[Cite as *Highland Hts. v. C.C.*, 2019-Ohio-2333.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

CITY OF HIGHLAND HEIGHTS, :

Plaintiff-Appellee, :

No. 107703

v. :

C.C., :

Defendant-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED IN PART, VACATED IN PART, AND REMANDED
RELEASED AND JOURNALIZED: June 13, 2019

Criminal Appeal from the Lyndhurst Municipal Court
Case No. 18CRB00496

Appearances:

Daniel W. Taylor, *for appellee*.

Berkman, Gordon, Murray & DeVan, and William Livingston, *for appellant*.

RAYMOND C. HEADEN, J.:

{¶ 1} Defendant-appellant C.C. ("C.C.") appeals his conviction for violating a protection order. For the reasons that follow, we affirm his conviction, vacate his 180-day suspended prison term, and remand.

Procedural and Substantive History

{¶ 2} C.C.'s wife, Y.H., filed a petition seeking a domestic violence civil protection order against C.C. in the Cuyahoga County Domestic Relations Court. On May 1, 2018, the court issued a protection order, listing Y.H. and each of the couple's three minor children as protected persons. The order prohibited C.C. from having any contact with any of the protected persons, including by way of text messages.

{¶ 3} On May 22, 2018, a complaint was filed against C.C. in the Lyndhurst Municipal Court alleging that he violated a protection order, in violation of R.C. 2919.27. Y.H. filed the complaint upon receiving text messages sent to her from C.C. on May 21, 2018.

{¶ 4} On June 13, 2018, C.C. was arraigned and pleaded not guilty.

{¶ 5} A bench trial was held on August 15, 2018. The city called Y.H. and Detective David Schiaciano ("Detective Schiaciano") as witnesses. Y.H. testified with the assistance of an interpreter that she received text messages and reported them to the police on May 22, 2018. Screenshots of the text messages were admitted into evidence, and Y.H. read the text messages into the record. The substance of the messages referred multiple times to the protection order and its no-contact provision. Detective Schiaciano testified that the messages depicted communication from C.C. to Y.H., and that law enforcement verified that the messages came from a phone number associated with C.C. On cross-examination, Detective Schiaciano confirmed that he did not know for certain who was using the cell phone at the time the messages were sent. C.C. was found guilty. The trial court sentenced him to a

suspended term of 180 days in jail and ordered him to pay court costs and a $250 fine.

{¶ 6} C.C. appeals, presenting three assignments of error for our review.

Law and Analysis

Complaint

{¶ 7} In his first assignment of error, C.C. argues that the charging instrument failed to put him on notice of the charge and state an offense and, therefore, his conviction is invalid. Specifically, he asserts that the complaint failed to provide any information as to what order was violated, what term of the protection order was violated, or what conduct constituted the violation.

{¶ 8} Because the filing of a valid complaint is a necessary prerequisite to a court obtaining subject matter jurisdiction, the question of whether a complaint is valid is a legal question. *Newburgh Hts. v. Hood*, 8th Dist. Cuyahoga No. 84001, 2004-Ohio-4236, ¶ 5, citing *State v. Kozlowski*, 8th Dist. Cuyahoga No. 69138, 1996 Ohio App. LEXIS 1580 (Apr. 18, 1996). Therefore, whether a complaint is valid is a question generally reviewed on a de novo basis. *Id*.

{¶ 9} In this case, C.C. did not object to the complaint at any point during the lower court proceedings. Crim.R. 12(C)(2) provides that defenses and objections based on defects in a complaint must be raised before trial. Crim.R. 12(H) provides that a defendant's failure to raise a defense or objection that must be made prior to trial constitutes a waiver of the defense or objection, "but the court for good cause shown may grant relief from the waiver." Because the record contains no evidence

of any objection to the complaint by C.C., he has waived all but plain error review. *State v. Horner*, 126 Ohio St.3d 466, 2010-Ohio-3830, 935 N.E.2d 26, ¶ 54. Crim.R. 52(B) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Notice of plain error is to be taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Long*, 53 Ohio St.2d 91, 372 N.E.2d 804 (1978).

{¶ 10} Crim.R. 3 provides that a complaint is "a written statement of the essential facts constituting the offense charged" and that it "shall also state the numeral designation of the applicable statute or ordinance."

{¶ 11} The complaint in this case is a form document with certain relevant information filled in to read as follows:

> Complainant being duly sworn states that C.C. at Highland Heights, Cuyahoga County, Ohio on or about May 21, 2018, no person shall recklessly violate the terms of a protection order issued pursuant to section 3113.31 of the revised code.

The complaint was also signed by complainant Y.H. "While all the specific facts relied upon to sustain the charge need not be recited, the material elements of the crime must be stated" for a complaint to be valid. *State v. Burgun*, 49 Ohio App.2d 112, 113, 359 N.E.2d 1018 (8th Dist.1976). Here, although the way in which the complaint form was drafted was perhaps inartful, the complaint described both the numerical designation and title of the statute C.C. was alleged to have violated and the essential elements of that charge. R.C. 2919.27(A)(1), violating protection order,

provides: "[n]o person shall recklessly violate the terms of * * * a protection order issued or consent agreement approved pursuant to section 2919.26 or 3113.31 of the Revised Code." Because we find that the complaint complies with the requirements of Crim.R. 3, we find no plain error. C.C.'s first assignment of error is overruled.

Waiver of Right to Counsel

{¶ 12} In his second assignment of error, C.C. argues that the trial court erred in allowing him to proceed pro se when he did not knowingly, intelligently, and voluntarily waive his right to counsel. We agree.

{¶ 13} A criminal defendant is constitutionally entitled to the assistance of counsel, and this right extends to misdemeanor cases that result in imprisonment. *Argersinger v. Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972). A criminal defendant also has the right to waive representation by counsel and represent himself at trial. *State v. Gibson*, 5th Dist. Stark No. 2013CA00175, 2014-Ohio-1169, ¶ 22, citing *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). Crim.R. 44 provides, in relevant part:

> (B) Where a defendant charged with a petty offense is unable to obtain counsel, the court may assign counsel to represent him. When a defendant charged with a petty offense is unable to obtain counsel, no sentence of confinement may be imposed upon him, unless after being fully advised by the court, he knowingly, intelligently, and voluntarily waives assignment of counsel.
>
> (C) Waiver of counsel shall be in open court and the advice and waiver shall be recorded as provided in Rule 22.

A defendant's waiver of the right to counsel pursuant to this rule must be made with an apprehension of the all "'facts essential to a broad understanding of the whole

matter[,]'" including the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, and possible defenses to the charges and circumstances in mitigation thereof. *State v. Gibson*, 45 Ohio St.2d 366, 377, 345 N.E.2d 399 (1976), quoting *Von Moltke v. Gillies*, 322 U.S. 708, 723, 68 S.Ct. 316, 92 L.Ed. 309 (1948).

{¶ 14} In determining the sufficiency of the trial court's inquiry in the context of a defendant's waiver of counsel, we conduct an independent review to determine whether a defendant voluntarily, knowingly, and intelligently waived his right to counsel under the totality of the circumstances. *State v. Robinson*, 8th Dist. Cuyahoga No. 106721, 2018-Ohio-5036, ¶ 11, citing *State v. Ricks*, 8th Dist. Cuyahoga Nos. 101198 and 101199, 2015-Ohio-414, ¶ 18; *Wellston v. Horsley*, 4th Dist. Jackson No. 05CA18, 2006-Ohio-4386, ¶ 10. This independent review involves indulging every presumption against the waiver of the right to be represented by counsel. *Id.*, citing *State v. Trikilis*, 9th Dist. Medina Nos. 04CA0096-M and 04CA0097-M, 2005-Ohio-4266, ¶ 12, citing *State v. Dyer*, 117 Ohio App.3d 92, 95, 689 N.E.2d 1034 (2d Dist.1996).

{¶ 15} In support of his argument, C.C. points out that at his arraignment, he was given a "Statement of Rights and Waiver," that included a "Waiver of Counsel Section" with a line where he could sign and date indicating that he was waiving that right, but he did not do so. Indeed, a review of the record from his arraignment shows that C.C. indicated he had contemplated obtaining an attorney but wanted time to "think about it." A review of the record does not show that C.C. refused to

sign a waiver of counsel, as he now asserts. A review of the record also does not show any point at which C.C. affirmatively waived his right to counsel. We acknowledge that the court engaged C.C. in a dialogue at his arraignment regarding his right to counsel and his desire to proceed pro se. The court informed C.C. that he could hire an attorney to represent him, he may be eligible to have counsel appointed, or he could waive this right and proceed pro se. Although it appears clear from the record that C.C. understood the nature of the charges against him, and both the elements of the offense and conduct in question are relatively straightforward, this does not negate the need for a complete colloquy. Further, the record contains no indications that the trial court informed C.C. of the possible defenses to the charge or mitigating circumstances, or warn him of the dangers of self-representation.

{¶ 16} Because we do not find that C.C. knowingly, intelligently, and voluntarily waived his right to counsel, we sustain this assignment of error. "While the court's failure to obtain a valid waiver of counsel in a petty offense case prevents the trial court from imposing a sentence on the defendant, it does not vacate the entire conviction." *Lyndhurst v. Lasker-Hall*, 8th Dist. Cuyahoga No. 102806, 2016-Ohio-108, ¶ 14, citing *Parma v. Wiseman*, 8th Dist. Cuyahoga No. 102404, 2015-Ohio-4983; *Lyndhurst v. Di Fiore*, 8th Dist. Cuyahoga No. 93270, 2010-Ohio-1578; *State v. Haag*, 360 N.E.2d 756, 49 Ohio App.2d 268 (9th Dist.1976); *State v. Knight*, 9th Dist. Lorain No. 11CA010034, 2012-Ohio-5816; *Oakwood v. Shackelford*, 8th Dist. Cuyahoga No. 50062, 1986 Ohio App. LEXIS 5486

(Jan. 30, 1986). In accordance with the foregoing, we can only modify his sentence by vacating that part which imposes prison time. Therefore, we vacate the suspended term of 180 days in prison.

Sufficiency of the Evidence

{¶ 17} In his third assignment of error, C.C. argues that the evidence was insufficient to support a conviction for violating a protection order. Specifically, he argues that no evidence was offered to prove that he was served with, shown, or informed of the protection order before the alleged violation, and no evidence was offered to prove that he sent the text messages to Y.H. or possessed his phone at the time she received the messages.

{¶ 18} A sufficiency challenge requires a court to determine whether the prosecutor met its burden of production at trial and to consider not the credibility of the evidence but whether, if credible, the evidence presented would support a conviction. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). The relevant inquiry is 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. Jenks*, 61 Ohio St.3d 259, 273, 574 N.E.2d 492 (1991), citing *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶ 19} R.C. 2919.27(D) provides that:

> In a prosecution for a violation of this section, it is not necessary for the prosecution to prove that the protection order * * * was served on the defendant if the prosecution proves that the defendant was shown the

> protection order * * * or a copy * * * or a judge, magistrate, or law enforcement officer informed the defendant that a protection order * * * had been issued, and proves that the defendant recklessly violated the terms of the order * * *.

C.C. argues that there was no evidence introduced at trial showing that he was either served with the protection order or informed of the order by a judge, magistrate, or law enforcement officer. This argument is not persuasive.

{¶ 20} C.C. concedes that the evidence at trial showed that Y.H. applied for a protection order and the court granted a protection order on May 1, 2018. A review of the record shows that the protection order itself indicates that it was to be served on C.C. and that C.C. himself indicated that he had received a copy of the protection order multiple times over the course of the proceedings. Further, the very substance of the texts that constituted the violation in this case refer explicitly to the protection order. All of this evidence is sufficient to show that C.C. had been served with the protection order.

{¶ 21} C.C. also argues that there is no evidence that he was the one who actually sent the text messages to Y.H., or that he was in possession of his phone at the time Y.H. received the messages. At trial, Y.H. testified that the text messages came from a number associated with C.C. Further, the screenshots show that the number was saved in Y.H.'s phone with C.C.'s name. Although C.C. is correct that there was no direct evidence presented that proved beyond a reasonable doubt that C.C. was using his phone at the time the messages were sent to Y.H., there is sufficient circumstantial evidence to support a conclusion that he sent the messages.

Construing the evidence in a light most favorable to the city, we find sufficient evidence was presented to sustain C.C.'s conviction. This assignment of error is overruled.

{¶ 22} Judgment affirmed in part, vacated in part, and remanded to the trial court for further proceedings.

It is ordered that appellant and appellee share the costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue of this court directing the Lyndhurst Municipal Court to carry this judgment into execution.

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

RAYMOND C. HEADEN, JUDGE

FRANK D. CELEBREZZE, JR., P.J., and
MICHELLE J. SHEEHAN, J., CONCUR