[Cite as *State v. Tabor*, 2012-Ohio-4642.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-07-076
	:	O P I N I O N
- vs -		10/8/2012
	:	
KENNETH TABOR,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT OF COMMON PLEAS
Case No. 10CR26783

David Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Craig A. Newburger, 477 Forest Edge Drive, South Lebanon, Ohio 45065, for defendant-appellant

HENDRICKSON, J.

{¶ 1} Appellant, Kenneth Tabor, appeals from his conviction for domestic violence in the Warren County Court of Common Pleas. For the reasons stated below, we affirm the decision of the trial court.

{¶ 2} On July 4, 2010, police responded to a report of domestic violence between appellant and his wife, Khishigjargal Altantsetseg, at the couple's home. When the police

arrived, wife was very upset and indicated that appellant had assaulted her. Wife also informed the police that she was eight months pregnant. Thereafter, wife filed a criminal complaint against appellant alleging domestic violence. A victim advocate was assigned to assist wife with the criminal case against her husband. Wife and the victim advocate met twice in person and spoke over the phone several times regarding the case.

{¶ 3} On August 22, 2010, a preliminary hearing was held where wife testified that appellant jumped on her, choked her, and put his knees on her belly. Wife also stated that appellant threw many of her clothes outside of their apartment. During the hearing, appellant's counsel cross-examined wife regarding the incident that night and her reaction to the alleged violence. A police officer also testified that upon responding to the scene, he found wife crying hysterically and clothes scattered around the apartment and outside the home. The officer also saw red marks around her neck and a bruise on her leg. After the court bound over the charge, appellant's bench trial was scheduled for January 10, 2011. A few days before the trial, wife indicated to the prosecution that she did not want to testify against appellant. Although wife was served with a subpoena and told by the prosecutor that she had to honor that subpoena, wife did not appear for trial. The trial was continued until February 22, 2011, at the prosecution's request.

{¶ 4} After the trial was continued, wife was served with notice regarding the new trial date. The victim advocate attempted to contact wife several times by sending her a letter with the new trial dates and by leaving multiple messages on her voicemail. However, wife did not return any of these calls or the correspondence. The week prior to trial, the advocate attempted to call wife again but received a message that she was no longer at that number. After this message, the advocate and the prosecutor went to the apartment complex where wife had been residing.

{¶ 5} Upon arriving at wife's last known residence, the advocate and the

prosecutor knocked but received no response from anyone in the apartment. However, a neighbor informed them that wife had moved into a different section of the apartment complex. The advocate and prosecutor drove to this new section, got out of their car, and saw wife come out of one of the apartments. The prosecutor moved into the parking lot where wife was able to see him. Wife paused and then proceeded to get into her car and drive away. The advocate and the prosecutor followed wife's car for a length of time and pulled up directly behind her car and honked the horn to get her attention but wife's vehicle sped off.

{¶ 6} On February 17, 2011, the prosecution filed a motion to call wife as a court's witness. The motion requested this action because "of th[e] apparent lack of cooperation with the prosecution of this case and in an effort to ascertain the truth of the matter in this case." Subsequently, a bench trial was held on February 22, 2011, where wife failed to appear again. Instead of addressing the state's pending motion, the trial court proceeded to receive evidence as to whether wife was unavailable. The prosecution introduced testimony of the victim advocate who explained the efforts she and the prosecutor undertook to secure wife's presence for trial. The trial court found wife to be an "unavailable" witness and admitted into evidence her preliminary hearing testimony. Thereafter, appellant was convicted of one count of domestic violence, in violation of R.C. 2919.25(A), a fifth-degree felony, in that the offender knew the victim was pregnant at the time of the violation. Appellant was sentenced to six months imprisonment.

{¶ 7} Appellant now appeals the trial court's decision, raising a single assignment of error:

{¶ 8} THE TRIAL COURT ERRED WHEN THE COURT ADMITTED INTO EVIDENCE TESTIMONY FROM DEFENDANT'S PRELIMINARY HEARING BY A WITNESS NOT PRESENT AT TRIAL.

{¶ 9} In appellant's sole assignment of error, he argues that the trial court erred when it admitted into evidence wife's preliminary hearing testimony when she was not present at trial. Specifically, he argues that the prosecution did not meet its burden to show that wife was "unavailable."

{¶ 10} In general, out-of-court statements offered to prove the truth of the matter asserted are excluded from trial. Evid.R. 802. However, an "unavailable" declarant's out-of-court statements are admissible when the statements are "[t]estimony given as a witness at another hearing of the same or different proceeding * * * if the party against whom the testimony is now offered * * * had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." Evid.R. 804(B)(1). Moreover, "[t]estimony given at a preliminary hearing must satisfy the right to confrontation and exhibit indicia of reliability." *Id.*

{¶ 11} The Sixth Amendment, applicable to the states through the Fourteenth Amendment, states, "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him." The Confrontation Clause provides that a declarant's "testimonial" out-of-court statements will be admitted against the accused only if the declarant is unavailable to testify and the accused had a prior opportunity to cross-examine the declarant. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1352 (2004). Statements given at a preliminary hearing are "testimonial" for purposes of the Confrontation Clause. *Id*. at 68. Thus, when the prosecution wishes to offer preliminary hearing testimony against a criminal defendant where the defendant had a prior opportunity to cross-examine the declarant, the pivotal question for purposes of the Confrontation Clause turns on whether the declarant is "unavailable."

{¶ 12} A declarant is unavailable for purposes of the Confrontation Clause and Evid.R. 804 (A)(5), when the declarant is "absent from the hearing and the proponent of

the declarant's statement has been unable to procure the declarant's attendance * * * through process or other reasonable means." *State v. Keairns*, 9 Ohio St.3d 228, 232 (1984). The prosecution must establish the unavailability of the declarant based upon the testimony of witnesses rather than hearsay which was not procured under oath, unless unavailability is conceded by the party against whom the statement is being offered. *Id.*

{¶ 13} The prosecution must show that the declarant is unavailable despite reasonable efforts made in good faith to secure his presence at trial. *Keairns* at 230. The United States Supreme Court has noted, "* * * if there is a possibility, albeit remote, that affirmative measures might produce the declarant, the obligation of good faith *may* demand their effectuation. 'The length to which the prosecution must go to produce a witness * * * *is a question of reasonableness*.'" (Emphasis added.) *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531 (1980), overruled in part on other grounds, citing *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930 (1970). However "* * * it is always possible to think of additional steps that the prosecution might have taken to secure the witness' presence * * * but the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising." *Hardy v. Cross*, 132 S.Ct. 490, 495 (2011).

{¶ 14} The measures the prosecution must undertake in order to fulfill its burden of reasonableness and good faith depends on the facts and circumstances of each case. In *State v. Nix*, 1st Dist. No. C-030696, 2004-Ohio-5502, the First District found that the state made reasonable efforts when the unavailable witness was subpoenaed and the prosecution was aware of the witness' present location. The court reasoned that the subpoenas, multiple visits by the state to the witness' last known address including a visit

in which a detective spoke to the witness, satisfied the state's burden. *Id.* at ¶ 28-31.[1] Moreover, this court has affirmed the introduction of an unavailable witness' prior testimony when the state undertook several measures in securing a witness' presence for trial including sending certified letters, issuing subpoenas, making phone calls to the witness' previous place of employment, and contacting local hospitals and police departments. *State v. Alexander*, 12th Dist. No. CA89-10-059, 1990 WL 82571 (June 18, 1990). Although in *Alexander*, the prosecution took many efforts in attempting to procure the witness' presence, the prosecution was not aware of the witness' present location and never made contact with the witness. *Id.* at *1.

{¶ 15} However, this court has reversed a judgment where an unavailable declarant's preliminary hearing testimony was admitted in trial. *State v. Welling*, 12th Dist. No. CA85-07-079, 1985 WL 3689 (Nov. 18, 1985). In *Welling,* the prosecution contacted several out-of-state agencies in attempting to find a witness' out-of-state address but failed to follow up with a out-of-state police department in locating the witness. *Id.* at *7. Importantly, the prosecution was not aware of the witness' present location, never spoke with the witness regarding the case, and never served the witness with a subpoena. *Id.* Although we encouraged the prosecution to more "energetically pursue" leads regarding a witness' location, the trial court's decision was reversed because of the cumulative effect of several errors throughout the course of the trial and not solely because of the admission of the unavailable declarant's testimony. *Id.* at * 8, *11.

{¶ 16} We find that the trial court did not err in admitting wife's preliminary hearing testimony. Initially, we note that wife's preliminary hearing testimony is testimonial and that appellant had a prior opportunity to cross-examine wife and a similar motive to

1. Although the court noted that the prosecution failed to present admissible evidence in the unavailability hearing regarding these attempts; this fact did not change the court's conclusion that the state made a "reasonable" and "good faith" effort in attempting to secure the witness's presence at trial. *Nix* at ¶ 31.

develop her testimony as he was testing the reliability and credibility of wife's assertions. Moreover, wife's testimony exhibited sufficient "indicia of reliability" as her testimony was consistent with the police officer's observations of the scene and the injuries she sustained from the incident. Appellant's counsel also had an adequate opportunity to cross-examine wife and counsel availed himself of this opportunity, and wife testified under oath. *See State v. Strickland*, 10th Dist. No. 06AP-1269, 2008-Ohio-1104, ¶ 60; *State v. Garnett*, 1st Dist. No. C-090471, 2010-Ohio-3303, ¶ 10. Therefore, our inquiry turns on whether the prosecution's efforts at procuring wife's presence at trial were "reasonable" and in "good faith."

{¶ 17} Upon a thorough review of the record, we find that the prosecution made "reasonable" and "good faith" efforts to secure wife's presence at trial. Wife was personally served with a subpoena regarding the first and second trial date. The prosecution made multiple efforts at contacting wife, including telephone calls, certified mail service, and a physical visit to her last known address. Moreover, wife saw the prosecutor and the advocate during their visit and avoided their presence. We disagree with appellant's assertion that our prior decision in *Welling* requires that we reverse the trial court's finding. In *Welling*, we found that the cumulative effect of all the errors in trial demanded that we reverse the trial court's judgment. Although we encouraged the prosecution to more "energetically pursue" leads regarding a witness' location, we did not find that this fact alone meant the state did not met its burden. Importantly, in *Welling,* the state was not aware of the witness' location and the witness was never successfully subpoenaed.

{¶ 18} We find our decision in *Alexander* is more comparable to the present case. In both *Alexander* and the present case, the prosecution made multiple attempts to locate the unavailable witnesses. Although the prosecution did not undergo the extent of efforts

that the state took in *Alexander,* in this case wife was subpoenaed for the second trial date, the state was aware of wife's present location, and the state had made contact with wife. More notable is the fact that the state brought wife's lack of cooperation to the trial court's attention by filing a motion to call wife as a court's witness. Thus, the state actually took affirmative measures to secure wife's presence at trial. This case is similar to *Nix* because wife was subpoenaed, the prosecution made affirmative measures to secure wife's presence at trial, including visiting wife's last known address, and wife repeatedly made efforts to avoid contact with the prosecution or come to trial. Thus, it is clear from the specific facts of this case that the state fulfilled its burden to secure wife's presence at trial.

{¶ 19} Therefore, the trial court did not err when it admitted wife's preliminary hearing testimony. Appellant's sole assignment of error is overruled.

{¶ 20} Judgment affirmed.

POWELL, P.J., concurs.

PIPER, J., concurs separately.

PIPER, J., concurring separately.

{¶ 21} I am disappointed that the state did not request a bench warrant pursuant to Crim.R. 17(G) the first time the witness did not obey the subpoena. Similarly, after the witness repeatedly displayed a lack of cooperation, I would have expected the state to seek a material witness warrant pursuant to R.C. 2937.18.

{¶ 22} Mindful that the state has a responsibility to produce even an uncooperative witness, I acknowledge that the state did attempt to gain the witness' voluntary participation. Despite the warning flags, the state still thought the witness was going to

appear for court. Otherwise, it would not have filed the motion to have the witness declared a witness for the court so that the state could elicit the truth with the use of cross-examination.

{¶ 23} Within the limited facts presented, I cannot find that the trial court's decision to admit the preliminary hearing transcript was unreasonable, arbitrary, or unconscionable. Therefore, I concur with the majority's decision.