing a prison sentence which was more than the minimum allowed under sentencing statutes. Appellant essentially argues that, the United States Supreme Court's ruling in *Oregon v. Ice* (2009), 555 U.S. 160, has revived the former statutes which were found to be unconstitutional and severed by *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856.

{¶ 23} Since the filing of the briefs in this case, the Supreme Court of Ohio has addressed this issue in part, by determining that "the United States Supreme Court's decision in *Oregon v. Ice* * * * does not revive Ohio's former consecutive-sentencing statutory provisions, R.C. 2929.14(E)(4) and 2929.41(A), which were held unconstitutional in *State v. Foster* * * *." *State v. Hodge*, 128 Ohio St.3d 1,

2010-Ohio-6320, paragraph two of the syllabus. *Hodge* also made clear that *Ice* had no effect on the other Ohio statutes severed by *Foster*, including R.C. 2929.14(B) requiring judicial fact-finding before the imposition of non-minimum sentences. Id. at ¶ 27. Since the statutory provisions are not revived, "trial court judges are not obligated to engage in judicial fact-finding prior to imposing * * * sentences unless the General Assembly enacts new legislation requiring that findings be made." Id. at ¶ 39.

{¶ 24} In the present case, appellant was sentenced to a non-minimum sentence. Thus, appellant's sentence is unaffected by *Ice*. Instead, we review appellant's sentence only to determine whether it is contrary to law or constitutes an abuse of discretion by the trial court.

{¶ 25} In a plurality opinion, the Supreme Court of Ohio set forth a two-step procedure for reviewing a felony sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, ¶ 26. The first step is to "examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law." Id. at ¶ 4. If this first step is satisfied, the second step requires that the trial court's decision be reviewed under an abuse-of-discretion standard. Id.

{¶ 26} In *Kalish*, the Supreme Court held that the defendant's sentence was not contrary to law, where the trial court: (1) expressly stated that it had considered the purposes and principles of R.C. 2929.11, as well as the factors listed in R.C. 2929.12, (2) properly applied postrelease control, and (3) imposed a sentence that was within the

permissible range. Id. at ¶ 18. The court further held that there was no abuse of discretion, inasmuch as: (1) the trial court had given careful and substantial deliberation to the relevant statutory considerations, and (2) there was nothing in the record to suggest that the court's decision was unreasonable, arbitrary, or unconscionable. Id. at ¶ 20.

{¶ 27} In the present case, appellant was convicted of domestic violence, in violation of R.C. 2919.25(A), a felony of the fourth degree, which provides that "[n]o person shall knowingly cause or attempt to cause physical harm to a family or household member." Under R.C. 2929.14(A)(4), for a fourth degree felony, the prison term "shall be six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months."

{¶ 28} As to the first step in *Kalish*, appellant's sentence was in the middle of the statutory range and the record reflects that the trial court considered the purposes and principles of sentencing and the seriousness and recidivism factors as required in R.C. 2929.11 and 2929.12. In addition, the court advised appellant regarding postrelease control. Therefore, we conclude that the trial court complied with all applicable rules and statutes and, as a result, appellant's sentence is not clearly and convincingly contrary to law.

{¶ 29} As to the second step, evidence was presented that appellant allegedly caused injuries to the victim in a fight which occurred at her home. According to the victim's statement to police, appellant had punched and slapped her in the face and later grabbed her, and threatened to kill her while holding a knife. Since appellant had a prior

conviction for domestic violence, he was charged with the fourth degree felony domestic violence. Therefore, we cannot say that the trial court abused its discretion in the imposition of appellant's sentence .

{¶ 30} Accordingly, appellant's third assignment of error is not well-taken.

IV.

{¶ 31} In his fourth assignment of error, appellant claims that the jury's verdict was against the manifest weight of the evidence. Appellant states that because the victim recanted her statements to the police, the verdict was against the manifest weight because it was based on her inconsistent testimony.

{¶ 32} Under a manifest weight standard, an appellate court sits as a "thirteenth juror" and may disagree with the fact finder's resolution of the conflicting testimony. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 387. The appellate court,

{¶ 33} "'reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.'"

Id., quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. See, also, *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶ 39, quoting *Martin*, supra. Additionally,

the reversal must be by concurrence of all three judges and the defendant is then granted a new trial. *Thompkins*, supra, at 389.

{¶ 34} In this case, appellant argues that because the victim of the domestic violence recanted and testified that her injuries were not caused by appellant, the jury was bound to find him not guilty. The following evidence was presented to the jury.

{¶ 35} The victim placed two 911 calls in the early morning of August 13, 2009. The 911 call dispatcher testified that, in the first call, a female said that "he had a knife and was going to kill her" and the call was disconnected. According to the first 911 tape played at trial, the victim reported that appellant was in her home, had assaulted her, and was threatening her with a "knife again." Police units were dispatched and the dispatcher called back to the phone number shown on the call. The female that answered said it was a mistake. The dispatcher told her to go out to the officers and then the call disconnected. The dispatcher noted that she had previously received four to five calls from the victim at that address.

{¶ 36} Police officers testified at trial that when they first arrived, they could not enter the home. After speaking with the dispatcher, the victim came outside to speak to an officer, while two or three more officers went inside her house. The victim showed the first officer her cut lip which was bleeding and a small bruise on her left cheek. An odor of alcoholic beverage was detected on the victim and, to one officer, she appeared to be "tipsy." Appellant was not observed to be intoxicated.

{¶ 37} According to the officer's testimony at trial, she verbally told him that appellant hit her in the lip with a closed fist, causing the cut and "smacked" her in the cheek. Appellant stated to her twice, "I should just kill you." The victim also told an officer that the two had been fighting in the bedroom, which caused the lamp to be broken and the items thrown around the room. She said appellant had told her not to call police, to calm down, and he would go downstairs to make her a drink.

{¶ 38} The victim told police that she had called 911 while appellant was downstairs. She said that when he heard her on the phone, he came back upstairs with a kitchen knife and hit her on the head with the handle, saying that he wanted to use it to kill her. The victim never told police that she fell and cut her lip. She told police that if appellant went to jail, he would kill her after he was released.

{¶ 39} Another officer testified that when he spoke with her at the house, she appeared "timid" or showed a "nervous fear." She also showed that officer her lip and said appellant hit her with the "butt of a steak knife." She said she was okay, and did not want to do anything else because she was afraid appellant was going to kill her. At the victim's request, the officer went upstairs in her home to find her cell phone. The victim told him it had been lost in the scuffle with appellant. The officer said he found a silver cell phone up in the bedroom on the floor and brought it down to the victim.

{¶ 40} That same officer took the victim's written statement, in which she said that she and appellant had had an argument and she was "afraid to say anymore." The officer

told her to put down on the form exactly what she had told him and to tell the truth. The form includes an affirmation that her statement was true.

{¶ 41} At trial, when shown the 911 taped statements and the written statement, the victim denied or did not remember telling police that appellant had hit her with his fist or the knife. She said that she and appellant had both been drinking prior to the incident. The victim testified that appellant was searching in her bedroom for her cell phone to see who she had been calling. She said that when they could not find the phone, during the search many things got "tossed around." She claimed the lamp was broken and table was turned over during the search for the phone. The victim acknowledged that the photos offered by the prosecution showing the house in disarray when the police arrived accurately depicted "things thrown around, bed clothes ripped up, and stuff on the floor."

{¶ 42} The victim said that during the searching for the phone, she fell and cut her lip. She denied that appellant had "put his hands on" her. She said, however, she remembered "seeing him with a knife" and a drink in his hand, coming up the stairs to her bedroom. The victim testified that she had found the phone in the toilet the next day, but claimed she did not see it when she went into the bathroom to call police on the house phone.

{¶ 43} The victim said that, prior to that incident, she had previously called the police when she and appellant had had arguments, but he was not arrested. She said she specified that physical violence had occurred this time because she knew the police

would get him out of her house. She said she did not remember saying many things to police, but had written that she was afraid to say more because one of the officers had said her daughter would be taken away. She also recalled that, after appellant was charged, she had written a letter to the judge stating that she had called the police because she was scared and just wanted appellant to leave her home. The victim told the judge that she had been drinking and it was all just a misunderstanding.

{¶ 44} Finally, a Wood County Sheriff's Deputy, Mary Ann Robinson, testified as an expert in the field of domestic violence. She explained the cycle of violence, the effects on the victim, and that victims often recant their statements because the abusers assure them that the violence will never happen again. The cycle, however, continues and the abuse reoccurs. Deputy Robinson stated that victims often do not pursue charges against the abusers because they fear for their lives or the lives of their children. Victims also accept the blame for why the abuse happens.

{¶ 45} The deputy then responded to the prosecutor's suggestion of a hypothetical situation, where a victim calls 911 to report someone had threatened to kill her with a knife and a month later claims the events never occurred. The deputy stated that, based upon her training and experience, such situations happen quite frequently and would fit into the cycle of violence. On cross-examination, the deputy acknowledged that she had not talked to the victim in this particular case, to determine if the victim had in fact changed her testimony in response to her fear of or wish to be with appellant.

{¶ 46} Although the testimony was conflicting, some of the basic elements remained. In both versions, the victim stated that appellant had a knife. In addition, she had experienced repeated episodes of violence which had prompted her to call for police on at least four to five prior occasions. Appellant had also been previously convicted of domestic violence in this relationship. The victim stated to police at the time of the incident that she was afraid appellant would kill her. She only later recanted, after some time had passed, when appellant was in jail or under a no contact order.

{¶ 47} Consequently, evidence was presented from which the jury could reasonably conclude that the victim's recantation was designed to protect herself, her child, or appellant. Based upon the record, we do not conclude that the jury lost its way or that this is the exceptional case requiring us to overturn the jury's assessment of the witness's credibility. Therefore, the jury's verdict was not against the manifest weight of the evidence.

{¶ 48} Accordingly, appellant's fourth assignment of error is not well-taken.

{¶ 49} The judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, P.J. _____
CONCUR.
JUDGE