

IN THE SUPREME COURT OF OHIO

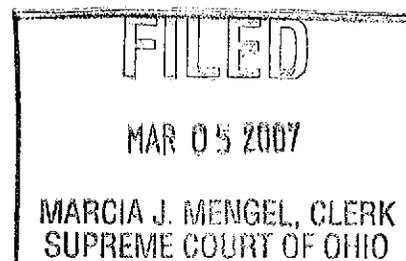
CASE NO. 2007-0184

STATE OF OHIO :
Appellant/ Cross Appellee :
-vs- :
JAKEENA BROWN :
Appellee/ Cross Appellant :

On Appeal from the
Cuyahoga County Court
of Appeals, Eighth
Appellate District Court
of Appeals
CA: 87651

MEMORANDUM IN SUPPORT OF JURISDICTION
OF APPELLEE /CROSS-APPELLANT JAKEENA BROWN

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TABLE OF CONTENTS

PAGES

EXPLANATION OF WHY THIS FELONY CASE RAISES SUBSTANTIAL CONSTITUTIONAL QUESTIONS AND IS A MATTER OF GREAT PUBLIC AND GENERAL INTEREST1

STATEMENT OF THE CASE AND FACTS9

ARGUMENT.....10

In Response to Propositions of Law I and II:10

Convictions for aggravated assault under both theories must stand when the convictions arise from a single act.

The two counts of aggravated assault should merge.

Proposition of Law III:11

When, in a single animus, a person engages in conduct that violates a single Revised Code section prohibiting an offense, only one conviction may be imposed, even if that particular offense has been committed in more than one of the statutorily prescribed manners of commission.

Propositions of Law IV and V:.....12

The portion of a statement made to the police at the scene of an investigation that is not essential to addressing an imminent harm is testimonial under the Confrontation Clause of the Sixth Amendment to the United States Constitution.

In the absence of evidence that a suspect who has just committed a crime is about to harm another person, an on-the-scene identification of that suspect to police is testimonial under the Sixth Amendment Confrontation Clause.

Proposition of Law VI:.....18

By virtue of Article XV, Section 11 of the Ohio Constitution, R.C. 2919.25, prohibiting domestic violence, does not apply to unmarried cohabitants without children.

CONCLUSION.....19

SERVICE19

APPENDIX: *State of Ohio v. Jakeena Brown* 2006-Ohio-62671

**EXPLANATION OF WHY THIS FELONY CASE RAISES SUBSTANTIAL
CONSTITUTIONAL QUESTIONS AND IS A MATTER OF GREAT PUBLIC AND
GENERAL INTEREST**

Introduction

The instant case involves a cross-appeal in which both parties have presented to this Court issues of statewide significance that warrant this Court's plenary consideration.

In order to avoid confusion, Ms. Brown is labeling the State's propositions of law as Propositions I and II, respectively, the same designations they carried in the State's previously filed Memorandum in Support of Jurisdiction. Proposition of Law III is propounded by Ms. Brown in response to the State's propositions; the three propositions all relate to the same fundamental issue – the proper interpretation of the Revised Code's provision regarding allied offenses and the Double Jeopardy Clause of the United States Constitution. Why these three propositions should be accepted by this Court, as a package, is addressed in Part B, below.

In part A of this section, Ms. Brown discusses Propositions of Law IV, V, and VI. Propositions of Law IV, V, and VI are propositions that Ms. Brown raises apart from the allied offense/ double jeopardy issues discussed in Propositions of Law I, II and III.

A. Propositions of Law IV, V and VI (Proposed by Ms. Brown)

1. Propositions of Law IV and V: Defining the Confrontation Clause

When a police officer arrives on a crime scene, his or her first question to those nearby is often, "Is anybody hurt?" If someone is hurt, the second question is often "who did this?" This case asks this Court to determine whether, under the Confrontation Clause of the United States Constitution, the answer to the second question is testimonial and thus cannot be introduced at trial unless the declarant is available to be cross-examined.

This is another in a line of cases that is coming before this Court and courts throughout the United States as defendants and prosecutors seek guidance on the parameters of the United States Supreme Court's landmark decision in *Crawford v. Washington*, 541 U.S. 36 and the Court's recent corollary decision in *Davis v. Washington* (2006) 126 S.Ct. 2266. What causes this case to distinguish itself from the others and be particularly appropriate for this Court's individual consideration is that this case presents one of, in not the, most common fact patterns encountered in criminal law. Significantly, while these facts recur daily, the United States Supreme Court's decisions have yet to address the Confrontation Clause in this particular context.

Crawford held that "testimonial" statements could not be introduced at trial unless the declarant was subjected to cross-examination. *Crawford* left unresolved the full definition of what is "testimonial." *Davis* held that statements to the police on the scene of an investigation after the situation no longer posed an ongoing emergency were testimonial and thus implicated the Confrontation Clause. *Davis* also held that statements made to a 911 operator by the victim while her assailant was in the home were not testimonial because the ongoing emergency caused the statement not to be a report of what had already taken place but a call for help during an ongoing emergency.

Significantly, the *Davis* Court acknowledged that it was not called upon to determine whether the Confrontation Clause was violated by the admission of statements made during the victim's ongoing conversation with the 911 operator when those statements were made immediately after the assailant left the home (thus alleviating the imminent danger to the victim) but was still at large. *Davis* suggested that such evidence would likely be testimonial:

This is not to say that a conversation which begins as an interrogation to determine the need for emergency assistance cannot, as the Indiana Supreme

Court put it, "evolve into testimonial statements," [State v. Hammon (Indiana 2005)], 829 N.E. 2d 444, at 457, once that purpose has been achieved. In this case, for example, after the operator gained the information needed to address the exigency of the moment, the emergency appears to have ended (when Davis drove away from the premises). The operator then told McCottry to be quiet, and proceeded to pose a battery of questions. It could readily be maintained that, from that point on, McCottry's statements were testimonial, not unlike the "structured police questioning" that occurred in *Crawford*, 541 U.S., at 53, n. 4, 124 S. Ct. 1354, 158 L. Ed.2d 177. This presents no great problem. Just as, for Fifth Amendment purposes, "police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect," *New York v. Quarles*, 467 U.S. 649, 658-659, 104 S. Ct. 2626, 81 L. Ed.2d 550 (1984), trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. Through *in limine* procedure, they should redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence. Davis's jury did not hear the *complete* 911 call, although it may well have heard some testimonial portions. We were asked to classify only McCottry's early statements identifying Davis as her assailant, and we agree with the Washington Supreme Court that they were not testimonial. That court also concluded that, even if later parts of the call were testimonial, their admission was harmless beyond a reasonable doubt. Davis does not challenge that holding, and we therefore assume it to be correct.

Id., at 2277-78.

Nor has this Court yet to address the application of *Crawford* and *Davis* to the circumstances encountered in this case. In *State v. Stahl* (2006), 111 Ohio St.3d 186, this Court acknowledged *Davis* as it held that a rape victim's statements to a medical professional as part of a medical examination were not testimonial – a majority of this Court in *Stahl* reasoned that its decision was in keeping with *Davis*. But *Stahl* did not determine whether such statements, had they been made to law enforcement officers (as opposed to being made in their presence) would have been admissible at trial without the declarant being subjected to cross-examination.

In deciding this case, the Eighth District Court of Appeals relied upon *Akron v. Hutton* (June 29, 2005) 2005 Ohio 3300, wherein Ohio's Ninth Appellate District held that statements

that meet the necessary criteria for the excited utterance exception to the hearsay rule are not violative of the Confrontation Clause. This approach is fundamentally flawed – whether a statement is admissible or inadmissible hearsay under a State evidence rule does not resolve federal Confrontation Clause concerns. This fundamental misconception, explicitly shown to be shared by at least the Eighth and Ninth Districts, needs also to be addressed by this Court – and will be addressed under the facts of this case.

2. Proposition of Law VI: Another *Carswell* Marriage Amendment Case

Another issue in this case concerns the recent Marriage Amendment to the Ohio Constitution and whether it precludes unmarried cohabitants without children from coverage under Ohio's domestic violence statute. This Court has accepted this issue in the matter of *State v. Carswell*, 109 Ohio St. 3d 1423, 2006 Ohio 1967, in which a decision is pending. As this Court has done with other cases in this regard, it can accept Ms. Brown's second Proposition of Law and stay briefing on this proposition pending the outcome of *Carswell*. See, e.g., *State v. Ward*, 110 Ohio St. 3d 1436, 2006 Ohio 3862, *Cleveland v. Voies*, 110 Ohio St. 3d 1437; 2006 Ohio 3862; and *State v. Burk*, 109 Ohio St. 3d 1455; 2006 Ohio 2226.

B. Propositions of Law I (proposed by the State), II (proposed by the State) and III (proposed by Ms. Brown): Double Jeopardy and Allied Offenses

Defendant-Appellant Jakeena Brown, by proposing Proposition III, joins the State of Ohio, who has proposed Propositions I and II, in asking this Court to address the issue of when multiple convictions can arise from a single criminal action. Both parties are appealing the Eighth District Court of Appeals' decision in this regard. The State appeals because one count of aggravated assault has been dismissed by the Eighth District as violative of the Double Jeopardy

Clause. Ms. Brown is appealing because the two counts of aggravated assault in this case were not merged as allied offenses under R.C. 2941.25.¹

In addressing these first three propositions of law, this Court will have to revisit *State v. Rance* (1999), 85 Ohio St.3d 632. In *Rance*, this Court established an elemental analysis whereby two offenses are only allied if, taken in the abstract, the elements of the crimes correspond so closely that one cannot be committed without the other. *Id.*, at 638.

The question presented here is whether *Rance* should really apply so literally to allow two convictions where the offenses of conviction are:

For the same statutory offense (here, aggravated assault)

Committed via a single action (here, one stab)

Against a single victim,

All because the statute provides for two different ways of committing the crime (here, causing physical harm with a deadly weapon as well as causing serious physical harm).

Simply put, did the General Assembly, in enacting R.C. 2941.25 really envision that a person could be convicted of two crimes of aggravated assault for one thrust of a knife that caused a single injury to a single person?

If the answer to this question is “yes,” then the implications go far beyond the isolated offense of aggravated assault. The State’s memorandum acknowledges that the same reasoning

¹ Even if Ms. Brown did not specifically raise Proposition of Law III, this Court would still have to confront the issue presented therein in the event it accepts Propositions of Law I and II. As discussed *infra*, no discussion of the Double Jeopardy Clause can ignore R.C. 2941.25. Moreover, if Ms. Brown is correct that R.C. 2941.25 precluded the two convictions in this case, then this Court would have to affirm the Eighth District on this alternative theory -- this Court’s precedent has long recognized that it will not reverse a district court of appeals that reached a correct decision, even if the reasoning of the district court of appeals was incorrect. *Agee v. Russell* (2001), 92 Ohio St.3d 540, 544 (“we will not reverse a correct judgment merely because a court of appeals erred in its specified rationale.”)

applicable to Ms. Brown's aggravated assault convictions also applies to the crimes of felonious assault. But that is merely the tip of the iceberg. There are myriad crimes prohibited under the Revised Code that can be committed in more than one way via one act where the two manners of commission do not technically satisfy the *Rance* elemental analysis. For example, a person can violate R.C. 4511.19 (driving under the influence of alcohol or drugs) by driving in an impaired fashion with a blood alcohol content exceeding 0.08. Under the State's interpretation of R.C. 2941.25, this constitutes the commission of two crimes for which multiple punishments can be imposed: the first for driving under the influence of alcohol, regardless of the blood-alcohol content (BAC), in violation R.C. 4511.19(A)(1)(a); and the second for driving with a BAC in excess of 0.08 in violation of R.C. 4511.19(A)(1)(b). While Ms. Brown does not quarrel with the State's right to bring charges under multiple theories, she contends that, for R.C. 2941.25 to be meaningful, it must prevent "two convictions for the price of one" in situations where only one statute has been violated.

And while, in this case, Ms. Brown received concurrent sentences for the two offenses, such a result is not guaranteed. There is nothing to prohibit consecutive terms of incarceration for persons such as Ms. Brown. Thus, the felonious assault that is committed by stabbing a person and causing serious physical harm is punishable by up to sixteen years of imprisonment if prosecuted by the State under R.C. 2903.11 as both an assault with a deadly weapon resulting in physical harm and as an assault resulting in serious physical harm. A person who is caught snorting a line of cocaine is subject to up to two years of imprisonment – one year for the fifth degree felony of possessing the cocaine and one year for the fifth degree felony of using the cocaine, each in violation of R.C. 2925.11. Cf., *State v. Foster*, Hamilton App. No. C-050378, 2006-Ohio-1567 (applying *Rance* and affirming convictions for transporting drugs and

possessing the same drugs); see also, *id.* (Painter, J. concurring) (criticizing *Rance* as “wrongly decided”).

Did the General Assembly, in passing R.C. 2941.25 really intend such results? Several courts throughout the State have concluded that the answer to this question should be “no,” but have found themselves required to follow *Rance* as the definitive interpretation of R.C. 2941.25. See, e.g., *Palmer v. Haviland* (S.D., Ohio 2005), 2005 U.S. Dist. LEXIS 41864 (criticizing *Rance* but, following its dictates, finding no constitutional violation where defendant convicted of aggravated robbery and robbery), *State v. Norman* (1999), 137 Ohio App.3d 184, 203 (same).

Respectfully, this Court’s post-*Rance* jurisprudence has also struggled with strict adherence to the *Rance* elemental analysis. Thus, in the context of the offense of kidnapping, this Court has, since *Rance*, held that the offense of kidnapping must merge with another offense where the restraint of the victim was merely that necessary to commit the other offense. *State v. Fears* (1999), 86 Ohio St.3d 329 (kidnapping and robbery are allied); *State v. Adams*, 103 Ohio St.3d 508, 526, 2004-Ohio-5845 (kidnapping and rape), *State v. Foust*, 105 Ohio St.3d 137, 2004-Ohio-7006 (same). These decisions are inconsistent with a pure application of *Rance* – taken in the abstract, the elements of the two offenses do not fit hand in glove. This has caused the Fifth District Court of Appeals to recently comment that this Court has been inconsistent in its application of *Rance*. *State v. Smith*, Morrow App. No. 05-CA-0007, 2006-Ohio-5276, n.2 (citing concurring opinion in *Foster*, *supra*).

It may well have been this same frustration with *Rance* caused the Eighth District to conclude in the instant case that Ms. Brown’s multiple convictions, while not violating R.C.

2941.25, nonetheless violated the Double Jeopardy Clause.² The Eighth District's decision in this regard is unprecedented – courts of appeals have not previously found that the Double Jeopardy Clause provides more protections than R.C. 2941.25. In effect, the Eighth District has now held that R.C. 2941.25 is unconstitutional – because it provides less protection than that required by the Double Jeopardy Clause.

Respectfully, the time for this Court to revisit *Rance* has come. Otherwise, courts and counsel will continue to struggle with the issue of when offenses are allied and when they are not. The fluidity of post-*Rance* precedent in both this Court and the lower courts has resulted in inconsistency in the interpretation of R.C. 2941.25. See, *McKitrick v. Jeffries* (N.D. Ohio), 2006 U.S. Dist. LEXIS 29472 at 24-30 (collecting cases). In *McKitrick*, a federal district court found that counsel was ineffective because counsel did not challenge the allied nature of kidnapping and robbery in light of this Court's post-*Rance* decision in *Fears*. Yet, *Rance*, which is considered the watershed case, would have compelled the conclusion that kidnapping and rape are not allied offenses. And, to compound matters, *Fears* disregarded the *Rance* test without citing to *Rance*. Thus, Shepardizing *Rance* is not sufficient to stay abreast of this Court's post-*Rance* jurisprudence.

² Allied offenses are not the only circumstance in which a district courts of appeals has recently expressed dissatisfaction with a compare-the-elements tests. In *State v. Kvasne*, Cuyahoga App. Nos. 86805 and 86915, 2006-Ohio-5235, the Eighth District rejected the traditional elemental analysis used to determine if two offenses are greater- and lesser-included offenses of one another. Instead, the Eighth District applied a transactional test that mirrored the test advocated by Justice Lundberg Stratton in her concurring opinion in *State v. Barnes* (2002), 94 Ohio St.3d 21. *Kvasne* currently is before this Court as Case No. 2006-2217; this Court has yet to decide whether to accept jurisdiction in *Kvasne*. While *Kvasne*, as a lesser included offense case, differs from the instant case, which involves allied offenses, the two cases share the tension of comparing elements in the abstract vis-à-vis examining offense conduct under the factual circumstances of the individual case.

By accepting the first three propositions of law, much, if not all, of this confusion will be eliminated. The circumstances of this case constitute the most compelling to revisit *Rance* – only one section of the Revised Code has been violated. This Court’s acceptance of this case will clear up the confusion that has arisen under *Rance* in this recurring circumstance of multiple convictions under a single Code Section. Moreover, depending upon how this Court analyzes the issues presented, its decision will give guidance to the corresponding problem, discussed in many of the cases cited supra, of multiple convictions under multiple Code sections where the offense conduct is inexorably intertwined.

Conclusion

Accordingly, this Court’s limited resources will be well spent by accepting this case for plenary review of the first five propositions of law and for holding Proposition of Law VI in abeyance pending the decision in *Carswell*.

STATEMENT OF THE CASE AND FACTS

Ms. Brown supplements the State’s factual recitation as follows.

On October 17, 2005, a jury found Defendant-Appellant, Jake0ena Brown, guilty of two counts of aggravated assault, felonies of the fourth degree. The jury also found Ms. Brown guilty of one count of domestic violence, a misdemeanor of the first degree.

At trial, evidence was presented that the Cleveland Police Department received a priority call to proceed to Greenwich Avenue in connection Defendant Brown’s having been assaulted. Before meeting Ms. Brown and investigating what had happened to her, the police were flagged down by her domestic partner, Kevin Johnson, who was holding his side and had blood on his shirt. Johnson told the police that he had been “stabbed” and, further, identified Brown as his assailant.

The police spoke with Brown, who admitted that the two had been in an argument during which Johnson had been cut by a knife that was in her hands. At trial, Brown testified that, while she had a knife during the argument, she never intentionally used it against Johnson and did not even realize during the argument that he had made contact with the knife and had been unintentionally cut.

Johnson, for his part, did not appear as a witness at trial, having failed to comply with the State of Ohio's efforts to ensure his testimony at trial. Without Johnson, the State proceeded by using police testimony that Johnson had immediately identified Brown on the scene as the person responsible for his having been "stabbed."

The Eighth District held that statements made to the police by the victim, Kevin Johnson, and testified to by the officers, thereby giving the accused no opportunity to confront the maker of the statements, did not violate the Confrontation Clause of the United States Constitution. The Court also found that Ms. Brown's conviction under Ohio's domestic violence statute, 29219.25, did not violate the Ohio Constitution Section 11, Article XV.

Where necessary additional facts are incorporated into the arguments to which they pertain.

ARGUMENT

In Response to Proposition of Law I and II (proposed by the State):

Convictions for aggravated assault under both theories must stand when the convictions arise from a single act.

The two counts of aggravated assault should merge.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution prohibits the imposition of multiple punishments for the same offense. *Costo v. United States* (C.A. 6, 1990), 904 F.2d 344. In this context, "the Double Jeopardy Clause does no more than

prevent the sentencing court from prescribing greater punishment than the legislature intended.” *Missouri v. Hunter* (1983), 459 U.S. 359, 365. The Double Jeopardy Clause presumes that a State legislature does not intend to authorize multiple punishments for a single offense. *Blockburger v. United States* (1932), 284 U.S. 299, 366. That presumption can be rebutted by “a clear indication of legislative intent” to the contrary. *Id.*

Here, the court of appeals correctly held that Ms. Brown could not be convicted of two counts of aggravated assault for a single act of stabbing the victim. The General Assembly, in enacting R.C. 2903.13 contemplated that a single offense would be committed when a single assault has taken place. While the General Assembly provided that this single offense could be committed in multiple ways, it never intended that a person could be convicted twice under R.C. 2903.13 for a single animus.

Accordingly, the Eighth District correctly held that the Double Jeopardy Clause was violated by the multiple convictions in this case. Having so concluded, the Eighth District correctly remanded the case to the trial court for the State to elect as to which of the two convictions would stand and which would be dismissed.

The State’s concern about merger of two offenses vis-à-vis dismissal of one offense is a distinction without a difference. Merger of two is the same as dismissal of one.

Proposition of Law III (proposed by Ms. Brown):

When, in a single animus, a person engages in conduct that violates a single Revised Code section prohibiting an offense, only one conviction may be imposed, even if that particular offense has been committed in more than one of the statutorily prescribed manners of commission.

At the same time, the Eighth District incorrectly decided that R.C. 2941.25 did not compel the same conclusion as did its Double Jeopardy Clause analysis. R.C. 2941.25 provides that:

(A) Where the same conduct by defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but the defendant may be convicted of only one.

(B) Where the defendant's conduct constitutes two or more offenses of dissimilar import, or where his conduct results in two or more **offenses of the same or similar kind committed separately or with separate animus** as to each, the indictment or information may contain counts for all such offenses, and the defendant may be convicted of all of them. (emphasis added).

Here the two code sections which Ms. Brown has offended, 2903.11(A)(1) and 2903.11(A)(2), are offenses of the same or similar kind. They have been included in the same section of the Revised Code – R.C. 2903.13. This, alone, should cause them to be allied because it is the strongest indication of the General Assembly's intention to treat them as being of the same or similar kind.

The Eighth District felt compelled to hold to the contrary because of the elemental test set forth in *State v. Rance*, supra. This Court should either eject *Rance* in this regard or hold that *Rance*, which did not involve two offenses committed under the same section of the Revised Code, is inapplicable.

Proposition of Law IV (proposed by Ms. Brown):

The portion of a statement made to the police at the scene of an investigation that is not essential to addressing an imminent harm is testimonial under the Confrontation Clause of the Sixth Amendment to the United States Constitution.

Proposition of Law V (proposed by Ms. Brown):

In the absence of evidence that a suspect who has just committed a crime is about to harm another person, an on-the-scene identification of that suspect to police is testimonial under the Sixth Amendment Confrontation Clause.

The trial court erred when it permitted the State to introduce the portion of the alleged victim's statement to the police that identified Jakeena Brown as his assailant. The Sixth

Amendment's Confrontation Clause provides that in all criminal prosecutions, the accused has the right to be confronted with the witnesses against him. U.S. Const. amend. VI. That guarantee includes the right to cross-examine witnesses. *Pointer v. Texas*, (1965) 380 U.S. 400, 404 (applying the Sixth Amendment to the states through the Fourteenth Amendment). Cross-examination has been characterized as the "greatest legal engine ever invented for the discovery of truth." *White v. Illinois* (1992), 502 U.S. 346, 356.

The right of confrontation is primarily directed at ensuring the "reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig* (1990), 497 U.S. 836, 845; *accord, Lilly, supra* (noting that such reliability testing should occur at trial). Ultimately, the Confrontation Clause serves two objectives. First, it gives a criminal defendant the right to confront his or her accusing witness face-to-face in open court for truth-testing cross-examination. Second, it allows the jury an opportunity to judge the credibility of the witness through observation of the witness's demeanor. *Id.*, citing *Mattox v. United States* (1895), 156 U.S. 237, 242-43.

In *Crawford v. Washington* (2004), 541 U.S. 36, the United States Supreme Court ruled, not for the first time, that the Confrontation Clause bars the introduction of testimonial out-of-court statements made by a witness not present at trial unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine. *Id.* at 68-70. According to *Crawford*, notwithstanding any reliability determination under the Rules of Evidence, the Sixth Amendment's Confrontation Clause requires independent safeguards on the use of out-of-court testimony. *Crawford*, 541 U.S. 36 at 62 (noting that the admission of "statements deemed reliable by a judge is fundamentally at odds with the right of confrontation."). In so concluding, the Court noted that the Sixth Amendment "commands, not that evidence be reliable, but that

reliability be assessed in a particular manner: by testing on the crucible of cross-examination.” *Id.* Therefore, even evidence deemed reliable under evidentiary rules may still be excluded by the Confrontation Clause. *See* 5 Jack B. Weinstein *et al.*, Weinstein's Federal Evidence § 802.05[3][e] (2d ed. 2004). After *Crawford*, there is “an absolute bar to statements that are testimonial, absent a prior opportunity to cross examine.” *Id.* at 61. Indeed, the Court summed up its holding in these words: “Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” *United States v. Franklin* (C.A. 6, 2005), 415 F.3d 537, 545; quoting *Crawford*, at 68-69.

With respect to ascertaining whether a statement is “testimonial,” *Crawford* recognized that “whatever else the term [“testimonial”] covers, it applies at a minimum to . . . police interrogations”. *Id.* at 68. The term “testimonial” includes any statement that a declarant would reasonably expect to be used prosecutorially. *Id.* at 51. Statements made to police during the course of their investigation of a suspected crime fall into this broad category. *Id.* at 64-66.

Similarly, the United States Court of Appeals for the Sixth Circuit has adopted a broad approach to the term testimonial in *United States v. Cromer* (C.A. 6, 2005), 389 F.3d 662. There, the court found that when a statement describing criminal activity is made knowingly to the authorities, it is almost always testimonial. In settling on this broad definition, the court relied to some extent on the approach taken by Richard D. Friedman in *Confrontation: The Search for Basic Principles* (1998), 86 Geo. L.J. 1011. The author advocates that any statement made by a declarant who “anticipates that the statement will be used in the prosecution or investigation of a crime” should be considered testimonial. *Confrontation*, at 1039-43.

In Ms. Brown’s trial, Cleveland police officers testified that while responding to a report

of an assault on a female they encountered Mr. Kevin Johnson. The officers noted blood on his shirt and testified that in response to their inquiry of, "What happened?" Mr. Johnson indicated he had been "stabbed." Then after further questioning by the officers, Mr. Johnson further stated, "My girlfriend, she's in that truck, she stabbed me." In deciding this case the Eighth District Court of Appeals ruled as follows:

Here, Johnson's on-the-scene statement to DiMaria and the officer's questions to Johnson were to meet an ongoing emergency...The officer's questions, and Johnson's responses thereto, indicated that the primary purpose of the interrogation was to enable the police to assist Johnson in an ongoing emergency, not to establish or prove events potentially relevant to criminal prosecution. Therefore, these statements were nontestimonial and appropriately admitted. *State v. Brown* (November 30, 2006), 2006 Ohio 6267, at para. 21.

The Court found that the officer's testimony as to what the victim related to them on scene was nontestimonial and therefore admissible relying on the reasoning of the Supreme Court of the United States in *Davis v. Washington* (2006), 126 S.Ct. 2266, wherein the Court determined that the officer's purpose in questioning the declarant is dispositive:

Statements are nontestimonial for purposes of the confrontation Clause when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Davis*, at 2273.

This analysis puts the onus for determining admissibility on the intent of the officer. This is the inappropriate criteria.

The Confrontation Clause in no way governs police conduct, because it is the trial use of, not the investigatory collection of, ex parte testimonial statements which offends that provision. But neither can police conduct govern the Confrontation Clause; testimonial statements are what they are. *Davis*, footnote 6 at 2279.

The officer's credibility is not in question here as the officer was present testifying in

court and available for cross-examination in full view of the jury. Rather, it is the reliability or trustworthiness of the statement the officer is relating which is the proper subject for review. The truthfulness of that statement cannot be inquired after nor challenged by cross-examining or confronting the officer but only by confrontation with the maker of the statement, Mr. Kevin Johnson. Regardless of what the police motivation was, this Court needs to evaluate what the motivation of the declarant was. "Even when interrogation exists, it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires a court to evaluate." *Davis*, footnote 1 p. 2274.

Here Kevin Johnson was responding to police questioning about his situation. Both Officers DiMaria and Rusnak testified that they asked him "what happened?" So an initial review of the facts show that the police interrogation here is the type which would not elicit testimonial statements. See *Davis*. The officers also testified that Kevin Brown identified his girlfriend as the person who cut him and indicated she was down the street. That these statements are testimonial in nature is plain to see. Kevin Johnson's statements to police portraying his version of the incident prompted Ms. Brown's arrest for domestic violence and felonious assault and created the foundation upon which the state now bases this prosecution.

In this matter, it is obvious that the victim had time for reflective thought. He was able to identify not only his attacker but also her remote location. The physical evidence of the scene indicates that he had been in the incident with her quite some time before the arrival of the police. He was aware that his "attacker" had been trying to get away from him, had threatened to call the police had left the scene and had been given ample opportunity to call the authorities and give them her story which necessarily would implicate him in criminal conduct. He was motivated to protect himself from the criminal accusations likely being made against him. One

cannot make such an accusation without considering the potential for later prosecution. When a statement describing criminal activity is made knowingly to authorities it is almost always testimonial. See *U.S. v. Cromer*, 389 F.3d 662.

The first part of Kevin Johnson's response, that he had been "stabbed," might be considered nontestimonial as this statement is reasonably given to the investigating officers as a plea for help. However, when he goes on to name the person responsible for the act and to point out where she is located, he has moved into the realm of testimonial.

"An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." *Davis*, at 2274 quoting *Crawford*, 541 U.S. at 51. Though Kevin Johnson's statement that he is stabbed is not a formal statement, just as surely, his specific identification of his attacker and her location is not a casual remark to an acquaintance.

The trial court should have either excluded the entire portion of testimony where officers told what Kevin Johnson had said or redacted the obviously more testimonial portions. "Just as, for Fifth Amendment purposes, police officers can and will distinguish almost instinctively between questions necessary to secure their own safety or the safety of the public and questions designed solely to elicit testimonial evidence from a suspect, trial courts will recognize the point at which, for Sixth Amendment purposes, statements in response to interrogations become testimonial. Through in limine procedure, they should redact or exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence." *Davis*, at 2277.

Proposition of Law VI (proposed by Ms. Brown):

By virtue of Article XV, Section 11 of the Ohio Constitution, R.C. 2919.25, prohibiting domestic violence, does not apply to unmarried cohabitants without children.

Ms. Brown cannot be convicted of domestic violence because the domestic violence provisions of the Ohio Revised Code do not apply to her. As a result, her conviction for domestic violence violates federal and state due process. U.S. Const. Amends. V and XIV, Ohio Const. Art. I, Sec. 10.

Ohio's domestic violence statute does not apply to unmarried cohabitants without children because:

- 1) Ohio's domestic violence law includes within its ambit any person who is a "spouse" or "a person living as a spouse." R.C. 2919.25(F)(1)(a)(i).
- 2) Article XV, Section 11, of the Ohio Constitution prohibits the creation or recognition of "a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage."
- 3) The statute's protection for a person "living as a spouse," particularly in the context of its position immediately behind the term "spouse," effectively approximates the one to the other.
- 4) The statute thus unconstitutionally recognizes a protected status to unwed cohabitants that approximates the effect of those cohabitants being married.

Put a different way, the domestic violence statute does not protect all unwed persons who dwell together, but does offer protection to those unwed cohabitants who "liv[e] as "spouse[s]." Since the statutory language specifically uses the term "spouse," the statute, on its face, effectively creates a relationship that approximates a marriage.

This Court has this issue currently under review in *State v. Carswell*, 109 Ohio St.3d 1423, 2006 Ohio 1967.

CONCLUSION

Wherefore, this Court should accept and exercise plenary jurisdiction over the instant case.

Respectfully submitted,

 DAVID M. KING, ESQ.

JOHN T. MARTIN, ESQ.
Assistant Public Defenders

CERTIFICATE OF SERVICE

A copy of the foregoing Motion was hand-delivered upon William Mason, Cuyahoga County Prosecutor and or a member of his staff, The Justice Center - 9th Floor, 1200 Ontario Street, Cleveland, Ohio 44113 this 5th day of March, 2007.

 DAVID M. KING, ESQ.
Assistant Public Defenders

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87651

STATE OF OHIO

CA 87651

PLAINTIFF-APPELLEE

PAMELA BOLTON
ASSISTANT COUNTY PROSECUTOR
8TH FLOOR JUSTICE CENTER
1200 ONTARIO STREET
CLEVELAND, OH 44113

vs.

JAKEENA BROWN

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED IN PART;
REVERSED AND REMANDED IN PART**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-467287

BEFORE: McMonagle, J., Cooney, P.J., and Calabrese, J.

RELEASED: November 30, 2006

JOURNALIZED: DEC 19 2006

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VOL 626 00453

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**FILED AND JOURNALIZED
PER APP. R. 22(E)**

DEC 19 2006

**GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY: [Signature] DEP.**

**ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED**

NOV 30 2006

**GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY: [Signature] DEP.**

CA06087651 42591891



N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

CHRISTINE T. MCMONAGLE, J.:

Defendant-appellant, Jakeena Brown, appeals her conviction on two counts of aggravated assault and one count of domestic violence. For the reasons that follow, we affirm in part, and reverse and remand in part.

Appellant was indicted by a Cuyahoga County Grand Jury on two counts of felonious assault, counts one and two of the indictment. Count one charged appellant with knowingly causing serious physical harm to the victim, Kevin Johnson. Count two charged appellant with knowingly causing or attempting to cause physical harm to Johnson by means of a deadly weapon or dangerous ordnance, to-wit: a knife. Both felonious assault charges were second-degree felonies. The third and final count of the indictment charged appellant with domestic violence against Johnson, a misdemeanor of the first degree.

The case proceeded to a jury trial. At the conclusion of the State's case-in-chief, the defense made a Crim.R. 29 motion for acquittal as to all three counts. The motion was denied. Appellant presented evidence on her behalf; she testified, and called her son and the investigating detective, Earl Brown. At the conclusion of her case-in-chief, appellant renewed her Crim.R. 29 motion; the motion was again denied.

The jury found appellant guilty of two counts of fourth-degree aggravated assault, inferior offenses of felonious assault, and domestic violence, as indicted. Appellant was sentenced to two years of community control sanctions.

At trial, Officer David DiMaria ("DiMaria") testified that he and his partner, Officer Richard Rusnak ("Rusnak"), responded to Greenwich Avenue in Cleveland after receiving a dispatch for an assault of a female. DiMaria described seeing the victim, Johnson, flag down the officers as they approached Greenwich Avenue. As the officers got closer to Johnson, DiMaria observed that Johnson was bleeding and holding his side. Rusnak called for medical assistance while DiMaria inquired of Johnson, whom he described as "injured" and "excited," what happened. Johnson told Officer DiMaria that his girlfriend had stabbed him. As Johnson explained to the officer what had happened to him, he pointed up the street to a red Blazer and indicated that his girlfriend was in the vehicle. DiMaria testified that he observed a "one-inch slit" in Johnson's abdomen, and that Johnson had lost a lot of blood.

While the officers were administering assistance to Johnson, the driver of the red Blazer, later identified as appellant, drove to the area where Johnson and the police were. Appellant exited the vehicle and told the officers that she had called them because Johnson had damaged her truck. Both officers described appellant as being angry over the situation. DiMaria testified that

appellant told him that Johnson broke the window to her truck, damaged the bumper and allowed a dog to destroy her temporary license plates. Appellant told the officer that, angry about Johnson's actions, she "cut him." Appellant never told the officer that she accidentally injured Johnson. When questioned as to what she cut him with, appellant told DiMaria that she used a knife. She told DiMaria that the knife was located in the Blazer.

Johnson was transported by ambulance from the scene to the hospital, where he was treated for his wound and admitted overnight for observation and pain control. His medical records were admitted into evidence at trial.

The officers were unable to locate the knife in the Blazer, but found a knife with blood on it lying in the street in the area where the Blazer was originally parked when the officers arrived on the scene. DiMaria described the knife as a steak knife. The knife was admitted into evidence at trial.

The investigation into the incident revealed that appellant and Johnson, girlfriend and boyfriend, were living together at the time of the incident, but experiencing "relationship difficulties." In particular, on the day of the offense, the two had been arguing about Johnson's employment status.

At trial, appellant admitted to fighting with Johnson, but characterized the stabbing as an accident. Appellant testified that earlier in the day, while she and Johnson had been arguing, Johnson angrily removed her temporary license

plates from her Blazer and left the home they shared together. Appellant testified that she received a phone call from her cousin, who resided on Greenwich Avenue, informing her that the temporary plates were at her home. Appellant explained that in order to drive to her cousin's house, she put a set of old license plates on her Blazer. Appellant testified that she used a knife to put the plates on her vehicle, because she did not have a screwdriver. Unbeknownst to appellant, Johnson was at her cousin's house.

When appellant arrived at her cousin's house, she and Johnson resumed arguing. Appellant testified that she reached into her pocket and took the knife out, and that Johnson, upon seeing the knife, "ran up on" her and got stabbed. Appellant explained that she had her eyes closed and was not even aware that Johnson had been stabbed until the police informed her. Appellant testified that after her encounter with Johnson, she drove around the block, summoned someone to call the police, and then parked her vehicle down the street and awaited their arrival. She explained that she was scared for her life and for the safety of her children, who were in the vicinity.

Appellant denied that she told Officer DiMaria that she "cut" Johnson. She testified that the police repeatedly asked her how deep she had cut Johnson, and she repeatedly told them that she did not know what had happened.

Similarly, appellant denied telling the police that they could find the knife in her vehicle.

After finishing their investigation at the scene, the police went to the hospital to obtain a formal statement from Johnson. Johnson admitted he fought with appellant and damaged her car and expressed remorse for his actions. He maintained, however, that appellant had stabbed him.

In her first assignment of error, appellant contends that the trial court erred by allowing inadmissible testimonial statements of Johnson to be admitted through DiMaria's testimony. Specifically, appellant contends that the statements violated the United States Supreme Court's holding in *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354.

Initially, we note that defense counsel did not object to the officer's testimony about Johnson's statements and, thus, pursuant to Crim.R. 52, has waived all but plain error. Plain error is an error or defect affecting a substantial right. Crim R. 52(B). As will be explained below, the trial court did not err by allowing the officer's testimony as to Johnson's statements.

The Confrontation Clause of the Sixth Amendment provides: "[i]n all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him." In *Crawford*, supra, the United States Supreme Court held that "testimonial" hearsay statements may only be admitted where

the witness is unavailable and where there was a prior opportunity to cross-examine the witness. *Id.* at 68-69. Although the Court did not set forth a comprehensive definition of “testimonial,” it did provide examples of the types of statements that belong to the “core class” of testimonial statements: “extrajudicial statements *** contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions[;]” “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at a later trial[;]” and “statements taken by police officers in the course of interrogations.” *Id.* at 51-52. (Citations omitted.)

The Ninth District Court of Appeals recently addressed the distinction between testimonial and nontestimonial statements in *Akron v. Hutton*, Summit App. No. C.A. 22424, 2005-Ohio-3300. In that case, the trial court allowed the admission of statements made to the police by the defendant’s wife, the victim in the case who was unavailable for trial. The court, in distinguishing *Crawford*, relied on *Fowler v. Indiana* (2004), 809 N.E.2d 960, wherein an Indiana court of appeals held that nontestimonial out-of-court statements may be admitted without the defendant having an opportunity to cross-examine the witness if the statements fall within a hearsay exception, such as an excited utterance. In *Fowler*, the police questioned the victim of a domestic violence incident at the

scene, but the victim refused to testify at trial; the victim's statements were admitted at trial through an officer's testimony. The *Fowler* court held that the victim's statements were nontestimonial excited utterances, subject to exception from the hearsay rule.

On appeal, the Supreme Court of Indiana agreed with the court of appeals that responses to initial inquiries at a crime scene are typically not testimonial. *Hammon v. Indiana* (2005), 829 N.E.2d 444, 453. The court, however, disagreed with the court of appeals' holding that a statement that qualifies as an excited utterance is necessarily nontestimonial. *Id.* In disagreeing with the court of appeals on this issue, the Supreme Court of Indiana held that whether a statement from a declarant to a police officer is testimonial depends upon the intent of the declarant in making the statement and the purpose for which the police officer elicited the statement. *Id.* at 457. If the declarant is making a statement to the police with the intent that his or her statement will be used against the defendant at trial, the statement is testimonial. Likewise, if the police officer elicits the statement in order to obtain evidence in anticipation of a potential criminal prosecution, the statement is testimonial. *Id.*

On appeal, the United States Supreme Court held as follows:

"Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary

purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington* (2006), 126 S.Ct. 2266, 2273-2274.

Here, Johnson's on-the-scene statement to DiMaria and the officer's questions to Johnson were to meet an ongoing emergency. The initial call to which the police were responding was for an assault on a female. Upon approaching the area to which they were dispatched, however, the police officers were flagged down by Johnson. The officers immediately noticed the amount of blood on Johnson's shirt and went to his aid. The officer's questions, and Johnson's responses thereto, indicated that the primary purpose of the interrogation was to enable the police to assist Johnson in an ongoing emergency, not to establish or prove events potentially relevant to criminal prosecution. Therefore, these statements were nontestimonial and appropriately admitted.

The statement taken from Johnson at the hospital, however, was testimonial and should not have been admitted. That notwithstanding, we find its admission harmless; it was not inconsistent with appellant's testimony that she and Johnson had fought, Johnson had damaged her vehicle, and she had

stabbed Johnson. Appellant maintained that the stabbing was accidental. There was no testimony of Johnson's opinion of whether appellant accidentally or purposefully stabbed him.

Accordingly, appellant's first assignment of error is overruled.

In her second, third and fourth assignments of error, appellant challenges the sufficiency of the evidence. A Crim.R. 29 motion challenges the legal sufficiency of the evidence. When a defendant challenges the sufficiency of the evidence, he or she is arguing that the State presented inadequate evidence on each element of the offense to sustain the verdict as a matter of law. *State v. Hawn* (2000), 138 Ohio App.3d 449, 471, 741 N.E.2d 594.

"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." *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, at paragraph two of the syllabus.

In her second assignment of error, appellant contends that there was insufficient evidence to support a finding that Johnson suffered serious physical

harm. In her third assignment of error, appellant contends that there was insufficient evidence that she possessed a deadly weapon.

R.C. 2903.12, governing aggravated assault, provides as follows:

“(A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly:

“(1) Cause serious physical harm to another or to another's unborn;

“(2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code.”

R.C. 2901.01(5) defines serious physical harm to persons as any of the following:

“(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

“(b) Any physical harm that carries a substantial risk of death;

“(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

“(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

“(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.”

Appellant argues that Johnson’s wound did not constitute serious physical harm because, aside from the officers seeing blood and a one-inch slit, “no other description of the harm caused [Johnson] was given.” Appellant also argues that Johnson’s medical records, which were admitted into evidence, “do very little to shed light on the severity of the injury[,]” and “[t]hus, a reasonable person would not find beyond a reasonable doubt that the injury was ‘of such gravity as would normally require hospitalization.’” We disagree.

The officers observed Johnson bleeding profusely and immediately acted to obtain medical treatment for him. Officer DiMaria described the wound as an one-inch slit in Johnson’s stomach. Further, Johnson *was* hospitalized for his injury. While hospitalized, Johnson’s wound was treated and observed.

This court has held that “[g]enerally, a trial court does not err in finding serious physical harm where the evidence demonstrates the victim sustained injuries necessitating medical treatment.” *State v. Scott*, Cuyahoga App. No. 81235, 2003-Ohio-5374, quoting *State v. Davis*, Cuyahoga App. No. 81170, 2002-Ohio-7068.

We find that there was sufficient evidence in this case that Johnson's injury constituted serious physical harm. Appellant's second assignment of error is overruled.

R.C. 2923.11(A) defines a deadly weapon as follows: "any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon." The Committee Comment to R.C. 2923.11(A) specifically mentions a knife as an example of a deadly weapon.

Appellant's injuries were caused by a steak knife. Ohio courts, including this court, have held that a steak knife can constitute a deadly weapon. See, for example, *State v. Burrows* (Feb. 11, 1988), Cuyahoga App. No. 54153; *In re J.R.*, Medina App. No. 04CA0066, 2005-Ohio-4090; *State v. Knecht* (Dec. 16, 1983), Portage App. No. 1306.

Accordingly, appellant's third assignment of error is overruled.

In her fourth assignment of error, appellant challenges the sufficiency of the evidence as it relates to the domestic violence charge. In particular, appellant argues that the domestic violence statute, contained in R.C. 2919.25, violates the State's Constitution because it grants a legal status to unmarried persons living as spouses. This issue has already been decided by this court.

The issue of the constitutionality of R.C. 2919.25 came about as a result of the November 2004 approval of the Ohio constitutional amendment known as Issue 1. Issue 1 amended the Ohio Constitution by defining marriage as follows:

“Only a union between one man and one woman may be a marriage valid in or recognized by this state and its political subdivisions. This state and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance or effect of marriage.” Section 11, Article XV, Ohio Constitution.

In *State v. Burk*, 164 Ohio App.3d 740, 2005-Ohio-6727, 843 N.E.2d 1254, this court found that Ohio’s domestic violence statute is neither incompatible with, nor unconstitutional in light of, Issue 1. See, also, *Cleveland v. Voies*, Cuyahoga App. No. 86317, 2006-Ohio-815; *State v. Douglas*, Cuyahoga App. Nos. 86567 & 86568, 2006-Ohio-2343. Further, the Fifth, Seventh, Ninth and Twelfth Appellate Districts have also addressed this issue and found R.C. 2919.25 constitutional in light of Issue 1. See *State v. Newell*, Stark App. No. 2004CA00264, 2005-Ohio-2848; *State v. Rexroad*, Columbiana App. Nos. 05 CO 36, 05 CO 52, 2005-Ohio-6790; *State v. Nixon*, 165 Ohio App. 3d 178, 2006-Ohio-72, 845 N.E.2d 544; *State v. Carswell*, Warren App. No. CA2005-04-047, 2005-Ohio-6547. But, see, *State v. Ward*, Greene App. No. 2005-CA-75, 2006-Ohio-1407, wherein the Second Appellate District reached the opposite conclusion.

The issue is presently pending in the Supreme Court of Ohio, and unless and until this court is reversed by the Supreme Court, we follow our precedent.

Accordingly, appellant's fourth assignment of error is overruled.

In her fifth assignment of error, appellant contends that her two convictions for aggravated assault are allied offenses of similar import and should have been merged into a single count. As there was no objection to the convictions at the trial court level, appellant has waived all but plain error. Pursuant to Crim.R. 52(B), as previously mentioned, plain error is an error or defect affecting a substantial right. See, also, *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804,

Although both appellant and the State have briefed the issue of the conviction on two counts of aggravated assault as implicating an analysis of whether the offenses are allied offenses, we find that such an analysis is not implicated. An allied offenses analysis is implicated only in a situation where the conduct by a defendant could be construed to constitute two or more offenses. See R.C. 2941.25.

Here, however, appellant committed only one act of aggravated assault. The indictment contained two separate counts of aggravated assault, each alleging a different means or method, but both referring to a single act. Count one charged appellant with knowingly causing serious physical harm to Johnson,

and count two charged appellant with knowingly causing or attempting to cause physical harm to Johnson by means of a deadly weapon or ordnance. There was only one aggravated assault committed. As such, appellant's conviction on both counts of aggravated assault was improper and in violation of double jeopardy safeguards. Accordingly, we reverse and remand, and direct the trial court to vacate both the finding of guilt and the sentence in one of the aggravated assault convictions.

Appellant's fifth assignment of error is sustained.

In her sixth assignment of error, appellant argues that she was denied the effective assistance of counsel.

In order to demonstrate a claim of ineffective assistance of counsel, appellant must show that her counsel deprived her of a fair trial. In particular, appellant must show that: (1) defense counsel's performance at trial was seriously flawed and deficient; and (2) the result of the trial would have been different if defense counsel had provided proper representation at trial. *Strickland v. Washington* (1984), 466 U.S. 668; *State v. Brooks* (1986), 25 Ohio St.3d 144.

A presumption that a properly licensed attorney executes his or her duty in an ethical and competent manner must be applied to any evaluation of a claim of ineffective assistance of counsel. *State v. Smith* (1985), 17 Ohio St. 3d 98;

Vaughn v. Maxwell (1965), 2 Ohio St. 2d 299. In addition, this court must accord deference to defense counsel's strategic choices during trial and cannot examine the strategic choices of counsel through hindsight. *Strickland*, supra at 689.

As her first ground for her claim of ineffective assistance of counsel, appellant cites the fact that her counsel did not object to Johnson's on-the-scene statements to the police.¹ As we already discussed, the statements Johnson made to the police were made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation was to enable police assistance to meet an ongoing emergency and, thus, were not testimonial. The statements were properly admitted, and defense counsel was not ineffective by not objecting to them.

Appellant's next claim of ineffective assistance of counsel is that her counsel failed to object to the convictions on the two counts of aggravated assault as being allied offenses. Because we are directing the trial court to vacate one of the aggravated assault convictions, this contention is moot.

¹In response to this contention, the State argues, inconsistently with its response to appellant's first assignment of error, that counsel did object to the introduction of Johnson's statements. A review of the transcript, however, reveals that Officer DiMaria primarily testified about Johnson's statements, and no objection by defense counsel was rendered. The two objections cited by the State were during the investigating detective's testimony and Officer Rusnak's testimony.

Appellant next contends that her counsel was ineffective by not challenging the sufficiency of the evidence relative to the domestic violence charge.² Again, as already mentioned, this court has ruled on the issue of the constitutionality of Ohio's domestic violence statute, and found it to be constitutional. Counsel, therefore, was not ineffective by not challenging the statute.

As her final claim of ineffective assistance of counsel, appellant cites her counsel's failure to object to a remark made by the assistant prosecuting attorney in her opening statement. Specifically, the assistant prosecuting attorney remarked that Johnson "doesn't want to be here[,]” and the jury would hear his statements through the police. As previously discussed, Officer DiMaria's testimony about Johnson's on-the-scene statements was permissible; his unobjected to testimony about Johnson's statements at the hospital did not constitute plain error. Moreover, the assistant prosecuting attorney's statements would have been prejudicial, if at all, to the State, which had to prosecute its case without its victim. Appellant's contention of ineffective assistance based upon that remark is therefore without merit.

²Counsel did make a general Crim.R. 29 motion as to all the counts of the indictment and, thus, preserved the issue for appeal. See *State v. Plough* (June 8, 2001), Portage App. No. 99-P-0029.

Based upon the above discussion, appellant's sixth assignment of error is overruled.

In her seventh and final assignment of error, appellant argues that her convictions were against the manifest weight of the evidence. We disagree.

State v. Martin (1983), 20 Ohio App. 3d 172, 485 N.E.2d 717, set forth the following test to determine whether a conviction is against the manifest weight:

"The court, 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 manifest miscarriage of justice that the conviction must be reversed ***." *Id.* at 175.

The Supreme Court of Ohio recognized the test in *State v. Thompkins* (1997), 78 Ohio St. 3d 380, 678 N.E.2d 541, wherein it stated:

"* * * Weight of the evidence concerns 'the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue which is to be established before them.'" *Id.* at 387, quoting Black's Law Dictionary (6 Ed.1990) at 1594.

In this assignment of error, appellant maintains that the State failed to prove that she acted "knowingly," an element required for a conviction on all three counts. We disagree.

DiMaria described seeing Johnson flag down the police vehicle as the police responded to a call of an assault of a female. DiMaria observed that Johnson was bleeding and holding his side. Rusnak called for assistance while DiMaria inquired of Johnson as to his apparent injury. Johnson, who Officer DiMaria described as "injured" and "excited," stated that his girlfriend had stabbed him. As Johnson explained to DiMaria what had happened to him, he pointed up the street to a red Blazer and indicated that his girlfriend, appellant, was in the vehicle. DiMaria testified that he observed a "one-inch slit" on Johnson's abdomen, and that Johnson had lost a lot of blood.

While the officers were administering assistance to Johnson, appellant drove her red Blazer to the area where Johnson and the police were. Appellant exited the vehicle, and angrily told the officers that she had called them because Johnson had damaged her truck. DiMaria testified that appellant told him that Johnson had broken the window to her truck, damaged the bumper and allowed a dog to destroy her temporary license plates. Appellant told the officer that, angry about Johnson's actions, she "cut" him. Appellant never told the police that she accidentally injured Johnson. When questioned as to what she cut him

with, appellant told DiMaria that she used a knife and that it was located in her Blazer. Although the knife was not recovered from the Blazer, it was found in the area where the Blazer was parked when the officers initially arrived on the scene.

Appellant's recount of the events differs, however. According to appellant, she had the knife because she had used it to put license plates on her vehicle, because she did not have a screwdriver. She claimed that when she received the call from her cousin informing her that the plates were at her house, she did not know that Johnson was at her cousin's house. Nonetheless, appellant admitted that upon arriving at her cousin's house, she and Johnson resumed arguing. According to appellant, she reached into her pocket and took out the knife, and Johnson, upon seeing the knife, "ran up on" her and got stabbed. Appellant testified that as Johnson "ran up" on her, she had her eyes closed and was not even aware that he had been stabbed until the police informed her.

Appellant denied that she told the police that she "cut" Johnson. She testified that the police repeatedly asked her how deep she had cut Johnson, and she repeatedly told them that she did not know what had happened. Similarly, appellant denied telling the police that they could find the knife in her vehicle.

Appellant essentially argues that her recitation of the events is more credible than the officer's testimony. Deference, however, must be given to the

determinations of the finders of fact, as they are in the best position to observe the witnesses and their demeanor. *State v. Antill* (1964), 176 Ohio St. 61. To that end, only where the finders of fact "clearly lost [their] way and created such a manifest miscarriage of justice" will we reverse the conviction and grant a new trial. *Thompkins*, supra at 387.

Upon review of the record, we cannot find that the jury clearly lost its way so as to create a manifest miscarriage of justice. We therefore overrule appellant's seventh assignment of error.

Judgment affirmed in part, reversed in part, and remanded to the lower court for further proceedings consistent with this opinion.

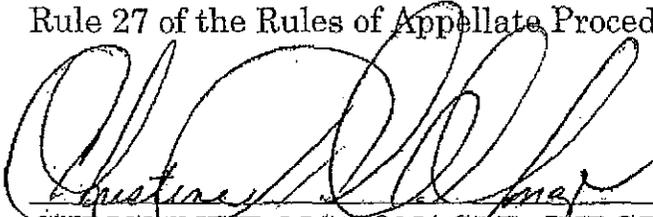
It is ordered that appellee and appellant equally share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to

Rule 27 of the Rules of Appellate Procedure.

A large, stylized handwritten signature in black ink, appearing to read "Christine T. McMonagle". The signature is written over a horizontal line.

CHRISTINE T. MCMONAGLE, JUDGE

COLLEEN CONWAY COONEY, P.J., and
ANTHONY O. CALABRESE, JR., J., CONCUR

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED