[Cite as *State v. Castillo*, 2015-Ohio-2738.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
HENRY COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 7-14-14**

v.

CARMEL J. CASTILLO, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Henry County Common Pleas Court
Trial Court No. 14-CR-0038

Judgment Reversed and Cause Remanded

Date of Decision: July 6, 2015

APPEARANCES:

Billy D. Harmon **for Appellant**

J. Hawken Flanagan **for Appellee**

ROGERS, P.J.

{¶1} Defendant-Appellant, Carmel Castillo, appeals the judgment of the Court of Common Pleas of Henry County, finding him guilty of violating a protection order and sentencing him to 180 days in jail. On appeal, Castillo argues that the trial court erred by admitting impermissible hearsay statements into evidence and by entering a verdict that was not supported by sufficient evidence. For the reasons that follow, we reverse the trial court's judgment.

{¶2} On May 20, 2014, the Henry County Grand Jury indicted Castillo on two counts of violating a protection order in violation of R.C. 2919.27(A)(1), felonies of the fifth degree.

{¶3} This matter proceeded to trial on October 4, 2014, where the following relevant evidence was adduced.

{¶4} Patrolman Timothy Monhollen was the first witness to testify for the State. He testified that he was employed by the Defiance Police Department in August of 2013. Patrolman Monhollen testified that he arrested Castillo for violating a protection order in August of 2013. He then made an in-court identification of Castillo. He also stated that the arrest resulted in case number 13CR3769.

{¶5} Sheriff Michael Bodenbender was the next witness to testify. Sheriff Bodenbender testified that he is employed by the Henry County Sheriff's Office and was working on October 29, 2013. He stated that while on patrol, he noticed a

"brown Ford Taurus" driving with a flat tire. Trial Tr., p. 111. He activated his overhead lights and the driver pulled off to the side of the road. The driver did not produce any identification to Sheriff Bodenbender, but she gave him a name and date of birth.

{¶6} Sheriff Bodenbender testified that there were three people in the car with the woman. There were two children in the backseat and a male in the passenger seat. Sheriff Bodenbender was able to identify the male passenger as Carmel Castillo. He also made an in-court identification of Castillo. When Sheriff Bodenbender ran Castillo's name, it came back that there was a protection order issued against Castillo, and the protected person was Sarah Wright. Pursuant to the protection order, Castillo was not to be within 500 feet of Wright. Sheriff Bodenbender also ran the name the driver gave him, and "everything checked out. The driver was valid and there was no reason to investigate her any farther." *Id.* at p. 115.

{¶7} The following relevant exchange then occurred:

> Sheriff Bodenbender: After the first offense when that happened, I got back to the office, I ran who the protected person was and the picture of the person that came up on the screen was another …
>
> Defense Counsel: Objection hearsay.
>
> Prosecutor: It's part of the normal course of investigation Your Honor.

Trial Court: I'm going to overrule the objection, you can answer that question.

Sheriff Bodenbender: The person that was protected was Sarah Wright.

Defense Counsel: Objection Your Honor, that [sic] a statement for identification, that's not a core statement to get to the proof of the matter asserted, which is the identity. You can testify to his physical observations but he can't testify to what he saw on a report.

Trial Court: Overruled, you can answer the question.

Prosecutor: In the court [sic] of your occupation as both Deputy Sheriff and Sheriff, is there a site upon which you can verify people who are victims of or are the protected person in a protection order?

Sheriff Bodenbender: Yes.

Prosecutor: And does that site have their photograph?

Sheriff Bodenbender: Yes.

Prosecutor: And did you access that site?

Sheriff Bodenbender: I did.

Prosecutor: And did you find out who the person was that was in the car with Mr. Castillo on the first event?

Sheriff Bodenbender: Yes I did.

Prosecutor: And who was that person?

Defense Counsel: Objection Your Honor, hearsay, foundation.

Trial Court: Overruled.

* * *

Prosecutor: And who was the protected person?

Sheriff Bodenbender: Sarah Wright.

Id. at p. 116-118.

{¶8} On November 1, 2013, Sheriff Bodenbender came into contact with Castillo again. He testified that he was traveling on State Route 110 and passed the same car with the same two individuals. He testified that Sarah Wright and Castillo were in the car together. Sheriff Bodenbender had the following relevant exchange:

> Q: And on that occasion how did you verify her identity?
>
> A: From the first time. I knew it was the same person I had the second, at that point I knew she was Sarah Wright.
>
> Q: And they were both in the car together I think I [sic] what you said?
>
> A: They were both in the same car.

Id. at 123.

{¶9} On cross-examination, Sheriff Bodenbender admitted that although he testified on direct examination that he pulled over a Ford Taurus, his report said that he pulled over a Mercury Sable. Sheriff Bodenbender stated that he has a camera in his police cruiser but it was not operable. Therefore, there is no video or audio recording of either stop. Further, Sheriff Bodenbender testified that he did not write a police report for the second traffic stop.

{¶10} On redirect examination, Sheriff Bodenbender testified that a second police officer came to the scene of the second traffic stop. This was because he was going to place Wright in custody as well and did not want Wright and Castillo in the same car. Sheriff Bodenbender testified that Wright was cooperative with him during the second traffic stop.

{¶11} The State then rested. Castillo moved for acquittal under Crim.R. 29, but the trial court denied the motion.

{¶12} Castillo's first and only witness was Gary Mohre, who testified that he works as a police officer in Blakesly, Ohio, and is also a private investigator. Mohre stated that he was contacted to do investigative work in regard to Castillo's case. Specifically, Mohre testified that he looked up the license plate number FDC8031. In October and November of 2013, the car was registered to Theresa Walker. Mohre stated that his search revealed that the car was a 2002 tan Mercury, but did not know the model of the car.

{¶13} On cross-examination, Mohre admitted that he has never met or talked to Theresa Walker and did not know if Walker was Wright's mother.

{¶14} After Mohre's testimony, the defense rested. Castillo renewed his Crim.R. 29 motion for acquittal, which the trial court again denied. Both the State and Castillo offered their closing statements, and the trial court charged the jury before deliberations.

{¶15} On August 4, 2012, the jury returned a not guilty verdict on the first count alleged in the indictment and a guilty verdict on the second count. The jury also found that Castillo was previously convicted of violating a protection order. This matter then proceeded to sentencing on September 11, 2014. The trial court sentenced Castillo to 180 days in jail and granted him work release on his 180 day sentence.

{¶16} Castillo filed this timely appeal, presenting the following assignments of error for our review.

Assignment of Error No. I

WHETHER THE TRIAL COURT ERRED IN ADMITTING IMPERMISSIBLE HEARSAY TESITMONY IN VIOLATION OF THE OHIO RULES OF EVIDENCE, THEREBY DENYING APPELLANT A FAIR TRIAL IN VIOLATION HIS [SIC] DUE PROCESS RIGHTS.

Assignment of Error No. II

WHETHER THE TRIAL COURT ERRED TO THE PREJUDICE OF APPELLANT WHEN IT ENTERED JUDGMENT CONVICTING HIM OF A FIFTH DEGREE FELONY VIOLATION OF PROTECTION ORDER BECEAUSE THERE WAS INSUFFICIENT EVIDENCE TO SHOW THAT HE HAD A PRIOR CONVICTION FOR VIOLATION OF PROTECTION ORDER.

Assignment of Error No. I

{¶17} In his first assignment of error, Castillo argues that the trial court erred by admitting impermissible hearsay. We agree.

{¶18}

Standard of Review

{¶19} We review a trial court's admission of testimony for an abuse of discretion. *State v. Bump*, 3d Dist. Logan No. 8-12-04, 2013-Ohio-1006, ¶ 61. "A trial court will be found to have abused its discretion when its decision is contrary to law, unreasonable, not supported by the evidence, or grossly unsound." *State v. Swihart*, 3d Dist. Union No. 14-12-25, 2013-Ohio-4645, ¶ 44, citing *State v. Boles*, 2d Dist. Montgomery No. 23037, 2010-Ohio-278, ¶ 16-18. Under Evid.R. 103(A) and Crim.R. 52(A), we disregard as harmless the admission of improper hearsay evidence unless a substantial right of the party is affected. *State v. Missler*, 3d Dist. Hardin No. 6-14-06, 2015-Ohio-1076, ¶ 60, citing *State v. Richcreek*, 196 Ohio App.3d 505, 2011-Ohio-4686, ¶ 31 (6th Dist.). "Substantial rights are not affected 'where the remaining evidence constitutes overwhelming proof of a defendant's guilt * * *.' " *Bump* at 65, quoting *State v. Jones*, 3d Dist. Van Wert No. 15-11-16, 2012-Ohio-5334, ¶ 34, citing *State v. Murphy*, 91 Ohio St.3d 516, 555 (2001).

{¶20} On appeal, the State argues that Sheriff's Bodenbender's testimony was not hearsay because it was a prior identification, which is defined as non-hearsay by Evid.R. 801(D)(1)(c).

Evid.R. 801(D)(1)(c)

{¶21} Under Evid.R. 801(D)(1)(c), a statement of identification is not hearsay if "(1) the declarant testifies at trial or a hearing and is subject to cross-

examination on that statement, (2) it identifies a person soon after perceiving him, and (3) the circumstances demonstrate the reliability of that identification." *State v. Ramos-Aquino,* 10th Dist. Franklin No. 09AP-975, 2010-Ohio-2732, ¶ 11. The rule makes clear that "identification testimony is not admissible per Evid.R. 801(D)(1)(c) unless the person who made the out-of-court identification testifies at trial and is subject to cross-examination." *State v. White*, 2d Dist. Montgomery No. 20324, 2005-Ohio-212, ¶ 42.

{¶22} Most commonly, Evid.R. 801(D)(1)(c) is used in order to admit identifications made at a line-up, show-up, photographic display, or a prior hearing. It is used to allow a third party to testify about a statement, made by a declarant, that identifies a person soon after perceiving him—assuming that the circumstances surrounding the identification can demonstrate that it was reliable. Here, Sheriff Bodenbender did not make a statement of identification. Instead, Sheriff Bodenbender was testifying as to the statement made by the computer, i.e., the identity of Sarah Wright. Therefore, we do not find that Evid.R. 801(D)(1)(c) is applicable in this case.

Hearsay Rule

{¶23} Since Evid.R. 801(D)(1)(c) does not apply, we must next determine whether Sheriff's Bodenbender testimony constituted hearsay. Hearsay is defined 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." Evid.R.

801(C). Moreover, a statement is defined as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Evid.R. 801(A).

{¶24} In this case, Castillo was charged with two counts of violating a protection order, in violation of R.C. 2919.27(A)(1), which states that "[n]o person shall recklessly violate * * * a protection order issued or consent agreement approved pursuant to section 2919.26 or 3113.31 of the Revised Code." A temporary protection order was issued against Castillo pursuant to R.C. 2919.26, which prohibited Castillo from being present within 500 feet of Sarah Wright. *See* (State's Exhibit 1, p. 6-7). Thus, in order to prove that Castillo violated his protection order, the State had to prove that Castillo was within 500 feet of Wright.

{¶25} In an attempt to present evidence which showed that Castillo was within 500 feet of Wright on October 29 and November 1, 2013, it presented the testimony of Sheriff Bodenbender who allegedly saw Castillo and Wright in the car together on both dates. While Sheriff Bodenbender was able to identify the passenger of the car as Castillo after checking his driver's license and later made an in-court identification of Castillo, he admittedly did not know who the driver of the car was. It was not until Sheriff Bodenbender got back to the police station and looked up Castillo's protection order on a database he discovered the identity of Sarah Wright. He used the information displayed on the computer screen to

conclude that Wright was the driver of the car, and thus, Castillo was violating his protection order. The State used the hearsay statement from the computer screen to prove the identity of Wright.

{¶26} Although we could not find a case from an Ohio court that dealt with a similar situation, we were able to find a case out of the Court of Appeals of Florida with nearly identical facts. *See generally Holborough v. State*, 103 So.3d 221 (Fla.App.2010). In *Holborough*, the defendant was charged with felony battery and the information charged that he "actually and intentionally touch[ed] or str[uck] Andrea Berube against her will or intentionally caused bodily harm to Andrea Berube * * *." *Id.* at 222. At the defendant's trial, Andrea Berube did not testify. *Id.* The police officer who responded to the scene testified that he saw the defendant straddling a woman and was repeatedly hitting the woman. *Id.* The prosecutor then asked the officer whether he was able ' "to find out the identity of that female that [he] saw beaten.' " *Id.* While the defense raised a hearsay objection, it was overruled and the officer testified that he was able to identify the victim as "Andrea Berube." *Id.* The officer explained that he based this identification on a Florida ID that the woman displayed to him. *Id.*

{¶27} The court found that the identification of the victim was based on inadmissible hearsay. *Id.* at 223. The court first noted that the State did not show that the officer had "personal knowledge" of the victim's identity besides from the Florida ID. *Id.* The court held that the victim's Florida ID was an out-of-court

statement, and that it was offered for the truth of the matter asserted on the ID—that the photograph of the victim depicted on the license was Andrea Berube. *Id.*

{¶28} In *Folwer v. State*, 929 N.E.2d 875 (Ind.App.2010), the State used a certified booking information printout to prove the identity of the victim in a battery case. *Id.* at 877. The printout contained the victim's photograph, name, date of birth, and a description of the individual. *Id.* The defense objected to the printout as inadmissible hearsay, but the trial court admitted the evidence over the objection. *Id.* On appeal, the court held that the printout was admissible since it fell under the public records exception to the hearsay rule. *Id.* at 879.

{¶29} In this case, Sheriff Bodenbender did not have personal knowledge of the driver's identity apart from the undocumented computer generated information.[1] The computer generated information was an out-of-court statement, and it was offered to prove the truth of the matter asserted—that the photograph of the driver that was depicted on the computer was Sarah Wright. Furthermore, the State did not try to offer the hearsay statement—the computer printout—into evidence under a hearsay exception like the prosecution did in *Folwer*.

{¶30} In *State v. Fink*, 12th Dist. Warren Nos. CA2008-10-118, CA2008-10-119, 2009-Ohio-3538, the court reversed a defendant's conviction for underage

[1] "The Supreme Court of Ohio has defined ' "personal knowledge" ' as ' "knowledge gained through firsthand observation or experience, as distinguished from a belief based upon what someone else has said." ' " *Zeedyk v. Agricultural Soc. of Defiance Cty.*, 3d Dist. Defiance No. 4-04-08, 2004-Ohio-6187, ¶ 16, quoting *Bonacorsi v. Wheeling & Lake Erie Ry. Co.*, 95 Ohio St.3d 314, 320 (2000), quoting *Black's Law Dictionary* 875 (7th Ed.1999). Here, Sheriff Bodenbender did not have personal knowledge of Wright's identity since his belief was based upon the statement from the computer screen.

consumption after the State failed to prove that the defendant was underage. *Id.* at ¶ 18-19. The court found that the only testimony that related to the defendant's age came from an officer who testified to the defendant's date of birth based solely on undocumented computer generated information from the Law Enforcement Automated Data System ("LEADS"). *Id.* at ¶ 18. The State failed to corroborate this information by providing the trial court with a copy of the defendant's driver's license, or with a printout of the LEADS report.[2] *Id.* Since the only evidence the State presented that referenced the defendant's date of birth was inadmissible, the court found that the defendant was clearly prejudiced by its admission and reversed his conviction. *Compare id.* at ¶ 19 *with In re A.M.I.*, 12th Dist. Warren No. CA2014-07-095, 2015-Ohio-367, ¶ 29-30 (finding that although officer erroneously testified about appellant's age which was based only on appellant's student records that were not offered into evidence, the appellant was not prejudiced as the State had presented other "admissible evidence with respect to appellant's age at the time of the offense").

{¶31} Here, Sheriff Bodenbender's testimony was based on his recollection of undocumented computer generated information obtained from an ambiguous database. Sheriff Bodenbender did not even testify as to what database he

[2] At least one district has found that a LEADS printout is not admissible under Evid.R. 803(8) because they are exempt from disclosure under the Ohio Public Records Act. *See State v. Straits*, 5th Dist. Fairfield No. 99CA7, 1999 WL 976212, *2 (Oct. 1, 1999). However, other districts have held that LEADS reports can fall under the public records exception, if properly authenticated. *See State v. Lett*, 7th Dist. Mahoning No. 08MA194, 2009-Ohio-5268, ¶ 22; *State v. Papusha*, 12th Dist. Preble No. CA2006-11-025, 2007-Ohio-3966, ¶ 13, 16; *City of Middleburg Hts. v. D'Ettorre*, 138 Ohio App.3d 700, 707-708 (8th Dist.2000).

obtained the information. Perhaps the computer printout would have qualified as an exception to the hearsay rule under Evid.R. 803(8), but the State chose not to offer the printout into evidence or lay the proper foundation to do so.

{¶32} Moreover, the State failed to present any other evidence which would provide the identity of the driver of the car. For example, they did not call Wright as a witness; did not provide a copy of her driver's license; or a printout of the information Sheriff Bodenbender viewed on his computer. Since the only evidence referencing the identity of the driver was inadmissible, Castillo is clearly prejudiced by its admission at trial.

{¶33} Accordingly, we sustain Castillo's first assignment of error.

Assignment of Error No. II

{¶34} In his second assignment of error, Castillo argues the trial court erred by entering a verdict without sufficient evidence. However, Castillo only argues that there was insufficient evidence presented that he had a prior conviction for violating a protection order. We disagree.

Standard of Review

{¶35} When an appellate court reviews the record for sufficiency, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *State v. Monroe*, 105 Ohio St.3d 384, 2005-Ohio-2282, ¶ 47. Sufficiency is a test of adequacy.

State v. Thompkins, 78 Ohio St.3d 380, 386 (1997), *superseded by constitutional amendment on other grounds as stated in State v. Smith*, 80 Ohio St.3d 89 (1997). Accordingly, the question of whether the offered evidence is sufficient to sustain a verdict is a question of law. *State v. Wingate*, 9th Dist. Summit No. 26433, 2013-Ohio-2079, ¶ 4.

R.C. 2919.27(A)(1), (B)(3)

{¶36} R.C. 2919.27(A)(1) provides that "[n]o person shall recklessly violate the terms of * * * [a] protection order issued or consent agreement pursuant to section 2919.26 or 3113.31 of the Revised Code[.]" "Violation of a protection order constitutes a misdemeanor of the first degree unless the offender has previously been convicted of, pleaded guilty to, or been adjudicated a delinquent child for violation of a protection order." *State v. Sheppard*, 2d Dist. Clark No. 2012CA41, 2012-Ohio-5783, ¶ 11, citing R.C. 2919.27(B)(2), (3). If the offender has a previous conviction for violation of a protection order, the offense is elevated to a felony of the fifth degree. *Sheppard* at ¶ 11, citing R.C. 2919.27(B)(3).

{¶37} "When [the] existence of a prior conviction does not simply enhance the penalty but transforms the crime itself by increasing its degree, the prior conviction is an essential element of the crime and must be proved by the state." *State v. Brooke*, 113 Ohio St.3d 199, 2007-Ohio-1533, ¶ 8, citing *State v. Allen*, 29 Ohio St.3d 53, 54 (1987). Further, under R.C. 2945.75(B)(1), "Whenever in any

case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction."

{¶38} Here, the State offered Exhibit 2 into evidence, which was a certified judgment entry that found Carmel Castillo guilty of violating a protection order in case number CR13-769. This judgment entry was filed with the Defiance Municipal Court on August 13, 2013. Further, the State offered Patrolman Monhollen's testimony, who testified that he worked for the Defiance Police Department and he arrested Castillo in August of 2013 for violating a protection order. He stated that this arrest resulted in case number 13CR769.

{¶39} Thus, we find that there was sufficient evidence to show that Castillo had a prior conviction for violating a protection order.

{¶40} Accordingly, we overrule Castillo's second assignment of error.

{¶41} Having found no error prejudicial to Castillo in the second assignment of error, but having found error prejudicial to Castillo in the first assignment of error, we reverse the trial court's judgment and remand this matter for further proceedings consistent with this opinion.

Judgment Reversed and
Cause Remanded

SHAW and WILLAMOWSKI, J.J., concur in Judgment Only.

/jlr