[Cite as *State v. Zobel*, 2016-Ohio-5751.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO

Plaintiff-Appellee

-vs-

MICHAEL ZOBEL

Defendant-Appellant

JUDGES:
Hon. John W. Wise, P. J.
Hon. Patricia A. Delaney, J.
Hon. Craig R. Baldwin, J.

Case No. 2016 AP 03 0019

O P I N I O N

CHARACTER OF PROCEEDING: Criminal Appeal from the Court of Common Pleas, Case No. 2015 CR 09 0222

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: August 29, 2016

APPEARANCES:

For Plaintiff-Appellee

RYAN STYER
PROSECUTING ATTORNEY
AMANDA K. MILLER
ASSISTANT PROSECUTOR
125 East High Avenue
New Philadelphia, Ohio 44663

For Defendant-Appellant

GERALD A. LATANICH
PUBLIC DEFENDER
152 North Broadway
New Philadelphia, Ohio 44663

Wise, P. J.

{¶1} Appellant Michael Zobel appeals his conviction on one count of violating a civil protection order and one count of menacing following a jury trial in the Tuscarawas County Common Pleas Court.

{¶2} Appellee is the State of Ohio.

STATEMENT OF THE FACTS AND CASE

{¶3} Appellant Michael Zobel was indicted as follows: Count One: Intimidation, in violation of R.C. 2921.03(A), a 3rd degree felony; Count Two: Violating a Protection Order, in violation of R.C. 2919.27(A)(1) and (B)(3), a 5th degree felony; Count Three: Obstructing Official Business, in violation of 2921.31(A) and (B), a 2nd degree misdemeanor; Count Four: Resisting Arrest, a violation of R.C. 2921.33(A) and (D), a 2nd degree misdemeanor; and Count Five: Aggravated Menacing, in violation of R.C. 2903.21(A) and (B), a 1st degree misdemeanor.

{¶4} Prior to the jury trial in this matter, the State moved to dismiss the Counts Three, Four and Five, which the trial court granted.

{¶5} On February 6, 2015, a jury trial proceeded on Counts One and Two. The jury trial continued on February 10, 2015.

{¶6} At trial, the State called three witnesses and admitted five exhibits into evidence. The first witness, Uhrichsville Fire Department Captain Wes Dillon, testified that he lives across the street from 529 North Dawson Street in Uhrichsville and knows this to be the residence of Sarah French. (T. at 102-103). Capt. Dillon testified that on August 23, 2015, he witnessed Appellant enter onto the property of Ms. French, while he was standing on his porch. (T. at 103-104). Capt. Dillon testified he was very familiar

with Appellant and confident in his identification on that day. (T. at 105). He also identified the man he saw in the courtroom as Mike Zobel. Having knowledge of Appellant and finding his entering the property of Ms. French suspicious, he contacted Sgt. Hickman, who was on duty at the time, and related what he had witnessed. (T. at 105-107). Capt. Dillon testified that when he lost sight of Appellant, he was within five feet of Sarah French's house. (T. at 109).

{¶7} Sgt. Hickman then testified that upon being notified Appellant was on the property owned by Sarah French, he responded. (T. at 124-125). He testified that he knew Ms. French had an active protection order against Appellant and took steps to verify it was still in effect. (T. at 124, 131-132). Sgt. Hickman was shown a certified copy of the protection order at issue marked as State's Ex. B and verified that he had seen that document in the past. Sgt. Hickman then explained to the jury the personal service on Appellant that had been accomplished by Dep. Chris Anderson on July 9, 2012. (T. at 127-128).

{¶8} Sgt. Hickman described his attempts to locate Appellant and his efforts in detaining and arresting him once he was found a short time later. (T. at 129-130). Sgt. Hickman testified that he placed Appellant under arrest for a felony-level violation of a civil protection order based on the fact he was within 500 feet of Sarah French's property, and that Appellant had a prior conviction for violating the protection order. (T. at 140). Sgt. Hickman told the jury how Appellant's daughter attempted to interfere with his arrest of Appellant and made statements indicating Appellant had just left 529 North Dawson Street, and that both she and Appellant knew he was not supposed to be at that location. (T. at 179).

{¶9} Sgt. Hickman was shown a Magistrate's Decision out of the Tuscarawas County Southern District Court, marked as State's Ex. C, and explained the contents to the jury. (T. at 134-135). Sgt. Hickman further testified that he had personal knowledge regarding this conviction, as it is his practice and the practice of his department to follow complaints containing enhanceable offenses filed in Southern District Court by his department. (T. at 138). He testified that his ability to arrest people for the appropriate crime depends on his knowledge of who has what prior convictions. (T. at 139-140).

{¶10} The jury also heard from Sgt. Ed Jones of the Tuscarawas County Sheriff's Office who provided testimony regarding Appellant's behavior and statements made during his detention and arrest. The evidence provided by Sgt. Jones was used by the State to prove the allegations of witness intimidation/menacing.

{¶11} The State rested after admitting its exhibits into evidence. Appellant rested without presenting any evidence.

{¶12} On February 11, 2015, following deliberations, the jury found Appellant not guilty of Count one: Intimidation but did find him guilty of the lesser included offense of menacing, a fourth degree misdemeanor. The jury also found Appellant guilty of Count Two: violating a protection order, a fifth degree felony.

{¶13} By Judgment entry filed March 17, 2016, the trial court sentenced Appellant to three (3) years of Community Control, with the initial placement being intensive supervision through the Community Corrections Program with a twelve-month sentence in a State Penal Institution to be imposed if the Community Control Sanctions are violated.

{¶14} Appellant now appeals, assigning the following errors for review:

ASSIGNMENTS OF ERROR

{¶15} "I. THE TRIAL COURT ERRED IN NOT DISMISSING THE FELONY CIVIL PROTECTION ORDER DUE TO INADEQUATE IDENTIFICATION OF THE ACCUSED AS THE PERSON IN THE PRIOR CONVICTION.

{¶16} "II. THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO SHOW THAT THE ACCUSED HAD A PRIOR CONVICTION FOR VIOLATING A PROTECTION ORDER CONVICTION.

{¶17} "III. THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL FOR THE JURY TO FIND THAT THERE WAS A CIVIL PROTECTION ORDER IN EFFECT AGAINST THE DEFENDANT.

(B) THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO SHOW THE CIVIL PROTECTION ORDER WAS SERVED ON THE DEFENDANT

{¶18} "IV. THE STATE OF OHIO DID NOT PROVE BEYOND A REASONABLE DOUBT THAT THE ACCUSED RECKLESSLY VIOLATED THE CIVIL PROTECTION ORDER.

{¶19} "V. THE TRIAL COURT ERRED IN NOT DISMISSING THE FELONY CIVIL PROTECTION ORDER DUE TO INADEQUATE IDENTIFICATION OF THE ACCUSED AS THE PERSON IN THE PRIOR CONVICTION."

I., II., and V.

{¶20} In his First and Fifth Assignments of Error, Appellant argues that the trial court erred in not granting his Crim.R. 29 motion for acquittal at the close of the State's case. In his Second Assignment of Error, Appellant argues that there was insufficient

evidence to prove that he had a prior conviction for violating a protection order. We disagree.

{¶21} A motion for acquittal at the close of the state's case tests the sufficiency of the evidence. An appellate court therefore reviews a denial of a Crim.R. 29 motion for acquittal using the same standard used to review a sufficiency of the evidence claim. *State v. Larry,* 5th Dist. Holmes No. 15CA011, 2016–Ohio–829, ¶ 20 citing *State v. Carter,* 72 Ohio St.3d 545, 553, 651 N.E.2d 965, 1995–Ohio–104.

{¶22} We therefore consider Appellant's First, Second and Fifth Assignments of Error together.

{¶23} The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks,* 61 Ohio St.3d 259, 574 N.E.2d 492 (1991) at paragraph two of the syllabus, in which the Ohio Supreme Court held, "[a]n appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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."

{¶24} In the case *sub judice*, Appellant was found guilty of Violating a Protection Order in violation of R.C. §2919.27, which provides in pertinent part:

(A) No person shall recklessly violate the terms of any of the following:

(1) ***

(2) A protection order issued pursuant to section 2151.34, 2903.213, or 2903.214 of the Revised Code;

{¶25} Appellant herein argues that the Magistrate's Decision memorializing his plea and finding of guilt and the Judgment Entry adopting same were defective. Appellant argues that because the date portion of the file time-stamp on the Judgment Entry of his prior conviction for violating a civil protection order was not readable, the State failed to prove his crime beyond a reasonable doubt. Appellant further argues that the state failed to prove that he is the same "Michael Zobel" as the Michael Zobel with the prior conviction for violating a civil protection order.

{¶26} Ohio law provides that, "[w]henever in any case it is necessary to prove a prior conviction, a certified copy of the entry of judgment in such prior conviction together with evidence sufficient to identify the defendant named in the entry as the offender in the case at bar, is sufficient to prove such prior conviction." R.C. 2945.75(B)(1). The Supreme Court of Ohio has held that R.C. 2945.75(B)(1) sets forth one way to provide sufficient proof of a prior conviction but that it is not the exclusive method of proof. " 'For example, an offender may, and often does, stipulate to a prior conviction to avoid the evidence being presented before a jury.' " *State v. Tate,* 138 Ohio St.3d 139, 2014–Ohio–44, ¶ 18, quoting *State v. Gwen,* 134 Ohio St.3d 284, 2012–Ohio–5046, ¶ 14. *See also State v. Raymond,* 10th Dist. No. 08AP–78, 2008–Ohio–6814, ¶ 12 ("The plain language of [R.C. 2945.75] *allows, but does not require,* the use of a 'certified copy of the entry of judgment' to prove a prior conviction."). (Emphasis sic.)

{¶27} Here, in addition to the "defective" Judgment Entry, the jury also heard testimony from Sgt. Hickman, who reported that he had personal knowledge that Sarah

French had a protection order against Appellant, and that Appellant had a prior conviction for violation of a protection order. (T. at 134-135). He testified that he was familiar with the Magistrate's Decision filed August 17, 2012, finding Appellant guilty of violation of a protection order. *Id*. He further testified that he receives all protection orders as part of his daily duties with police department and that he was following the case, stating that it was "very important to me because the second one is a felony." (T. at 139).

{¶28} Upon review, this Court finds that Sgt. Hickman's testimony together with the Magistrate's Decision and the Judgment Entry adopting same, was sufficient for the jury to find, beyond a reasonable doubt, that Appellant had a prior conviction for violating a protection order.

{¶29} Appellant's First, Second and Fifth Assignments of Error are overruled.

III.

{¶30} In his third assignment of error, appellant argues that the State failed to provide sufficient evidence that he had been served with the protection order. We disagree.

{¶31} The civil protection order herein was issued pursuant to R.C. §2903.214, which reads, in pertinent part:

* * *

> (F)(1) The court shall cause the delivery of a copy of any protection order that is issued under this section to the petitioner, to the respondent, and to all law enforcement agencies that have jurisdiction to enforce the order. The court shall direct that a copy of the order be delivered to the respondent on the same day that the order is entered.

* * *

{¶32} In *Smith,* the Supreme Court of Ohio determined that in order to sustain a conviction for the crime of violating a civil stalking or sexually-oriented-offense protection order under R .C. 2919.27(A)(2), the state must prove beyond a reasonable doubt *all requirements* of R.C. 2903.214(F)(1). *See State v. Smith,* 136 Ohio St.3d 1, 2013–Ohio–1698, 989 N.E.2d 972, ¶ 16.

{¶33} In *Smith,* the petitioner obtained an ex parte civil stalking protection order against Robert L. Smith, Jr. *Id.* at ¶ 4, 989 N.E.2d 972. On the day the order was issued, the clerk of courts ordered the sheriff serve a copy of the order upon Smith. *Id.* Before Smith was served, the petitioner "showed Smith a copy and told him he was not allowed to be around her." *Id.* at ¶ 5, 989 N.E.2d 972. The next morning, Smith broke into petitioner's home. *Id.* at ¶ 6, 989 N.E.2d 972. An altercation ensued. *Id.* Petitioner called 9–1–1. *Id.* at ¶ 7, 989 N.E.2d 972. Smith attempted to flee but was apprehended and arrested. *Id.* Shortly thereafter, a deputy sheriff served Smith with a copy of the protection order. *Id.* at ¶ 8, 989 N.E.2d 972. Smith was charged with and convicted of violating the protection order in violation of R.C. 2919.27(A)(2). *Id.* at ¶ 9, 989 N.E.2d 972. Smith appealed, arguing there was no evidence that the order was served before the alleged offense. *Id.* at ¶ 14, 989 N.E.2d 972. Reversing the judgment of conviction, the Ohio Supreme Court emphasized,

{¶34} Therefore, to prove a violation of R.C. §2919.27(A)(2), the state must prove, beyond a reasonable doubt, all requirements of R.C. §2903.214, including the requirement that the order be delivered to the defendant. *Smith* at ¶16. The Court further

found "delivery" to be synonymous with "service." In *Smith,* the defendant was not served with the ex parte protection order before the altercation that led to the charges.

{¶35} Here, Appellant's case is distinguishable from *Smith*. In the case at bar, Appellant was served with the order well before the conduct that gave rise to the charges set forth in the Indictment had occurred. The record shows that Appellant was served with the civil protection order on July 9, 2012, at 3:38 p.m. The Return of Service, Personal, is signed by Deputy Anderson and was docketed on July 13, 2012. (T. at 128-129). At trial, Sgt. Hickman identified Deputy Anderson's signature on the proof of personal service. *Id*. Additionally, the State admitted the "Civil, Criminal, and/or anti-Stalking Order Service Receipt" signed by Appellant and dated July 9, 2012. The Order served upon Appellant states that it does not expire until June 29, 2017.

{¶36} Based on the foregoing, this Court finds that the State presented sufficient evidence that Appellant had been served with the Civil Protection Order on July 9, 2012.

{¶37} Appellant's Third Assignment of Error is overruled.

IV.

{¶38} In his Fourth Assignment of Error, Appellant argues that the State failed to present sufficient evidence to prove Appellant recklessly violated the civil protection order. We disagree.

{¶39} Appellant concedes that he was on Sarah French's property but argues that the State failed to prove that she was in her home or likely to be in her home at the time of the offense.

{¶40} As set forth above, Appellant was charged with violating a civil protection order in violation of R.C. §2919.27(A)(1) and (B)(3), which provide:

(A) No person shall recklessly violate the terms of any of the following:

* * *

(2) A protection order issued pursuant to section * * * 2903.214 of the Revised Code;

* * *

(B)(1) Whoever violates this section is guilty of violating a protection order.

* * *

(3) If the offender previously has been convicted of [or] pleaded guilty to * * * a violation of a protection order * * *, two or more violations * * * that involved the same person who is the subject of the protection order * * *, or one or more violations of this section, violating a protection order is a felony of the fifth degree.

{¶41} Appellant argues that the prosecution failed to proffer sufficient evidence that he acted recklessly.

{¶42} Revised Code Section 2901.22 provides that:

A person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature. A person is reckless with respect to circumstances when, with heedless indifference to the consequences, he perversely disregards a known risk that such circumstances are likely to exist.

{¶43} Here, the State presented evidence that a protection order was in effect at the time Appellant was arrested, that Appellant knew it was in effect, and that he entered onto the property of Sarah French in violation of such order.

{¶44} Viewing the evidence in a light most favorable to the prosecution, this Court concludes that there was sufficient evidence from which the jury could have found that the State proved beyond a reasonable doubt that Appellant recklessly violated the terms of the civil protection order.

{¶45} Appellant's Fourth Assignment of Error is overruled.

{¶46} Based on the foregoing reasons, the judgment of the Court of Common Pleas, Tuscarawas County, Ohio is affirmed.

By: Wise, P. J.

Delaney, J., and

Baldwin, J., concur.

JWW/d 0810