[Cite as *Toledo v. Jenkins*, 2015-Ohio-1270.]

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

City of Toledo

Appellee

v.

David P. Jenkins, III

Appellant

Court of Appeals No. L-14-1164

Trial Court Nos. CRB-14-07798-0102
CRB-14-07798-0202

DECISION AND JUDGMENT

Decided: March 31, 2015

* * * * *

David Toska, City of Toledo Chief Prosecutor, Henry Schaefer and Christopher Lawrence, Assistant Prosecutors, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

SINGER, J.

{¶ 1} Appellant, David Jenkins, appeals his conviction entered by the Toledo Municipal Court for domestic violence. For the reasons that follow, we affirm.

{¶ 2} Appellant sets forth two assignments of error:

I. Appellant's right to due process and confrontation, under the Sixth Amendment to the United States Constitution and Article I, Section

10 of the Ohio Constitution, was violated by the trial court by allowing into evidence the hearsay statements of Tiffany Maclean.

II. The trial court erred to the prejudice of appellant by allowing the state to introduce a 911 call without proper authentication.

{¶ 3} On May 24, 2014, Toledo police were dispatched to 3227 Lagrange Street on a 911 call. In fact, two calls were made to 911 by a woman who said she was Tiffany Maclean and she was at 3227 Lagrange. Officers responded to the Lagrange Street address and found an injured woman who identified herself as Tiffany Maclean and identified appellant as her assailant. At that time, the officers did not know appellant's whereabouts. Two other officers were called to the scene and photographs were taken of Maclean's face. Based upon Maclean's statements to police and the officers' observations, appellant was charged with domestic violence, in violation of Toledo Municipal Code 537.19(A), and one count of assault, in violation of Toledo Municipal Code 537.03(A), both misdemeanors of the first degree. Appellant was arrested and pled not guilty.

{¶ 4} On July 2, 2014, a bench trial commenced. Officers Sterling and Sean Murphy testified at trial, as did appellant. Maclean did not appear for trial. Officer Sterling stated she was working with her partner on May 24, 2014, when they were dispatched to 3227 Lagrange on a "domestic violence, assault" call. They arrived at the location about five to seven minutes after receiving the dispatch, and Officer Sterling saw a female sitting on the sidewalk, hysterical and crying. The officer testified the female's

eye was swollen and "looked like it was starting to completely close and was bruised." The injured female told the officers her name was Tiffany Maclean and she had just gotten into a fight with her live-in boyfriend of seven years, appellant, over a hair straightener. Maclean told the officers that appellant broke the hair straightener, punched her in the face and choked her. Officer Sterling testified up until that time she did not know where appellant was, but then the desk officer announced over the radio that "the other half" was at the Safety Building. Officer Sterling stated she took photographs of Maclean's face with the injury to her eye. Those photographs were admitted into evidence. Officer Sterling opined Maclean's wounds appeared fresh because there was immediate bruising and swelling while the officers were there. The officer also noticed red marks on Maclean's neck. Officer Sterling also stated she encountered appellant that day at the emergency room at St. Vincent's hospital and saw a couple of scratches, "like a red mark," on his neck. The officer recalled speaking with appellant and "[h]e said they were arguing and she [Tiffany] was on top of him so he punched her to get her off of him."

{¶ 5} Officer Murphy testified he arrived at 3227 Lagrange on May 24, 2014, with a camera and took some photographs of the victim. He stated he saw the victim's injuries and "her right eye was completely swollen shut and it was bruised." Officer Murphy testified he observed the victim was crying. The officer was then shown the pictures he took of the victim's injuries; those pictures were admitted into evidence. Officer Murphy stated he spoke with appellant at the hospital and appellant said "the victim's injuries

were a result of his defensive action. Appellant said that the victim attacked him and jumped on top of him and was holding him down and that he was beginning to [black out] * * * when he struck her [with his fist]." The officer remembered appellant stated his right wrist was hurting. Officer Murphy also noticed appellant had a scratch mark on his neck.

{¶ 6} The state then moved to admit the 911 tape with the two 911 calls into evidence. Appellant's counsel objected on the ground that there was no way to authenticate whether Maclean was the party who made the 911 calls. The trial court overruled the objection and admitted the 911 tape, in part, into evidence.

{¶ 7} Appellant took the stand and denied seeing Maclean on May 24, 2014, or striking, choking or punching her. Appellant also denied speaking with Officers Sterling or Murphy on that day. Appellant testified the officers came into court and lied. Appellant stated he was at the hospital on May 24, 2014, to get his hand checked out because he "messed up his thumb" from working. Appellant maintained his neck was fine, he had no scratches to the neck, and the officers lied about seeing injuries on him.

{¶ 8} Following the testimony, the court found appellant guilty of domestic violence and assault. The court merged for sentencing the assault offense with the domestic violence offense and sentenced appellant to 180 days in jail on the domestic violence conviction. This appeal ensued.

{¶ 9} In his first assignment of error, appellant argues the trial court violated his right to due process and confrontation by allowing Officer Sterling's testimony as to what

Maclean allegedly told her. Appellant contends although he objected to the introduction of Maclean's statements, the trial court ruled the statements were excited utterances and admitted them, but did not address the Confrontation Clause issue. Appellant submits Maclean's statements were testimonial and barred by the Confrontation Clause since he was not present and there was no ongoing emergency when they were made.

{¶ 10} "The Sixth Amendment's Confrontation Clause provides that, '[i]n all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.'" (Citation omitted.) *Crawford v. Washington*, 541 U.S. 36, 42, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Section 10, Article I of the Ohio Constitution "provides no greater right of confrontation than the Sixth Amendment[.]" *State v. Self*, 56 Ohio St.3d 73, 79, 564 N.E.2d 446 (1990). The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford* at 53-54. While "testimonial" was not defined in *Crawford*, the court indicated the type of statements implicated by the Confrontation Clause included those "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (Citation omitted.) *Id.* at 52.

{¶ 11} In the consolidated cases of *Davis v. Washington* and *Hammon v. Indiana*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006), the United States Supreme Court considered whether statements of a witness who does not appear at trial are subject to the

requirements of the Confrontation Clause. The court set forth the primary-purpose test to determine whether the statements were testimonial or nontestimonial:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. *Id.* at 822.

{¶ 12} In *Davis*, a domestic violence victim made statements in a 911 call, identifying her attacker and describing his location immediately after the assault. *Id.* at 817-819. The court applied the primary-purpose test and found "the circumstances of [the 911] interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency." *Id.* at 828. The court articulated "the nature of what was asked and answered [during the 911 call], again viewed objectively, was such that the elicited statements were necessary to be able to resolve the present emergency." *Id.* at 827. The court observed the 911 call "was plainly a call for help against bona fide physical threat" and included "frantic answers" given "in an environment that was not tranquil, or even (as far as any reasonable 911 operator could make out) safe." *Id.* The court determined these statements were nontestimonial. *Id.* at 828. Thus, the statements were not barred by the Confrontation Clause.

{¶ 13} In *Hammon*, a victim made statements to police officers who responded to a domestic violence complaint after the scene had been secured. *Id.* at 819-820. The court found the statements were testimonial and were barred by the Sixth Amendment. *Id.* at 829-832. The court noted there was "no immediate threat" to the victim and "no emergency in progress," because the police had separated the attacker from the victim. *Id.* at 829-830. The court also noted when the officer questioned the victim, he was "not seeking to determine (as in *Davis*) 'what is happening' but rather 'what happened.'" *Id.* at 830. The court held "[o]bjectively viewed, the primary, if not indeed the sole, purpose of the interrogation was to investigate a possible crime * * *." *Id.*

{¶ 14} This court has also addressed the issue of whether statements made in 911 calls are testimonial or nontestimonial. *See State v. Williams*, 2013-Ohio-726, 987 N.E.2d 322 (6th Dist.), *appeal not allowed*, 135 Ohio St.3d 1461, 2013-Ohio-2285, 988 N.E.2d 580. In *Williams*, a neighbor who was outside called 911 saying, "This man is beating this lady up real good." *Id.* at ¶ 9. Williams challenged the admissibility of the neighbor's statements on the 911 call because the neighbor did not testify at trial. *Id.* at ¶ 4. We held "the primary purpose of the statements by the neighbor in the 911 call was to seek police assistance to aid Mrs. Williams in an ongoing emergency involving domestic violence." *Id.* at ¶ 14. We concluded the "statements in the 911 call were nontestimonial and, therefore, not subject to the requirements of the Sixth Amendment's Confrontation Clause." *Id.*

{¶ 15} Here, the state observes that at trial, appellant only objected to the admission of Maclean's statements on the basis of hearsay, and did not raise the issue of his right to confrontation in the court below. "The failure to raise a constitutional issue at the trial level waives the right to advance a constitutional argument at the appellate level. * * * Therefore, absent plain error, appellant waived his constitutional arguments." *State v. Traxler*, 6th Dist. Williams No. WM-06-005, 2007-Ohio-2025, ¶ 18. "Plain error does not exist unless it can be said that but for the error, the outcome of the trial would clearly have been otherwise." *State v. Wogenstahl*, 75 Ohio St.3d 344, 357, 662 N.E.2d 311 (1996).

{¶ 16} At appellant's trial, Officer Sterling testified about how she found Maclean in a hysterical and crying state with a fresh injury to her eye. Upon questioning, Maclean responded she had just gotten into a fight with appellant, and he punched her in the face and choked her. At that time, the officers did not know where appellant was. Applying the primary-purpose test to Maclean's statements to Officer Sterling, the statements are nontestimonial. The questions the officers asked Maclean concerned an ongoing emergency as the officers needed to ensure Maclean's safety and their own safety by eliciting information from Maclean about what had occurred. Nothing in the record indicates that Officer Sterling or her partner's inquiries were directed to any other objective. In turn, the responses given by Maclean to the officers' questions were both appropriate and helpful in assisting the officers in resolving the situation. In fact, it was only after the officers questioned Maclean did they learn, from another officer, that

appellant was at the police station. In light of the foregoing, Maclean's statements were clearly nontestimonial, thus the admission of her statements did not violate appellant's Sixth Amendment right to confront a witness against him. Moreover, Officer Sterling's testimony regarding what Maclean told her was not crucial to the state's case against appellant, since the officer also testified about the injuries she observed on Maclean's face and neck, as well as the explanation appellant gave her about what happened that day, that he punched Maclean to get her off of him. It cannot be said that the outcome of the trial would clearly have been otherwise if this evidence had been excluded.

{¶ 17} Appellant also seems to take issue with the trial court's finding that Maclean's statements were excited utterances and therefore admissible.

{¶ 18} The admission or exclusion of relevant evidence lies within the trial court's sound discretion. *State v. Sage*, 31 Ohio St.3d 173, 180, 510 N.E.2d 343 (1987). It is well-established that when scrutinizing admissibility issues, 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).

{¶ 19} "'Hearsay' is 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). Hearsay statements are not admissible into evidence unless permitted by constitution, statute, or rule. Evid.R. 802. One exception to the hearsay

rule is the "excited utterance" of the speaker. Evid.R. 803(2). An "excited utterance" is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.*

{¶ 20} In order for testimony to be admitted into evidence under the excited utterance exception, the following elements must be met "(1) there was an event startling enough to produce a nervous excitement in the declarant, (2) the statement must have been made while under the stress of excitement caused by the event, (3) the statement must relate to the startling event, and (4) the declarant must have had an opportunity to personally observe the startling event." *State v. Boles*, 190 Ohio App.3d 431, 2010-Ohio-5503, 942 N.E.2d 417, ¶ 34 (6th Dist.), citing *State v. Duncan*, 53 Ohio St.2d 215, 373 N.E.2d 1234.

{¶ 21} Here, Officer Sterling testified she responded to the 911 call within seven minutes and encountered Maclean, who was hysterical, crying and injured. Clearly, Maclean was under the "stress of excitement" caused by the assault when she told Officer Sterling what had happened to her and who assaulted her. There is nothing in the record to suggest Maclean's statements were the result of reflective thought. Accordingly, the trial court did not abuse its discretion in determining Maclean's statements were excited utterances, and in admitting the testimony of Officer Sterling. Appellant's first assignment of error is therefore not well-taken.

{¶ 22} In his second assignment of error, appellant argues the 911 tape was not properly authenticated. Appellant contends the 911 calls were attributed to Maclean but

no evidence was offered at trial that Maclean was actually the caller. Appellant maintains his right to confrontation was denied since he was unable to confront Maclean.

{¶ 23} As stated previously, the admission or exclusion of relevant evidence lies within the trial court's sound discretion. *Sage*, 31 Ohio St.3d at 180, 510 N.E.2d 343.

{¶ 24} Evid.R. 901 governs the authentication of demonstrative evidence, including recorded telephone calls. Evid.R. 901(A) provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the material in question is what its proponent claims." The rule also provides examples of the manner in which evidence may be properly authenticated, and one such example is when its "appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances" is sufficient to support a finding that the evidence is what its proponent claims. Evid.R. 901(B)(4). The threshold standard for authenticating evidence pursuant to Evid.R. 901(A) is low, and "'does not require conclusive proof of authenticity, but only sufficient foundational evidence for the trier of fact to conclude * * * [the evidence] is what its proponent claims it to be.'" *State v. Monday*, 6th Dist. Lucas No. L-95-152, 1996 WL 549213, *5 (Sept. 30, 1996), quoting *State v. Easter*, 75 Ohio App.3d 22, 25, 598 N.E.2d 845 (4th Dist.1991).

{¶ 25} Here, the state presented a certificate of authenticity for the 911 tape which included how the 911 calls were received and recorded and how the recording was kept in the ordinary course of business. While the state did not specifically present any

witness testimony to verify whose voice was on the recording, there is sufficient evidence in the record, which is distinct in character, to identify Maclean as the 911 caller. The 911 tape reveals a sobbing and hysterical caller who identified herself as Maclean and appellant as her boyfriend. The caller told the 911 operators her address on Lagrange Street and said her boyfriend punched her and she could not see out of her eye. Officer Sterling testified upon arriving at the Lagrange address, "[the] [c]aller was sitting outside on the ground crying. Eyes swollen shut." The women identified herself to Officer Sterling as Maclean and said she had been punched in the eye by appellant. Officer Sterling took photographs of Maclean's injuries, which were admitted into evidence. The information on the 911 calls coupled with Officer Sterling's testimony and the photographs of Maclean constitutes sufficient foundational evidence to support a finding that Maclean was the 911 caller, such that the 911 tape was properly authenticated.

{¶ 26} Appellant also asserts his right to confrontation was denied since he could not confront Maclean with regards to the statements on the 911 tape. Again, appellant did not raise the issue of his right to confrontation in the court below, thus this argument will be reviewed under the plain error analysis enunciated above. A review of the record shows the trial court limited the admission of the 911 tape to those portions of the calls which addressed the ongoing emergency. Appellant acknowledges this fact. Therefore, the trial court only considered Maclean's statements which were nontestimonial and not subject to the requirements of the Sixth Amendment's Confrontation Clause. Furthermore, the 911 tape was not crucial to the state's case against appellant, since

Officers Sterling and Murphy both testified about the injuries they observed on Maclean and the accounts appellant gave about what happened. It therefore cannot be said that the outcome of the trial would clearly have been otherwise if the 911 tape had been excluded.

{¶ 27} Since the trial court did not err with respect to its finding as to the admissibility of the 911 tape, and appellant's right to confrontation was not violated, appellant's second assignment of error is without merit.

{¶ 28} The judgment of the Toledo Municipal Court is hereby 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

Arlene Singer, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE