[Cite as *State v. Herring*, 2025-Ohio-334.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
JEFFERSON COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

TERRY LEE HERRING,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 24 JE 0010

Criminal Appeal from the
Court of Common Pleas of Jefferson County, Ohio
Case No. 24-CR-10

BEFORE:
Cheryl L. Waite, Carol Ann Robb, Katelyn Dickey, Judges.

JUDGMENT:
Affirmed.

Atty. Jane M. Hanlin, Jefferson County Prosecutor and *Atty. Bernard C. Battistel*, Assistant Prosecutor, for Plaintiff-Appellee

Atty. Adam M. Martello, for Defendant-Appellant

Dated: January 28, 2025

WAITE, J.

{¶1} Appellant Terry Lee Herring appeals the June 24, 2024 judgment entry of the Jefferson County Court of Common Pleas convicting him on one count of domestic violence. Appellant argues that the conviction is against the manifest weight of the evidence, as there is no proof he caused the victim physical harm. He also contends his trial counsel was ineffective for failing to sever the domestic violence charge from a failure to comply charge, even though he was acquitted on the latter charge. For the following reasons, Appellant's arguments have no merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} Two separate incidents, based on different fact patterns and which occurred on separate dates, led to the single indictment in this matter. The first involved a domestic violence incident against the mother of Appellant's child. As this Court does not use the given names of minors or victims in most cases, she is hereafter called "Mother."

{¶3} This incident occurred on December 21, 2023 at Mother's residence in Tiltonsville, Jefferson County, which appears to be a duplex house. Mother lives in the duplex with her children: the child she shares with Appellant and her son's friend, who she may have adopted. Appellant does not appear to reside with Mother. According to a neighbor, who lives in the other section of the duplex, she heard sounds coming from Mother's apartment that indicated a brawl was taking place. These noises continued on and off, from 3:00 a.m. until 10:00 a.m., when this neighbor called the police. Jefferson County Sheriff's Office Deputies Zach Stackhouse and Courtney Smuck responded to the

call. Several other officers later arrived, but Deputies Stackhouse and Smuck led the investigation.

{¶4} Dep. Stackhouse first spoke to Mother. She told the deputy that she had been engaged in an argument with Appellant, but that Appellant had left in his vehicle with Matt Harris, the boyfriend or husband of the neighbor who had called police. Dep. Stackhouse initially observed that Mother looked "visibly upset." He also saw lacerations on her face, and that the left side of her bottom lip was split. She had a cut on her right eyebrow and her elbow was scraped. (Trial Tr., p. 75.)

{¶5} Mother told Dep. Stackhouse that she and Appellant had been arguing for several days, but she did not know what had caused him to be so argumentative. (Stackhouse Body Cam., 2:45.) The bodycam video shows Mother had a split lip, a cut over one eye, a bleeding laceration on her elbow, and was complaining of a painful bump on the back of her head. As officers believed she showed signs of concussion, she agreed to have paramedics dispatched to the area to check her for concussion and treat her wounds.

{¶6} She explained that on this occasion, the argument began after Appellant noticed a crack in the screen of his laptop computer. She asserts Appellant caused this damage to the laptop. She explained to him that it could be repaired, but he threw the laptop, smashing it. At this point, she asked him to leave. She and Appellant went to the hallway area, which lead to a staircase.

{¶7} Mother told the deputies that she had a fish tank in the hallway that her son planned to clean out and use to hold a snake. Once in the hallway, Appellant grabbed Mother by the neck and acted as if he was going to throw her down the stairs. She told

deputies that he had previously thrown her down the stairs. (Trial Tr., p. 93.) This time she was able to free herself, and dug her nails into his face in what she referred to as self-defense, while again insisting he leave. Mother stated she did not know what happened to her after that, but the next thing she did remember was Appellant helping her out of the fish tank. She did not know how she wound up in the tank, and may have blacked out. Mother was concerned, as her head hurt and she felt dizzy. She again told Appellant to leave, telling him that something was wrong with her and she needed to be checked by a doctor. Appellant finally heeded her wishes and left.

{¶8} Mother's adopted son told the deputies that he was sleeping during some of the argument, but woke up due to the noise. When he awoke, Appellant had gone, but the place was "destroyed." (Stackhouse Body Cam., 7:52)

{¶9} As Mother wrote a statement for law enforcement, Dep. Stackhouse spoke to the neighbor who had called police. This neighbor told the deputies that her companion, Harris, left after she called police. She insinuated that he left because of her call to police. She said she did not know Harris had taken Appellant with him until the deputies told her that Mother had informed them that the two had driven away in Appellant's car. The neighbor was upset with Harris and cooperated with police.

{¶10} Despite the fact that there were at least five deputies and a local police cruiser that responded to this call, none of the officers entered the residence to observe or in any way document the scene. Deputies stayed outside when they spoke to Mother, and stood in the neighbor's doorway while they spoke to her.

{¶11} Sometime after the incident, Appellant called Mother. She testified that she told him " '[t]hank you for a busted lip and a black eye for Christmas,' you know? And he

said, 'I only punched you in the mouth.' " (Trial Tr., p. 98.) She explained at trial that she did not remember being punched, but that Appellant admitted he punched her, and she had a split lip when officers arrived. She also clarified that she does not remember anything that occurred between the time shortly after scratching Appellant and his helping her out of the fish tank, but knows that something happened to cause injury to the back of her head and her face during this time.

{¶12} The second incident occurred one week after the domestic violence incident. This matter occurred in Rayland, one town away from Mother's home. Law enforcement was not able to locate Appellant immediately after the domestic violence occurred, but on December 28, 2023, officers were told to be on the lookout for a dark BMW with fictitious West Virginia plates. (Trial Tr., p. 106.) Deputy Douglas Hardsouk was assisting Sergeant Viola with a traffic stop when he noticed a vehicle that matched the description. He alerted Sgt. Viola, who believed it might be the vehicle of interest. Dep. Hardsouk ran the license plate and confirmed that it was fictitious. As Dep. Hardsouk and Sgt. Viola were in separate vehicles, Dep. Hardsouk attempted to stop the BMW while Sgt. Viola completed the earlier traffic stop. Dep. Hardsouk initiated a stop of the BMW, which eventually did stop. However, Dep. Hardsouk noticed that the back lights were on, indicating that the driver had merely placed a foot on the brake, and the vehicle was not in park. Dep. Hardsouk used his intercom to order the driver to either turn off the vehicle, or put it in park. When Dep. Hardsouk saw the reverse lights activate, he repeated his instruction. The vehicle then sped away and Dep. Hardsouk followed.

{¶13} Speeds exceeded 115 miles per hour during chase, and Dep. Hardsouk terminated pursuit. He continued to drive around the area, but at a slower speed. At

some point during his drive, Dep. Hardsouk saw the BMW, missing the license plate, parked in the driveway of a local house.

{¶14} Although the homeowner initially refused consent, law enforcement eventually persuaded her to let them inside to look for Appellant. (Trial Tr., p. 113.) Dep. Hardsouk located Appellant inside a bedroom, with the keys to the BMW, underneath a pile of clothes in the closet. Lieutenant Liddick lifted the mattress. The license plate was found underneath the bed. Appellant informed officers that he hid because he was aware that an active warrant for his arrest had been issued by a neighboring county (Belmont). (Trial Tr., p. 132.) Appellant did not mention the domestic violence incident at the time he was apprehended.

{¶15} On February 7, 2024, Appellant was charged in a single indictment on one count of failure to comply with an order or signal of a police officer, a felony of the third degree in violation of R.C. 2921.331(B), (C)(5)(a)(ii), and one count of domestic violence, a third degree felony in violation of R.C. 2919.25(A), (D)(4). The domestic violence charge included an enhancement due to Appellant's three prior domestic violence convictions in West Virginia.

{¶16} Following a one-day trial on June 20, 2024, a jury convicted Appellant of the domestic violence charge, but acquitted him of failure to comply. The court held a sentencing hearing the following day. In a June 24, 2024 sentencing entry, Appellant was ordered to serve thirty months of incarceration, one to three years of mandatory postrelease control, and a lifetime weapons disability was imposed. It is from this entry that Appellant timely appeals.

ASSIGNMENT OF ERROR NO. 1

APPELLANT'S CONVICTION FOR DOMESTIC VIOLENCE WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶17} Again, as Appellant was acquitted on the failure to comply charge, the only offense at issue in this matter is his conviction for domestic violence.

{¶18} Appellant claims that there was no evidence offered at trial that he struck or kicked Mother. He asserts there was no evidence any kind of physical contact occurred other than him touching her neck and his attempt to help her out of the fish tank. Appellant highlights the fact that the neighbor who called 911 did not witness the argument, and informed police that it sounded as if both he and Mother were attacking each other. Appellant expressly notes that in this assignment, he contests only the element of physical harm.

{¶19} The state responds that there was a great deal of evidence, generally citing to Mother's testimony.

{¶20} "[T]he weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. Hunter*, 2011-Ohio-6524, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230 (1967), paragraph one of the syllabus. The trier of fact is in the best position to weigh the evidence and judge the witnesses' credibility by observing their gestures, voice inflections, and demeanor. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984). The jurors are free to believe some, all, or none of each witness' testimony and they may separate the credible parts of the testimony from the incredible parts. *State v. Barnhart*, 2010-Ohio-3282, ¶ 42 (7th Dist.), citing *State v.*

Mastel, 26 Ohio St.2d 170, 176 (1971). When there are two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, we will not choose which one is more credible. *State v. Gore*, 131 Ohio App.3d 197, 201 (7th Dist.).

{¶21} The prohibition on domestic violence is found in R.C. 2919.25. Appellant was convicted of subsections (A) and (D)(4) of the statute. Subsection (A) is the offense itself, while subsection (D)(4) contains an enhancement. In relevant part, the statute provides:

> (A) No person shall knowingly cause or attempt to cause physical harm to a family or household member.
>
> . . .
>
> (D)(4) If the offender previously has pleaded guilty to or been convicted of two or more offenses of domestic violence or two or more violations or offenses of the type described in division (D)(3) of this section involving a person who was a family or household member at the time of the violations or offenses, a violation of division (A) or (B) of this section is a felony of the third degree, and, if the offender knew that the victim of the violation was pregnant at the time of the violation, the court shall impose a mandatory prison term on the offender pursuant to division (D)(6) of this section, and a violation of division (C) of this section is a misdemeanor of the first degree.

{¶22} While Appellant frames this issue as one of manifest weight, it appears that his arguments are more geared towards the sufficiency of the evidence. Regardless, our review of this evidence begins with the body camera videos of law enforcement officers. Video depicts Mother in an emotional state and very clearly upset. A bleeding cut can be seen on her arm near her elbow, she has a cut on an eyebrow, her lip is split, and she frequently complains of pain near a bump on the back of her head. Mother also showed signs of concussion, supported by evidence that she blacked out at some earlier point, and her complaints of dizziness.

{¶23} Mother testified at trial. As to her injuries and their cause, she testified:

> A And then we were in the hallway by the steps, and he grabbed me by my neck and was going to throw me down the steps. And, like, I was yelling, and he started mocking me, so I dug my fingernails in his face. Then the next thing I remember is him helping me out of -- we had, like, a big fish tank in the hallway my son was supposed to clean, and he was, like, helping me out of that. And then when I stood up, I got real dizzy and I told him he needed to leave, that I needed to get checked because something is wrong.
>
> Q Did you eventually see your injuries?
>
> A Yeah. I went in the bathroom and looked at my face.
>
> Q And what were the injuries that you saw?
>
> A My eye was busted, and my lip was busted.

Q Any head injuries?

A My head hurt real bad.

(Trial Tr., p. 93.)

{¶24} Appellant correctly notes that Mother did not remember him striking or kicking her during their altercation at any point. However, she clarified:

Q You weren't punched.

A He admitted to punching me though.

Q He did?

A Yeah. Because I had told him, I said, "Thank you for a busted lip and a black eye for Christmas," you know? And he said, "I only punched you in your lip."

Q Let me ask you this. Did you tell the police you were punched?

A I didn't remember being punched, but he said it.

(Trial Tr., p. 98.) It is clear from the video that something happened to cause a split in Mother's lip, which can be clearly seen on the video along with her other injuries. Appellant, who was obviously present in the residence until just before police arrived and was engaged in an argument and physical altercation with her, raised no alternative explanation as to how Mother came to be injured, and does not advance any other possible explanation for her wounds, now.

{¶25} Appellant emphasizes that there is no direct evidence as to what occurred prior to the moment he helped Mother out of the fish tank. This record clearly shows the couple were engaged in an altercation. Mother had apparently fresh cuts to her face and arm, and sustained a bump on her head. Officers feared she may have suffered a concussion. Other than the two children, Mother and Appellant were the sole occupants of the house and Appellant left only moments before police arrived. While there is no eyewitness testimony that Appellant struck or otherwise physically attacked Mother, and she has no independent recollection of her own, all of the evidence leads to the logical conclusion that her physical injuries could only have been caused by Appellant. Circumstantial evidence supports the conclusion that Appellant inflicted Mother's injuries.

{¶26} Mother gave undisputed testimony that Appellant grabbed her by the neck and suggested he would throw her down the stairs. Mother had visible fresh injuries when law enforcement arrived, very shortly after Appellant left. Additionally, Mother testified Appellant admitted to her that he punched her in the face. While Appellant now contests Mother's veracity, credibility is an issue for the jury. Further, we note that Appellant's action in grabbing Mother by the neck, alone, appears sufficient for a finding of guilt in this case.

{¶27} In addition, Mother's neighbor called the police because it was apparent that a physical altercation was taking place. Mother admits she scratched Appellant in the face in what she calls an act of self-defense. The jury saw Mother's injuries, heard her statements to police captured on video, and heard her testimony. The jury also heard the testimony of her neighbor, which also implicates Appellant. It is apparent the jury believed Mother, and relied on the other evidence in this record to conclude Appellant had inflicted

Mother's injuries. Nothing in this record suggests this decision is unreasonable. Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

> IT WAS INEFFECTIVE ASSISTANCE OF COUNSEL TO FAIL TO MOVE TO SEVER THE TRIALS FOR THE CHARGES OF DOMESTIC VIOLENCE AND FAILURE TO COMPLY WITH ORDER OR SIGNAL OF A LAW ENFORCEMENT OFFICER.

{¶28} Despite the fact that Appellant was acquitted on count one (failure to comply), he contends that counsel was ineffective in failing to attempt to sever count one from count two, his domestic violence charge.

{¶29} The test for an ineffective assistance of counsel claim is two-part: whether trial counsel's performance was deficient and, if so, whether the deficiency resulted in prejudice. *State v. White*, 2014-Ohio-4153, ¶ 18 (7th Dist.), citing *Strickland v. Washington,* 466 U.S. 668 (1984); *State v. Williams*, 2003-Ohio-4396, ¶ 107. In order to prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Lyons*, 2015-Ohio-3325, ¶ 11 (7th Dist.), citing *Strickland* at 694. The appellant must affirmatively prove the alleged prejudice occurred. *Id*. at 693.

{¶30} As both prongs are necessary, if one is not met, an appellate court need not address the remaining prong. *Id*. at 697. The appellant bears the burden of proof on the issue of counsel's effectiveness, and in Ohio, a licensed attorney is presumed competent.

State v. Carter, 2001 WL 741571 (7th Dist. June 29, 2001), citing *State v. Calhoun*, 86 Ohio St.3d 279, 289 (1999).

{¶31} We note here that contrary to the state's assertion, Appellant did not inform police or claim at trial that he hid from police due to the domestic violence incident. He clearly told law enforcement that he hid due to a Belmont County arrest warrant. This was addressed by the parties and the court at the close of trial, where they debated whether an instruction on consciousness of guilt was appropriate. Defense counsel argued that it was not:

> [T]he only testimony we have -- we didn't have any testimony where it was admitted or he admitted that, in fact, he was hiding because of the fleeing and eluding or the domestic violence out of Jefferson County. His testimony which was admitted at trial today, at least from what he said, was that he was hiding -- he was hiding due a warrant outstanding out of Belmont County, Ohio.

(Trial Tr., p. 162.) The court did give the instruction based on its belief that when considering all the circumstances, even though Appellant expressly explained that he hid due to the pending arrest warrant, it was also possible that he was hiding because of the act of domestic violence.

{¶32} Turning to Appellant's contention that the state's joinder of the offenses is contrary to Crim.R. 8(A), Ohio law favors joining multiple criminal offenses in a single trial. *State v. Harrison*, 2020-Ohio-3624, ¶ 55 (7th Dist.), citing *State v. Franklin*, 62 Ohio St.3d 118, 122 (1991), citing *State v. Lott*, 51 Ohio St.3d 160, 163 (1990). "[J]oinder and the

avoidance of multiple trials is favored for many reasons, among which are conserving time and expense, diminishing the inconvenience to witnesses and minimizing the possibility of incongruous results in successive trials before different juries." *State v. Torres*, 66 Ohio St.2d 340, 343 (1981).

{¶33} Crim.R. 8(A) provides:

> Two or more offenses may be charged in the same indictment, information or complaint in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct.

{¶34} A defendant may move to sever trial of joined offenses pursuant to Crim.R. 14 if he can establish prejudice. *Lott, supra*, at 163. In relevant part, Crim.R. 14 provides: "If it appears that a defendant or the state is prejudiced by . . . such joinder for trial together of indictments, informations or complaints, the court shall order an election or separate trial of counts, grant a severance of defendants, or provide such other relief as justice requires."

{¶35} The state may counter a claim of prejudice in one of two ways. The state may demonstrate that the evidence presented at trial for each offense was simple and direct. *State v. Moore*, 2013-Ohio-1435, ¶ 23 (7th Dist.), citing *State v. Coley*, 93 Ohio St.3d 253 (2001). Failing that, the state must show that all of the evidence presented at the combined trial would have been admissible in each case if tried separately. *Id*. If the

state can demonstrate that the evidence is simple and direct, then it is not required to prove the stricter admissibility test. *State v. Harris*, 2015-Ohio-2686, ¶ 29 (7th Dist.), citing *State v. Johnson*, 88 Ohio St.3d 95, 109 (2000). Evidence is simple and direct when it is apparent that the jury was not confused about which evidence proved which act. *Harrison, supra* at ¶ 60, citing *Harris*, at ¶ 30; *Coley* at 259.

{¶36} Appellant's argument is that the two incidents at issue were completely separate and unrelated events that occurred a week apart. However, even though Appellant provided evidence at trial where he claimed he hid from police because of a pending arrest warrant from a neighboring county, a reasonable interpretation of Appellant's actions shows it may have been, at least in part, due to his act of domestic violence. Thus, at the point where the indictment was filed, there was a link to the two incidents, as the state theorized Appellant hid from police due to his commission of domestic violence. Although Appellant disputed this at trial, joinder occurs at the indictment stage, before trial.

{¶37} Because no objection was lodged at trial to the joinder, Appellant is limited to a plain error review. He contends the issue affected the outcome of the proceedings because the jury could have believed that, because he faced multiple charges, he must have been guilty of something. This Court and at least one other other appellate court have found an acquittal of one of the charges is relevant to show the jury was not confused by joinder, particularly where there is substantial evidence on the remaining charge. See *Harris, supra; State v. Mays,* 2023-Ohio-1908 (6th Dist.).

{¶38} As Appellant failed to preserve this issue by objection to the trial court, he must not only show prejudice, but must also demonstrate that the failure to object affected

the outcome of the proceedings. His argument that he would have been acquitted of the domestic violence charge if these offenses had not been joined is based on nothing but mere speculation. The evidence against Appellant on the domestic violence charge was substantial. The jury saw the video, which showed the extent of Mother's injuries and also revealed the emotion and fear in her voice. They heard Mother's testimony of her ordeal. They heard the testimony of her neighbor, corroborating that a physical altercation took place. The record does show that his counsel obtained favorable rulings from the trial court to limit portions of the relevant body camera footage, and counsel elicited testimony from the responding officers that they never went into the residence, viewed the scene, or attempted to investigate or corroborate portions of Mother's story. This record shows defense counsel robustly defended against this charge. It is clear that the jury simply believed Mother's testimony, particularly as this record shows there is no other possible explanation for Mother's injuries, which were visibly fresh and still bleeding.

{¶39} The record also shows defense counsel did an admirable job in securing an acquittal on the failure to comply charge. Again, Appellant was found by law enforcement in the house where the vehicle he was apparently using was parked, hiding underneath a pile of clothes with the keys to that vehicle. The missing license plate was in the same room and under the bed. Obtaining an acquittal of this charge demonstrates that counsel was clearly effective.

{¶40} Appellant cannot satisfy either of the *Strickland* prongs in his ineffective assistance argument. Accordingly, Appellant's second assignment of error is without merit and is also overruled.

Conclusion

{¶41} Appellant argues that his conviction is against the manifest weight of the evidence, as there is no evidence he caused the victim physical harm. He also argues that his trial counsel was ineffective for failing to sever the domestic violence charge from a failure to comply charge. There is a great deal of evidence on this record to support Appellant's domestic violence conviction, and Appellant was acquitted of failure to comply, which shows that the jury could not have been confused by joinder and that counsel's representation was effective. For all of the foregoing, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Robb, P.J. concurs.

Dickey, J. concurs.

For the reasons stated in the Opinion rendered herein, Appellant's assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Jefferson County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.