[Cite as *State v. Verga*, 2015-Ohio-2582.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2014-11-134
	:	O P I N I O N
- vs -		6/29/2015
	:	
RICHARD VERGA,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT
Case No. 2014CRB00590

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Rose & Dobyns Co., LPA, Blaise S. Underwood, 97 N. South Street, Wilmington, Ohio 45177, for defendant-appellant

HENDRICKSON, J.

{¶ 1} Defendant-appellant, Richard Verga, appeals from his misdemeanor conviction in the Warren County Court for violating a protection order. For the reasons discussed below, judgment is reversed, Verga's conviction is vacated, and Verga is discharged.

{¶ 2} On May 22, 2014, a criminal protection order (CRPO) was issued against Verga, pursuant to R.C. 2903.213 in Warren County Court Case No. 2014CRB00353,

prohibiting him from having contact with Carol Nelson. The CRPO stated that a copy of the protection order was to be served on Verga "by personal service." The first page of the CRPO provided that the "[a]ddress where Defendant can be found" was the "Lobby of WCC." The third page of the CRPO contained a signature line where Verga was supposed to sign and date the protection order, acknowledging service of the CRPO. This portion of the CRPO remained blank.

{¶ 3} On July 17, 2014, Verga was charged by complaint with two counts of violating the CRPO in violation of R.C. 2919.27, misdemeanors of the first degree, and three counts of intimidation of a victim or witness in violation of R.C. 2921.04, also misdemeanors of the first degree. The charges arose following Verga's phone call to Nelson's residence at 12:34 a.m. on July 17, 2014.

{¶ 4} A jury trial on the charges was held on October 10, 2014, and a copy of the CRPO was introduced into evidence. Following the state's presentation of its case-in-chief, Verga moved for acquittal pursuant to Crim.R. 29(A). The trial court denied Verga's motion, and Verga presented his defense. Thereafter, the matter was submitted to the jury, who returned a not guilty verdict on all charges except for one count of violating a protection order. Verga was sentenced to ten days in jail, with ten days suspended, placed on non-reporting probation for one year, and ordered to pay a $500 fine.

{¶ 5} Verga timely appealed his conviction for violating a protection order, asserting the following assignment of error.

{¶ 6} THE TRIAL COURT ERRED IN DENYING APPELLANT'S OHIO CRIM.R. 29 MOTION FOR ACQUITTAL AS [THE STATE] FAILED TO ESTABLISH ALL ELEMENTS OF THE OFFENSE BEYOND A REASONABLE DOUBT.

{¶ 7} In his sole assignment of error, Verga argues that the trial court erred when it denied his Crim.R. 29 motion for acquittal as there was insufficient evidence to support the

offense of violating a protection order. Specifically, Verga contends that the state failed to present evidence that he was served with the CRPO prior to his July 17, 2014 phone call to Nelson.

{¶ 8} Crim.R. 29(A) provides, in relevant part, that a trial court "on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal on one or more offenses charged in the * * * complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses." The standard of review for a denial of a Crim.R. 29 motion is the same as the standard of review for a sufficiency of the evidence claim. *State v. Conley*, 12th Dist. Warren No. CA2013-06-055, 2014-Ohio-1699, ¶ 14, citing *State v. Carter*, 72 Ohio St.3d 545, 553 (1995). Whether the evidence presented at trial is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386 (1997). When reviewing the sufficiency of the evidence underlying a criminal conviction, an appellate court examines the evidence in order to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. *State v. Paul*, 12th Dist. Fayette No. CA2011-10-026, 2012-Ohio-3205, ¶ 9. Therefore, "[t]he 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. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus. "If the evidence is found to be insufficient to prove every element beyond a reasonable doubt, the Double Jeopardy Clause of the United States and Ohio Constitutions bar retrial." *Conley* at ¶ 14, citing *State v. Troisi*, 124 Ohio St.3d 404, 2010-Ohio-275, ¶ 7.

{¶ 9} Verga was convicted of violating a protection order in contravention of R.C. 2919.27(A)(2), which provides:

> (A) No person shall recklessly violate the terms of any of the

> following:
>
> * * *
>
> (2) A protection order *issued pursuant to* section 2151.34, *2903.213*, or 2903.214 of the Revised Code.

(Emphasis added.)

{¶ 10} In *State v. Smith*, 136 Ohio St.3d 1, 2013-Ohio-1698, syllabus, the Ohio Supreme Court held that "[t]o sustain a conviction for a violation of a protection order pursuant to R.C. 2919.27(A)(2), the state must establish, beyond a reasonable doubt, that it served the defendant with the order before the alleged violation." In *Smith*, the defendant was convicted of violating a civil stalking or sexually-oriented-offense protection order (SSOOPO) issued in accordance with R.C. 2903.214. *Id.* at ¶ 1. The Supreme Court reversed the defendant's conviction after finding that the state failed to prove that the SSOOPO had been served on the defendant. *Id.* at ¶ 26. In doing so, the court held as follows:

> The requirements of R.C. 2903.214 are incorporated into R.C. 2919.27(A)(2). R.C. 2903.214(F)(1) requires delivery of the SSOOPO to the respondent before a violation of R.C. 2919.27(A)(2) can be charged. The only manner by which the court is able to fulfill this mandate is to serve the SSOOPO. Therefore, to sustain a conviction for a violation of a protection order pursuant to R.C. 2919.27(A)(2), the state must establish, beyond a reasonable doubt, that it served the defendant with the order before the alleged violation.

Id. at ¶ 28.

{¶ 11} Although the facts in the case before us differ slightly from those in *Smith*, as Verga was convicted of violating a protection order issued in accordance with R.C. 2903.213 (CRPO) rather than a protection order issued in accordance with R.C. 2903.214 (SSOOPO), the requirement of delivery of the protection order is the same under both sections of the Revised Code. Pursuant to R.C. 2903.213, CRPOs must be "issued by the court to the

complainant, to the alleged victim, to the person who requested the order, *to the defendant*, and to all law enforcement agencies that have jurisdiction to enforce the order." (Emphasis added). R.C. 2903.213(G)(1). The court issuing the CRPO "*shall direct that a copy of the order be delivered to the defendant* on the same day that the order is entered." (Emphasis added.) *Id.* Consequently, in order to obtain a conviction in this case, the state had to prove, beyond a reasonable doubt, that Verga was served with a copy of the protection order before July 17, 2014, the date he called Nelson's residence. *See Smith*, 2013-Ohio-1698; *State v. Terrell*, 2d Dist. Clark No. 2003-CA-102, 2014-Ohio-4344; *State v. Johnson*, 6th Dist. Wood Nos. WD-13-008 and WD-13-009, 2014-Ohio-2435.

{¶ 12} The record in the present case is void of any evidence demonstrating that the CRPO was served on Verga prior to July 17, 2014. Though the state contends that admission of the CRPO as an exhibit provided the jury with "enough circumstantial evidence" to believe beyond a reasonable doubt that Verga had been in court on the day the CRPO had been issued and that he "had been served with the CRPO on the spot," we find otherwise. The CRPO lists Verga's address as the "Lobby of WCC"—an acronym never explained at trial, but presumed to be the Warren County Court. Though the CRPO instructs the clerk of court to deliver a copy of the protection order to Verga "by personal service," there was no evidence introduced that any person actually served Verga with a copy of the CRPO at the Warren County Court (or elsewhere) on May 22, 2014 or any other day. The "service acknowledged" line of the CRPO was never signed by Verga and there are no notations anywhere on exhibit indicating service occurred. Additionally, there was no testimony from the clerk of court that the CRPO was served on Verga at any time prior to July 17, 2014.[1]

1. At trial, the state presented testimony from Sheriff Larry Sims, Deputy Troy Black, and Detective Randi Carter with the Warren County Sheriff's Office, as well as testimony from the victim, Carol Nelson, her daughter Sarah

{¶ 13} Accordingly, as the state failed to present any evidence proving the necessary element of delivery of the protection order, we find that there was insufficient evidence to sustain Verga's conviction for violating a protection order. The trial court erred when it denied Verga's Crim.R. 29 motion for acquittal.

{¶ 14} Verga's sole assignment of error is sustained. Verga's conviction for violating a protection order is reversed and vacated, and double jeopardy attaches to bar the state from reprosecuting this charge.

{¶ 15} Judgment reversed, Verga's conviction is vacated, and Verga is hereby discharged.

S. POWELL, P.J., and RINGLAND, J., concur.

Nelson, and two of Nelson's co-workers, Christopher Copis and Faith Sorice. None of the state's witnesses testified that Verga was served with a copy of the CRPO. Verga did not testify at trial.