

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. W. Scott Gwin, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. John W. Wise, J.
-vs-	:	
	:	
JEFF MARSHALL	:	Case No. 2009AP110057
	:	
Defendant-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the New Philadelphia Municipal Court, Case No. 0901092

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: June 15, 2010

APPEARANCES:

For Plaintiff-Appellee

CHRISTINE WEIMER
150 East High Avenue
New Philadelphia, OH 44663

For Defendant-Appellant

NICOLE STEPHAN
153 North Broadway
New Philadelphia, OH 44663

Farmer, J.

{¶1} On September 9, 2009, appellant, Jeff Marshall, was charged with violating a civil protection order in violation of R.C. 2919.27. The subject protection order had been granted to Mildred Danford as against appellant on August 26, 2009 and was in effect until February 26, 2010.

{¶2} A bench trial commenced on October 7, 2009. By judgment entry filed October 9, 2009, the trial court found appellant guilty and sentenced him to one hundred eighty days in jail.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE CONVICTION FOR VIOLATING A PROTECTION ORDER OHIO REVISED CODE 2919.27(A)(1) IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

II

{¶5} "THE CONVICTION FOR VIOLATION OF A PROTECTION ORDER IS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

III

{¶6} "THE TRIAL COURT ERRED BY ALLOWING INTO EVIDENCE A HEARSAY STATEMENT AND ABUSED ITS DISCRETION BY FAILING TO VOIR DIRE THE DECLARANT, A MINOR CHILD, TO DETERMINE HER COMPETENCY TO TESTIFY OR HER AVAILABILITY TO TESTIFY PRIOR TO ALLOWING THE HEARSAY STATEMENT INTO EVIDENCE."

I, II

{¶7} Appellant claims his conviction was against the sufficiency and manifest weight of the evidence. We disagree.

{¶8} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259. "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." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307. On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶9} Appellant was convicted of violating a protection order in violation of R.C. 2919.27(A)(1) which states, "[n]o person shall recklessly violate the terms of any of the following: (1) A protection order issued or consent agreement approved pursuant to section 2919.26 or 3113.31 of the Revised Code."

{¶10} R.C. 2901.22(C) defines "recklessly" as follows:

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

{¶12} The protective order filed on August 26, 2009 contains the following requirements:

{¶13} "RESPONDENT SHALL STAY AWAY FROM PETITIONER and all other protected persons named in this order, and not be present within 500 feet (distance) of any protected persons wherever protected persons may be found, or any place the Respondent knows or should know the protected persons are likely to be, even with Petitioner's permission. If Respondent accidentally comes in contact with protected persons in any public or private place, Respondent must depart *immediately*. This order includes encounters on public and private roads, highways, and thoroughfares."

{¶14} Appellant argues the evidence does not establish that he knew the whereabouts of the protectee, Mildred Danford.

{¶15} Some facts are uncontested. First, there is a valid protection order banning appellant from being present within 500 feet of Ms. Danford. Secondly, appellant was in fact at Marty's, a gas station, on September 9, 2009, and said gas station was within 150 feet of Harbor House, a domestic violence shelter, where Ms. Danford was living. T. at 4, 47, 50, 79.

{¶16} Appellant denied ever being in the alley behind Harbor House. T. at 89. However, appellant admitted that he knew Kayla and Ms. Danford were living in the

same shelter and he drove Ryan Belknap to Marty's to repay a debt to Kayla. T. at 79, 82.

{¶17} There is evidence from both Ms. Danford and a worker at Harbor House, Angela, that appellant was gesturing toward the shelter while parked at the gas station. T. at 8, 40, 44. Ms. Danford testified appellant drove by daily and parked across the street from the shelter:

{¶18} "He drives down into town when, you know, he drives out of town. He's been in the back alley behind the house and I was out there with my dog, and sitting there. But he just - - I mean it was almost like a daily basis he was driving by the house and when he goes by the house he slows down real slow." T. at 37.

{¶19} At the conclusion of the evidence, the trial court indicated he did not believe appellant's claim of innocence. T. at 98, 100. Instead, the trial court relied on the adult witnesses, one of whom was a disinterested party. T. at 99.

{¶20} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. Jamison* (1990), 49 Ohio St.3d 182, certiorari denied (1990), 498 U.S. 881. The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260.

{¶21} When addressing credibility, the belief of even one witness is sufficient to prove any fact in question. The issue sub judice was appellant's knowledge of Ms. Danford's whereabouts. Appellant was seen by Ms. Danford while she was outside of Harbor House on previous occasions. Appellant knew Kayla and Ms. Danford were in the same shelter and that he was taking Mr. Belknap to Kayla to repay a debt.

{¶22} Upon review, we find credible evidence to substantiate the conclusion that appellant willfully or recklessly violated the civil protection order.

{¶23} Assignments of Error I and II are denied.

III

{¶24} Appellant claims the trial court erred in permitting a hearsay statement. We agree, but find the error to be harmless.

{¶25} The complained of testimony was that Kayla testified that her five-year old daughter told her that appellant stated he knew where Ms. Danford was:

{¶26} "Ruthie's very wise of her age. The only thing she did say was that, you know, about Uncle Jeff cause like I said to him, it's Uncle Jeff, they've known her for three, three and a half years now. She had just said 'We seen Uncle Jeff,' and she knew what was going on. I explained to her that, you know, it had to be secret, you couldn't go tell nobody that Aunt Mitsy was there. And as soon as the girls seen Mitsy they knew it was Aunt Mits. And it was said that - - I wasn't there, my five year old just came to me and said 'Uncle Jeff knows where Aunt Mits is at.' I said 'Did you tell him?' She's like, 'No, cause you told me not to.' And that's all that was said." T. at 21.

{¶27} Evid.R. 801(C) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."

{¶28} Clearly the statement was presented on the pivotal issue of the case and was offered for the truth of the matter asserted.

{¶29} The state offered it because it believed the child was not competent and therefore was unavailable under Evid.R. 804. T. at 20.

{¶30} The trial court did not convene a hearing on the issue of competency or unavailability. In fact, there is no hearsay exception on the issue of competency of a child except in child abuse cases. See, Evid.R. 807.

{¶31} Although we find the trial court erred in permitting the testimony, we find it was harmless error. Harmless error is described as "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded." Crim.R. 52(A). Overcoming harmless error requires a showing of undue prejudice or a violation of a substantial right.

{¶32} As we stated in Assignment of Error I and II, there was sufficient direct and circumstantial evidence offered by Ms. Danford, Angela, and Kayla to establish the elements of the offense. The trial court did not affirmatively adopt the complained of testimony, as it determined the case on appellant's credibility vis-à-vis the three adult witnesses.

{¶33} Assignment of Error III is denied.

{¶34} The judgment of the New Philadelphia Municipal Court of Tuscarawas County, Ohio is hereby affirmed.

By Farmer, J.

Gwin, P.J. and

Wise, J. concur.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ John W. Wise

JUDGES

SGF/sg 601

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
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Plaintiff-Appellee	:	
	:	
-vs-	:	JUDGMENT ENTRY
	:	
JEFF MARSHALL	:	
	:	
Defendant-Appellant	:	CASE NO. 2009AP110057

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the New Philadelphia Municipal Court of Tuscarawas County, Ohio is hereby affirmed. Costs to appellant.

s/ Sheila G. Farmer

s/ W. Scott Gwin

s/ John W. Wise

JUDGES