[Cite as *State v. Johnson*, 2014-Ohio-2435.]

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

State of Ohio

Appellee

v.

Shavell L. Johnson

Appellant

Court of Appeals Nos. WD-13-008
WD-13-009

Trial Court Nos. CRB 1201403
CRB 1201609

DECISION AND JUDGMENT

Decided: June 6, 2014

* * * * *

P. Martin Aubry, City of Perrysburg Prosecutor, for appellee.

Stephen D. Long, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant appeals his conviction of 18 counts of violating protection orders entered on a jury verdict in the Perrysburg Municipal Court.

{¶ 2} On June 27, 2011, Lori Sanchez petitioned the Lucas County Court of Common Pleas, Domestic Relations Division, for a domestic relations civil protection

order against appellant, Shavell L. Johnson. Appellant and Sanchez are the parents of two children. Sanchez told the court that appellant had pushed her to the ground on one occasion and that he had choked and hit her on another occasion. The court issued an ex parte protection order and set an initial July 5, 2011 date for a full hearing on the petition. The court set an expiration date of August 26, 2011, on the temporary order. Appellant did not receive a copy of the temporary order until August 4, 2011, when he was served by a deputy sheriff in the Wood County jail. On August 26, 2011, after a full hearing at which appellant was not present, the court extended the order until August 24, 2016.

{¶ 3} On August 25, 2011, Lori Sanchez's mother, Margret Sanchez, petitioned the Wood County Court of Common Pleas for a civil stalking protection order against appellant. Margret Sanchez alleged that appellant had threatened to "mess up my car" and "hurt me if he sees me." The court issued an ex parte protection order the same day and set an August 30, 2011 date for a full hearing on the petition. The temporary order contained a February 25, 2012 expiration date. Both the Wood County order and the Lucas County order forbid appellant from having contact or communication with the petitioners. On September 6, 2011, following a full hearing at which appellant did not appear, the court extended the protection order until August 25, 2016.

{¶ 4} On September 24, 2012, Lori Sanchez received a series of text messages on her mother's cell phone originating from a number she knew to belong to appellant's mother. She also received multiple hang-up calls. From the content of the messages,

Lori Sanchez believed the text messages and the hang-up calls were from appellant in violation of both protective orders. She called police.

{¶ 5} On September 25, 2012, police charged appellant with a single count of violating a protection order in violation of R.C. 2919.27. Appellant pled not guilty. On November 16, 2012, appellant was charged with an additional 17 counts of violating a protection order. Appellant pled not guilty to the additional charges.

{¶ 6} The court appointed counsel for appellant, but initial counsel withdrew, as did his second appointed counsel. The court appointed a third counsel. At the outset of the trial, appellant asked the court to appoint yet another counsel, but the court declined. Appellant then elected to represent himself during the trial.

{¶ 7} At trial, the state introduced photographs of text messages, phone records tying the calls to appellant's mother's telephone and testimony from both Lori and Margret Sanchez that appellant would have been the only one with knowledge of some of the information contained in the texts. Court clerks from both Lucas and Wood Counties authenticated the respective protection orders. At the conclusion of the state's case, appellant moved for a judgment of acquittal pursuant to Crim.R. 29. The court denied the motion.

{¶ 8} Appellant chose to testify in his own behalf. He denied having received service of either protective order until December 2012, after the alleged offenses. Following this, the matter was submitted to the jury which, on deliberation, found

appellant guilty of all 18 counts. The court accepted the verdict, found appellant guilty and imposed multiple 180-day sentences. From this judgment appellant now appeals.

{¶ 9} Pursuant to 6th Dist.Loc.App.R. 12(A), we sua sponte transfer this matter to our accelerated docket and render our decision. Although appellant sets forth six assignments of error, the resolution of the questions raised in his first assignment of error is dispositive of the case. In his first assignment of error, appellant maintains that the trial court erred in denying his Crim.R. 29 motion for acquittal because the state failed to present evidence that he was served with copies of either full hearing protection order.

{¶ 10} In material part, Crim.R. 29(A) provides:

> The 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 of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses.

{¶ 11} The standard of review for a denial of a Crim.R. 29 motion is the same as the standard of review for sufficiency of the evidence. *State v. Carter*, 72 Ohio St.3d 545, 553, 651 N.E.2d 965 (1995). "The test is, viewing the evidence in a light most favorable to the prosecution, could any rational trier of fact have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Witcher*, 6th Dist. Lucas No. L-06-1039, 2007-Ohio-3960, ¶ 20, citing *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997).

{¶ 12} It is unlawful for a person to recklessly violate the terms of a protection order issued, inter alia, pursuant to R.C. 3113.31 (domestic violence protection order), R.C. 2919.27(A)(1), or 2903.214 (civil stalking protection order). R.C. 2919.27(A)(2). The protection ordered issued in Lucas County in this matter was a domestic violence protection order. The Wood County order was a civil stalking protection order.

{¶ 13} R.C. 3113.31(F)(1) and 2903.214(F)(1) require that when a protection order is issued, "[t]he court shall direct that a copy of an order be delivered to the respondent on the same day that the order is entered." This language has been interpreted to mean that the order must be served upon the respondent and that such service, antecedent to the alleged violation, is an essential element that the state must prove beyond a reasonable doubt to establish the offense. *State v. Smith*, 136 Ohio St.3d 1, 2013-Ohio-1698, 989 N.E.2d 972, syllabus.[1]

{¶ 14} Appellant testified that he was not served either full hearing protection order until December 2012. More importantly, the state presented no testimony or documentary evidence that appellant received service of the full hearing protection orders. Indeed, the only evidence of service admitted was an affidavit of service from the Wood County Sheriff that averred a protection order from Lucas County was served on

[1] *Smith* was before the Ohio Supreme Court at the time of appellant's trial, but the decision was not released until several months later. A judicial ruling from the Ohio Supreme Court is applied retroactively to cases pending on the date of announcement, *Ali v. State*, 104 Ohio St.3d 328, 2004-Ohio-6592, 819 N.E.2d 687, ¶ 6, including cases pending before an appeals court. *State v. Evans*, 32 Ohio St.2d 185, 186, 291 N.E.2d 466.

appellant on August 4, 2011. This was the ex parte order which, by its own terms, expired on August 26, 2011, more than a year prior to the violations of the orders that were alleged.

{¶ 15} The state argues that the fact that appellant was aware that there were to be full hearings on the ex parte protection orders was sufficient to make his subsequent acts a reckless disregard of those probable orders. After *Smith*, we may not credit such an argument.

{¶ 16} *Smith* clearly and unequivocally makes service of a protection order an essential element that the state must prove to establish a violation of R.C. 2919.27. Here, the state failed to establish that element. Consequently, there was insufficient evidence to prove the offenses charged. Accordingly, appellant's first assignment of error is well-taken. Appellant's remaining assignments of error are moot.

{¶ 17} On consideration, the judgments of conviction of the Perrysburg Municipal Court are vacated. Appellee is ordered to pay the court costs of this appeal pursuant to App.R. 24.

Judgments vacated.

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

Arlene Singer, J. _____
JUDGE

Stephen A. Yarbrough, P.J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE