[Cite as *State v. Fraley*, 2012-Ohio-4994.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WOOD COUNTY

State of Ohio — Court of Appeals No. WD-11-045

Appellee — Trial Court No. 2011CR0071

v.

John Fraley — **DECISION AND JUDGMENT**

Appellant — Decided: October 26, 2012

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney,
Gwen Howe-Gebers, Chief Assistant Prosecuting Attorney,
and David E. Romaker, Jr., Assistant Prosecuting Attorney,
for appellee.

Neil S. McElroy, for appellant.

* * * * *

SINGER, P.J.

{¶ 1} Appellant appeals his conviction for inducing panic, a fifth degree felony, entered on a jury verdict in the Wood County Court of Common Pleas. Because we conclude that the trial court abused its discretion in admitting testimony wholly derived

from the contents of a document excluded from evidence, we reverse and remand for further proceedings.

{¶ 2} On February 8, 2011, employees at the Candlewood Suites in Perrysburg, Ohio, observed a smoke alarm in room 313 of the hotel. The occupant of the room was appellant, John H. Fraley.

{¶ 3} When the hotel operations manager called the room, there was no answer. When the manager went to the room, appellant refused to open the door. The manager then advised appellant that, if he would not allow inspection of the room, he had to leave. When appellant continued to deny the manager entry, the manager went to call the police.

{¶ 4} When the manager reached the desk, the clerk told him that she had seen appellant leave the room on a security camera. The manager returned to the room and entered. Inside the room was a black cloud of smoke. A glass lid from a teapot was shattered on the floor. The smoke detector was detached from the ceiling. The manager replaced the smoke detector in the ceiling and returned to the desk, intending to rekey the room.

{¶ 5} Before the manager could accomplish this, appellant passed him and returned to the room. The manager followed and again repeatedly directed appellant to leave the room. When appellant refused, the manager called police.

{¶ 6} One of the police officers who responded later testified that, when he entered the hall outside room 313, he smelled a burnt chemical odor that made his eyes water. The officer testified that when he spoke to appellant, appellant became argumentative and

refused to leave. After numerous requests that appellant leave, police arrested him for criminal trespass.

{¶ 7} Incident to his arrest, police searched appellant and a backpack he was carrying. On his person, police found rubber gloves and a respirator mask. In the backpack were a bottle of muriatic acid, a can of spray engine cleaner, a bottle of white-out and a bottle of ferrous sulfate iron supplement tablets. In appellant's car, police found more muriatic acid, a spray can of engine degreaser, a container of swimming pool cleaner and some car wax.

{¶ 8} One of the officers who responded later testified that muriatic acid and engine cleaner were sometimes used in the manufacture of methamphetamines. Concerned that the room may have been used for cooking meth, Perrysburg police contacted the U.S. Drug Enforcement Administration ("DEA") to request a cleanup crew.

{¶ 9} A cleaning crew under contract with the DEA arrived a short time later, removing the chemicals from the room and appellant's car. In the meantime police and hotel employees relocated guests from adjacent rooms.

{¶ 10} On February 17, 2011, the Wood County Grand Jury named appellant in a two count indictment charging methamphetamine manufacture and inducing panic, with a specification of economic damage in excess of $500. Appellant initially entered a plea of not guilty by reason of insanity, but later amended his plea to not guilty. Prior to trial, the state dismissed the manufacturing charge. The matter proceeded to a jury trial on the inducing panic charge alone.

{¶ 11} At trial, the state called the hotel manager and the responding police officers who testified to the events of February 8, 2011. It was through one of these police officers that the state initially sought to introduce a statement for the cost of cleaning up room 313. The exhibit had been sent from the DEA to support the claim of economic damages in excess of $500. Appellant objected to the introduction of this document, arguing that a Perrysburg police officer was not the proper witness to authenticate a document prepared by the DEA. The trial court sustained the objection.

{¶ 12} The following day, the state called Kevin Graber, a DEA agent who had formerly been the hazardous materials cleanup coordinator for the DEA Toledo office. Although not directly involved in the Perrysburg cleanup, the agent was familiar with DEA procedures. Over appellant's objections, the agent testified that, while he had not previously seen the cleanup statement at issue, he was familiar with the type of invoices sent to the DEA. The agent testified that the statement at issue was consistent with prior invoices he had seen and that the contractor listed on the invoice, Chemical Pack Services, to his knowledge, was the contractor used by the Toledo office when the Perrysburg cleanup occurred. The agent then read the invoice into the record, noting a cleanup cost of $1,482.50.

{¶ 13} On cross-examination, the agent testified that the DEA statement was not normally received in the Toledo office, but would ordinarily be kept at the DEA's Virginia headquarters. The agent testified that he had no personal knowledge of the cleanup in Perrysburg.

{¶ 14} At the conclusion of the state's case, the state again attempted to admit the cleanup statement into evidence. Appellant again objected to admission of the document and requested that the agent's testimony derived from the document be stricken. The trial court refused to admit the document, but denied appellant's motion to strike the agent's testimony. The state rested.

{¶ 15} Appellant did not present a defense. The matter was submitted to the jury which found appellant guilty with a specification of damages in excess of $500. The trial court accepted the verdict and, following a presentence investigation, sentenced appellant to an 11-month term of incarceration.

{¶ 16} From this judgment of conviction, appellant now brings this appeal. Appellant sets forth the following three assignments of error:

> I. Admission of Agent Garber's testimony regarding the cost of the hazardous material cleanup violated Mr. Fraley's constitutional right to confront the witnesses against him as guaranteed by the 6th Amendment to the United States Constitution.
>
> II. The trial court erred to the prejudice of the defendant when it admitted, over objection, hearsay testimony regarding the cost of the hazardous material cleanup.
>
> III. The trial court erred to the prejudice of the defendant when it admitted, over objection, the testimony of Agent Garber who had no personal knowledge regarding the cost of the hazardous material cleanup.

I. Confrontation Clause

{¶ 17} In his first assignment of error, appellant asserts that the trial court improperly permitted admission of hearsay testimony concerning the cleanup cost of the hotel room. The admission of this testimony, appellant maintains, violates his constitutional right to confront witnesses against him.

{¶ 18} The Sixth Amendment to the Constitution of the United States provides:

{¶ 19} "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *." "Hearsay," by definition, is a statement, other than made by the declarant while testifying in trial, which is offered to prove the truth of the matter asserted. Evid.R. 801(C). Since hearsay evidence is ordinarily not admissible into evidence, Evid.R. 802, these provisions are compatible.

{¶ 20} The tension occurs with the application of any of the multitude of the exceptions to the hearsay rule. Whenever the state seeks to introduce hearsay into a criminal proceeding, the court must determine not only whether the evidence fits within an exception, but also whether the introduction of such evidence offends an accused's right to confront witnesses against him.

{¶ 21} For a number of years, the test used to determine a Confrontation Clause infringement required a showing that the hearsay declarant was unavailable to appear in court and that the statement sought to be admitted bore an "indicia of reliability." *Ohio v. Roberts*, 448 U.S. 56, 65-66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). Reliability was

inferred if the evidence fell within a "firmly rooted hearsay exception." Absent such a particularized showing of trustworthiness, the evidence was to be excluded. *Id.* at 66.

{¶ 22} The test articulated in *Roberts*, however, has since been abrogated in *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). *Crawford*, at 51-52, separates the type of hearsay which might be introduced at trial into "testimonial statements" and statements that are not. Testimonial statements consist of ex parte in-court testimony or its equivalent; affidavits, custodial examinations, prior testimony or similar pretrial statements that a declarant would reasonably expect to be used by the prosecution; depositions, prior testimony or confessions; and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 52; *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, paragraph one of the syllabus. These are the types of statements with which the Confrontation Clause is concerned. Testimonial statements are admissible into evidence only if the declarant is unavailable to testify and then only if the accused had a prior opportunity to cross-examine. *Id.* at 54. Statements that are not testimonial, that is made under circumstances not expected to be used at trial, are subject to the ordinary rules of admissibility for hearsay. *State v. Clemons*, 7th Dist. No. 10 BE 7, 2011-Ohio-1177, ¶ 110.

{¶ 23} In this matter, the amount of economic damages incurred as the result of appellant's acts is an element of the offense of inducing panic as a fifth degree felony. Appellant's indictment charges his offense resulted in economic harm "of five hundred

dollars but less than five thousand dollars." At the time of appellant's offense, inducing panic with economic harm of less than $500 resulted in a first degree misdemeanor.[1] Damage in excess of $500, then, is a fact that must be proven by the prosecution beyond a reasonable doubt to sustain a felony conviction. The only evidence put forth as to any cost associated with appellant's acts was the statement for cleanup in the amount of $1,482.50.

{¶ 24} The cleanup statement is from Chemical Pack Services of Vermillion, Ohio, dated February 17, 2011, and identified as "Invoice Number 3908." The document references a DEA job number and a DEA case number and details hourly charges for the response crew and a recovery technician as well as the cost of material consumed. It is captioned "Invoice for Hazardous Waste Removal Services." On the face of the document, there is nothing to suggest that it was created for any other purpose than to get paid. Absent any indicia that the statement was created for use at a later trial, we must conclude that the document is not testimonial hearsay. Accordingly, appellant's first assignment of error is not well-taken.

II. Hearsay Exception

{¶ 25} In his second and third assignments of error, appellant argues that the cleanup invoice was hearsay evidence for which there was no applicable admissibility exception and that the information contained on the invoice was no less hearsay without

[1] Effective September 30, 2011, R.C. 2917.31(C)(4)(a) was amended to require economic harm between $1,000 and $7,500 to be a fifth degree felony. 2011 Am.Sub.H.B. No. 86 § 1.

exception when read in court by a DEA agent with no knowledge of the underlying facts and no knowledge of the authenticity of the invoice.

{¶ 26} The state responds that the cleanup invoice should have been admitted into evidence as a business record under Evid.R. 803(6) and that the information contained in the document was likewise admissible through the testimony of a DEA agent who was familiar with the agency's records keeping practices and could authenticate the document.

{¶ 27} Evid.R. 803(6), the business record exception, provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> (6) **Records of regularly conducted activity**. A memorandum, report, record, or data compilation, in any form, of acts, events, or conditions, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution,

> association, profession, occupation, and calling of every kind, whether or not conducted for profit.

{¶ 28} There are four essential elements that must be shown for hearsay to be admitted under the rule as a business record:

> (i) the record must be one regularly recorded in a regularly conducted activity; (ii) it must have been entered by a person with knowledge of the act, event or condition; (iii) it must have been recorded at or near the time of the transaction; and (iv) a foundation must be laid by the "custodian" of the record or by some "other qualified witness." 1 Weissenberger, *Ohio Evidence*, Section 803.73 at 65 (1995); *State v. Davis*, 116 Ohio St.3d 404, 2008-Ohio-2, 880 N.E.2d 3, ¶ 171.

{¶ 29} A condition precedent to the admissibility of hearsay evidence under the business record exception is the introduction of evidence sufficient to support a finding that the matter in question is what the proponent claims. 1 Weissenberger, *supra*, Section 803.79 at 74; Evid.R. 901(A). Business records, for the most part and certainly in this instance, are not self-authenticating. *See* Evid.R. 902. No party argues that the document at issue here is subject to statutory authentication pursuant to Evid.R. 901(B)(10).

{¶ 30} The identification and authentication of a document, as well as testimony that the document has been kept in the course of regularly conducted activity and recorded at or near the time of the transaction, must come from the custodian of the records or some "other qualified person." 1 Weissenberger, *supra*. The phrase "other

qualified person" should be afforded a broad interpretation. The witness need not have firsthand knowledge of the transaction, but he or she must demonstrate familiarity with the operation of the business and the circumstances of the record's preparation, maintenance and retrieval. The witness must be able to testify on the basis of this knowledge that the record is what it purports to be and that it was made in the ordinary course of business. Absent such testimony, the evidence should not be admitted. *Id.*

{¶ 31} When the state first attempted to introduce the cleanup invoice through the testimony of a Perrysburg police detective, the trial court properly sustained appellant's objection because the detective could not authenticate the document or testify that it was kept in the normal course of business. The next day the state called DEA Agent Gerber who testified that he previously, but not at the time in question, had been DEA cleanup coordinator for Northwest Ohio and Southern Michigan:

> Q. And during your time as agent involved in coordinating that, could you explain to the jury what that would entail?
>
> A. Yes. For labs that we were not going to respond to – because this happens in very rural areas at very odd hours all of the time – our job as coordinator would be to contact our headquarters. We would be given an appropriations number from DEA headquarters in Virginia. Since all of these [cleanups] are funded by Congress, we would then * * * contact the contractor locally to the office to coordinate a cleanup where they would respond to.

Q. Are you familiar what [sic] one of those invoices with those numbers that you just indicated, are you familiar with one of those?

A. I am familiar.

Q. I will show you what I have marked as State's exhibit 11, if you could take a moment to review that?

A. I am familiar with documents such as this.

* * *

Q. And is that similar to documents that you have seen over the time period and during the twenty or so labs that you have been personally responsible for making those contracts?

A. That is correct. And I will add Chemical Pack Services was the obligated contractor for that fiscal year. * * *

Q. So at the top it says, "Invoice for Hazardous Waste Removal," correct?

A. That is correct.

Q. And at the top of there is an invoice dollar amount, Correct?

A. That is correct.

Q. Can you read that if I bring it in a little?

A. $1482.50.

{¶ 32} The remainder of Agent Gerber's testimony concerned the procedures used when hazardous materials are discovered and a description of the cleanup.

{¶ 33} On cross-examination, the agent testified his only involvement in this case had been to tell Perrysburg police to call the current cleanup coordinator:

Q. That was your entire involvement in this situation correct?

A. Correct.

Q. Until this afternoon?

A. That is correct.

* * *

Q. And up until arriving here had you ever seen this document marked State's exhibit 11?

A. Not his particular document, but documents like that I have seen in the past.

Q. You never saw this one until moments ago, correct?

A. Correct.

* * *

Q. And this is not a document that normally would be received by the Toledo office, correct?

A. That is correct.

Q. It is a document that is generally maintained in the DEA office in Virginia, correct?

A. Yes.

Q. And you yourself have no personal knowledge as to what exactly Chemical Pack Services did upon their arrival at the scene, correct?

A. On this particular day, that is correct.

{¶ 34} The trial court again sustained appellant's objection to admission of the invoice, but denied appellant's motion to strike Agent Gerber's testimony as to the cost of the cleanup which the witness read from the cleanup invoice.

{¶ 35} The exhibit and the testimony derived wholly from the exhibit are inextricably linked. If the invoice is hearsay and the proponent of the exhibit fails to establish a business record exception, then testimony that is wholly derived from the information contained in the invoice is also hearsay without an established exception. To rule one admissible and the other not admissible is inherently arbitrary.

{¶ 36} The testimony of Agent Gerber was insufficient to establish a business record exception. He was not the custodian of records. He was unable to identify by personal knowledge that the specific document presented was received in the normal course of business, that it was recorded by one familiar with the event or that it was recorded at or near the time of the transaction. He could not even testify that this specific document had even been taken from DEA records. Consequently, the court acted within its discretion in denying admission of the document.

{¶ 37} Inversely, the court's decision to admit testimony wholly derived from a document properly ruled inadmissible constituted an abuse of discretion. *See Blakemore*

v. Blakemore, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). Accordingly, appellant's second and third assignments of error are well-taken.

{¶ 38} On consideration whereof, the judgment of the Wood County Court of Common Pleas is reversed. This matter is remanded to said court for further proceedings consistent with this decision. It is ordered that appellee pay the court costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, P.J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE