[Cite as *State v. Tarver*, 2012-Ohio-4335.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2011-P-0073**
- vs -	:	
WILLIAM E. TARVER, III,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Court of Common Pleas, Case No. 2010 CR 0686.

Judgment: Affirmed.

Victor V. Vigluicci, Portage County Prosecutor, and *Theresa M. Scahill,* Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

John J. Plough and *Benjamin J. Plough,* 136 N. Water Street, Suite 202, Kent, OH 44240 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, William E. Tarver, III, appeals his conviction, following a jury trial, in the Portage County Court of Common Pleas, of violating a protection order. Appellant challenges the sufficiency and weight of the evidence. For the reasons that follow, we affirm.

{¶2} Appellant was charged by indictment with four counts of violating a protection order and one count of menacing by stalking. Counts One, Two, Three, and

Five charged appellant with violating a protection order, and Count Three charged him with menacing by stalking.

{¶3} Appellant pled not guilty. Prior to trial, the court granted the state's motion to dismiss Counts Three, Four, and Five, and the case proceeded to jury trial on Counts One and Two. These counts charged appellant with violating a protection order, having previously been convicted of violating a protection order, on March 19, 2010 and March 25, 2010, respectively, each count being a felony of the fifth degree, in violation of R.C. 2919.27.

{¶4} Catherine Krul testified that she had a romantic relationship with appellant for several years. While they were living together, Catherine became pregnant. Catherine told appellant she was pregnant; however, he left her before she gave birth. Catherine gave birth to her daughter, B.K., in 1997.

{¶5} For the next five years, Catherine raised B.K. alone. Then, in 2002, appellant called Catherine telling her he wanted to reconcile. Catherine told him their daughter was six years old. They made arrangements for appellant to meet her. Thereafter, appellant moved in with Catherine and B.K., and they lived together in Catherine's home for seven years. Although appellant was never determined by any court or administrative agency to be B.K.'s father, he told B.K. he was her father.

{¶6} While living together, appellant subjected Catherine and B.K to physical and verbal abuse. In April 2009, Catherine decided to terminate her relationship with appellant. On May 4, 2009, she filed a petition for a domestic violence civil protection order in the Portage County Domestic Relations Court.

{¶7} On the same date Catherine filed her petition, May 4, 2009, the court issued an ex parte civil protection order against appellant.

{¶8} Detective Elizabeth Ittel of the Portage County Sheriff's Office testified that on May 6, 2009, she personally served appellant with the ex parte order. She said the ex parte order included notice to appellant that the full hearing on the petition was to be held on May 13, 2009, at 11:00 a.m. A full hearing was held as scheduled, but appellant failed to appear. Following the hearing, the court issued a "Domestic Violence Civil Protection Order Full Hearing" ("CPO") on May 14, 2009. The CPO was admitted in evidence. Appellant refers to the CPO in his brief as the ex parte order. However, the ex parte order was never offered or admitted in evidence. The protected persons in the CPO were Catherine and B.K., who was then 11 years old.

{¶9} The order by its terms was made effective for five years until May 13, 2014. It included the following provisions:

{¶10} "5. Respondent shall not enter * * * the * * * school * * * of the protected persons named in this order, including the buildings, grounds and parking lots at [this] location[ ].

{¶11} "6. Respondent shall stay away from petitioner and all other protected persons named in this order, and not be present within 500 feet * * * of any protected persons wherever protected persons may be found * * *.

{¶12} "7. Respondent shall not * * * have any contact with the protected persons named in this Order or their * * * schools * * *."

{¶13} The Domestic Relations Court served appellant with a copy of the CPO on May 14, 2009.

{¶14} Catherine testified that in the fall of 2009, on B.K.'s first day of school at Stanton Middle School in Kent, Ohio, she gave a copy of the CPO to the school principal, Tom Larkin. Catherine also told B.K. that if she ever saw appellant, she was to call Catherine to let her know.

{¶15} Catherine said that after school on March 19, 2010, B.K. called her at work upset, telling her she had just seen appellant at her school. When Catherine came home from work at about 4:30 p.m., she took B.K. to the police department and they made a report.

{¶16} Again, on March 25, 2010, after school, B.K. called Catherine telling her she had just seen appellant at school. After work, Catherine took B.K. to the police department to make a report.

{¶17} B.K. testified that on March 19, 2010, she was 12 years old and in the sixth grade at Stanton Middle School. She said that at the end of the school day, while standing in front of her bus before boarding, she saw appellant talking to Mr. Larkin, the school principal. She said that appellant was about 15 feet from her. B.K. got on the bus and called her mother to tell her that appellant was at her school.

{¶18} B.K. testified that in the following week, on March 25, 2010, after school, she was talking with a group of her friends by the bike rack in front of her school bus. The bus had already arrived, but the students had not yet boarded it. While talking to her friends, appellant approached B.K. and walked past her. She said that appellant was "about an inch" away from her. B.K. testified that appellant saw her as he approached her and knew she was there. Thus, appellant's statement in his brief that there was no evidence that he approached B.K. on March 25, 2010 is incorrect.

{¶19} B.K. then got on the school bus and called Catherine, telling her she had seen appellant again on the school grounds.

{¶20} The state presented exhibits, which appellant did not dispute, demonstrating that on October 20, 2004, he was convicted of violating a protection order in the Portage County Municipal Court. In that case, Connie Tarver, appellant's ex-wife, and their daughters were the protected persons.

{¶21} For the defense, Thomas Larkin, then Principal of Stanton Middle School, testified he has known appellant since Mr. Larkin was first hired by Kent City Schools in 1996. Appellant was a friend of the athletic director, John Nemec. Mr. Larkin corroborated B.K.'s testimony regarding the March 19, 2010 incident. He said that after school let out at 2:35 p.m., he walked into the school parking lot to monitor the students walking toward the school buses. He said that he saw appellant in the parking lot and he came over to talk to Mr. Larkin. Appellant then walked with Mr. Larkin as he walked toward the school buses.

{¶22} Mr. Larkin said that appellant is not employed by the school. Appellant told him he comes to the school to help out the track team. Mr. Larkin said that the areas described by B.K. are located on school property, including the parking lot where he saw appellant and where the buses were waiting for the students. Mr. Larkin said that, according to the CPO, appellant is not allowed on school grounds, and that when he saw appellant in the parking lot, appellant was on school grounds.

{¶23} Cathy Scott, Assistant Principal at Stanton Middle School, testified that the bike rack, which was described by B.K., is on school property.

{¶24} Roger Sidoti, principal at Theodore Roosevelt High School, which is part of the same campus on which the middle school is located, testified that, following one of the incidents in March 2010, appellant came to the high school and "hunted him down." Appellant wanted Mr. Sidoti's help because the police were called involving an incident with B.K. Mr. Sidoti was aware of B.K. because appellant had previously told Mr. Sidoti that his daughter, B.K., was attending the middle school. Mr. Sidoti told appellant he could not help him and referred appellant to Mr. Larkin.

{¶25} Mr. Sidoti testified he was frustrated because he was unaware of the specifics of the two civil protection orders that were in place against appellant. Consequently, Mr. Sidoti went to the courthouse and obtained copies of both. One was for the protection of appellant's ex-wife, Connie Tarver, and their daughters. According to an amendment to the Connie Tarver protection order, appellant was allowed to attend athletic events after school hours, but he had to maintain a distance of 75 feet from his daughters unless they initiated the contact. However, there were no such limitations to the Krul CPO at issue here.

{¶26} John Nemec, teacher and coach at the Stanton Middle School, testified regarding his close relationship with appellant, who he had known since appellant was a teenager. Later, he coached appellant in track. Mr. Nemec said that in the 2009-2010 school year, appellant worked with the sprinters in the track program at the middle school. He said that in 2010, he would see appellant almost every day at the middle school on the track.

{¶27} The jury was unable to reach a verdict on Count One regarding the March 19, 2010 incident, but found appellant guilty of violating a protection order as alleged in

Count Two regarding the March 25, 2010 incident. With respect to Count Two, the jury also found that appellant had previously been convicted of violating a protection order, enhancing the offense to a fifth-degree felony. On the state's motion, the court dismissed Count One.

{¶28} Subsequently, the court sentenced appellant to 20 days in the county jail and placed him on probation for two years. The court stayed appellant's sentence pending appeal.

{¶29} Appellant appeals his conviction asserting two assignments of error. For his first assigned error, he alleges:

{¶30} "The trial court committed prejudicial error by overruling Defendant-Appellant's objection and admitting the ex parte civil protection order into evidence because: 1) it contained handwritten allegations of alleged prior physical abuse by defendant, and 2) was highly prejudicial to Defendant since the prior conduct was not relevant to prove Defendant-Appellant had violated the protection order by being within 500 feet of a protected party without proof of any other bad conduct."

{¶31} Initially, appellant argues the trial court erred in admitting the ex parte protection order. However, the court did not admit the ex parte order. Instead, the court admitted the CPO. In order to address appellant's argument, we construe it as applying to the CPO.

{¶32} As construed, appellant argues the trial court erred by admitting the CPO into evidence because the danger of prejudice outweighed its relevance and, further, the CPO was inadmissible as other act evidence.

{¶33} Before addressing the argument, we note that, while appellant objected at trial to the CPO on the ground that he was allegedly not served with it, he did not argue the CPO, including its findings of fact, was prejudicial or contained other act evidence. Further, contrary to appellant's argument, the trial court gave him an opportunity to state all grounds he wished to assert in support of the objection. Therefore, any error was waived but for plain error. From our review of the record, we do not discern plain error.

{¶34} Decisions relating to the admissibility of evidence are within the broad discretion of a trial court, and such rulings will not be upset without an abuse of the court's discretion. *State v. Ricco*, 11th Dist. No. 2008-L-169, 2009-Ohio-5894, ¶17. An abuse of discretion occurs where the trial court's judgment does not comport with reason or the record. *Id*., citing *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925).

{¶35} Unless otherwise prohibited, evidence is relevant and admissible if it has any tendency to make a consequential fact more or less probable. Evid. 401 and Evid.R. 402. A trial court, however, is required to exclude relevant evidence "if its probative value is substantially outweighed by the danger of *unfair* prejudice, of confusion of the issues, or of misleading the jury." Evid.R. 403. (Emphasis added.)

{¶36} "Because fairness is subjective, the determination whether evidence is unfairly prejudicial is left to the sound discretion of the trial court and will be overturned only if the discretion is abused." *State v. Hollabaugh,* 5th Dist. No. 2009 CA 00313, 2010-Ohio-6600, ¶20.

{¶37} Further, Evid.R. 404(B) provides:

{¶38} "Evidence of other * * * acts * * * is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be

admissible for other purposes, such as proof of motive, * * * intent, * * * knowledge, * * * or absence of mistake or accident."

{¶39} Appellant argues that the trial court's admission of the CPO was unfairly prejudicial because it contained the following handwritten findings of fact: "Respondent has purpose[ly] harmed Petitioner on several occasions in last two years, causing injuries. She has also be[en] choked twice. Petitioner and her daughter have fear and apprehension that Respondent will harm them again."

{¶40} In contrast, the state argues that the CPO was highly relevant to the charge of violating the CPO because the state was required to prove the existence of the CPO in order to prove its violation. The state cites *State v. Galloway*, 9th Dist. No. 19752, 2001 Ohio App. LEXIS 299 (Jan. 31, 2001), in support. In *Galloway*, the defendant was charged with violation of a protection order. At trial, the state introduced the order in evidence. Like appellant, Galloway argued that evidence of the protection order was unfairly prejudicial and was improper other act evidence. The Ninth District disagreed, holding that such evidence was admissible to prove absence of mistake or accident, or knowledge, and was necessary for the state to prove the defendant had violated the protection order. *Id*. at *16.

{¶41} Here, as part of its case-in-chief, the state was required to prove the existence of the CPO in order to prove that appellant had violated it. The CPO was not offered to prove appellant's bad character, but, rather, to prove an element of the crime. Thus, the CPO was highly relevant. Further, the danger of unfair prejudice was low because, even without the findings of fact, the existence of the CPO indicated prior misconduct. Moreover, the Connie Tarver protection order was also admitted in

evidence. Further, the evidence of appellant's guilt was overwhelming. The undisputed evidence showed that appellant had been served with the CPO; that appellant knew his daughter attended the school; and that he was present on the grounds of B.K.'s school *and* within 500 feet of her when he approached her on March 25, 2010. As a result, we cannot say that, but for the CPO, the jury would not have found appellant guilty.

{¶42} Finally, appellant argues the CPO was prejudicial because one of the jurors read the findings of fact out loud in the jury room during deliberations. However, since the admission of the CPO was not prejudicial error, we fail to see how one juror reading it could result in prejudice. In any event, we note that the only evidence of such fact comes from an affidavit of appellant's counsel filed in support of a motion for new trial. In his affidavit, appellant's counsel stated that after the jury returned its verdict, a juror told him that during deliberations, one or more of the jurors read out loud the findings of fact indicating that appellant had choked Catherine Krul in an attempt to persuade the jury to find appellant guilty.

{¶43} In order to permit juror testimony to impeach the verdict, a foundation of extraneous, independent evidence must first be established. This foundation must consist of information from sources other than the jurors themselves, * * *, and the information must be from a source which possesses firsthand knowledge of the improper conduct. One juror's affidavit alleging misconduct of another juror may not be considered without evidence aliunde being introduced first. * * *. *Similarly, where an attorney is told by a juror about another juror's possible misconduct, the attorney's*

> *testimony is incompetent and may not be received for the purposes of impeaching the verdict or for laying a foundation of evidence aliunde.* * * *. (Emphasis added.) *State v. Schiebel*, 55 Ohio St.3d 71, 75-76 (1990).

{¶44} Because the evidence of alleged juror misconduct in this case was derived solely from the affidavit of appellant's counsel, it is incompetent for purposes of impeaching the jury's verdict.

{¶45} We therefore hold the trial court did not abuse its discretion in admitting the CPO into evidence.

{¶46} Appellant's first assignment of error is overruled.

{¶47} For his second assignment of error, appellant contends:

{¶48} "There was insufficient credible evidence to convict Defendant of violating a civil protection order."

{¶49} Appellant challenges both the sufficiency and weight of the evidence. A challenge to the sufficiency of the evidence examines whether the state introduced adequate evidence to support the verdict as a matter of law. *State v. Schlee*, 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, *13 (Dec. 23, 1994). Generally speaking, a "sufficiency" argument raises a question of law as to whether the prosecution offered some evidence concerning each element of the charged offense. *State v. Windle*, 11th Dist. No. 2010-L-0033, 2011-Ohio-4171, ¶25. "[T]he proper inquiry is, after viewing the evidence most favorably to the prosecution, whether the jury could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Troisi*,

179 Ohio App.3d 326, 2008-Ohio-6062, ¶9 (11th Dist.), citing *State v. Jenks*, 61 Ohio St.3d 259, 273 (1991).

{¶50} In contrast, a manifest weight challenge concerns:

{¶51} "[T]he 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 [finder of fact] that the party having the burden of proof will be entitled to [its] verdict, if, on weighing the evidence in [its] mind[], [it] shall find the *greater amount of credible* evidence sustains the issue which is to be established before [it]. Weight is not a question of mathematics, but depends on its *effect in inducing belief*." (Emphasis sic.) *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997), citing Black's Law Dictionary (6th Ed.1990).

{¶52} In determining whether the judgment is against the manifest weight of the evidence, the court, reviewing the entire record, weighs the evidence and all reasonable inferences, and considers the credibility of the witnesses. *Thompkins*, *supra*. The court determines whether, in resolving conflicts in the evidence and deciding witness credibility, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *Id*. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Id*.

{¶53} Witness credibility rests solely with the finder of fact, and an appellate court is not permitted to substitute its judgment for that of the jury. *State v. Awan*, 22 Ohio St.3d 120, 123 (1986).

{¶54} First, appellant argues the state failed to present sufficient evidence on the issue of recklessness to support his conviction. He argues his being within 500 feet of B.K. was at most negligent or accidental. We do not agree.

{¶55} R.C. 2919.27(A)(1), violating a protection order, provides that "[n]o person shall recklessly violate the terms of * * * [a] protection order * * *." The offense is a misdemeanor of the first degree, unless the offender has previously been convicted of a violation of a protection order, in which case violating a protection order is a felony of the fifth degree.

{¶56} "Recklessness" is defined at R.C. 2901.22(C), as follows: "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."

{¶57} Based on Mr. Sidoti's testimony, appellant was aware that B.K. was attending the middle school. Further, based on service of the CPO, he was on notice that on May 14, 2009, the CPO had been entered against him and in favor of B.K. Further, the CPO ordered him not to enter the grounds of B.K.'s school (Paragraph 5 of CPO) and not to be within 500 feet of her (Paragraph 6). Yet, on March 25, 2010, the evidence was undisputed that appellant, seeing B.K. at the bike rack, which is on school grounds, approached her and came "about an inch" away from her. Thus, appellant violated both sections of the CPO.

{¶58} Appellant argues his mere presence at the school was insufficient to show he was reckless in violating the CPO. However, in order to establish recklessness, the state was only required to prove that appellant disregarded a known risk that his

conduct was likely to place him on the school grounds or within 500 feet of B.K. The foregoing evidence satisfied this definition of recklessness.

{¶59} Appellant argues that his witnesses' testimony that he had a legitimate reason for being on school property negated his recklessness. However, unlike the protection order issued against appellant and in favor of his ex-wife and their children, the CPO has no provision allowing appellant to be on school property at certain times or for certain purposes. Thus, the fact that appellant may have been helping the track students after approaching B.K. does not excuse him from his violation.

{¶60} Further, whether the school staff was familiar with the terms of the CPO or whether they gave appellant any instructions about it is irrelevant because it was *his* responsibility to be aware of and to follow the CPO.

{¶61} Next, appellant argues his conviction for the March 25, 2010 incident was against the manifest weight of the evidence because there was no evidence of stalking. However, the offense of violating a protection order does not require that at the time, the defendant was stalking the victim.

{¶62} Further, in support of his manifest-weight challenge, appellant argues that only B.K. testified appellant walked by her on March 25, 2010. He argues her testimony is not credible because B.K. did not report the incident, and staff at the school did not report seeing anything unusual between her and appellant. However, B.K. immediately called her mother and they reported the incident to the police the same day. Moreover, the fact that the school employees who were outside testified they were unaware of anything unusual is no evidence the encounter did not occur. The employees were

busy monitoring the students and getting them on the buses, and there was nothing about the encounter that would have necessarily attracted their attention.

{¶63} Based on our review of the record, the state presented sufficient evidence to support the jury's verdict. Moreover, in weighing the evidence, the jury obviously found B.K to be credible. As the trier of fact, it was entitled to make this call. We find nothing to suggest that B.K's testimony was not credible, particularly in light of the fact that there was no evidence presented contradicting her version of events. After reviewing the record, we cannot conclude the jury lost its way and created such a manifest miscarriage of justice that appellant was entitled to a new trial.

{¶64} Appellant's second assignment of error is overruled.

{¶65} For the reasons stated in this opinion, appellant's assignments of error are without merit. It is the judgment and order of this court that the judgment of the Portage County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

MARY JANE TRAPP, J.,

concur.