[Cite as *State v. Williams*, 2009-Ohio-6967.]

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

State of Ohio — Court of Appeals No. L-08-1371

Appellee — Trial Court No. CR0200802216

v.

Richard Williams — **DECISION AND JUDGMENT**

Appellant — Decided: December 31, 2009

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Michael D. Bohner, Assistant Prosecuting Attorney, for appellee.

Jerome Phillips, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Defendant-appellant, Richard Williams, appeals the September 29, 2008 judgment of the Lucas County Court of Common Pleas which, after a trial to the court, found appellant guilty of domestic violence, in violation of R.C. 2919.25(A) and (D)(3),

and sentenced him to four years of community control. For the reasons that follow, we affirm the trial court's judgment.

{¶ 2} The relevant facts of this case are as follows. On May 28, 2008, appellant was indicted on one count of domestic violence, in violation of R.C. 2919.25(A) and (D)(3). The charge stemmed from an incident on May 17, 2008, where appellant allegedly choked his girlfriend, threatened her, and pushed her down the stairs while she was holding an infant. On July 1, 2008, appellant was indicted on a second domestic violence charge stemming from the events of December 31, 2007, where appellant allegedly hit his girlfriend, then pregnant, and pushed her down the stairs.[1] On July 29, 2008, the cases were consolidated.

{¶ 3} Anticipating that the victim would not cooperate in the state's prosecution of appellant; on July 21, 2008, the state filed notices of intent to introduce into evidence the birth certificate of the victim's child which named appellant as the father, and a recording of the telephone call made to the 911 operator. Appellant opposed the motions. As to the birth certificate, appellant argued that although it is admissible as a record of vital statistics under Evid.R. 803(9), portions of the record may still be considered inadmissible hearsay. As to the 911 call recording, appellant argued that to the extent that any portions were either testimonial in nature or did not meet the excited utterance hearsay exception, they must not be admitted into evidence.

[1]Appellant was originally indicted on this charge on January 11, 2008. The charge was dismissed and later refiled.

{¶ 4} On August 14, 2008, the court ruled that, pursuant to Evid.R. 803(8) and 803(9), the birth certificate and all the information contained in the birth certificate was admissible. As to the 911 call, the court found that there were three distinct conversations with the 911 operator. The first call was very brief and no information was obtained. The third call was with a third, unidentified party and was clearly inadmissible. The trial court found that the second call, where the alleged victim called requesting assistance, was an information gathering exchange and nontestimonial in nature. The court then ruled that the 911 tape was admissible at trial.

{¶ 5} On August 14, 2008, the bench trial in this matter commenced and the following evidence was presented. Thaddeus J., the victim's brother, testified that in the summer of 2007, the victim became involved in a romantic relationship with appellant. Thaddeus testified that appellant and the victim have a child together; the child was born in 2008.

{¶ 6} Thaddeus testified that on December 31, 2007, he was at his sister's apartment; she was six months pregnant at the time. Thaddeus testified that appellant and the victim were arguing and that the victim had scratches on her neck. According to Thaddeus, appellant admitted to scratching the victim. Thaddeus testified that appellant left and later returned with two adult males; appellant and the victim continued arguing. Thaddeus stated that one of the males was "wrestling" or fighting with him. According to Thaddeus, the altercation between appellant and the victim became physical and

appellant hit the victim, pulled her by her hair, and pushed her down some stairs. Thaddeus admitted that he did not actually witness any violence against the victim.

{¶ 7} Regarding the May 17, 2008 incident, Thaddeus identified the voice on the 911 recording as his sister's. He stated that her voice did not sound "normal" and that she needed help.

{¶ 8} Toledo Police Officer, David O'Brien, testified that on May 17, 2008, at approximately 9:45 a.m., he was dispatched to Siegel Street in Toledo, Lucas County, Ohio, on a call that someone was being held against their will. According to Officer O'Brien's testimony and the dispatch records admitted into evidence, O'Brien and his partner, Officer Vasquez, arrived on the scene at approximately 9:48 a.m. Officer O'Brien testified that he knocked on the apartment door and there was no answer. O'Brien stated that the victim then walked across the courtyard and identified herself. The victim was visibly upset and shaking and told O'Brien that appellant held her against her will and "beat her" while she was holding her child. O'Brien observed a fresh scratch on her neck.

{¶ 9} According to Officer O'Brien, the victim believed that appellant was still in her apartment. O'Brien and Officer Vasquez entered the apartment and appellant was not there.

{¶ 10} During cross-examination, Officer O'Brien was questioned about the victim's injuries. O'Brien stated that the only injury he observed was the cut or scratch on the victim's neck; it did not require medical attention. O'Brien also observed that the

baby had no injuries. O'Brien admitted that not all allegations of domestic violence were truthful. At the close of the state's case, appellant made a Crim.R. 29 motion for a directed verdict. The motion was denied.

{¶ 11} Appellant then presented the testimony of Toledo Police Detective Mary Jo Jaggers. Detective Jaggers testified that she works exclusively on domestic violence cases. Jaggers stated that she investigated the December 31, 2007 incident; Jaggers did not observe any injuries on the victim.

{¶ 12} Detective Jaggers testified that the victim had expressed an unwillingness to testify against appellant. Jaggers was then questioned about a letter, allegedly written by the victim, wherein she indicates that she lied about the events in question. The letter was admitted into evidence.

{¶ 13} During cross-examination, Detective Jaggers indicated that she and the victim had met on several occasions to discuss the December 31, 2007 incident. Jaggers also spoke with the victim regarding the May 17, 2008 incident. Officer Jaggers stated that there were no inconsistencies in the victim's story. Officer Jaggers acknowledged that the victim did not wish to proceed with the prosecution but that because there had been two incidents and that they had a child together, Jaggers was concerned and went forward with the prosecution.

{¶ 14} At the conclusion of the evidence the trial court found appellant guilty of the May 17, 2008 domestic violence charge and not guilty of the December 31, 2007

domestic violence charge. On September 29, 2008, appellant was sentenced to four years of community control. This appeal followed.

{¶ 15} Appellant raises the following four assignments of error for our review:

{¶ 16} "First Assignment of Error: The trial court erred by allowing into evidence hearsay contained in a birth certificate.

{¶ 17} "Second Assignment of Error: The trial court erred when it allowed into evidence testimonial out-of-court statements of the alleged victim, in violation of the defendant's right to confront witnesses against him.

{¶ 18} "Third Assignment of Error: The trial court erred in holding that the alleged victim's statements to a police officer and a 911 operator were excited utterances.

{¶ 19} "Fourth Assignment of Error: The verdict of guilty was against the manifest weight of the evidence."

{¶ 20} In appellant's first assignment of error he contends that the trial court erred by allowing a hearsay statement, contained in a birth certificate, into evidence. Appellant does not dispute that, in general, a birth certificate is admissible into evidence pursuant to Evid.R. 803(8) and 803(9); however, appellant asserts that the entire content of the document is not necessarily admissible. Appellant argues that the statement on the document that appellant is the father of the victim's child was hearsay within hearsay and that no exception applies.

{¶ 21} As to the May 27, 2008 incident, appellant was charged with one count of domestic violence, in violation of R.C. 2919.25(A) and (D)(3), which prohibits the

following: "No person shall knowingly cause or attempt to cause physical harm to a family or household member."

{¶ 22} A "family or household member" is defined, in relevant part, as: "The natural parent of any child of whom the offender is the other natural parent or is the putative other natural parent." R.C. 2919.25(F)(1)(b). Finally, under R.C. 3107.01(H), a "'[p]utative father' means a man, including one under age eighteen, who may be a child's father and to whom all of the following apply:

{¶ 23} "(1) He is not married to the child's mother at the time of the child's conception or birth;

{¶ 24} "(2) He has not adopted the child;

{¶ 25} "(3) He has not been determined, prior to the date a petition to adopt the child is filed, to have a parent and child relationship with the child by a court proceeding pursuant to sections 3111.01 to 3111.18 of the Revised Code, a court proceeding in another state, an administrative agency proceeding pursuant to sections 3111.38 to 3111.54 of the Revised Code, or an administrative agency proceeding in another state;

{¶ 26} "(4) He has not acknowledged paternity of the child pursuant to sections 3111.21 to 3111.35 of the Revised Code."

{¶ 27} As set forth in the statute, the state was required to prove only that appellant was the "putative father" of the victim's child. See *State v. Woods* (Mar. 22, 2001), 5th Dist. No. 00-CA-0075. Thus, appellant's name on the birth certificate need only stand for the proposition that appellant may be the child's father; it does not need to

be proof of the matter asserted. Further, even if we assume that appellant's name on the birth certificate was improperly admitted, appellant's brother testified that appellant is the father of the victim's child, the child has appellant's last name, and (as will be discussed, infra) appellant informed the 911 operator that she and appellant have a child together.

{¶ 28} Based on the foregoing, we find that appellant's first assignment of error is not well-taken.

{¶ 29} In appellant's second assignment of error he contends that the trial court erred when it permitted Officer O'Brien to testify regarding out-of-court statements made by the victim. Appellant further argues that the victim's statements to the 911 operator were testimonial. Appellant contends that the statements are inadmissible hearsay based upon the Confrontation Clause requirements as set forth in *Crawford v. Washington* (2004), 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177, and *Davis v. Washington* and *Hammon v. Indiana* (2006), 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224.

{¶ 30} The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him. * * *."

{¶ 31} In *Crawford v. Washington*, the Supreme Court of the United States, overruling the reliability of the testimony test in *Ohio v. Roberts* (1980), 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597, held that: "[w]here testimonial evidence is at issue, * * * the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." Id. at 68. *Crawford* stated that it would leave the

question of what it "testimonial" for another day; that day came with the court's decision in *Davis v. Washington* and *Hammon v. Indiana*, supra.

{¶ 32} In *Davis*, the court held that a 911 telephone call made in response to an ongoing emergency was not a testimonial statement for Sixth Amendment purposes. Id. at 826-827. The statement was made as the events were actually happening and they enabled police assistance.

{¶ 33} The court next addressed *Hammon v. Indiana*, first noting that it was a much easier task than *Davis*. In *Hammon*, the police reported to a "domestic disturbance." When police arrived, the victim was alone on the front porch and appeared somewhat frightened. Id. at 819. The parties were separated and the alleged victim was questioned about the events. At trial, the victim did not testify but the responding officer recounted the statements made by the victim. Id. at 819-820. The court found the victim's statements to be testimonial because the facts "objectively indicate[d] that there [was] no such ongoing emergency, and that the primary purpose of the interrogation [was] to establish or prove past events potentially relevant to later criminal prosecution." Id. at 822.

{¶ 34} Regarding the 911 call in the present case, appellant argues that the victim's call from the safety of a neighbor's apartment was not the result of an ongoing emergency; the call relayed past events and the questioning by the 911 operator was geared toward future prosecution. In support of this argument, appellant relies on this court's case captioned *State v. Morales*, 6th Dist. No. L-07-1231, 2008-Ohio-4619,

wherein, we applied the "primary purpose" test which, as first articulated in *Davis v. Washington*, supra, provides:

{¶ 35} "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 prosecution." *Davis* at 822.

{¶ 36} During the 911 call at issue, the operator first ascertained the victim's address and her name, and the reason for the call. Thereafter, the following exchange took place:

{¶ 37} "911 Operator: Do you live together?

{¶ 38} "[Victim]: No … we just … (inaudible)

{¶ 39} "911 Operator: Just listen to me … listen to me …. Do you live together?

{¶ 40} "[Victim]: No.

{¶ 41} "911 Operator: Any kids together?

{¶ 42} "[Victim]: Yes.

{¶ 43} "911 Operator: Ok … any weapons involved, guns or knives?

{¶ 44} "[Victim]: No he just hit me.

{¶ 45} "911 Operator: Ok … and so no weapons … do you need medical attention?

{¶ 46} "[Victim]: No…

{¶ 47} "911 Operator: Ok … is he still there?

{¶ 48} "[Victim]: No but he be back (inaudible) …

{¶ 49} "911 Operator: What?

{¶ 50} "[Victim]: No but he will be it is just a matter of time … (inaudible) …

{¶ 51} "911 Operator: Ok … how long ago did this happen?

{¶ 52} "[Victim]: It happened a few minutes ago … (inaudible) …"

{¶ 53} The 911 operator then got appellant's name, a description, and the direction he went on foot.

{¶ 54} Reviewing the relevant case law, we find that the 911 recording was admissible as it was made in response to an ongoing emergency. The identity of the suspect, including the relationship between the parties, was useful in aiding law enforcement in safely apprehending the suspect.

{¶ 55} Appellant also contends that the statements the victim made to the responding officers was testimonial where the emergency had passed and the primary purpose of the officer's testimony was to gather information of a past crime. Appellant argues that the facts in *Hammon v. Indiana*, 547 U.S. 813, are factually similar to the present facts.

{¶ 56} As set forth above, in *Hammon*, when the officers arrived on the scene there was no emergency in progress and the victim indicated that things were fine. Id. at 829-830. The court noted that when the victim was again questioned she was objectively

asked "what happened"; the officer was investigating a possible crime. Id. at 830. Thus, the court concluded that questioning regarding past events is inherently testimonial because it does "precisely *what a witness does* on direct examination * * *." (Emphasis in original.) Id.

{¶ 57} This court addressed a similar issue in *Toledo v. Loggins*, 6th Dist. No. L-06-1355, 2007-Ohio-5887. In *Loggins*, the police arrived approximately two hours following a domestic violence call. Upon arrival, the alleged victim answered the door and appeared nervous and frightened but not hysterical. Id. at ¶ 3. The officer noticed some swelling around the victim's eye. Based on these facts, we concluded that because there was no emergency in progress at the time of the officers' arrival, any statements made were testimonial in nature and, thus, barred by the rules against hearsay.

{¶ 58} In the present case, the officers arrived within three minutes of the 911 call. The victim came running across the courtyard and was "visibly upset" and "shaking." The victim identified appellant as the individual who "held her against her will and beat her when she had her child in her arms." According to Officer O'Brien, the victim believed that appellant was still in her apartment. The officers made entry into the apartment and determined that it was empty. O'Brien did not testify as to the substance of any conversation with the victim following the officers' entry into the apartment. Upon review of these facts, we find that when the officers arrived on the scene there was an ongoing emergency and that the information obtained by the victim was to aid in the emergency and was not testimonial in nature.

{¶ 59} Based on the foregoing, we find that the trial court did not err when it allowed into evidence the nontestimonial hearsay statements of the victim. Appellant's second assignment of error is not well-taken.

{¶ 60} In his third assignment of error, appellant contends that the alleged victim's statements to a police officer and a 911 operator were not excited utterances and, thus, were inadmissible hearsay. We note that the determination of whether hearsay statements are subject to exception rests within the sound discretion of the trial court and will not be disturbed absent an abuse of that discretion. *State v. Hand*, 107 Ohio St.3d 378, 393, 2006-Ohio-18, ¶ 92. An abuse of discretion is more than an error of law or judgment; it connotes that the court's attitude is arbitrary, unreasonable or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶ 61} Evid.R. 803(2) provides an exception to the hearsay rule for an excited utterance. 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." In determining whether a statement is admissible under the excited utterance hearsay exception, "'[t]he central requirements are that the statement must be made while the declarant is still under the stress of the event and the statement may *not* be a result of reflective thought.' (Emphasis added.)" *State v. O'Neal*, 87 Ohio St.3d 402, 411, 2000-Ohio-449, quoting *State v. Taylor* (1993), 66 Ohio St.3d 295, 303.

{¶ 62} As set forth in our analysis of appellant's second assignment of error, Officer O'Brien testified that when the police arrived on the scene, approximately three

minutes after the 911 call, the victim ran towards them and was visibly upset. She indicated that she believed that appellant was still in the apartment. Based on these facts, we cannot say that the trial court abused its discretion in finding that the victim was still under the stress of the event and allowing the testimony to be admitted into evidence.

{¶ 63} Regarding the 911 call, appellant contends that reviewing only the victim's "tone of voice" on the recording, there is nothing to suggest that she was incapable of reflection or fabrication. As stated in *State v. Taylor*, 66 Ohio St.3d at 303, the passage of time between the startling event and the statement is relevant, though not dispositive, of whether it can be considered an excited utterance. Further, merely being upset does not demonstrate that the statement was not the result of reflective thought. Id.

{¶ 64} The victim called 911 just minutes after the incident. The victim stated that appellant just left but that he would be back. As stated above, when the police arrived on the scene, three minutes following the 911 call, the victim was visibly upset and shaking. The victim believed that appellant was in her apartment. It follows that if the victim was still under the stress of the incident when the police arrived, she was also under the stress of the incident when she placed the 911 call. Thus, the trial court did not abuse its discretion in permitting the 911 recording as an excited utterance. Appellant's third assignment of error is not well-taken.

{¶ 65} In appellant's fourth and final assignment of error, he contends that the trial court's judgment was against the manifest weight of the evidence. To determine whether a verdict is against the manifest weight of the evidence, the appellate court must decide

whether the judgment is supported "by some competent, credible evidence going to the essential elements of the case." *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280. In this way, the appellate court acts as the "thirteenth juror" and "' * * * 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.'" *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. The rule of law in *Thompkins* applies equally to a matter tried before the bench or a jury. *State v. Fisher*, 6th. Dist. No. L-02-1041, 2002-Ohio-7305, ¶ 7.

{¶ 66} Appellant argues that the trial court's verdict was against the weight of the evidence because the victim is a "liar" and that Officer O'Brien had no first-hand information. Thus, appellant was convicted entirely on the basis of hearsay.

{¶ 67} Upon careful review of the record, we cannot say that he trial court, acting as the factfinder "lost its way" and created a "manifest miscarriage of justice." Sufficient testimony was presented as to all the elements of the offense; further, the testimony of Officer O'Brien, who observed the victim within minutes of the incident, was credible. Accordingly, appellant's fourth assignment of error is not well-taken.

{¶ 68} On consideration whereof, we find that appellant was not prevented or prejudiced from having a fair trial and the judgment of the Lucas County Court of

Common Pleas is affirmed. Pursuant to App.R. 24, appellant is ordered to pay the costs of this appeal.

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

Thomas J. Osowik, J. _____
CONCUR.
JUDGE