

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ROSS COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	Case No. 08CA3080
	:	
vs.	:	Released: December 11, 2009
	:	
MICHAEL D. HILES, JR.,	:	<u>DECISION AND JUDGMENT</u>
	:	<u>ENTRY</u>
Defendant-Appellant.	:	

APPEARANCES:

James T. Boulger, Chillicothe, Ohio, for Defendant-Appellant.

Michael M. Ater, Ross County Prosecutor, and Richard W. Clagg, Ross County Assistant Prosecutor, Chillicothe, Ohio, for Plaintiff-Appellee.

McFarland, J.:

{¶1} Defendant-Appellant, Michael Hiles, appeals from the decision of the Ross County Court of Common Pleas denying his motion for a new trial. He contends the trial court erred in excluding certain out of court, potentially exculpatory statements by 1) finding Appellant did not make reasonable efforts to secure the declarant's presence at trial, and 2) denying his right to compulsory and due process. As we cannot conclude that the trial court abused its discretion in determining Appellant failed to make reasonable efforts to secure the declarant's presence at trial, we

overrule his first assignment of error. Further, because Appellant does not meet his burden of presenting clear and convincing evidence that Evid. R. 804(A)(5) is unconstitutional when applied to his particular circumstances, we overrule his second assignment of error. Accordingly, both of Appellant's assignments of error are overruled and we affirm the decision and judgment of the court below.

I. Facts

{¶2} Appellant and his cousin, Jeremy Hiles, were the only occupants of a truck which collided with another vehicle. Both Appellant and his cousin had been drinking heavily. The collision caused severe injuries to the driver of the other vehicle. Appellant, himself, was ejected from the truck and required hospitalization. As a result of the collision, Appellant was indicted on one count of aggravated vehicular assault and one count of vehicular assault. Though an eyewitness to the accident identified Appellant as the driver of the truck, at trial, Appellant claimed that it was Jeremy Hiles who was driving when the collision occurred.

{¶3} Though Jeremy was not present during any part of the trial, Appellant attempted to introduce a number of out of court statements allegedly made by Jeremy which, according to Appellant, helped establish that it was Jeremy who was driving the truck at the time of the accident. The

trial court allowed one of the statements into evidence as an excited utterance under Evid.R. 803(2). However, the remaining statements, which Appellant sought to admit under Evid.R. 804(B)(3), were disallowed. The court ruled Appellant had not made reasonable efforts to procure the presence of Jeremy at trial as required by the rule and, therefore, the remaining out of court statements would not be admitted.

{¶4} The jury subsequently found Appellant guilty of both aggravated vehicular assault and vehicular assault. Following the verdict, Appellant filed a motion for new trial, stating the court's decision to excluded Jeremy Hiles' out of court statements denied Appellant his right to compulsory process and procedural due process. The trial court denied the motion and, merging the convictions as allied offenses of similar import, sentenced Appellant to a four-year prison term. Following sentencing, Appellant timely filed the current appeal.

II. Assignments of Error

- I. THE TRIAL COURT'S FINDING THAT THE DEFENDANT HAD NOT USED REASONABLE MEANS FOR PURPOSES OF EVIDENCE RULE 804(A)(5) TO SECURE THE ATTENDANCE OF A MISSING WITNESS CONSTITUTED AN ABUSE OF DISCRETION.
- II. THE TRIAL COURT'S REFUSAL TO PERMIT THE DEFENDANT TO PLACE IN EVIDENCE THE OUT-OF-COURT DECLARATIONS AGAINST PENAL INTEREST OF JEREMY HILES VIOLATED THE DEFENDANT'S RIGHT TO

COMPULSORY PROCESS UNDER THE SIXTH AMENDMENT
AND CONSTITUTED A DENIAL OF HIS RIGHT TO DUE
PROCESS SECURED UNDER THE FIFTH AND SIXTH
AMENDMENTS OF THE UNITED STATES CONSTITUTION.

III. First Assignment of Error

{¶5} In his first assignment of error, Appellant contends the trial court erred in finding he had failed to use reasonable means to secure the presence of Jeremy Hiles at trial. This decision resulted in the exclusion of Jeremy Hiles' alleged out of court statements. Because Appellant sought to admit the statements as hearsay exceptions, we first state the appropriate standard of review.

{¶6} “The trial court has broad discretion to determine whether a declaration should be admissible as a hearsay exception.” *State v. Dever* (1992), 64 Ohio St.3d 401, 410, 1992-Ohio-41, 596 N.E.2d 436. See, also *State v. Hand*, 107 Ohio St.3d 378, 2006-Ohio-18, 840 N.E.2d 151, at ¶92. “A trial court has broad discretion in the admission or exclusion of evidence, and so long as such discretion is exercised in line with the rules of procedure and evidence, its judgment will not be reversed absent a clear showing of an abuse of discretion with attendant material prejudice to defendant.” *State v. Green*, 4th Dist. No. 08CA3233, 2009-Ohio-5199, at ¶14, citing *State v. Powell*, 177 Ohio App.3d 825, 2008-Ohio-4171, 896 N.E.2d 212, at ¶33.

{¶7} Abuse of discretion is more than an error of law or judgment; rather, it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *State v. Herring* (2002), 94 Ohio St.3d 246, 255, 2002-Ohio-796, 762 N.E.2d 940; *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144. When an appellate court applies this standard, it can not substitute its judgment for that of the trial court. *State v. Jeffers*, 4th Dist. No. 08CA7, 2009-Ohio-1672, at ¶12; *In re Jane Doe I* (1991), 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181, citing *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301.

{¶8} The out of court statements allegedly made by Jeremy Hiles that Appellant sought to have admitted were made to: Audra Queen, sister of Appellant; Lisa Vandemark, former girlfriend of Jeremy Hiles; and Appellant himself. Audra Queen stated that, at the hospital following the accident, while Appellant was receiving care, Jeremy spoke to her. Queen stated that Jeremy was acting belligerent and agitated and sometimes crying. Queen stated that, while trying to calm him, Jeremy told her “I killed Mikey. I Killed Mikey.” Queen further stated that when she noted to Jeremy that his injuries looked like they were caused by a steering wheel, he agreed with her. Though the trial court allowed the “I killed Mikey” statement into

evidence as an excited utterance under Evid.R. 803(2), it excluded the statement regarding the steering wheel.

{¶9} Lisa Vandemark stated that she spoke with Jeremy multiple times on the night of the accident. “He was really distraught, wiggling out. The message he left on my phone said that he had hit something but didn’t know what he had hit and that he was in real big trouble and when I answered the phone, he was just like rambling on about how he was in trouble and that Mike was in the hospital and that Mike was in real bad shape * * *.” The trial court did not allow the statement into evidence.

{¶10} Appellant stated that Jeremy called him sometime in the months following the accident. “He said that um, I asked him why he didn’t stand up and take responsibility for what he had done and he had said that he was on parole and facing other charges in other counties, similar things and a, that it would be too overwhelming for him to come in and take this upon hisself [sic] now.” This statement was also excluded by the court.

{¶11} The trial court disallowed the out of court statements related above due to the requirements of Evid.R. 804(B)(3) and 804(A)(5). Under Evid.R. 804(B)(3) the hearsay rule will not exclude a statement against interest that tends to expose the declarant to criminal liability and that is corroborated by circumstances clearly indicating the truth worthiness of the

statement. However, for Evid.R. 804(B)(3) to apply, the declarant must be unavailable. Under Evid.R.804(A)(5), the declarant is unavailable if he or she “is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under division (B)(2), (3), or (4) of this rule, the declarant's attendance or testimony) by process or other reasonable means.”

{¶12} “A declarant is not ‘unavailable’ within the meaning of Evid.R. 804(A) unless the party seeking admission of the hearsay evidence has made ‘reasonable efforts in good faith to secure his presence at trial.’” *State v. Jenkins*, 4th Dist. No. 05CA7, 2006-Ohio-2546, at ¶38, quoting *State v. Keairns* (1984), 9 Ohio St.3d 228, 230, 460 N.E.2d 245. Further, in order to satisfy this burden, “[a] showing of unavailability under Evid.R. 804 must be based on testimony of witnesses rather than hearsay not under oath unless unavailability is conceded by the party against whom the statement is being offered.” *Keairns* at 232.

{¶13} During the availability hearing, testimony established the following concerning Appellant’s efforts to locate Jeremy Hiles: 1) Appellant tried to phone Jeremy directly, but was unable to reach him; 2) Appellant contacted Jeremy’s brother, Tim Hiles, ten to twelve times in an effort to locate Jeremy; 3) Appellant asked Jeremy’s mother if she knew

where he could be found; 4) Appellant's counsel spoke with Lisa Vandemark on two separate occasions and questioned her regarding Jeremy's whereabouts; 5) Appellant's counsel spoke with Audra Queen about Jeremy's current location; 6) counsel checked Chillicothe Municipal Court records which indicated a warrant had been issued for Jeremy, but not served, for an unrelated incident; 7) counsel was informed of possible warrants for Jeremy's arrest in Pike and Pickaway counties; 8) counsel kept track of the state's efforts to subpoena Jeremy in the case sub judice; 9) counsel discovered Jeremy's mother had filed a protection order against him in an unrelated matter and had unsuccessfully attempted to serve him; and 10) counsel secured a subpoena for Jeremy, but only the day before trial and, not having an address to direct it to, he did not deliver it to the Sheriff's Department.

{¶14} After the availability hearing, the trial court found that, despite the actions listed above, Appellant had failed to make reasonable efforts to secure Jeremy's presence at trial. The court noted that Appellant had learned approximately a month before trial, from both Jeremy Hiles' mother and brother, that Jeremy might be residing in Lancaster. Further, Appellant apprised his counsel of this information. The trial court found that, despite this knowledge, Appellant made no effort to locate Jeremy in

that location. He did not contact the Lancaster Police Department, the Lancaster Municipal Court, the Fairfield Sheriff's Department, the Fairfield Court of Common Pleas or the local parole department, and he made no attempt to check utility records in the area. Further, the court noted that, despite learning that Jeremy may have been on post release control and under the supervision of the Ohio Adult Parole Authority, Appellant never contacted that agency in an attempt to ascertain his whereabouts. Finally, the court noted that even though trial had been scheduled twice previously, Appellant never requested a subpoena for Jeremy until the day before trial actually commenced. In light of the trial court's findings, we are unable to say it abused its discretion in determining that Appellant failed to make reasonable efforts to secure Jeremy's presence at trial and, thus, in excluding Jeremy's out of court statements.

{¶15} Appellant essentially argues that the State's attempts to contact Jeremy should be imputed to him and, combined with the active steps he did take, these efforts were enough to show that a reasonable, good faith effort was made. However, it is the proponent of the statement, not the opposing party, that must make reasonable efforts to secure the attendance of the declarant when seeking to introduce a statement under Evid.R. 804(B)(3). Further, even if Appellant was able to adopt the State's attempts

to contact Jeremy as his own, serving a subpoena is not enough, in itself, to establish a good faith effort. “The issuance of a subpoena alone does not constitute a sufficient effort when other reasonable methods are also available.” *Keairns* at 232.

{¶16} Here, the trial court determined such other reasonable methods were available. The trial court found that, because Appellant had recent knowledge that Jeremy was in Lancaster, Appellant should have made some sort of effort to search in that location. Because he failed to do so, and because he did not attempt to subpoena Jeremy until the day before trial commenced, the court determined Appellant’s efforts did not satisfy the requirements of Evid.R. 804(A)(5).

{¶17} When an appellate court applies the abuse of discretion standard, it cannot simply substitute its judgment for that of the trial court. As such, although we realize the jury, had it heard Jeremy’s alleged out of court statements, may have considered the statements as evidence supporting Appellant’s defense, we cannot find that the trial court abused its discretion in determining Appellant did not make a reasonable, good faith effort to secure Jeremy’s presence at trial. Accordingly, Appellant’s first assignment of error is overruled.

IV. Second Assignment of Error

{¶18} In his second assignment of error, Appellant contends the trial court violated his right to compulsory process under the Sixth Amendment and denied his right to due process under the Fifth and Sixth Amendments of the United States Constitution. Essentially, Appellant argues that, as applied to the facts of this case, the provisions of Evid.R. 804(A)(5) violate his constitutional rights.

{¶19} “An ‘as applied’ attack on the constitutionality of a statute is to be decided by considering the facts. The burden is upon the party making the attack to present clear and convincing evidence of a presently existing state of facts that makes the statute unconstitutional when applied to the state of facts.” *In re Sturm*, 4th Dist. No. 05CA35, 2006-Ohio-7101, at ¶88. See, also, *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229, 231, 520 N.E.2d 188.

{¶20} “Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’” (Internal citations omitted.) *Crane v. Kentucky* (1986), 476 U.S. 683, 690, 106 S.Ct. 2142, quoting *California v. Trombetta* (1984), 467 U.S. 479, 485,

104 S.Ct. 2528. However, this right is not absolute and does not require that all evidence favorable to a defendant be admitted. *State v. Swann*, 119 Ohio St.3d 552, 2008-Ohio-4837, 895 N.E.2d 821, at ¶13.

{¶21} In the case sub judice, the trial court excluded the out of court statements solely on the basis of Appellant's lack of reasonable efforts, as required by Evid. R. 804(A)(5), to secure Jeremy Hiles' presence at trial. However, Appellant has put forth no evidence demonstrating that Evid. R. 804(A)(5) is unconstitutional when applied to the particular facts of his case. While Jeremy's out of court statements may have aided Appellant in his defense, this alone does not mandate that they be admitted. The exercise of the right to due process and compulsory process "* * * must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Swann* at ¶14, quoting *Chambers v. Mississippi* (1973), 410 U.S. 284, 302, 93 S.Ct. 1038. As Appellant does not meet his burden of presenting clear and convincing evidence of a presently existing state of facts that makes Evid. R. 804(A)(5) unconstitutional when applied to those facts, we overrule his second assignment of error.

V. Conclusion

{¶22} For the foregoing reasons, we overrule both of Appellant's assignments of error. Because Appellant did not attempt to subpoena Jeremy Hiles until the day before trial commenced, and because he did not make any effort to search for him in his last known location, we cannot conclude the trial court abused its discretion in determining Appellant did not make reasonable efforts to secure Jeremy's presence at trial. Because Appellant does not present clear and convincing evidence that, as applied, Evid. R. 804(A)(5) violated his right to due process and compulsory process, we also overrule his second assignment of error. Accordingly, the trial court's decision is affirmed.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED and that the Appellee recover of Appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Ross County Common Pleas Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

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

Kline, P.J. and Harsha, J.: Concur in Judgment and Opinion.

For the Court,

BY: _____
Judge Matthew W. McFarland

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.