IN THE UTAH COURT OF APPEALS

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Salt Lake City,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellee,	)	
	)	Case No. 20081057-CA
v.	)	
	)	F I L E D
James Francis Denier,	)	(February 4, 2010)
	)	
Defendant and Appellant.	)	2010 UT App 24

Third District, Salt Lake Department, 081900493
The Honorable Robin W. Reese

Attorneys: Charity Shreve, Salt Lake City, for Appellant
Padma Veeru-Collings, Salt Lake City, for Appellee

Before Judges Davis, Thorne, and Greenwood.[1]

DAVIS, Presiding Judge:

Defendant James Francis Denier appeals his conviction for violation of a protective order limiting his contact with Catherine Samuel. Denier argues that the trial court made erroneous evidentiary rulings and that there was insufficient evidence to support a guilty verdict. We affirm.

Denier first argues that the trial court erred in allowing testimony by a certain police officer because it was hearsay. See generally Utah R. Evid. 802 ("Hearsay is not admissible except as provided by law or by these rules."). "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Id. R. 801(c). "Whether proffered evidence meets the definition of hearsay . . . is a question of law, reviewed for correctness. Nevertheless, because application of the hearsay rules in a specific case is so highly fact-dependent, a district court's conclusions on such issues are entitled to some measure of deference." Wayment v. Clear Channel Broad., Inc., 2005 UT 25, ¶ 44, 116 P.3d 271 (citations omitted).

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[1]The Honorable Pamela T. Greenwood, Senior Judge, sat by special assignment pursuant to Utah Code section 78A-3-102 (2008) and rule 11-201(6) of the Utah Rules of Judicial Administration.

The statement left on Samuel's answering machine, as it was used in this case, does not meet the definition of hearsay. The police officer testified,

> [The caller] had indicated to [Samuel], like I say, that he knew the conversation was being recorded. He was talking about complaints that had been filed over the last eight or nine years, and that they'd all been found false or, his words were that they were found innocent, not guilty. He was talking, he did talk about "this is about our son, not about you, not about me."

This statement was not presented to prove the truth of any of the matters asserted--that the conversation was being recorded, that Denier had been found innocent of previous complaints, or that the issue was about the couple's child. Instead, the statement was presented as evidence that the message Samuel claimed was left by Denier[2] actually existed and that the message said nothing of visitation with the child. See generally State v. Olsen, 860 P.2d 332, 335 (Utah 1993) ("[I]f an out-of-court statement is 'offered simply to prove that it was made, without regard to whether it is true, such testimony is not proscribed by the hearsay rule.'"). Thus, the statement did not qualify as hearsay and was properly allowed.[3]

Denier next argues that the trial court should not have disallowed, as irrelevant, testimony regarding the visitation order relating to Denier and Samuel's child. See generally Utah R. Evid. 402 ("Evidence which is not relevant is not admissible."). The term "relevant evidence" is defined broadly: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Id. R. 401. "A trial court has broad discretion in deciding whether evidence is relevant, and we review a trial court's relevance determination for abuse

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[2]Samuel testified that she was well acquainted with Denier's voice, that she recognized that it was Denier's voice in the recording, and that she had caller ID on her phone that confirmed Denier was the source of the call.

[3]Because of our ruling on this matter, we need not determine if the challenged statement was an admission by a party-opponent. See generally Utah R. Evid. 801(d)(2) (providing that admissions by a party-opponent are not hearsay).

of discretion." State v. Fedorowicz, 2002 UT 67, ¶ 32, 52 P.3d 1194.

Considering the very small degree of possible relevance of the visitation order specifying whether Denier was entitled to visitation during the holidays--making it slightly more or less probable that the call from Denier would have related to visitation--we cannot say that the trial court abused its broad discretion in determining that the evidence was not relevant. This is especially true where the trial court was never told what the visitation order provided regarding holiday visitation at the time at issue.[4] But even if disallowing the testimony was an abuse of the trial court's discretion, and even assuming that Denier would have testified that the visitation order provided that he was entitled to visitation at the time at issue, we do not see that the exclusion of such testimony was prejudicial. In light of the other evidence before the jury--testimony by both Samuel and the police officer that the content of the message did not relate to visitation as well as the fact that Denier was unable to remember even leaving the message and could not, therefore, testify as to what it said--we are not convinced that there is a reasonable likelihood that with the disallowed testimony the jury would have determined that the call was actually regarding visitation. See generally State v. Evans, 2001 UT 22, ¶ 20, 20 P.3d 888 ("[H]armless error is an error that is sufficiently inconsequential that there is no reasonable likelihood that it affected the outcome of the proceedings. Put differently, an error is harmful only if the likelihood of a different outcome is sufficiently high that it undermines our confidence in the verdict." (citation omitted)).

Finally, Denier challenges the trial court's denial of his motion to dismiss at the close of the State's case-in-chief, arguing that there was insufficient evidence from which a jury could find him guilty. "The denial of a motion to dismiss for failure to establish a prima facie case is a question of law we review for correctness." State v. Spainhower, 1999 UT App 280, ¶ 4, 988 P.2d 452.

> Evidence is sufficient, and the denial of a motion to dismiss proper, if "the evidence and all inferences that can be reasonably drawn from it [establish that] some evidence exists from which a reasonable jury could

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[4]Because Denier never answered the challenged question and because counsel made no proffer of the testimony, it is unclear from the record what the visitation order provided regarding holiday visitation at the time at issue.

find that the elements of the crime had been proven beyond a reasonable doubt."

Id. ¶ 5 (alteration in original) (quoting State v. Dibello, 780 P.2d 1221, 1225 (Utah 1989)).

Denier argues that the evidence here "compels the determination that the conversation between Samuel and Denier related to their son and Denier's visitation rights and therefore was not a violation of the protective order." But such a view of the evidence is in a light most favorable to Denier. Instead, when reviewing the sufficiency of the evidence, we must look at the evidence in a light most favorable to the State. See State v. Boyd, 2001 UT 30, ¶ 13, 25 P.3d 985 ("To succeed on this claim [of insufficient evidence, the defendant] must marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict." (internal quotation marks omitted)). In such a light, there was sufficient evidence to support the charge here. Samuel testified that the message on her machine was from Denier, and the police officer specifically testified that the message mentioned nothing of visitation. Such is sufficient evidence from which a fact finder could find, beyond a reasonable doubt, that Denier was guilty of violating the protective order. We do not agree that the police officer's testimony that Denier stated "this is about our son, not about you, not about me" could lead only to the conclusion that the call was an attempt "to effectuate reasonable visitation," which is the only type of permissible contact listed in the protective order. Thus, the trial court did not err in denying Denier's motion to dismiss.

Affirmed.

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James Z. Davis, Presiding Judge

WE CONCUR:

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William A. Thorne Jr., Judge

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Pamela T. Greenwood, Senior Judge