[Cite as *State v. Littlejohn*, 2016-Ohio-1125.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103234

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

PHILLIP LITTLEJOHN

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-593177-A

BEFORE: Kilbane, P.J., Stewart, J., and Boyle, J.

RELEASED AND JOURNALIZED: March 17, 2016

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MARY EILEEN KILBANE, P.J.:

{¶1} Defendant-appellant, Phillip Littlejohn ("Littlejohn"), who was classified as a sexually oriented offender in 2006, appeals from his conviction for failure to provide notice of change of address. For the reasons set forth below, we affirm.

{¶2} On February 5, 2015, Littlejohn was indicted on three counts of failure to provide notice of change of address pursuant to R.C. 2950.05(E), alleged to have occurred on June 6, 2014, September 15, 2014, and September 29, 2014, all with penalty enhancing furthermore clauses alleging that Littlejohn was previously convicted of attempted failure to register in 2011.[1] The state maintained that during his most recent registration, Littlejohn indicated that he resided at 4666 West 130th Street in Cleveland, but at the relevant time periods, Littlejohn resided or was temporarily domiciled for more than five days at his wife's Lakewood home. Littlejohn pled not guilty and the matter proceeded to a jury trial from May 6, 2015 to May 12, 2015.

{¶3} The state's evidence demonstrated that in 2006, Littlejohn was convicted of felonious assault with a sexual motivation specification and notice of a prior conviction, a felony of the third degree, and he was classified as a sexually oriented offender. Following his release from a four-year prison term in that matter, Littlejohn was notified that he is required to register as a sex offender and verify his address with the sheriff's department of his county of residence annually for a period of ten years. Further, Littlejohn is to notify the county sheriff not later than five days after changing his residence.

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[1]In *State v. Wilson*,1st Dist. Hamilton No. C-090436, 2010-Ohio-2767, the court held that the enhancement provisions of R.C. 2950.99 do not apply to prior convictions for attempted failure to register. Nonetheless, it does not appear that this caused error herein because the trial court did not impose a mandatory term of imprisonment under R.C. 2950.99.

{¶4} Detective Jerome Wilcoxson ("Detective Wilcoxson"), of the sex offender watch program, testified that sexually oriented offenders must register their addresses annually and must list their addresses, new addresses, and any secondary addresses where they also reside. The registration form has a section for "secondary addresses" that the offender may list in order to reside at an alternate location and still maintain compliance with registration requirements. The form instructs that the offender must "register personally with the sheriff of the county * * * in which you reside or are temporarily domiciled for more than five days." In this matter, Littlejohn completed his annual registration on December 23, 2013, by indicating that he lived at 4666 West 130th Street in Cleveland. He did not list any other addresses.

{¶5} Patrol Officer Justin Bly ("Officer Bly"), of the Lakewood Police Department, testified that on September 15, 2014, he responded to a call for assistance at 1445 Ridgewood Avenue, made by Littlejohn's wife. As Officer Bly entered the home, he observed a bag of men's clothing near the front porch. Littlejohn's wife, Antoinette Littlejohn ("Antoinette"), told Officer Bly that they were her husband's clothes. Antoinette reported that Littlejohn did not live there but got inside through "unknown means" and stayed at the home "quite often." Officer Bly also stated that officers had responded to the home on prior occasions and had seen Littlejohn there. On one such occasion, the officer observed him in bed.

{¶6} Detective Scott Trommer ("Detective Trommer"), of the Lakewood Police Department, testified that on September 16, 2014, he interviewed Littlejohn and verified information that had been provided by Littlejohn when he was booked into the Lakewood jail. According to Detective Trommer, Littlejohn confirmed that he lived on Ridgewood Avenue in

Lakewood, and stated that he lived with Antoinette. Littlejohn additionally stated that he also lives at his girlfriend's house in Lakewood.[2]

{¶7} Officer Paul Sidell ("Officer Sidell"), of the Lakewood Police Department, testified that on September 29, 2014, Littlejohn arrived at the Lakewood police station to report that he had been assaulted by Antoinette. During this time, Littlejohn informed Officer Sidell that he resided with Antoinette at 1445 Ridgewood Avenue in Lakewood. Littlejohn also provided this same address to the Lakewood probation department.

{¶8} Detective Kathleen Orlando ("Detective Orlando"), of the sex offender's unit of the Cuyahoga County Sheriff's Office, testified that her duties include registration compliance enforcement. She has worked with Littlejohn and has previously registered his address and a change of address. Detective Orlando established that in 2011, Littlejohn was noncompliant, and he was subsequently convicted of attempted manner of registering, in violation of R.C. 2950.04, in Cuyahoga C.P. No. CR-11-548835.

{¶9} Detective Orlando also testified that on September 30, 2014, she received a telephone call purportedly from Antoinette. The caller provided her telephone number and stated that Littlejohn falsely registered the Cleveland address of 4666 West 130th Street, and that he has a friend at that address who notifies him when the deputies patrol to verify his address. In reality, according to the caller, Littlejohn resides at 1259 Warren Road in Lakewood.

{¶10} Following the presentation of the state's case, the trial court denied a defense motion for acquittal pursuant to Crim.R. 29, and Littlejohn presented evidence on his behalf.

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[2]Following this portion of the testimony, the trial court advised the parties, outside of the presence of the jury, that it had learned that Littlejohn had filed a civil case in May 2014 that was on the judge's docket. This civil complaint indicated that he resided at 22350 Northland Avenue, in Lakewood, and the case was settled and dismissed prior to the instant matter. The parties herein waived all issues associated with the prior matter.

{¶11} Antoinette testified that Littlejohn does not live with her, but he stops over to make sure that she has taken her medication. She acknowledged making police reports about Littlejohn, but stated that after speaking with counsel and being advised of her rights, that not all of the things she has accused him of are true. Antoinette further testified that she spoke with Detective Orlando, but she denied leaving a voice message for her, and denied telling her that Littlejohn resides on Warren Road. Antoinette insisted that she told Detective Orlando that Littlejohn resides at his reported address at 4666 West 130th Street in Cleveland, and he does not live with her in Lakewood.

{¶12} Guy Smith testified that he lives near Littlejohn's home on 4666 West 130th Street, and that Littlejohn has been his neighbor there for three years.

{¶13} Littlejohn testified that he resides at 4666 West 130th Street in Cleveland, and he only stops at Antoinette's home to make sure that she has taken her medication and to check on her teenage daughters and the pets. As to the contrary information he provided to the Lakewood police, he stated that he simply informed the police that his address was "the same," so they may have mistakenly assumed that he was residing at the Ridgewood Avenue address because of the couple's previous involvement with the police. Ultimately, however, Littlejohn admitted that he did tell the Lakewood police that he lived on Ridgewood Avenue in Lakewood because he is frequently there and U.S. marshals once arrested him at that address.

{¶14} On rebuttal, Detective Orlando stated that after she received the voice message in this matter, she returned the call to a number she recognized as belonging to Antoinette. During this follow-up call, Antoinette provided Detective Orlando with information that was consistent with the facts of this matter. Eventually, Detective Orlando opined that Littlejohn is concealing

his whereabouts because Lakewood stringently restricts the locations within the city where sex offenders are permitted to reside.

{¶15} On surrebuttal, Antoinette again denied leaving the telephone message and denied that it came from her cell phone.

{¶16} On May 12, 2015, the jury found Littlejohn not guilty of failing to provide notice of address change as to the June 2014 charge, but guilty of the September 15, 2014 and September 29, 2014 charges. The trial court sentenced Littlejohn to two concurrent terms of 36 months of imprisonment for a "felony 3, low tier" and three years of postrelease control sanctions.

{¶17} Littlejohn now appeals and assigns the following three errors for our review:

Assignment of Error One

It was error to admit into evidence the prior conviction.

Assignment of Error Two

The verdict was not supported by evidence that was sufficient and by the manifest weight.

Assignment of Error Three

The sound recording evidence was inadmissible under Evid.R. 901(A).

Littlejohn's 2011 Conviction

{¶18} Within his first assignment of error, Littlejohn argues that the trial court erred in admitting evidence that he was convicted of failure to register in 2011. In opposition, the state argues that it was an essential element of the instant offense.

{¶19} In general, pursuant to R.C. 2950.99, a prior conviction for failure to register enhances the penalty for failure to register and renders it a felony of the same degree as the

offender's conviction for the underlying sexual offense that triggered the duty to report.[3] Therefore, this fact may be a material element of the state's case and had to be proven beyond a reasonable doubt. *State v. Nievas*, 121 Ohio App.3d 451, 700 N.E.2d 339 (8th Dist.1997); *State v. Arnold*, 8th Dist. Cuyahoga No. 79280, 2002 Ohio App. LEXIS 201 (Jan. 24, 2002); *State v. Hatcher*, 8th Dist. Cuyahoga No. 70857, 1997 Ohio App. LEXIS 3403 (July 31, 1997). In this matter, however, the 2011 conviction was for attempted failure to register, so the enhancement provisions of R.C. 2950.99 do not apply. *State v. Wilson*, 1st Dist. Hamilton No. C-090436, 2010-Ohio-2767.

{¶20} Nonetheless, we note that there was no objection to this evidence at trial. Viewing the issue for plain error, we conclude that the record does not demonstrate that the introduction of this evidence affected Littlejohn's substantial rights or caused a manifest miscarriage of justice under Crim.R. 52, because the jury carefully analyzed the evidence with respect to each charge. Therefore, the trial court did not abuse its discretion in admitting this evidence. *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987).

{¶21} The first assignment of error is without merit.

Sufficiency of the Evidence

{¶22} In his second assignment of error, Littlejohn argues that the conviction is supported by insufficient evidence.

{¶23} A challenge to the sufficiency of the evidence supporting a conviction requires a determination of whether the state has met its burden of production at trial. *State v. Thompkins*, 78 Ohio St.3d 380, 390, 1997-Ohio-52, 678 N.E.2d 541. When reviewing sufficiency of the

[3]In addition, under more recently enacted provisions of R.C. 2950.99, where the offender has a prior conviction for failure to report, the new charge of failure to report carries a definite prison term of no less than three years. R.C. 2950.99(A)(2)(b).

evidence, an appellate court must determine "'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. Leonard*, 104 Ohio St.3d 54, 2004-Ohio-6235, 818 N.E.2d 229, ¶ 77, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. In a sufficiency inquiry, an appellate court does not assess whether the state's evidence is to be believed, but whether if believed, the evidence admitted at trial supported the conviction. *Thompkins*; *Jenks* at paragraph two of the syllabus.

{¶24} Offenders such as Littlejohn that were convicted of sexually oriented offenses prior to January 2008, are required to register their addresses with the sheriff of the county in which they reside or are temporarily domiciled for more than five days. R.C. 2950.05. They must also "provide written notice of any change of residence address," and also shall register "any" "new address." *Id*. Under this statute, an offender may violate the registration law by: (1) failing to register one's address in the county where the offender resides within five days of coming into the county; (2) failing to register one's address in the county where the offender is temporarily domiciled for more than five days; or (3) failing to register a new address where the defendant resides or is temporarily domiciled. *State v. Ballard*, 7th Dist. Columbiana No. 08CO13, 2009-Ohio-5472, ¶ 92; *State v. Sommerfield*, 3d Dist. Union No. 14-07-09, 2007-Ohio-6427, ¶ 6; *State v. Curtis*, 8th Dist. Cuyahoga No. 89412, 2008-Ohio-916. In addition, the acquisition of a second residence has been deemed to be a change of address that triggers the duty of a sex offender to provide his change of address to the sheriff's office. *State v. Combs*, 12th Dist. Brown No. CA2013-08-008, 2014-Ohio-2117.

{¶25} The Supreme Court of Ohio has held that there is no scienter requirement for the offense as the act of failing to register alone, without more, is sufficient to trigger criminal

punishment under R.C. 2950.99. *State v. Cook*, 83 Ohio St.3d 404, 409, 418, 1998-Ohio-291, 700 N.E.2d 570.

{¶26} In this matter, the evidence presented by the state demonstrated that Littlejohn had registered using the 4666 West 130th Street address in Cleveland, but he was actually living in Lakewood with Antoinette. The state's evidence included information that Littlejohn himself provided to the Lakewood authorities, the presence of his clothing at that address, as well as law enforcement's repeated interactions with Littlejohn at the Ridgewood address including the September 15, 2014 and September 29, 2014 domestic violence responses. Viewed in a light most favorable to the state, this evidence was sufficient to establish the charge of failure to register the Lakewood address with the sheriff in violation of R.C. 2950.05.

Manifest Weight of the Evidence

{¶27} Littlejohn next contends that his convictions are against the manifest weight of the evidence.

{¶28} In *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, the court explained a challenge to the manifest weight of the evidence as follows:

> Weight of the evidence concerns "the inclination of the *greater amount of credible evidence*, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*." (Emphasis added.) *Black's* [*Law Dictionary* (6th Ed.1990) 1594].

> When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "'thirteenth juror'" and disagrees with the factfinder's resolution of the conflicting testimony. [Quoting *Tibbs v. Florida*, 457 U.S. 31, 45, 102 S. Ct. 2211, 2220, 72 L.Ed.2d 652 (1982)]. *See also State v. Martin* (1983), 20 Ohio App.3d 172, 175, * * *, 485 N.E.2d 717, 720-721 ("The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.").

Id.

{¶29} In this matter, the state presented evidence that Littlejohn was repeatedly and consistently domiciled in Lakewood, at an address that he did not register with the sheriff, and that his clothes were at the Lakewood home. In addition, the evidence from the domestic violence reports in Lakewood indicates that Littlejohn himself told the Lakewood police that he resided at this address. The state also presented evidence that Littlejohn did not actually stay at the Cleveland residence he had registered. Although Littlejohn mounted a defense to the charges, this evidence was refuted by the compelling testimony and documentary evidence presented by the state. From all of the foregoing, and after having thoroughly reviewed the entire record, we cannot say that the conviction is against the manifest weight of the evidence or that the jury lost its way in convicting Littlejohn of Counts 2 and 3 of the indictment.

{¶30} This assignment of error is without merit.

Telephone Message

{¶31} In his third assignment of error, Littlejohn argues that the trial court violated the provisions of Evid.R. 901 in permitting introduction of evidence of the phone call placed to Detective Orlando concerning Littlejohn's residence in Lakewood.

{¶32} We review this claim for an abuse of discretion. *State v. Thompson*, 8th Dist. Cuyahoga No. 96929, 2012-Ohio-921, ¶ 27, citing *State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987).

{¶33} Evid.R. 901 governs the authentication or identification of evidence and provides:

> (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:
>
> (1) Testimony of witness with knowledge. Testimony that a matter is what it is claimed to be.
>
> * * *
>
> (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.
>
> (6) Telephone conversation. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (a) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (b) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

{¶34} In *Thompson*, 8th Dist. Cuyahoga No. 96929, 2012-Ohio-921, this court explained that the state was not required to "prove beyond any doubt that the evidence is what it purports to be." *Id*., quoting *State v. Moshos*, 12th Dist. Clinton No. CA2009-06-008, 2010-Ohio-735, ¶ 12. Instead, the state needed only to demonstrate a reasonable likelihood that the recording was authentic. *Id.* A proponent may demonstrate genuineness or authenticity through direct or circumstantial evidence. *Id.* This court explained:

> Such evidence may be supplied by, but is not limited to, the testimony of a witness with knowledge, voice identification, or by evidence that a call was made to the number assigned at the time by the telephone company to a particular person. *See* Evid.R. 901(B)(1), (5), and (6); *Moshos* at ¶ 14; *State v. Small*, 10th Dist. No. 06AP-1110, 2007-Ohio-6771, ¶ 38.

Thompson at ¶ 29.

{¶35} The *Thompson* court determined that telephone calls from jails were sufficiently authenticated in light of the testimony from the officers who recorded the calls and the recipient who testified that she recognized defendant Thompson's voice in "several" of the recordings. The *Thompson* court further concluded that the issue of "whether the voice on the recordings was indeed Thompson was a question of fact for the jury to determine. Accordingly, the trial court did not abuse its discretion in allowing the recordings into evidence." *Id.*, at ¶ 32.

{¶36} Similarly, in this matter, the phone message was authenticated by testimony from the recipient, Detective Orlando, who testified that the caller claimed to be Littlejohn's wife and gave a call back number that the detective recognized as Antoinette's number. The caller also provided detailed, accurate information about the matter and additional information when Detective Orlando called her back. Detective Orlando ultimately referred the matter to the

grand jury. Although Antoinette later denied making the call, it was within the province of the jury to determine this issue. The trial court did not abuse its discretion in permitting the introduction of this evidence.

{¶37} The third assignment of error is without merit.

{¶38} Judgment is affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARY EILEEN KILBANE, PRESIDING JUDGE

MELODY J. STEWART, J., and
MARY J. BOYLE, J., CONCUR