[Cite as *Toledo v. Green*, 2015-Ohio-1864.]

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

City of Toledo — Court of Appeals No. L-14-1093

Appellee — Trial Court No. CRB-13-18182

v.

Jeffery A. Green — **DECISION AND JUDGMENT**

Appellant — Decided: May 15, 2015

* * * * *

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

Sheldon S. Wittenberg, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Jeffery A. Green, appeals an April 3, 2014 judgment of the Toledo Municipal Court convicting him of one count of domestic violence, a violation of Toledo Municipal Code Section 537.19(a), and a first degree misdemeanor. The city of

Toledo charged appellant with the offense on October 18, 2013. The case proceeded to a bench trial on March 13, 2014. The trial court returned a guilty verdict on the charge and issued the April 3, 2014 judgment of conviction pursuant to the verdict.

{¶ 2} The court sentenced appellant to serve a 180 day period of incarceration at the Corrections Center of Northwest Ohio, but suspended all 180 days of the sentence and imposed a one year term of active probation. Under the terms of probation, appellant is required to attend batterer's counseling.

{¶ 3} Appellant asserts two assignment of error on appeal:

Assignments of Error

1. The trial court erred when it admitted, over objection, an unauthenticated recording of a 911 call.

2. Admission of testimonial statements made by the alleged victim violated Mr. Green's right to confront witnesses against him as guaranteed by the 6th Amendment to the United States Constitution.

{¶ 4} Section 537.19(a) of the Toledo Municipal Code provides: "No person shall knowingly cause or attempt to cause physical harm to a family or household member." The city contended at trial that appellant caused physical harm to his stepdaughter in violation of the municipal ordinance. The alleged victim, however, did not testify at trial. No witness, with personal knowledge of the events on which the prosecution is based testified at trial.

{¶ 5} Two Toledo Police Department officers testified at trial. The officers testified that they were dispatched to respond to a call at 252 Stillwater in Toledo. Over the objection of appellant, the trial court permitted the officers to testify at trial concerning statements made by the alleged victim to them after they arrived at the residence.

{¶ 6} Over objection of appellant, a recording of the 911 call was also admitted into evidence at trial. The city presented at trial a Certificate of Authenticity executed by the Communications Bureau of the Toledo Police Department to support admission of the recording into evidence.

{¶ 7} We consider the assignments of error out of turn. Under assignment of error No. 2, appellant contends that the out of court statements of the alleged victim were testimonial in nature and that the admission of the statements at trial violated his right to confront the witness against him as guaranteed by the Sixth Amendment of the United States Constitution.

Confrontation Clause Analysis

{¶ 8} "[T]he Confrontation Clause bars admission of testimonial statements unless the witness appears at trial or, if the witness is unavailable, the accused had a prior opportunity for cross-examination." *State v. Clark*, 137 Ohio St.3d 346, 2013-Ohio-4731, 999 N.E.2d 592, ¶ 19, citing *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). 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 when statements made to police in a 911 call or at the crime scene are considered testimonial and subject to the requirements of the Confrontation Clause. *Id.* at 817. In the decisions, the United States Supreme Court "distinguished police interrogations that relate to an ongoing emergency from those that relate to past criminal conduct." *Clark* at ¶ 20.

{¶ 9} The Ohio Supreme Court identified in *Clark* the primary purpose test formulated by the United States Supreme Court in *Davis* and *Hammon* to determine when such out of court victim statements are considered testimonial or nontestimonial:

> In considering whether the statements made in the context of those two different situations were testimonial, the court formulated the primary-purpose test: "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, 126 S.Ct. 2266, 165 L.Ed.2d 224. *Clark* at ¶ 20.

{¶ 10} In *Davis*, the caller in a 911 call identified herself and her assailant. She stated that the former boyfriend was "jumpin' on me again" and that he was using his

fists. *Davis* at 817. Police arrived within four minutes after the call. *Id.* at 818. Upon arriving at the scene, police observed the caller in a "shaken state," with fresh injuries, and in frantic efforts to gather her belongings so she and her children could leave the residence. *Id.*

{¶ 11} The court concluded in the case that the circumstances of the questioning of the caller by police in the 911 call "objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency." *Id.* at 828. In reaching this conclusion, the court considered the fact that the caller "was speaking about events as they were actually happening," that there was an "ongoing emergency," and that the call was "plainly a call for help against [a] bona fide physical threat." *Id.* at 827. The court also considered the nature of what was asked and answered during the call. *Id.* The court determined in *Davis* that the victim's statements to police were nontestimonial. *Id.* at 828.

{¶ 12} In *Hammon,* the police responded to a reported domestic disturbance. When they arrived at the scene, they found the victim "alone on the front porch, appearing 'somewhat frightened,' but she told them that 'nothing was the matter.'" *Hammon*, 517 U.S. 813, 819, 126 S.Ct. 2266, 165 L.Ed.2d 224, quoting *Hammon v. State*, 829 N.E.2d 444, 447 (Indiana 2005). The husband, the alleged perpetrator, was in the kitchen and told police "that he and his wife had 'been in an argument' but 'everything was fine now' and that the argument 'never became physical." *Id.* While at

the scene, a police officer had the victim fill out and sign a battery affidavit. The affidavit included a statement that the husband shoved the victim on the floor into broken glass, hit her in the chest and threw her down It also stated the husband also attacked the victim's daughter. *Id.* at 820. At the scene, police also questioned the victim concerning the incident.

{¶ 13} The husband was charged with domestic battery and with violating his probation. *Id.* at 820. The victim did not appear to testify at trial. Nevertheless, the trial court admitted the victim's affidavit into evidence and permitted a police officer to testify as to what the victim told him when he questioned her at the scene.

{¶ 14} The United States Supreme Court ruled in *Hammon* that the statements by the victim to police were testimonial and inadmissible; concluding both that no emergency was in progress when police arrived at the scene and that there was no immediate existing threat to the victim when the statements were made. *Id.* at 829-830.

{¶ 15} This court has applied the primary purpose test to determine the admissibility of out of court statements by alleged crime victims to operators in 911 calls and to responding police at the scene where admissibility is challenged on Confrontation Clause grounds in *State v. Williams*, 987 N.E.2d 322, 2013-Ohio-726 (6th Dist.) and *Toledo v. Jenkins*, 6th Dist. Lucas No. L-14-1164, 2015-Ohio-1270. In *Williams*, the 911 call was made by a neighbor who witnessed a neighbor woman screaming outside and in a struggle with her husband. *Williams* at ¶ 9-11. The victim was yelling and struggling

to free herself from the grasp of her husband at the time of the call. *Id.* The husband had chased her into the street, restrained her, and punched her in the knees in an attempt to force her back into their house. *Id.*

{¶ 16} The audio recording of the call disclosed that the woman caller was excited by events, there was contemporaneous yelling in the background, and the caller described the incident as ongoing. *Id.* at ¶ 9. Evidence was presented at trial of the circumstances existing at the scene at the time of the 911 call. *Id.* at ¶ 10-11.

{¶ 17} We concluded that evidence in the record objectively demonstrated the purpose of the 911 call was to seek police assistance to aid a victim in an ongoing emergency and determined that the statements to the 911 operator were nontestimonial. *Id.* at ¶ 14.

{¶ 18} In *Jenkins*, we considered whether out of court statements by a claimed victim of domestic violence in two 911 calls and statements made by the caller to police after they arrived at the scene were testimonial under Confrontation Clause analysis. The claimed victim did not testify at trial. The trial court limited admission of the recording of the 911 calls to those portions of the calls that addressed the ongoing emergency. *Jenkins* at ¶ 26.

{¶ 19} In the 911 calls the victim identified herself and identified the appellant as her assailant. *Id.* at ¶ 3. The caller was sobbing and hysterical during the calls and stated the appellant had punched her and that she could not see out of her eye. *Id.* at ¶ 25.

Police arrived within seven minutes of the last 911 call. A responding police officer testified that she found the caller in a hysterical and crying state upon arrival at the scene with a fresh injury to her eye. *Id.* at ¶ 16. Upon questioning by police, the woman stated "she had just gotten into a fight with appellant, and he punched her in the face and choked her." *Id.* At the time of these statements to police, the whereabouts of assailant were unknown. *Id.*

{¶ 20} We concluded in *Jenkins* that the 911 calls and statements to police (seven minutes later at the scene) demonstrated the existence of an ongoing emergency and that the statements were nontestimonial and admissible under the primary purpose standard. *Id.* at ¶ 16, 26.

Statements to Police in this Case

{¶ 21} Officers Andrew Crisp and Anthony Barwiler of the Toledo Police Department testified that they were dispatched to respond to a call at 252 Stillwater in Toledo. The evidence at trial established that the 911 call was made on February 8, 2014. Both officers testified that they arrived at the residence approximately 10 to 15 minutes after they were dispatched. Both testified that when they arrived, the alleged victim was with her mother in the living room. Appellant was in the kitchen.

{¶ 22} The testimony of the police officers does not suggest that there was any ongoing emergency when they arrived. Officer Crisp testified that the victim "seemed a little upset" when they arrived and "was a little bit loud." She had a "minor bite mark" on her finger.

{¶ 23} The police officers testified that there was back and forth bickering between appellant and the victim at the scene. Officer Barwiler testified that he acted to keep the alleged victim and alleged perpetrator apart and at a distance to permit separate questioning of the victim. After the officers arrived, appellant moved further away from the alleged victim -- towards the rear of the house. The victim and appellant were in different rooms when Officer Crisp interviewed the alleged victim.

{¶ 24} We have reviewed the record and conclude that the circumstances existing at the time police interviewed the alleged victim, objectively considered, do not demonstrate the existence of any ongoing emergency or the existence of any bona fide physical threat to the victim at the time of her statements to police at the scene. We conclude under *Davis* and *Harmon* that the primary purpose of the interrogation was to establish or prove past events potentially relevant to a later criminal prosecution.

{¶ 25} Accordingly, we conclude that the trial court erred in admitting into evidence at trial testimony of the police officers of statements made by the alleged victim to police at the scene. Use of the out of court statements at trial denied appellant his right under the Confrontation Clause to confront witnesses against him.

{¶ 26} We find assignment of error No. 2 well-taken.

{¶ 27} Under assignment of error No. 1, appellant argues that the trial court erred in admitting, over appellant's objection, an unauthenticated recording of a 911 call.

{¶ 28} At the outset, we note that "A trial court has broad discretion in the admission and exclusion of evidence. Unless the trial court has clearly abused its

discretion, an appellate court should not interfere in its determination." *State v. Apanovich*, 33 Ohio St.3d 19, 25, 514 N.E.2d 394 (1987). An abuse of discretion implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 29} Evid.R. 901 governs the authentication of evidence, and provides in relevant part "[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." Evid.R. 901(A). Appellant argues that the contents of the 911 call were presented by the prosecution as statements by the alleged victim and that the city failed to present evidence at trial to establish the identity of the caller in the recording.

{¶ 30} Appellant argues that an illustration provided under Evid.R. 901(B)(5) demonstrates the necessity of identifying the speaker in a telephone call and a means to do so:

> Evid R 901 Requirement of authentication or identification.
>
> (A) General provision
>
> The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (B) Illustrations

> By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> * * *
>
> *(5) Voice identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

Neither of the two witnesses at trial (Officers Crisp and Barwiler) was asked whether they recognized the voice on the 911 recording and could identify the speaker.

{¶ 31} The city contends that the Certificate of Authenticity executed by the Communications Bureau of the Toledo Police Department with respect to the recording, admitted into evidence at trial, was sufficient to meet the requirements of Evid.R. 901. The city argues that the certificate disclosed how the audio recording was created, that the recording is of an actual call received by the 911 operator, and that no modification had been made to the recording. Alternatively, the city argues that the recording was also admissible under Evid.R. 901(B)(7), dealing with public records.

{¶ 32} Evid.R. 901(B)(7) is another of the Evid.R. 901(B) illustrations. It provides:

> *(7) Public records or reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or

a purported public record, report, statement or data compilation, in any form, is from the public office where items of this nature are kept.

{¶ 33} Appellant responds and contends that the deficiency is not in the accuracy of the recording but in lack of evidence of the identity of the caller. Appellant argues that the certificate of authenticity does not provide evidence of the identity of the caller in the 911 call. Appellant cites a decision of the Seventh District Court of Appeals in *State v. Spires*, 7th Dist. Noble No. 04 NO 317, 2005-Ohio-4471 in support of his argument.

{¶ 34} In *Spires* the Seventh District Court of Appeals considered the admissibility of recordings of telephone calls made by an inmate at the Noble County Correctional Institution. The state contended that the calls were between the inmate and Carolyn Spires, the appellant in the case. The calls were offered in evidence against Carolyn Spires in a prosecution on two counts of illegally conveying drugs onto the grounds of a detention facility, violations of R.C. 2921.36(A)(2). *Id.* at ¶ 11.

{¶ 35} In the appeal, Carolyn Spires argued that the state failed to properly authenticate recordings of the telephone conversations under Evid.R. 901 by identifying that it was her voice on recordings of the telephone calls. *Id.* at ¶ 15. In its analysis, the *Spires* court recognized that "[a]uthentication is a form of relevancy; it connects the evidence to the person involved in the case. See 1980 Staff Note to Evid.R. 901." *Id.*

{¶ 36} The 1980 staff note to Evid.R. 901 provides in part:

Certain evidence, other than physical evidence such as a letter, must also be authenticated or identified, particularly in light of modern

communication methods. Thus, X receives a telephone call purportedly from Y. If the telephone call is to be accepted as evidence in a trial, X may "authenticate" or "identify" the voice of Y by preliminarily testifying that he is familiar with the voice of Y as a result of previous conversations with Y. See Rule 901(B)(5).

{¶ 37} In *Spires*, the Seventh District Court of Appeals recognized that identification of the voice on the recording was necessary to meet the authentication requirements for admissibility of the recordings under Evid.R. 901. The court held "in order to satisfy the authentication or identification requirement for admissibility of the tapes, the state must have submitted sufficient evidence that the woman's voice on the tapes is appellant's voice." *Spires* at ¶ 27.

{¶ 38} The Third District Court of Appeals has also recognized that Evid.R. 901 requires identification of the voice in a telephone call before a recording of a telephone call is to be admitted into evidence. *See State v. Pettaway*, 3d Dist. Seneca No. 1314-18, 2015-Ohio-1597, ¶ 35-37.

{¶ 39} While the record includes evidence that the 911 telephone call was properly recorded, evidence is lacking as required under Evid.R. 901 to identify the voice of the person making the call as that of the alleged victim in this case. Accordingly, we conclude that the trial court erred and abused its discretion in admitting the recording of the 911 call into evidence.

{¶ 40} We find assignment of error No. 1 well-taken.

{¶ 41} Appellant argues that the only evidence at trial offered to prove him guilty of the crime of domestic violence was evidence of the unauthenticated 911 telephone recording and out of court statements made by the alleged victim to police after police arrived at the scene. The admissibility of both was challenged by appellant on appeal. Appellant argues that should this court sustain his assignments of error contending that neither the 911 recording nor the statements to police were proper evidence in the case, then the required remedy is to vacate his conviction for lack of sufficient evidence to support a conviction and not to remand the case for a new trial.

{¶ 42} We agree that without evidence of the contents of the 911 call and evidence of statements by the alleged victim to police at the scene, the evidence in the record is not sufficient to support a conviction. A determination on appeal that the evidence was insufficient to support a conviction requires vacating the conviction, not remanding for a new trial. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997); *State v. Hernandez*, 10th Dist. Franklin No. 09AP-765, 2010-Ohio-2066, ¶ 21.

{¶ 43} Accordingly, we conclude that appellant was denied a fair trial. We reverse and vacate the judgment of the Toledo Municipal Court and hereby enter judgment acquitting appellant of the offense of Domestic Violence, a violation of Toledo Municipal Code Section 537.19(a). We order the city to pay the 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.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

James D. Jensen, J. _____
CONCUR.
JUDGE