

[Cite as *State v. Velez*, 2011-Ohio-5220.]

STATE OF OHIO            )  
                                  )ss:  
COUNTY OF LORAIN      )

IN THE COURT OF APPEALS  
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No.     11CA009999

Appellant

v.

OLGA VELEZ

APPEAL FROM JUDGMENT  
ENTERED IN THE  
COURT OF COMMON PLEAS  
COUNTY OF LORAIN, OHIO  
CASE No.    08CR077033

Appellee

DECISION AND JOURNAL ENTRY

Dated: October 11, 2011

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DICKINSON, Judge.

INTRODUCTION

{¶1} Olga Velez was arrested in connection with a drug-trafficking investigation targeting her son, Angel Bauzo, and his cousin, Jose Matos. Ms. Velez was charged with complicity to commit money laundering, complicity to trafficking in drugs, and falsification. Although the trial court permitted the admission of 18 recorded phone calls between Ms. Velez and Mr. Bauzo, it refused to allow the State to present additional recorded phone conversations not involving Ms. Velez. The trial court excluded the additional recordings based on its determination that the State had not provided prima facie evidence that Ms. Velez was a participant in a conspiracy as required for admission under Rule 801(D)(2)(e) of the Ohio Rules of Evidence. The State appealed the adverse ruling during its case in chief. This Court affirms the judgment of the trial court because the State did not proffer the additional recordings it intended to present to the jury.

## BACKGROUND

{¶2} The lead detective in this matter testified that he had secured permission to intercept and record telephone conversations on three different telephone lines over the course of 2 ½ months. The State collected thousands of recordings in that time. During Ms. Velez’s trial, the court listened to exhibit 30, a recording of 18 intercepted calls between Ms. Velez and her son, Mr. Bauzo. After reviewing the exhibit, the trial court permitted the State to play it for the jury over Ms. Velez’s objection. During a hearing outside the presence of the jury, the State indicated that it intended to offer “[approximately] 33 other calls between Angel Bauzo and other various individuals[.]” The parties argued about whether the additional recordings met the requirements for admissibility of out-of-court statements of co-conspirators under Rule 801(D)(2)(e) of the Ohio Rules of Evidence. The trial court determined that the State had presented sufficient evidence of a conspiracy, but excluded the recorded statements because it “[wa]s not satisfied that [the State] show[ed] . . . prima faci[e] evidence that this defendant is a participant in this conspiracy.” The State immediately appealed under Rule 12(K) of the Ohio Rules of Criminal Procedure.

## EXCLUSION OF EVIDENCE

{¶3} The State’s assignment of error is that “the trial court erred in excluding statements made in furtherance of a conspiracy when the State established a prima facie showing of a criminal conspiracy [involving Ms. Velez].” Under Rule 801(D)(2)(e) of the Ohio Rules of Evidence, “[a] statement is not hearsay if . . . [it] is offered against a party and is . . . a statement by a co-conspirator of a party [made] during the course of and in furtherance of the conspiracy upon independent proof of the conspiracy.” Thus, the co-conspirator rule permits the admission of an out-of-court statement of a co-conspirator if five conditions are met. The proponent must

show that (1) a conspiracy existed (2) the defendant participated in the conspiracy (3) the declarant participated in the conspiracy (4) the statement was made during the course of the conspiracy and (5) the statement was made in furtherance of the conspiracy.

{¶4} Under Rule 103(A)(2) of the Ohio Rules of Evidence, “[e]rror may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, and . . . the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.” “The purpose of a proffer is to assist the reviewing court in determining, pursuant to [Rule 103 of the Ohio Rules of Evidence], whether the trial court’s exclusion of evidence affected a substantial right of the appellant.” *State v. Mullins*, 2d Dist. No. 21277, 2007-Ohio-1051, at ¶36 (quoting *In re Walker*, 162 Ohio App. 3d 303, 2005-Ohio-3773, at ¶37).

{¶5} In this case, the State made no effort to introduce the “[approximately] 33 other” recordings it intended to use against Ms. Velez or even to summarize the untold number of out-of-court statements contained therein. When the trial court announced its decision to exclude the recordings, the State asked the Court to “journalize its findings with regard to [the exclusion of the other recorded calls] and to save the jury[.]” but made no mention of offering the recordings to be included in the record for appellate purposes. Based on the record in this matter, this Court has no indication of what evidence was excluded except that it was contained in “about 33 other calls” that involved Mr. Bauzo speaking to “various individuals” other than Ms. Velez. There is no other indication of the identities of the “various” declarants in those recordings or the content of their statements.

{¶6} This Court need not consider whether the trial court properly determined that the State failed to present prima facie evidence that Ms. Velez was involved in the conspiracy

because the record is insufficient to support a finding that the trial court's ruling is reversible error. It is unclear whether any of the out-of-court statements were made in furtherance of the conspiracy and how useful each would have been in supporting the State's case against Ms. Velez. Without reviewing the excluded evidence, this Court is unable to determine whether the evidence was admissible under Evidence Rule 801(D)(2)(e) and, if so, whether the trial court's exclusion of it affected a substantial right of the State. See Crim. R. 52(A) ("Any error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded."). The State has failed to meet either of the Evidence Rule 103(A) requirements for basing an appeal on an adverse evidentiary ruling. The assignment of error is overruled.

#### CONCLUSION

{¶7} This Court is unable to review the State's assignment of error without a proffer of the excluded evidence. The judgment of the Lorain County Common Pleas Court is affirmed, and this matter is remanded for proceedings consistent with this opinion.

Judgment affirmed.

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There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is

instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

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CLAIR E. DICKINSON  
FOR THE COURT

CARR, P. J.  
MOORE, J.  
CONCUR

APPEARANCES:

DENNIS P. WILL, Prosecuting Attorney, and BILLIE JO BELCHER, Assistant Prosecuting Attorney, for Appellant.

MARK B. MAREIN and STEVEN L. BRADLEY, Attorneys at Law, for Appellee.