[Cite as *Toledo v. Huggins*, 2013-Ohio-3467.]

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

City of Toledo

Appellee

Court of Appeals No. L-12-1265
L-12-1266

Trial Court No. CRB-12-08763-0101
CRB-11-09574-0101

v.

Marcel Huggins

Appellant

DECISION AND JUDGMENT

Decided: August 9, 2013

* * * * *

David Toska, City of Toledo Prosecutor, and
J. Scott Kunzler, Assistant Prosecuting Attorney, for appellee.

Laurel Kendall, for appellant.

* * * * *

OSOWIK, J.

{¶1} This is an appeal from a judgment of the Toledo Municipal Court, which found appellant guilty of one count of violating a temporary protection order, in violation

of TMC 537.20(c), and one count of telephone harassment, in violation of TMC 537.10(b). Following separate trials, appellant was convicted and sentenced to active probation for a term of one-year, with a suspended jail sentence of sixth months. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶2} Appellant, Marcel Huggins, sets forth the following four assignments of error:

1. The trial court committed plain error when it allowed hearsay evidence under the "excited utterance" exception in the first trial (TPO and TPO violation).

2. The trial court committed plain error when it over-ruled Appellant's motion for acquittal based on insufficient evidence in Trial No. 1.

3. The trial court committed plain error when it found Appellant guilty of a violation of a temporary protection order which had been dismissed previously.

4. The trial court committed plain error when it over-ruled Appellant's motion for acquittal based on insufficient evidence in Trial No. 2.

{¶3} The following undisputed facts are relevant to the issues raised on appeal. On June 29, 2011, appellant made a series of threatening and harassing phone calls to an

ex-girlfriend. The victim is the mother of one of appellant's children. During the phone calls, which occurred in the early morning hours, appellant subjected the victim to a wealth of inappropriate and vulgar language. In addition, appellant threatened to come to the victim's residence and "come through the door." On July 15, 2011, appellant was arrested as a result of the events.

{¶4} On March 26, 2012, while appellant's harassment charges remained pending, appellant was also charged with domestic violence against a second ex-girlfriend. Notably, during the initial proceedings in that case, appellant was informed about and consented on the record in open court to a temporary protection order (TPO) being issued barring him from contact with the victim.

{¶5} On May 19, 2012, the domestic violence victim to whom the TPO applied called police officers at approximately 3 a.m. to report that appellant had been banging on the doors and windows of her residence. A Toledo police officer responded to the scene at approximately 3:15 a.m. When the officer arrived, he had to knock on the door several times in an attempt to bring the frightened victim to the door. The officer ultimately found the victim "hysterically crying." The victim reported that appellant had been outside her residence attempting to gain access in violation of the TPO. The victim informed the responding officer about the TPO she had against appellant. The officer next confirmed the existence and the validity of the TPO through a police database. The

TPO was found actively in place. Appellant was arrested and charged with a violation of the TPO.

{¶6} On August 15, 2012, both cases proceeded to back to back bench trials. The first trial involved appellant's violation of the TPO. The domestic violence victim did not appear at trial. However, the police officer who had responded to the victim's 9-1-1 call presented detailed and convincing testimony regarding the victim's hysterical behavior resulting from appellant's actions. Given the circumstances, the trial court permitted the testimony into the record under the "excited utterance" exception to hearsay. Notably, appellant openly acknowledged at trial that he had voluntarily consented to the TPO at a prior hearing. Based on the persuasive testimony of the responding officer, appellant was found guilty of violating the TPO.

{¶7} The second trial was held immediately following the first trial. The trial involved appellant's harassment of his ex-girlfriend via telephone. The harassment victim was present at trial. Although unable to produce recordings of the harassing phone calls, the state was able to present detailed and convincing testimony from the victim that appellant had harassed the victim during several early morning telephone calls. The trial court was not persuaded by appellant's generic denial of the events. Accordingly, appellant was found guilty of telephone harassment, in violation of TMC 537.10(b).

{¶8} Appellant was sentenced to active probation for a term of one year, with a suspended jail sentence of sixth months. This appeal ensued.

{¶9} In the first assignment of error, appellant asserts that the trial court erred in allowing an "excited utterance" hearsay exception into the first trial. In support of this assertion, appellant maintains that the responding officer did not see appellant at the victim's house following the 9-1-1 call. Additionally, appellant contends that the 15 minute span of time which elapsed between the 9-1-1 call and the officer's arrival at the scene negates the propriety of the excited utterance exception. After careful review of the record, we disagree.

{¶10} The admission or exclusion of relevant evidence rests within the sound discretion of the trial court. *State v. Sage*, 31 Ohio St.3d 173, 180, 510 N.E.2d 343 (1987). It is well-established that when examining admissibility issues, such as the disputed testimony before us, a reviewing court may not reverse the trial court absent an abuse of discretion. *State v. Easter*, 75 Ohio App.3d 22, 26, 598 N.E.2d 845 (4th Dist.1991). An abuse of discretion connotes that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶11} Of particular relevance to this evidentiary dispute, we note that in order for testimony to be admissible as an excited utterance exception to the hearsay rule pursuant to Evid.R. 803(2), a startling event sufficient to still the reflective faculties of the

declarant must occur. In conjunction with this, a nearly contemporaneous statement must be made that relates to that event involving matters which the declarant had an opportunity to personally observe. *State v. Boles*, 190 Ohio App.3d 431, 2010-Ohio-5503, 942 N.E.2d 417, ¶ 40 (6th Dist.).

{¶12} The victim's statements to the responding officer that she observed appellant, who was currently being prosecuted for domestic violence against this victim and who was subject to a TPO with the victim, yelling outside her residence in the middle of the night and physically banging against on the doors and windows attempting to gain access, would clearly constitute a startling event.

{¶13} In addition, we note that there is no specific amount of time after which a statement can no longer be considered as an excited utterance and not the result of reflective thought. *State v. Taylor*, 66 Ohio St.3d 295, 612 N.E.2d 316 (1993). Notably, the record in the matter encompasses no evidence suggesting that the disputed statements were the result of reflective thought.

{¶14} It is undisputed that the Toledo police officer who responded to the victim's 9-1-1 call arrived within a short period of time. In addition, the officer testified that upon arrival at the victim's residence, the victim was extremely hesitant to come to the door. The officer further relayed that when he ultimately saw the victim, she was "hysterically crying." The officer testified that the victim immediately named appellant as the individual who had been yelling and knocking on doors and windows in an attempt to

enter the residence despite a TPO with the victim. This series of events clearly establishes an excited utterance exception to the hearsay rule. The trial court did not act in an arbitrary, unreasonable, or unconscionable fashion by permitting the disputed testimony. We find appellant's first assignment of error not well-taken.

{¶15} In the related second and fourth assignments of error, appellant asserts that the trial court erred in overruling his Crim.R. 29 motions for acquittal. In support, appellant argues that the prosecution lacked sufficient evidence to establish the TPO violation and telephone harassment. We do not agree.

{¶16} The term "sufficiency" of the evidence presents a question of law as to whether the evidence is legally adequate to support a jury verdict as to all elements of the crime. *State v. Thompkins,* 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). The relevant inquiry in such cases 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, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶17} Contrary to appellant's assertions, the record indicates that during the course of both trials ample evidence was provided to establish the existence of the active TPO, the violation of said TPO, and the telephone harassment. In the first trial, the responding officer's detailed testimony clearly constituted sufficient evidence to demonstrate the existence of a valid, verified TPO. Additionally, the testimony further

established that appellant had been present and acting aggressively at the victim's residence, in clear violation of the TPO.

{¶18} In the second trial, the detailed testimony provided by the harassment victim sufficiently established appellant's multiple inappropriate, harassing phone calls to the victim. Appellant did not provide any testimony which refuted the testimony of the officer or the harassment victim. Appellant simply denied the charges. The trial court properly found the testimony of the victim and the officer more persuasive. Wherefore, we find appellant's second and fourth assignments of error not well-taken.

{¶19} In the third assignment of error, appellant asserts that the TPO against him had been previously dismissed and could not therefore have been violated. In support of this assertion, appellant proposes that the TPO was not validly reinstated by the trial court. Upon examining the record, we are not persuaded.

{¶20} We first note that the record clearly establishes that appellant did not challenge the validity of the TPO during the trial court proceedings. On the contrary, the record clearly shows that appellant knowingly and voluntarily consented to the TPO in open court. Accordingly, arguments contesting its validity were waived. Additionally, the trial court record clearly reflects that the TPO was active and in effect at the time appellant went to the victim's residence. This was independently verified by the responding officer through a checking of the relevant police database. We find appellant's third assignment of error not well-taken.

{¶21} On consideration whereof, the judgment of the Toledo Municipal Court is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R.24.

Judgment affirmed.

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

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE