[Cite as *State v. Ellis*, 2015-Ohio-2898.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2014-T-0067**
- vs -	:	
PAUL EDWARD ELLIS, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Trumbull County Court of Common Pleas, Case No. 13 CR 00622.

Judgment: Affirmed.

Dennis Watkins, Trumbull County Prosecutor, and *Gabriel M. Wildman*, Assistant Prosecutor, Administration Building, Fourth Floor, 160 High Street, N.W., Warren, OH 44481 (For Plaintiff-Appellee).

Michael A. Partlow, 112 South Water Street, Suite C, Kent, OH 44240 (For Defendant-Appellant).

COLLEEN MARY O'TOOLE, J.

{¶1} Paul Edward Ellis, Jr., appeals from the judgment of the Trumbull County Court of Common Pleas, entered on a jury verdict, finding him guilty of failing to notify the sheriff of a change in address, a third degree felony. Mr. Ellis was a registered sex offender: one of his duties was to notify the Trumbull County sheriff of any change in address within 20 days. Mr. Ellis contends he was deprived of a fair trial, under the doctrine of cumulative error. Finding no error, we affirm.

{¶2} Cindy Miller was the lessee of a house located at 3350 Northwest Boulevard in the City of Warren, Ohio. Ms. Miller lived there with a son; her daughter Michelle Brown and her baby; and her daughter Mary Wiseman, and her five minor children. In October or November 2012, Mr. Ellis, Mary Wiseman's boyfriend, moved in. July 8, 2013, Ms. Brown's fiancé, Matthew Wells, also moved in. July 9, 2013, Ms. Miller and Mr. Ellis had an argument, and she told him to leave, which he did, taking his clothes and belongings in several storage bins. At trial, both Ms. Miller and Mr. Wells testified that Mr. Ellis did not reside at 3350 Northwest Boulevard thereafter. Ms. Miller admitted she was often absent from the house, due to working 12 hour shifts.

{¶3} July 25, 2013, Ms. Miller called Deputy Sheriff Russ Maldonado to inform him that Mr. Ellis no longer resided with her, and that she wanted her house removed from the website listing residences of sex offenders. As of July 25, 2013, Mr. Ellis had not told Deputy Maldonado, who is in charge of supervising the registered sex offenders list for the sheriff's department, of his new address.

{¶4} August 1, 2013, Ms. Miller made a formal, written statement about Mr. Ellis' departure from her house to the sheriff's department. August 12, 2013, Deputy Maldonado visited 3350 Northwest Boulevard to take statements. Ms. Wiseman, Mr. Ellis' girlfriend, refused.

{¶5} After Deputy Maldonado left, Mr. Ellis appeared at the house. He demanded that Ms. Miller give him a formal notice of eviction, which she declined to do. Mr. Ellis called the police, who responded, and asked him to leave the premises.

{¶6} August 13, 2013, on arriving at work, Deputy Maldonado had a voicemail message from Mr. Ellis from the previous day. Mr. Ellis told the deputy he was moving in with his sister. He came by the sheriff's department the next day, and was arrested.

{¶7} October 2, 2013, Mr. Ellis was indicted by the Trumbull County Grand Jury for failure to notify the sheriff of his address change within 20 days, in violation of R.C. 2950.05(A) and (F)(1), and R.C. 2950.99(A)(1)(b)(ii). October 9, 2013, Mr. Ellis entered a plea of not guilty. Jury trial commenced May 27, 2014, a verdict of guilty being returned May 30, 2014. Sentencing hearing was held June 30, 2014. By a judgment entry filed July 9, 2014, the trial court sentenced Mr. Ellis to 36 months imprisonment.

{¶8} Mr. Ellis timely noticed this appeal, assigning a single error:

{¶9} "The appellant was denied a fair trial as the result of the cumulative effects of multiple errors committed during his trial." Mr. Ellis presents the following issue under this assignment of error: "Whether a criminal defendant's conviction is the result of an unconstitutionally unfair trial, where the record reveals a series of evidentiary errors which, individually standing alone might not require reversal, but which the cumulative effect thereof indicates an unfair proceeding."

{¶10} The doctrine of cumulative error was first adopted in Ohio in *State v. DeMarco*, 31 Ohio St.3d 191, paragraph two of the syllabus (1987): "Although violations of the Rules of Evidence during trial, singularly, may not rise to the level of prejudicial error, a conviction will be reversed where the cumulative effect of the errors deprives a defendant of the constitutional right to a fair trial."

{¶11} We review a trial court's evidentiary rulings for abuse of discretion. *Musson v. Musson*, 11th Dist. Trumbull No. 2013-T-0113, 2014-Ohio-5381, ¶34. Regarding this standard, we recall the term "abuse of discretion" is one of art, connoting judgment exercised by a court which neither comports with reason, nor the record. *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). An abuse of discretion may be found when the trial court "applies the wrong legal standard, misapplies the correct legal standard, or relies on clearly erroneous findings of fact." *Thomas v. Cleveland*, 176 Ohio App.3d 401, 2008-Ohio-1720, ¶15 (8th Dist.)

{¶12} Mr. Ellis recounts a list of alleged errors relating to evidence admitted in his case, none requiring reversal on its own, to support his contention that cumulative error applies. First, he points to a text message, sent by Ms. Wiseman to her mother, Ms. Miller, telling her mother to inform police that Mr. Ellis was still living at 3350 Northwest Boulevard. Defense counsel objected to this, and the trial court sustained the objection, finding the text message to be hearsay. Nevertheless, the assistant prosecutor referenced the text message in closing arguments.

{¶13} However, as the state points out, the trial court did allow into evidence, over objection, a lengthy conversation between Mr. Ellis and Ms. Wiseman, recorded at the jail, in which the two discuss this very text message. Consequently, we must agree with the state that any mention by the assistant prosecutor in closing of that message was not error. Further, it does not appear defense counsel objected at that time.

{¶14} Mr. Ellis also finds error in the trial court admitting the tapes of his jail conversation with Ms. Wiseman. He contends they contain nothing probative. He implies that they merely were used to prove his bad character, in violation of Evid.R.

403 and/or 404, since Mr. Ellis liberally sprinkled his conversation with profane and lewd language. The trial court listened to the disputed tapes with counsel, and ruled they were admissible, since they contained threats against Ms. Wiseman, who was listed as a defense witness.

{¶15} We agree with the trial court. A party's threatening statements may be offered against that party. *State v. Missler*, 3rd Dist. Hardin No. 6-14-06, 2015-Ohio-1076, ¶63. Threats against a witness are admissible as reflecting consciousness of guilt. *Id.* In this respect, we note the taped conversations contain various threats against the state's principal witness, Ms. Miller. The trial court did not err in admitting the tapes.

{¶16} Finally, Mr. Ellis objects to the trial court's decision to allow Ms. Miller to testify that his sister, Gloria Ellis, threatened her. Mr. Ellis asserts this was inadmissible hearsay. The trial court allowed it in under the present sense impression exception to the hearsay rule. We agree with the trial court. Pursuant to Evid.R. 803(3), it showed the then-existing state of mind of Gloria Ellis, a listed defense witness, and was admissible. *See, e.g.*, *State v. Davis*, 62 Ohio St.3d 326, 343 (1991).

{¶17} As none of the evidentiary issues raised by Mr. Ellis constituted error, the doctrine of cumulative error cannot apply, and the assignment of error lacks merit.

{¶18} The judgment of the Trumbull County Court of Common Pleas is affirmed.

CYNTHIA WESTCOTT RICE, J., concurs,

TIMOTHY P. CANNON, P.J., concurs in judgment only with a Concurring Opinion.

TIMOTHY P. CANNON, P.J., concurring in judgment only.

{¶19} I respectfully concur in judgment only.

{¶20} I do not agree with the blanket statement that this court reviews "a trial court's evidentiary rulings for an abuse of discretion," as stated by the majority. Instead, our appellate court's standard of review for evidentiary rulings is mixed. While I agree some rulings on evidence are left to the sound discretion of the trial court, i.e., whether the prejudicial nature of evidence is outweighed by the probative value, a ruling on the admissibility of evidence, i.e., whether testimony constitutes hearsay or non-hearsay, is reviewed de novo. This was explained in *Jack F. Neff Sand & Gravel, Inc. v. Great Lakes Crushing, Ltd*., 11th Dist. Lake No. 2012-L-145, 2014-Ohio-2875, at ¶23. In that case, we stated:

> Although we apply an abuse of discretion standard to evidentiary rulings on matters such as relevancy and the admission of expert testimony, the trial court does not have discretion to admit hearsay 'except as otherwise provided by the Constitution of the United States, by the Constitution of the State of Ohio, by statute enacted by the General Assembly not in conflict with a rule of the Supreme Court of Ohio, by these rules, or by other rules prescribed by the Supreme Court of Ohio.' Evid.R. 802. *See also*, *State v. DeMarco*, 31 Ohio St.3d 191, 195 (1987). Therefore, we apply a de novo review to determine whether the testimony here constitutes hearsay or non-hearsay. *See John Soliday Fin. Group, LLC v. Pittenger*, 190 Ohio App.3d 145, 150, 2010-Ohio-4861 (5th Dist.).

{¶21} Because of our mixed standard of review, as previously espoused by this court, it should not be suggested that the trial court has *discretion* to admit evidence that is clearly not permitted by the law. That said, I agree with the conclusions in the majority opinion that appellant's assignment of error is without merit.

{¶22} I respectfully concur in judgment only.