**[Cite as *Cleveland v. L.K.P.*, 2018-Ohio-5233.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
**No. 106906**

**CITY OF CLEVELAND**

PLAINTIFF-APPELLEE

vs.

**L. K. P.**

DEFENDANT-APPELLANT

**JUDGMENT:**
REVERSED AND REMANDED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2017CRB011634

**BEFORE:** Blackmon, J., McCormack, P.J., and Stewart, J.

**RELEASED AND JOURNALIZED:** December 20, 2018

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PATRICIA ANN BLACKMON, J.:

**{¶1}** L.K.P. appeals from the trial court's denial of his motion to acquit and assigns the following error for our review:

I. The trial court erred when it denied the Appellant's Rule 29 motion to acquit the Appellant of the charge of violation of a protection order.

**{¶2}** Having reviewed the record and pertinent law, we reverse the decision and remand back to the trial court. The apposite facts follow.

**{¶3}** On July 11, 2016, the Cuyahoga County Court of Common Pleas, Domestic Relations Division, issued a domestic violence civil protection order against L.K.P. pursuant to R.C. 3113.31. The protected parties under the order are A.A., who is the mother of two of L.K.P.'s children, A.P. and A.C., who are A.A. and L.K.P.'s children, and A.H., who is A.A.'s

child with another man. The terms of the protection order run through July 10, 2021, and prohibit L.K.P. from coming within 500 feet of the protected parties.

**{¶4}** On May 18, 2017, A.A., her children, her boyfriend, and L.K.P. were at the Virgil E. Brown Center in Cleveland to address L.K.P.'s child support obligations. After the hearing, an altercation occurred during which L.K.P. put his hands on A.A. and punched her boyfriend. The police were called to the scene, and ultimately L.K.P. was charged with assault, violation of the protection order, and menacing. The case was tried to the bench in Cleveland Municipal Court, and on January 19, 2018, the court found L.K.P. guilty of assault and violating the protection order. The court acquitted L.K.P. of menacing. On February 7, 2018, the court sentenced L.K.P. to 180 days in jail, all of which the court suspended, and fined him $1,000, $900 of which the court suspended, for each count. The court also ordered him to pay court costs and put him on five years active probation.

**{¶5}** L.K.P. now appeals from his conviction and sentence concerning the violation of the protection order. Specifically, L.K.P. argues that there was insufficient evidence to convict him because "the prosecution did not provide any evidence that the appellant was served with the order prior to the alleged violation." The city, on the other hand, argues that because L.K.P. did not raise the specific issue of service of the protection order in his Crim.R. 29 motion for acquittal, this argument is waived.

## Sufficiency of the Evidence

**{¶6}** Crim.R. 29 mandates that the trial court issue a judgment of acquittal where the prosecution's evidence is insufficient to sustain a conviction for the offense. Crim.R. 29(A) and sufficiency of the evidence require the same analysis. *State v. Taylor*, 8th Dist. Cuyahoga No. 100315, 2014-Ohio-3134. "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." *State v. Driggins*, 8th Dist. Cuyahoga No. 98073, 2012-Ohio-5287, ¶ 101, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997).

**{¶7}** 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. Vickers*, 8th Dist. Cuyahoga No. 97365, 2013-Ohio-1337, citing *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991).

**Violation of a Protection Order**

**{¶8}** Pursuant to R.C. 2919.27(A), "[n]o person shall recklessly violate the terms of * * * [a] protection order issued * * * pursuant to section * * * 3113.31 of the Revised Code * * *." In *State v. Smith*, 136 Ohio St.3d 1, 2013-Ohio-1698, 989 N.E.2d 972, ¶ 16, the Ohio Supreme Court held that, to establish a violation of R.C. 2919.27, "the state must prove, beyond a reasonable doubt, * * * the requirement that the order be delivered to the defendant" prior to the violation.

**{¶9}** This court recently vacated a conviction for violating a protection order based on the city of Cleveland's failure to prove service of the protection order on the defendant. *See Cleveland v. K.C.*, 8th Dist. Cuyahoga No. 106364, 2018-Ohio-3567. We find *K.C.* applicable to the case at hand. The city introduced no evidence showing that L.K.P. was served with the protection order after it was issued on July 11, 2016. The protection order itself was introduced into evidence; however, it states only that "copies of this order shall be delivered to" L.K.P. As we held in *K.C.*, "[t]hough the protection order instructs the clerk of courts to deliver a copy to

[the defendant], there was no evidence introduced that [the defendant] was actually served with a copy of the protection order * * *." *Id.* at ¶ 17.

**{¶10}** The *K.C.* court relied on R.C. 2909.214(F)(1) and *State v. Smith*, 136 Ohio St.3d 1, 2013-Ohio-1698, 989 N.E.2d 972, to hold that "in order to obtain a conviction in this case, the state must prove, beyond a reasonable doubt, that [the defendant] was served with a copy of the protection order he allegedly violated prior to * * * the date on which he engaged in conduct that violated the protection order." *K.C.* at ¶ 15. We are aware that the Ohio legislature has amended R.C. 2919.27(D) to loosen this requirement resulting in *Smith* no longer being good law; however, this amendment was effective on September 27, 2017, which is after the violation occurred in the instant case.

**{¶11}** The explicit language of the law in place at the time of the apparent violation of the protection order dictates that we vacate L.K.P.'s conviction. As we examine the elements of the criminal charge at the time of the apparent violation, we find a clear procedural error on the part of the city. We have no choice but to set aside this specific conviction. It is vital to establish that despite this troubling outcome, the protection order remains in place. Nothing herein should be interpreted as a reading that L.K.P. was unaware of his personal and legal obligations to A.A., the mother, and most certainly his court-ordered legal obligations as grounded in the protection order. Vacating a conviction for violating a protection order based on a failure to show service, as the law previously required, creates an inherently threatening result in a case where the record establishes that the appellant had actual knowledge of the existence of the order despite the lack of service.

**Waiver of Sufficiency of Evidence Argument**

**{¶12}** Turning to the city's argument that L.K.P. waived his right to challenge delivery or service of the protection order, we are guided by this court's holding in *State v. Cayson*, 8th Dist. Cuyahoga No. 72712, 1998 Ohio App. LEXIS 2169 (May 14, 1998):

> In order to preserve the right to appeal the sufficiency of evidence upon which a conviction is based, a defendant must timely file a Crim.R. 29 motion for acquittal with the trial court. If a Crim.R. 29 motion is not made by a defendant, he or she waives any sufficiency of evidence argument on appeal, and this court will review only for plain error.
>
> * * * The federal courts, employing the virtually identical provisions of Fed.R.Crim.P. 29(a), place no duty on an accused to set forth specific grounds for a motion for judgment of acquittal. However, if an accused does set forth specific grounds in a motion for judgment of acquittal, all grounds not specified are waived.

(Citations omitted.)

**{¶13}** In the case at hand, L.K.P.'s attorney made a Crim.R. 29 motion for acquittal on the record after the city rested its case. The following colloquy reflects this motion:

> DEFENSE COUNSEL: Judge, at this time, the defense is making a Motion For Acquittal, under Criminal Rule 29, [and] *State v. Bridgeman*. Even viewed in the light most favorable to the state, this evidence is not sufficient to convict [L.K.P.], beyond a reasonable doubt, of these charges.
>
> The alleged victims have changed their stories, they flow like water, and they seem most surprisingly and most disturbingly to me, [to] get worse every time they tell them, for [L.K.P.] that is, even though, you think they'd tell the worse [sic] story straight after the claimed incident happened and not embellish it after time, it just doesn't add up, Judge.
>
> And, consequently, we hope that this Court will acquit [L.K.P.], at this time. Thank you.
>
> PROSECUTOR: Pursuant to Rule 29 A, the Court should enter a Judgment of Acquittal, only if the evidence is insufficient to sustain a conviction for each offense. We've shown that the defendant came within 500 feet of the victim, while she had a valid [protection order], that he spoke to her, that he put his hands on her, that he threatened her, that he caused her to be in fear.

> The evidence, also, showed that he came to the other victim, [the boyfriend], and grabbed his shirt, and assaulted him, and threatened him as well. I believe that the Court should not enter a Judgment of Acquittal, if the reasonable minds can reach different conclusions, in the evidence viewed, in the light most favorable to the city, it shows that reasonable minds differ.
>
> THE COURT: In viewing the evidence most favorable to the non-moving party, that being the prosecution, I do believe, through the testimony of the two witnesses, that I have heard enough evidence as it relates to the elements of each offense, the Violation of the Protection Order, the Assault, and the Menacing. So the Motion For Rule 29 will be denied.

**{¶14}** Defense counsel renewed the motion for acquittal at the close of L.K.P.'s case-in-chief, and the court again denied the motion.

**{¶15}** It is clear from the transcript that L.K.P. did not move for acquittal specifically based on the city's failure to show that the protection order was delivered to him. The question remains, however, as to whether L.K.P. set forth any specific grounds in this oral motion or whether the motion was general in scope. Defense counsel referred to "these charges" and did not identify any offense. Defense counsel further stated that "it just doesn't add up" and that the "victims have changed their stories." The court made no specific findings when denying the motion other than that the city presented "enough evidence."

**{¶16}** Upon review, we find that L.K.P. did not set forth specific grounds for acquittal in his Crim.R. 29 motion. The only statement that could arguably be considered "specific" concerns the credibility of the victims' testimony, which is irrelevant to a sufficiency of the evidence analysis. "[Q]uestions of credibility have no bearing on issues relating to the sufficiency of the evidence as credibility and sufficiency are completely separate principles of appellate review." *State v. Harris*, 8th Dist. Cuyahoga No. 87915, 2007-Ohio-526, ¶ 16.

**{¶17}** The city presented no evidence that L.K.P. was served with a copy of the protection order, and L.K.P. did not waive this argument on appeal. Accordingly, we find insufficient

evidence to sustain a conviction for violation of a protection order. L.K.P.'s sole assigned error is sustained.

**{¶18}** Judgment is reversed and the matter is remanded with instructions for the court to enter an order vacating L.K.P.'s conviction of violation of a protection order.

It is ordered that appellant recover of appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cleveland Municipal Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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PATRICIA ANN BLACKMON, JUDGE

TIM McCORMACK, P.J., CONCURS;
MELODY J. STEWART, J., DISSENTS
WITH ATTACHED DISSENTING OPINION

MELODY J. STEWART, J., DISSENTING:

**{¶19}** I would affirm L.K.P.'s conviction because there was sufficient evidence of proof of service. As the majority notes, during the city's case-in-chief, the protection order itself was introduced into evidence. That order provided that "copies of this order shall be delivered to" L.K.P. Although the language of the order alone does not prove that L.K.P. was served, the introduction of the order coupled with other evidence presented by the city does show that the protection order was served on L.K.P.

**{¶20}** The city presented testimony from A.A. that the protection order was granted on July 11, 2016 and that the child support hearing was held on May 18, 2017, just prior to the altercation. She stated that before the protection order was in place, L.K.P. could and did see the children, but that he had not seen them since. A.A. claimed that L.K.P. was upset during the child support hearing because he was ordered to pay support, but was not permitted to see the children because of the protection order. Further, she stated that after the child support hearing L.K.P. yelled at her, saying "you lied, you lied, you know dang well that I didn't choke you. You lied, you got that TPO on me. Why I got to pay child support if I can't see my kids?" This evidence warranted the trial court's denial of L.K.P.'s Crim.R. 29 motion at the close of the city's case-in-chief.

**{¶21}** In addition to A.A.'s testimony, L.K.P.'s testimony during the presentation of his defense, further evinces the he was served with the protection order before he violated it.

> Prosecutor: And you were aware of that CPO before the May 18th [sic], 2017 altercation?
>
> L.K.P.: Yes.
>
> * * *
>
> Prosecutor: Did you have a copy of the CPO?
>
> L.K.P.: Yes, I got one.

**{¶22}** I agree with the majority that according to *Smith*, 136 Ohio St.3d 1, 2013-Ohio-1698 at ¶ 28, "to sustain a conviction for a violation of a protection order * * * the state must establish, beyond a reasonable doubt, that it served the defendant with the order before the alleged violation." However, nothing in *Smith* prevents proof of service from being established through circumstantial evidence. *See Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492, at paragraph one of the syllabus ("Circumstantial evidence and direct evidence inherently possess

the same probative value * * *."); *see also State v. Meinke*, 2017-Ohio-7787, 97 N.E.3d 1184, ¶ 13 (9th Dist.) ("[W]hile documentary evidence may be one way to prove service, testimony may also be used."). I would find that A.A.'s and L.K.P.'s testimony sufficiently established proof of service. To require more in this case would only serve to elevate form over substance.

**{¶23}** I also note that the analysis above does not conflict with this court's decision in *K.C.*, 8th Dist. Cuyahoga No. 106364, 2018-Ohio-3567, at ¶ 16. In *K.C.*, a panel of this court rejected the circumstantial evidence presented by the city as being sufficient to demonstrate proof of service. The panel did not conclude, however, that circumstantial evidence is insufficient to prove service.

**{¶24}** Based on the foregoing, I would find that the city presented sufficient evidence to prove that L.K.P. was served with a copy of the protection order prior to violating it. I therefore respectfully dissent.