[Cite as *State v. Ybarra*, 2017-Ohio-9144.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. Patricia A. Delaney, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Earle E. Wise, Jr., J.
-vs-	:	
	:	Case No. 17-CA-26
	:	
JOSE A. YBARRA	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Licking County Court of Common Pleas, case no. 17 CR 080
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	December 18, 2017

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
WILLIAM C. HAYES LICKING CO. PROSECUTOR PAULA M. SAWYERS 20 S. Second St., Fourth Floor Newark, OH 43055	ROBERT C. BANNERMAN P.O. Box 77466 Columbus, OH 43207-0098

Delaney, P.J.

{¶1} Appellant Jose A. Ybarra appeals from the April 20, 2017 Judgment Entry of the Licking County Court of Common Pleas. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} Jane Doe is appellant's ex-wife; the two were married from 1995 to 2013. At one time appellant and Doe lived together in a trailer park in Heath, Ohio; now Doe lives there without appellant. Doe has lived in the trailer park since 1995. She lives near the rear of the complex, on a dead-end street. Residents do not have assigned parking spots and share a common parking area in front of their trailers.

{¶3} On October 15, 2013, Doe obtained a civil protection order (C.P.O.) against appellant which is valid through October 9, 2018. Appellant was convicted of violating the C.P.O. in 2014 and 2015. The C.P.O. states appellant shall not be within 500 feet of Doe. Specifically, the C.P.O. states:

> * * * *.
>
> 5. [Appellant] shall not enter or interfere with the residence, school, business, place of employment * * * of [Jane Doe], including the building, grounds, and parking lots at those locations. [Appellant] may not violate this Order **even with the permission of a protected person**. [NCIC 04] (Emphasis in original).
>
> 6. [Appellant] shall stay away from [Jane Doe] and all other protected persons named in this Order and not be present within 500 feet * * *of any protected persons wherever those protected persons may be found, or any place [appellant] knows or should know the

> protected persons are likely to be, **even with [Jane Doe's] permission**. If [appellant] accidentally comes in contact with protected persons in any public or private place, [appellant] must depart *immediately*. This Order includes encounters on public and private roads, highways, and thoroughfares. [NCIC 04] (Emphasis and italics in original).
>
> * * * *.
>
> Appellee's Exhibit 4.

{¶4} Jane Doe is employed but does not work a regular schedule; her work hours depend upon when her employer needs her. She is not usually home around 3:00 p.m., but sometimes she is.

{¶5} Jeffrey Wilson is Doe's longtime neighbor. Wilson and his wife live in a trailer "catercorner" to Doe's (T. 83). Wilson has known both Doe and appellant for around 17 years.

{¶6} On February 4th, 2017, around 3:00 p.m., Wilson left his own trailer, in his car, to take trash to the dumpsters and to check his mailbox. Wilson dropped off his trash, turned around, and observed a dark green older car driving through the complex. As the car passed him, Wilson clearly recognized appellant as the driver. Wilson proceeded to the mailbox and picked up his mail, then turned around and went back toward the trailers because he wanted to see where appellant went, knowing appellant and Doe "[have] had problems" (T. 92).

{¶7} Wilson again observed appellant driving the dark green car, now coming out of the dead-end street upon which Wilson and Doe both live. From the spot where

Wilson observed appellant, Doe's trailer is visible. Wilson returned to his own home and asked his wife to call Doe to let her know appellant had been spotted in the trailer park.

{¶8} Jane Doe reported the incident to the Heath Police Department. Ptl. Jason Black investigated Doe's allegations and found the active C.P.O. against appellant. He also researched appellant's vehicle history and found an active registration for a dark green 1997 Pontiac Bonneville. Black printed out a stock image of the make and model of the vehicle and brought it with him to speak to Wilson.

{¶9} Wilson described the circumstances under which he saw appellant twice in the trailer park. Wilson identified the photo of the Bonneville as similar to the vehicle driven by appellant. Wilson described appellant's location when he was coming out of the street Doe lives on; Black estimated the distance to be 200 to 300 feet from Doe's trailer. He checked his visual estimate with Google maps, which confirmed the distance to be less than 500 feet away.

{¶10} Appellant was charged by indictment with one count of violation of a protection order pursuant to R.C. 2919.27(A)(1) and (B)(1)(3), a felony of the fifth degree. The indictment states appellant has previously been convicted of violation of a protection order in Licking County Municipal Court case no. 13-CRB-02532 and Licking County Court of Common Pleas case nos. 14-CR-554, 14-CR-793, and 15-CR-680.

{¶11} Appellant entered a plea of not guilty and filed a pro se motion to dismiss on February 17, 2017.[1] Appellee responded with a motion in opposition. A hearing was held on March 6, 2017 and the trial court overruled the motion to dismiss via judgment entry.

[1] The trial court appointed counsel for appellant on February 13, 2017.

{¶12} The matter proceeded to trial by jury. Appellant moved for a judgment of acquittal at the close of appellee's evidence and the motion was overruled. Appellant was found guilty as charged. The jury also found in the affirmative that appellant was previously convicted of violation of a protection order. The trial court sentenced appellant to a prison term of 9 months.

{¶13} Appellant now appeals from the April 20, 2017 Judgment Entry of conviction and sentence.

{¶14} Appellant raises one assignment of error:

ASSIGNMENT OF ERROR

{¶15} "APPELLANT'S CONVICTION WAS LEGALLY INSUFFICIENT, AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, AND THE TRIAL COURT'S JURY INSTRUCTION CONSTITUTED PLAIN ERROR."

ANALYSIS

{¶16} In his sole assignment of error, appellant argues his conviction of violation of a protection order is not supported by sufficient evidence and is against the manifest weight of the evidence. He also argues the trial court committed plain error in improperly instructing the jury upon the description of the criminal offense. We disagree with both arguments.

{¶17} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, paragraph two of the syllabus. 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, "An 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."

{¶18} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the "thirteenth juror," and after "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 overturned and a new trial ordered." *State v. Thompkins*, supra, 78 Ohio St.3d at 387. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶19} Appellant was convicted of one count of violation of a protection order pursuant to R.C. 2919.27(A)(1) and (B)(1)(3), which state in pertinent part:

> (A) No person shall recklessly violate the terms of any of the following:
>
> (1) A protection order issued or consent agreement approved pursuant to section 2919.26 or 3113.31 of the Revised Code;
>
> * * * *.

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

* * * *.

(3) Violating a protection order is a felony of the fifth degree if the offender previously has been convicted of, pleaded guilty to, or been adjudicated a delinquent child for any of the following:

(a) A violation of a protection order issued or consent agreement approved pursuant to section 2151.34, 2903.213, 2903.214, 2919.26, or 3113.31 of the Revised Code;

(b) Two or more violations of section 2903.21, 2903.211, 2903.22, or 2911.211 of the Revised Code, or any combination of those offenses, that involved the same person who is the subject of the protection order or consent agreement;

(c) One or more violations of this section.

* * * *.

{¶20} Although not separately assigned as error, appellant first makes two arguments arising from the trial court's jury instructions. First, he argues insufficient evidence was admitted to establish that he was served with the protection order on February 4, 2017. Second, he argues the instruction requiring him to have been served on February 4, 2017 is plain error requiring reversal. The following is the challenged portion of the instruction by the trial court:

* * * *.

> The Defendant is charged with violating a protection order in violation of Ohio Revised Code Section 2917.27(A)(1)(B)(3). Before you can find the Defendant guilty you must find beyond a reasonable doubt that on or about February 4, 2017, and in Licking County, Ohio, the Defendant was served with a copy of a protection order and recklessly violated the terms of a protection order.
>
> Served means actual delivery of the protection order to the Defendant.
>
> * * * *.
>
> T. 161-162.

{¶21} As both parties point out, appellant did not object to the jury instruction at trial. The failure to object to a jury instruction waives any claim of error relative thereto unless, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Lindsay*, 5th Dist. Licking No. 06CA0057, 2007–Ohio–2211, ¶ 30, citing *State v. Underwood*, 3 Ohio St.3d 12, 444 N.E.2d 1332 (1983), at syllabus. The "plain error rule" should be applied with utmost caution and should be invoked only to prevent a clear miscarriage of justice. *Id*. Jury instructions must be reviewed as a whole. *State v. Williams*, 5th Dist. Fairfield No. 14-CA-44, 2015-Ohio-1675, ¶ 29, appeal not allowed, 143 Ohio St.3d 1543, 2015-Ohio-4633, 40 N.E.3d 1180, citing *State v. Coleman,* 37 Ohio St.3d 286, 290, 525 N.E.2d 792(1988).

{¶22} The trial court's instruction was taken verbatim from Ohio Jury Instructions. In *State v. Schell*, the Ninth District addressed a similar argument regarding language in the instruction about service of the protection order. 9th Dist. Summit No. 28255, 2017-

Ohio-2641. "[T]he instructions found in the Ohio Jury Instructions are not mandatory, [but] they 'are recommended instructions based primarily upon case law and statutes[.]'" *Schell*, 2017-Ohio-2641 at ¶ 40, citing *State v. Armstrong*, 9th Dist. Summit No. 24479, 2009–Ohio–5941, ¶ 13, internal citations omitted. When a jury instruction tracks with the language of the Ohio Jury Instructions, there is no plain error. *Id*., citing *State v. Harwell*, 2nd Dist. Montgomery No. 25852, 2015–Ohio–2966, ¶ 64. Ohio Jury Instruction CR 519.27 applies to R.C. 2919.27, violation of a protection order. Id. at ¶ 41. Based on the evidence presented at trial, the trial court gave the jury instruction provided in Ohio Jury Instruction CR 519.27, including definitions of "[s]erved" and "recklessly." Id. A review of the filed jury instructions reflects that the language used by the trial court substantially mirrors Ohio Jury Instruction CR 519.27 and is a correct statement of law. Id.

{¶23} We further note the language of the O.J.I. instruction arises from *State v. Smith,* 136 Ohio St.3d 1, 2013–Ohio–1698, 989 N.E.2d 972, in which the Supreme Court of Ohio stated: "[t]o sustain a conviction for a violation of a protection order pursuant to R.C. 2919.27(A)(2), the state must establish, beyond a reasonable doubt, that it served the defendant with the order before the alleged violation." Appellee's Exhibit 4, a certified copy of the C.P.O., plainly states the order was personally served upon appellant by "Deputy M. Collins" on October 15, 2013. Additionally, the evidence established appellant has previously been convicted of violating the same order more than once. Any inference by appellant that appellee somehow failed to demonstrate he was served with the C.P.O.

is not well-taken.[2] See, *State v. Jackson*, 6th Dist. Sandusky No. S-15-020, 2016-Ohio-3278, ¶ 10, appeal not allowed, 147 Ohio St.3d 1413, 2016-Ohio-7455, 62 N.E.3d 186.

{¶24} The trial court in this case gave a jury instruction that was essentially the same as the jury instruction provided in the Ohio Jury Instructions. Upon review, the jury instruction complied with United States and Ohio Supreme Court law. *See, State v. Ellis*, 5th Dist. Fairfield No. 02CA96, 2004-Ohio-610, ¶ 33.

{¶25} Appellant also argues his conviction is against the manifest weight and sufficiency of the evidence because Wilson "guessed" the distance between where he allegedly saw appellant and Jane Doe's residence, and Ptl. Black improperly used Google Maps to determine the distance. Upon our review of the record, we disagree with appellant. Wilson was unequivocal in his identification of appellant as the driver of the dark green car, and equally unequivocal about appellant's location in the trailer park the second time Wilson spotted him. Appellee's Exhibit 2-L, admitted during Wilson's testimony, shows Doe's trailer within view of the spot (T. 91-92), a distance Black visually estimated as 200 to 300 feet (T. 119). Black used Google maps to double check his visual estimate and both were less than 500 feet. The jury could reasonably find appellant was within the prohibited distance of Jane Doe's home, or the parking area thereof. The weight of the evidence and the credibility of the witnesses are determined by the trier of

[2] We recognize we have previously ruled this appellant was served with this order. In *State v. Ybarra*, 5th Dist. Licking No. 16-CA-16, 2016-Ohio-5761, at ¶ 13, involving the same appellant, victim, and C.P.O. as the instant case, we found "[a]ppellant was served with the full protection order and therefore was not at liberty to disobey the order on the basis that he had not been served with notice of the underlying hearing." We therefore affirmed appellant's conviction upon one count of violation of a protection order.

fact. *State v. Yarbrough*, 95 Ohio St.3d 227, 231, 2002-Ohio-2126, 767 N.E.2d 216, ¶ 79.

{¶26} Viewing the evidence in a light most favorable to appellee, we find the jury could have found the essential elements of violation of a protection order proven beyond a reasonable doubt. Additionally, after reviewing the entire record, weighing the evidence and all reasonable inferences, and considering the credibility of the witnesses, we find in resolving conflicts in the evidence, the jury did not clearly lose its way.

{¶27} Appellant's sole assignment of error is overruled.

CONCLUSION

{¶28} Appellant's sole assignment of error is overruled and the judgment of the Licking County Court of Common Pleas is affirmed.

By: Delaney, P.J.,

Hoffman, J. and

Wise, Earle, J., concur.