[Cite as *State v. Duncan*, 2017-Ohio-9378.]

STATE OF OHIO, NOBLE COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 16 NO 0440
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
ANTHONY D. DUNCAN	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Court of Common Pleas of Noble County, Ohio Case No. 216-2047

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Atty. Kelly A. Riddle
Noble County Prosecutor
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Caldwell, Ohio 43724
No Brief Filed

For Defendant-Appellant: Atty. Jacob T. Will
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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Carol Ann Robb

Dated: December 22, 2017

WAITE, J.

{¶1} Appellant Anthony D. Duncan appeals from his felony conviction entered in the Noble County Court of Common Pleas. He raises a number of issues, including the admissibility of recorded telephone calls between Appellant and one of his visitors, the trial court's decision to overrule his request to wear civilian attire in the court, and the weight of the evidence. For the foregoing reasons, the judgment of the trial court is affirmed.

Procedural and Factual History

{¶2} On October 9, 2015, Carl Alexander, a mailroom employee at the Noble County Correctional Institution ("NCCI") charged with scanning and reviewing all incoming mail for offenders, discovered two envelopes addressed to inmate Chod Clark and bearing his inmate number. These had Suboxone affixed under the stamps. Alexander notified his supervisor and the envelopes were photographed and secured in a vault. Jared McGilton, an institutional investigator at NCCI, began an investigation of the incident and notified Trooper Shawn Allar, who was assigned to NCCI, who also began an investigation. Trooper Allar turned the envelopes over to Robin Ladd at the Ohio Bureau of Criminal Investigations who examined the envelopes and found eight partial fingerprints. She matched the fingerprints to Crystal Anderson, aka Seresun ("Crystal"). Ladd reported this information to Trooper Allar who in turn relayed it to McGilton, who entered Crystal's name into the NCCI database. Crystal's name came up as one of Appellant's registered visitors. McGilton also accessed Appellant's prison email account and Appellant's home address. It was revealed that Appellant shared a home address with Crystal. The

email account contained this email sent to Crystal from Appellant: "His name is Chod Clark, 715-178, have your friend write him he's a cool guy. I think she will like him but I love you so much and miss you too, love you." (Tr., p. 59.) Based on this information, McGilton spoke with Appellant about the drugs found on Clark's pieces of mail. Appellant denied all involvement.

{¶3} McGilton was also able to utilize the NCCI database to retrieve outgoing phone calls made by Appellant to Crystal. There were approximately twenty telephone conversations reviewed by Trooper Allar. Pursuant to NCCI rules, each call could last no more than fifteen minutes. Some were only five minutes in duration. The calls began with the inmate identifying himself by name before the call could be accepted by the recipient. Trooper Allar testified at trial that he reviewed the phone calls and then spoke with Appellant for approximately "60 seconds, 2 minutes." (Tr., p. 52.) Trooper Allar testified that he recognized Appellant's voice as the same voice identified as "Tony" in the telephone calls. (Tr., pp. 52, 54.) As there were technical difficulties in playing the recorded calls in court, Trooper Allar read from a transcript of the calls, all made to the same telephone number. This number was given to NCCI by Crystal when she applied to be Appellant's visitor. Trooper Allar read transcripts of five of the telephone calls, all of which consisted of the caller identifying himself as "Tony." Each telephone call involved the same topic: the caller asking the listener about picking up stamps and writing a letter. While all of the calls are made to Crystal's telephone number, the recipient never identified herself by name during the calls. Reading one transcript Trooper Allar stated:

> On October 2nd, 2015, 09:24 hours inmate Anthony Duncan calls Crystal Seresun, identifies himself as Tony with the prompted recording. Mr. Duncan says, "you was supposed to get those stamps and shit today". Ms. Seresun says, "I'm getting up". Mr. Duncan says, "mom said they sell those envelopes at the post office, so did your girl write that letter". Ms. Seresun, "I told her to last night". Mr. Duncan, "you're dragging your feet". Crystal "she is writing it right now, she's writing it and I'll look it over, I told her not to put her name or mine". Mr. Duncan, "shut up, shut up, shut up, put something on the". Ms. Seresun, "I told her to make up a name". Mr. Duncan, "listen it's a pen pal thing, did you get that". Ms. Seresun, "I got everything except". Mr. Duncan, "alright, alright, go get the things and get to the post office, get what I tell you". And that is the end of the transcription for that particular call.

(Tr., p. 54.)

{¶4} Trooper Allar read four more transcripts into the record. All were follow up calls which occurred prior to the discovery of the drugs in the mailroom and all were from "Tony" and purportedly made to Crystal. Crystal failed to appear at trial after being subpoenaed and was not interviewed by anyone involved in the investigation prior to charges being filed against Appellant.

{¶5} Trooper Allar completed his investigation and written report. He testified at trial that he had the opportunity to speak with Appellant but did not conduct an interview.

{¶6} On May 25, 2016, the Noble County Grand Jury indicted Appellant on one count of complicity (illegal conveyance of prohibited items onto the grounds of a detention facility), in violation of R.C. 2923.03(A)(1), a felony of the third degree. On June 30, 2016, Appellant pleaded not guilty and counsel was appointed. On November 14, 2016, Appellant filed a motion for trial clothing. In a judgment entry dated November 15, 2016, the trial court granted Appellant's motion permitting him to wear "prison blues." The matter proceeded to a jury trial on November 21, 2016. The jury found Appellant guilty and the trial court sentenced him on the same day to a term of 24 months of incarceration to be served consecutively to the sentence Appellant was currently serving for a Guernsey County offense.

{¶7} Appellant filed this appeal asserting three assignments of error.

ASSIGNMENT OF ERROR NO. 1

THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO WEAR CIVILIAN CLOTHES AT TRIAL.

{¶8} In his first assignment of error, Appellant contends he was highly prejudiced by the trial court's denial of his motion to wear civilian clothing at trial.

{¶9} Courts have recognized a defendant may be prejudiced by appearing at trial in jail clothes. *State v. Collins*, 6th Dist. No. L-05-1399, 2007-Ohio-3578, ¶ 27, citing *Estelle v. Williams*, 425 U.S. 501, 507 (1976). In *Estelle*, the United States

Supreme Court held that a defendant's right to due process is violated when he is compelled to stand trial before a jury while wearing identifiable prison clothing. *Id.* at 512. At the same time, the Court declined to establish a per se rule to invalidate any conviction where the accused wore prison garb at trial. *Id.* See *State v. Smith,* 2d Dist. No. 21058, 2006-Ohio-2365, ¶ 26. In reaching its decision, the Court recognized both that a defendant may be prejudiced by appearing in jail clothing and that a defendant might purposely elect, as a matter of trial strategy, to stand trial in such attire. *Estelle* at 504-505. See *State v. Gandy*, 1st Dist. No. C-050804, 2006-Ohio-6282, ¶ 4. Taking into consideration these apparently opposing principles, the relevant inquiry becomes not merely whether the defendant appeared before the jury in prison attire, but whether he was compelled to appear in prison garb. *Estelle*, 425 U.S. at 507; *Gandy* at ¶ 4; and *Smith* at ¶ 26.

{¶10} The record contains Appellant’s motion to wear civilian clothing. In its judgment entry the trial court did not explicitly overrule this motion, but granted permission for Appellant to attend his trial in “prison blues.” Presumably, this attire was less likely to be identified as prison garb by jurors. There was no objection from Appellant at trial concerning his attire. “[T]he failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation.” *Estelle*, 425 U.S. at 512-513. Moreover, Appellant could not have been prejudiced by wearing his prison blues since the jury was already aware that Appellant was a

prisoner: the crime he was charged with involved his complicity to convey drugs into a prison.

{¶11} The majority of the testimony presented by the state included an analysis of the discovery of the contraband in the NCCI mailroom, the subsequent NCCI investigation and transcripts from Appellant's telephone calls made from within the prison. All of this renders Appellant's assignment less than compelling, because all of the evidence directly related to Appellant's conduct while he was incarcerated as a prisoner. See *State v. Garrett,* 5th Dist. No. 03-CA-49, 2004-Ohio-2231, at ¶ 41 (concluding that it was, at most, harmless error for the defendant to attend trial in shackles and prison attire because "the jury was already aware that [he] was a prisoner"); *State v. Powers*, 106 Ohio App.3d 696, 700-701 (1995), quoting *State v. Chitwood*, 83 Ohio App.3d 443, 449 (1992) (noting that, because they jury was told the defendant previously had been convicted of the same violent crime for which he was on trial, "the possibility of any prejudice inuring to him as a result of a brief viewing in shackles * * * became extremely remote"). Appellant failed to object at trial, and has waived this argument. Regardless, as the evidence before the jury overwhelming revealed that Appellant was currently incarcerated, Appellant cannot demonstrate prejudice, and so, cannot demonstrate that the trial court erred in granting him permission only to wear prison blues. Appellant's first assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 2

THE TRIAL COURT ERRED IN PERMITTING OUT-OF-COURT TESTIMONIAL STATEMENTS.

{¶12} In his second assignment of error Appellant contends the trial court erred in permitting the introduction of telephone calls made by Appellant to Crystal because Crystal was not present at the trial for cross-examination by Appellant. Appellant contends the entire case against him was based on the transcripts of the telephone calls between Appellant and Crystal. He claims that because these transcripts were erroneously admitted, reversible error exists. Appellant does not dispute that Crystal was the recipient of these calls. He argues only that she was not present at trial to be cross-examined, allegedly violating the Sixth Amendment's Confrontation Clause.

{¶13} The admission of evidence lies within the broad discretion of the trial court. *State v. Issa,* 93 Ohio St.3d 49, 64, 752 N.E.2d 904 (2001). However, the Sixth Amendment's Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him." Sixth Amendment to the U.S. Constitution. In the past, an out-of-court declaration by an unavailable witness did not run afoul of the Confrontation Clause if it was accompanied by adequate "indicia of reliability." *See, e.g., Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980) (if the declaration "falls within a firmly rooted hearsay exception" or exhibits "particularized guarantees of trustworthiness"). In 2004 in *Crawford v. Washington,* 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the United States Supreme Court held testimonial statements by declarants

who do not appear at trial may not be admitted unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Id.* at 68. The Sixth Amendment's Confrontation Clause applies only to testimonial statements and does not apply to nontestimonial statements. *State v. Siler*, 116 Ohio St.3d 39, 2007-Ohio-5637, 876 N.E.2d 534, ¶ 21. The bar to "testimonial" statements applies "at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Crawford* at 68. The *Crawford* Court held that a police interrogation of the defendant's wife at a station house (after she and her husband were arrested and *Mirandized*) involved testimonial (as opposed to nontestimonial) statements, which were ruled inadmissible. *Id.* at 38, 52-53. When a testimonial statement is involved, the Confrontation Clause requires a showing of both the declarant's unavailability and the defendant's opportunity to have previously cross-examined the declarant. *Id.* If the statement is nontestimonial, it is merely subject to the admissibility requirements of the hearsay rules. *Id.*

{¶14} To determine whether a statement to a person not engaged in law enforcement is testimonial, the "objective witness" test is applied. *Siler* at ¶ 26-27. This test requires the court to determine whether an objective witness would have reasonably believed that her statement would be available for use at a later trial. *State v. Stahl,* 111 Ohio St.3d 186, 2006-Ohio-5482, 855 N.E.2d 834, ¶ 36. The test focusses on the expectation of the declarant at the time the statement was made. The intent of the questioner is irrelevant unless it could affect a reasonable declarant's expectations. *Id.*

{¶15} At trial, counsel for Appellant objected to the statements made by Crystal during the telephone conversations based on hearsay and confrontation grounds. The trial court overruled the objections pursuant to Evid.R. 801(D)(2)(e). The trial court also noted that Crystal was subpoenaed but failed to appear at trial. (Tr., pp. 46-47.)

{¶16} In sharp contrast to the prosecution in *Crawford,* the state in the instant case introduced statements made between two alleged co-conspirators with no law enforcement involvement. Unlike *Crawford,* this case does not involve police interrogation. As previously noted, the term "testimonial statement" applies "at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." *Crawford* at 68. Crystal's statements to Appellant do not fall within any of these examples and Appellant provides no legal authority for the expansion of *Crawford's* application to jailhouse telephone calls. See *Stahl,* ¶ 18.

{¶17} In *Stahl* the Ohio Supreme Court noted:

> The court in *Crawford* expressly declined to define "testimonial," but it did give three examples of "formulations" for "testimonial statements" that historical analysis supports. 541 U.S. at 51–52, 124 S.Ct. 1354, 158 L.Ed.2d 177. The first deems testimonial all " '*ex parte* in-court testimony or its functional equivalent — that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that

> declarants would reasonably expect to be used prosecutorially.' " Id. at 51, 124 S.Ct. 1354, 158 L.Ed.2d 177, quoting Crawford's brief. The second includes all " 'extrajudicial statements * * * contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions.' " Id. at 52, 124 S.Ct. 1354, 158 L.Ed.2d 177, quoting *White v. Illinois* (1992), 502 U.S. 346, 365, 112 S.Ct. 736, 116 L.Ed.2d 848 (Thomas, J., concurring). And the third includes " 'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " Id., quoting the brief of amicus curiae National Association of Defense Lawyers.

Id. at ¶ 19.

{¶18} Moreover, the Court in *Stahl* declined to "trample other forms of hearsay to which the right of confrontation does not apply." *Id.* at ¶ 21. Accordingly, the statements made by Crystal and read into the record at trial were made in the course of, and in furtherance of, the conspiracy. In addition to the frequency of the calls, all made to Crystal's number on record with NCCI, the statements by Appellant include repeated demands: "you need to get those stamps" and "call the post office and get this s**t taken care of." Crystal replies, "we have a problem, you can see them" and Appellant injected "through the envelope," and Crystal responds "through the stamp you can see the outline of it. I'm afraid to send the [sic] them cause everything is done." (Tr., pp. 55, 57.)

{¶19} Evid.R. 801(D)(2)(e) provides that a statement is not considered hearsay if it is an admission by a party-opponent, is a statement made against a party, or "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy." The Supreme Court of Ohio recognized that "[t]he statement of a co-conspirator is not admissible pursuant to Evid.R. 801(D)(2)(e) until the proponent of the statement has made a prima facie showing of the existence of the conspiracy by independent proof." *State v. Carter,* 72 Ohio St.3d 545, 651 N.E.2d 965 (1995), paragraph three of the syllabus.

{¶20} Independent evidence established that a conspiracy to convey drugs into the prison existed based on the testimony of Ladd that Crystal's fingerprints were found on the envelopes, as well as the testimony of McGilton that Crystal was registered as a visitor for only Appellant at NCCI. There was evidence that Appellant had sent emails to Crystal from his NCCI email account discussing the issue and evidence that Appellant and Crystal shared the same residence and home telephone number. A majority of the incriminating statements during the phone calls were made by Appellant and not Crystal, which implicates the provisions of Evid.R. 804(B)(3), statements against interest. This record reflects the state established a *prima facie* case of conspiracy. The telephone transcripts were admitted into evidence only after independent proof of a conspiracy was shown. *Carter* at 972. Therefore, the statements between Appellant and Crystal do not fall under the definition of "testimonial statements" as established in *Crawford.* The statements made between

Crystal and Appellant fall squarely under the Evid.R. 801(D)(2)(e) hearsay exception, statements by a co-conspirator. Appellant's second assignment of error is without merit and is overruled.

ASSIGNMENT OF ERROR NO. 3

THE DEFENDANT'S CONVICTION WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE.

{¶21} Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other." (Emphasis deleted.) *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). "Weight is not a question of mathematics, but depends on its effect in inducing belief." (Emphasis deleted.) *Id.*

{¶22} When reviewing a manifest weight of the evidence argument, a reviewing court must examine the entire record, consider the credibility of the witnesses and determine 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. *Id.* at 387, 389. Only in exceptional circumstances will a conviction be reversed as against the manifest weight of the evidence. *Id.* This strict test for manifest weight acknowledges that credibility is generally within the province of the factfinder, who sits in the best position to accurately assess the credibility of the witnesses. *State v. Hill*, 75 Ohio St.3d 195, 204, 661 N.E.2d 1068 (1996); *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967).

{¶23} The jury, as trier of fact, was able to hear and observe the testimony of each witness on direct and cross-examination. The determination of witness credibility was in the province of the jury. The jury could rationally believe the testimony of the state's witnesses regarding the investigation into the incident that began with the discovery of the mailroom contraband. McGilton and Trooper Allar both testified that they spoke to Appellant and that they were familiar with his voice. Hence, they were able to recognize his voice on the phone calls made to Crystal. Moreover, the calls emanated from Appellant's prison phone pin number and the caller gave his name as "Tony" when prompted. Those calls were made to Crystal's telephone number. She shared a residential address with Appellant and was listed as Appellant's only registered visitor at the prison. Finally, evidence of email communications between Appellant and Crystal and regarding the contraband was presented. These were sent via Appellant's prison email.

{¶24} In evaluating a manifest weight of the evidence argument, we must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the witnesses and determine 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. *Thompkins*, 78 Ohio St.3d at 387. Reviewing this record, we conclude that it does not present an exceptional case where the jury clearly lost its way and created a manifest miscarriage of justice.

{¶25} Sufficiency of the evidence is a legal question dealing with adequacy. *State v. Pepin–McCaffrey*, 186 Ohio App.3d 548, 2010-Ohio-617, 929 N.E.2d 476, ¶ 49 (7th Dist.), citing *Thompkins* at 386

{¶26} "Sufficiency is a term of art meaning that legal standard which is applied to determine whether a case may go to the jury or whether evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Draper*, 7th Dist. No. 07 JE 45, 2009-Ohio-1023, ¶ 14, citing *State v. Robinson*, 162 Ohio St. 486, 124 N.E.2d 148 (1955). To discharge the state's burden when prosecuting a criminal offence, "probative evidence must be offered" on "every material element which is necessary to constitute the crime." *State v. Billman*, 7th Dist. Nos. 12 MO 3, 12 MO 5, 2013-Ohio-5774, ¶ 8, citing *State v. Martin*, 164 Ohio St. 54, 57, 128 N.E.2d 7 (1955). In a sufficiency review, a reviewing court does not determine "whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *State v. Rucci*, 7th Dist. No. 13 MA 34, 2015-Ohio-1882, ¶ 14, citing *State v. Merritt*, 7th Dist. No. 09 JE 26, 2011-Ohio-1468, ¶ 34.

{¶27} A person who is guilty of complicity in the commission of an offense is prosecuted and punished as if he were a principal offender. R.C. 2923.03(F). Appellant was convicted of complicity to illegally convey prohibited items onto the grounds of a detention facility in violation of R.C. 2923.03(A)(1), a felony of the third degree, which states in part: "No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following: (1) Solicit or procure another to commit the offense."

{¶28} As previously discussed, the state must show the defendant shared the criminal intent of the principal, and this intent may be inferred from the circumstances surrounding the crime and from the defendant's conduct before, during, and after the offense. *State v. Johnson*, 93 Ohio St.3d 240, 245, 754 N.E.2d 796 (2001). In addition, circumstantial evidence and direct evidence inherently possess the same probative value. *See, e.g., In re Washington*, 81 Ohio St.3d 337, 340, 691 N.E.2d 285 (1998); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph one of the syllabus.

{¶29} Appellant concedes that Crystal is the recipient of the phone calls that were transcribed and read into the record by Trooper Allar. His contention does not involve Crystal, he merely contends that the state failed to authenticate Appellant made the calls. Appellant says that neither Trooper Allar nor McGilton spoke with him enough times to reliably authenticate his voice, and that Crystal, who did not testify at trial, was the only credible witness who could have identified Appellant's voice on those calls. Because Appellant claims the state's case relied on the telephone calls, without proper authentication of Appellant as the caller the state failed to meet its burden. Appellant argues that without the evidence contained in the telephone calls, the case against him fails.

{¶30} McGilton testified that he spoke to Appellant fewer than six times, with each conversation lasting approximately two to three minutes. Trooper Allar testified that he spoke with Appellant once for about one to two minutes. Although neither witness spoke with Appellant at length, evidence was presented to the jury that both

witnesses who had listened to the telephone calls had also spoken with Appellant and could recognize his voice. Moreover, the state presented evidence that, with one exception, the calls all emanated from Appellant's personal pin number. Appellant acknowledged that he had bartered with another inmate to use his pin number to obtain additional telephone time, explaining the discrepancy. The caller always announced his name was Tony when prompted and the calls were made to Crystal's home number, a number on record as Appellant's home telephone number, also.

{¶31} Despite Appellant's assertions, the state presented additional evidence of conspiracy. This evidence included emails to Crystal from Appellant's account, Crystal's fingerprints on the envelopes containing the contraband, and the fact that Crystal's only connection to NCCI was as a registered visitor for Appellant. Viewing the evidence in a light most favorable to the prosecution, a rational juror could have found the elements of the offense proven beyond a reasonable doubt. *See State v. Goff,* 82 Ohio St.3d 123, 138, 694 N.E.2d 916 (1998). Appellant's third assignment of error is without merit and is overruled.

{¶32} Based on the above, Appellant has failed to demonstrate the trial court abused its discretion in ordering him to wear prison blues at trial, as there was substantial evidence before the jury that the offense was committed while Appellant was incarcerated. Appellant's telephone conversations with Crystal read into the record are not testimonial statements under *Crawford* and are permissible under the hearsay exceptions to the evidence rules. Finally, Appellant's conviction for

complicity to illegal conveyance of prohibited items onto the grounds of a detention facility was not against the manifest weight or sufficiency of the evidence. Based on the foregoing, all of Appellant's assignments of error are without merit and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Robb, P.J., concurs.