

IN THE SUPREME COURT OF OHIO

State of Ohio,

Plaintiff-Appellee,

vs.

Jeffrey E. Gray,

Defendant-Appellant.

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District.

07-0853

Court of Appeals
Case No. 06AP-15

**MEMORANDUM IN SUPPORT OF JURISDICTION OF DEFENDANT-APPELLANT
JEFFREY E. GRAY**

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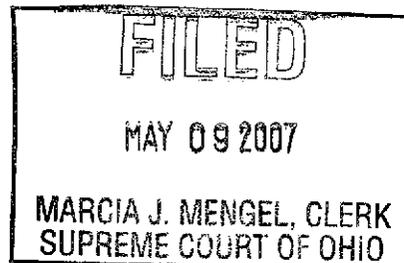


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I. THE PRESENT CASE INVOLVES MATTERS OF PUBLIC AND GREAT GENERAL INTEREST

The present case involves the improper admission of a 911 tape during a bench trial in which the trial court indicated that the tape was persuasive evidence of guilt. The defense had timely objected to the tapes because they contained inadmissible hearsay. The judge overruled the objection on the ground that the tapes were not hearsay since they were comparable to writings, recordings, or photographs, which he believed were admissible under "Article V" of the Ohio Rules of Evidence. The judge further held that statements did not constitute a present sense impression, excited utterance, or mental or other physical condition exception to the hearsay rule as there was insufficient foundational evidence for the hearsay exceptions.

The Court of Appeals properly held that the trial court erred in admitting the 911 statements on the ground that they were properly authenticated. *State v. Gray*, Franklin App. No. 06AP-15, 2007-Ohio-1504, at ¶8. Satisfying the evidentiary restrictions contained in other articles of the Rules of Evidence does not relieve a party of the responsibility of abiding by the hearsay restrictions contained in Article VIII. The Court of Appeals, however, found that there was an alternative ground for admitting the first 911 call – that the statements constituted excited utterances. This holding was erroneous and creates misleading and far-reaching legal precedent for two reasons.

First, the appellate court applied the incorrect standard in assessing the admissibility of the evidence. There was little to no evidence in the record to support a finding that the declarant was actually in an excited state sufficient to satisfy the standard set forth for the Evid.R. 803(2) exception. No one questioned the witness about her state of mind at the time she made the 911 call and there was no testimony

about her condition during the call. The Tenth District, however, applied an objective standard, which was based on the general circumstances and likelihood that a person in the position of the declarant would be in an excited state. The correct standard is a subjective one – based on the actual condition of the declarant. A court, especially a reviewing court, cannot assume that the declarant is in an excited state based on the circumstances surrounding the statement. The holding of the Tenth District permits such a finding and is inconsistent with the holding of the Eleventh District in *State v. Kalia*, Trumbull App. No. 2002-T-0023, 2003-Ohio-4226.

Second, the Tenth District ignored the trial court's holding that there was insufficient evidence to support a finding that the statement was admissible as an excited utterance. The appellate court should have applied an abuse of discretion standard in reviewing the judge's evidentiary ruling. The simple rejection of the judge's factual determination constituted error and set a dangerous precedent for reviewing evidentiary matters.

Both rulings at best further confuse an already complex legal issue. At worst, the rulings provide inconsistent, contradictory, and legally flawed analysis. Both propositions impact a substantial number of parties – civil and criminal, plaintiff and defendant. As a result, both propositions should be accepted for further review by this Court.

II. STATEMENT OF THE CASE

On August 7, 2005, two complaints were filed in the Franklin County Municipal Court charging Jeffrey E. Gray, defendant-appellant (hereinafter, Appellant), with assault, a violation of Columbus City Code section 2303.13, and domestic violation, a violation of R.C. 2919.25.

On December 6, 2005, a bench trial commenced before Judge Paul Herbert of the Franklin County Municipal Court. At the end of the prosecution's case, the court granted the prosecution's motion to amend the complaints to remove allegations that Appellant struck the alleged victim with a fist. Since the prosecuting witness did not see the blow, or who struck her, she was unable to identify the object that was used.

At the end of all the evidence, the court found Appellant guilty of both offenses. The court imposed a sentence of 180 days on the domestic violence charge. Of this term, the court suspended two days for time served, suspended 177 days on condition that Appellant successfully complete one year of reporting probation, and ordered one (1) day to be served. The court ordered Appellant to pay court costs in the amount of \$150.

Jeffrey Gray appealed the judgment of the Franklin County Municipal Court. In a decision rendered on March 30, 2007, the Franklin County Court of Appeals upheld the judgment of the trial court. On April 6, 2007, Appellant filed an Application for Reconsideration. That application is still pending before the Court of Appeals. Appellant is now before this Court seeking leave to appeal in a misdemeanor case.

III. STATEMENT OF FACTS

On August 7, 2005, Melinda and Jeffrey Gray (Appellant) were married, separated, and in the process of getting a divorce. They had two children: Steven, age five, and Kara, age 2. Appellant called his wife around 1 p.m. that day to tell her that he had to pick up his brother in Chillicothe. She told him that would be fine.

Appellant testified that between 4:00 and 4:30 p.m., he and his girlfriend brought the children to his wife's residence at 321 Belvidere Avenue. Because he brought the children back early, he purchased some food for them at McDonalds.

Appellant let his son out of the car and carried his daughter to the porch. His daughter, who was in the process of being potty-trained, had just had an accident and was wet. Appellant placed his daughter on the porch, which is about four feet high. Appellant never went onto the porch. As he was standing in front of the porch, Appellant asked Melinda for a gun that he owned. His son said that she had given the gun to "Uncle Jimmy." Appellant was annoyed because "Uncle Jimmy" could not legally own a gun, it was Appellant's gun, and, contrary to Melinda's claims, Appellant had never threatened her. Moreover, the gun was not operable because Appellant had inadvertently jammed shells into it and had to tear it apart to remove them. Appellant characterized the exchange as a small argument, and could not recall exactly what was said. Melinda testified that she was upset because her daughter was wet. She indicated that she had given the gun away because the windows in her home were unsafe and couldn't be secured. She also believed that Appellant had threatened her with the weapon.

Melinda Gray testified that when she bent over to check her daughter's pants, she was hit with something below her right eye. She did not see Appellant strike her and could not tell whether she was struck by a hand or an object. Melinda believed that Appellant had struck her because he was standing to her right, on the ground, about a foot and a half away. Appellant's girlfriend was about ten feet from them. Melinda's daughter was in front of her, and her son was behind her. According to Melinda, Appellant jumped into his girlfriend's car and drove away. Melinda went inside their house and called 911 within 1 to 1-1/2 minutes. She called the 911 operator back a short time later to cancel the request for a medic because she did not need medical assistance. The court introduced both 911 tapes over defense objection.

Melinda indicated that it was about 6 p.m. when she first called the 911 operators. She conceded, however, that the report she filed with the police on the day of the incident stated that the assault occurred around 5:05 p.m. The discrepancy in time undermined Melinda's version of events. She indicated that she immediately called 911 to report the offense and that the officer arrived about 10-20 minutes after the call. Columbus Police Officer Zachary Weekley testified that he responded to the 911 call around 6:41 p.m., well after the time the offense occurred. When he arrived, Officer Weekly took photographs of Melinda Gray, who had a bruise over her right eye. The officer found Melinda to be pretty calm.

Donna Hall, a cashier at the Great Southern Kroger store for nine years, testified that she had been dating Appellant for about six months at the time of the incident. Hall had been with Appellant every time he dropped his kids off. Although Appellant usually

returned the children between 6:00 and 6:30, he came earlier because they had to pick up Appellant's brother in Chillicothe.

According to Hall, Appellant carried his daughter to the porch and then returned to the car to get their food and drinks. He placed the food on the porch and asked his wife about a gun that he owned. Melinda started to say something to Appellant, who tried to walk away and get in her car. Appellant told Hall to just ignore the woman and drive away. Melinda was still yelling at them as they pulled away. Hall, who never left the car, was about 15-30 feet away from the porch. She could still hear their conversations because the car window was down. Hall had a clear line of sight of Appellant and Melinda and did not see Appellant touch her. As they were leaving, Hall heard Melinda Gray call out, "Watch out, he'll hit you."

Appellant testified that he was standing below Melinda and to her right. There was no way that he could have struck her without being seen. After returning his children, Appellant proceeded to Chillicothe, having no reason to believe that the police were looking for him. He arrived at Chillicothe about 5:30 to 6:00 p.m. The trip normally takes between an hour and an hour and a half.

The parties, who had separated in April of 2005, were in the midst of divorce proceedings at the time the incident occurred. In addition, Melinda Gray indicated that she had called Franklin County Children Services to complain about Appellant because their daughter had been in wet and soiled pants when Appellant dropped her off.

IV. ARGUMENT

FIRST PROPOSITION OF LAW

A court must apply a subjective standard in determining whether statements from a declarant satisfy the excited utterance exception to the hearsay rule, as set forth in Evid.R. 803(2), because the court must find that the declarant had actually experienced sufficient nervous excitement as to make her statements spontaneous and unreflective.

The Rules of Evidence prohibit the use of hearsay, which is defined as "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." Evid. R. 801(C); Evid. R. 802. The 911 tape in the present case was offered by the prosecution as proof of the claims asserted in it and was introduced to bolster the testimony of Melinda Gray, who was the caller. The defense timely objected to the statements contained in the tape. The trial court refused to find that any of the hearsay exceptions applied to the 911 tape. Instead, the court determined that hearsay restrictions did not govern admission of the tapes. The court overruled defense objections in the following manner:

Q. Did you, prior to testifying today, Miss Gray, have an opportunity to listen to a tape recording of the 911 call that you made to the Columbus Police Department?

A. Yes, I did.

Q. Okay. Did you recognize the voice on the tape?

A. Yes.

Q. And whose voice was it?

A. It was mine.

MR. TOBIAS: And with the Court's permission, I would like to play the audiotape for Miss Gray. I have previously allowed Mr. Hood to listen to it.

MR. HOOD: I'm going to object under hearsay. Just note my exception.

THE COURT: Overruled.

MR. HOOD: Your Honor, you're finding, what exactly is it made under?

MR. TOBIAS: It's not hearsay. It's her actual statement. She's not testifying to an out-of-court statement from someone else.

MR. HOOD: She may not - - Clarify the availability to testify. It may be out-of-court statements being offered only for the truth of the matter asserted, but it's definitely - -

MR. TOBIAS: As long as I authenticated it with the proper foundation being laid and it's made contemporaneously with the incident, Judge.

THE COURT: It would be like objecting to a photograph. I mean - -

MR. HOOD: Well, I understand that, Your Honor, but this is a statement, which is a bit different. If he wants to try to put it into an exception, he should lay the proper foundation.

MR. TOBIAS: I'm going to do that right now.

MR. HOOD: It hasn't been admitted with the proper foundation.

The parties and the court then debated the definition and applicability of the hearsay rules to the taped 911 calls. The prosecution initially argued that the hearsay rule did not apply to out-of-court statements made by the witness on the stand. The court suggested that the fact that the witness is subject to cross examination excuses compliance with the hearsay restrictions. The prosecution then offered exceptions to the hearsay rule, noting that the 911 tapes would be admissible as present sense impressions, excited utterances, and existing mental, emotional, and physical condition. (Evid.R. 803(1), (2), and (3)). The court found that there were insufficient facts to support a finding that the 911 tapes were admissible under any of the cited hearsay exceptions.

Instead, the court admitted the taped statements for the reason that they were not hearsay. The following discussion appears on the record:

THE COURT: All right. I'm not going to find her statements as hearsay. This is my finding, but I'm going to find that this would fall under Article V of the Ohio Rules of Evidence, contents of writings, recordings and photographs, and as long as it's relevant and its probative value outweighs the prejudicial, it comes in as evidence as long as it's either the original or can be properly authenticated.

So, like the photographs, as we talked about earlier, I think if they can properly authenticate this recording and it's relevant and its prejudicial value doesn't outweigh the probative value, I think it comes in as evidence. So that's my ruling.

MR. HOOD: Proper authentication? The Court's opinion is the proper authentication has been made?

THE COURT: Well, he asked her if she listened to a previous recording and she said yes. He said, "Do you recognize the voice on that?" She said, "Yes, it was mine." Now, he hasn't introduced that as an exhibit yet. Has that been labeled as an exhibit?

MR. TOBIAS: It has. I'm going to ask the Court to - - I'm going to identify it and ask the Court to allow me to play it to ask her if it's a fair and accurate recording of the call she made on the date in question.

THE COURT: Right. I think at this point he's established it.

MR. TOBIAS: Just because you hear it doesn't mean it's evidence yet. It still has to be properly admitted before you can consider it.

THE COURT: Not to be too academic here, but I'm just not sure that - - As a matter of fact, I don't think it's a hearsay issue because ***I don't think it falls under present sense impression, excited utterances or mental or other physical condition. But I think to fall under one of those three, you would have to lay a bit more foundation*** on that but - -

MR. HOOD: So you are finding it's not hearsay?

THE COURT: Right. It's a recording, and it can be authenticated as a recording.

MR. HOOD: Thank you.

THE COURT: Go ahead and play the tape.

Because the court admitted the tapes as being properly authenticated, the state never elicited any additional testimony to support a claim that they were excited utterances. Instead, the court's finding that there was insufficient foundational testimony to support the excited utterance exception to the hearsay rule was not challenged.

The record lacked sufficient evidence to support a finding that the declarant was in such an excited state as to establish the hearsay exception. Of critical importance, Melinda, who was yelling for her boyfriend to come downstairs during the 911 call, did not testify that she was in such an excited condition that her statement was not the result of reflective thought. "To be admissible under Evid.R. 803(2) as an excited utterance, a statement must relate "to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." An out-of-court statement is admissible as an excited utterance is admissible despite its hearsay nature if the following four conditions are satisfied: (1) that there was some occurrence startling enough to produce a nervous excitement in the declarant, which was sufficient to still his reflective faculties and thereby make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, and thus render his statement or declaration spontaneous and unreflective, (2) that the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had been time for such nervous excitement to lose a domination over his reflective faculties, so that such domination continued to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, (3) that the statement or declaration related to such startling occurrence or the circumstances of such

startling occurrence, and (4) that the declarant had an opportunity to observe personally the matters asserted in his statement or declaration." *State v. Wallace* (1988), 37 Ohio St.3d 87, 89, quoting *Potter v. Baker* (1955), 162 Ohio St. 488, paragraph two of the syllabus. There was no evidence to support a finding that Melinda Gray was, at the time she called the police, in such a state as to make her statements spontaneous and unreflective. Moreover, when Officer Weekley interviewed the Melinda shortly after the first 911 call, she appeared to be "pretty calm."

The Tenth District relied on the factors set forth in *Potter v. Baker* to find that the declarant was in an excited state. *Gray*, at ¶11. The Court of Appeals noted that the call was made within a couple of minutes of the assault, before there was time for such nervous excited to lose domination over reflective faculties, that the occurrence was startling, and that the declarant had an opportunity to observe matters asserted in her statement. *Gray*, at ¶11. This determination, however, cannot be based on an objective review. While time, nature of the event, and opportunity to observe are necessary factors, they are not the only requirements. The critical question is whether the **declarant was experiencing** "such nervous excitement to lose a domination over [her] reflective faculties, so that such domination continued to remain sufficient to make [her] statements and declarations the unreflective and sincere expression of [her] actual impressions and beliefs ..." *Wallace; Potter*. "[T]he analysis of an excited utterance exception to the hearsay rule takes on a hybrid chemistry of more of a subjective state in the victim's reaction to a more objective requirement of what is a startling occurrence which produces a contemporaneous excited utterance..." *State v. Kalia*, Trumbull App. No. 2002-T-0023,

2003-Ohio-4226, at ¶21.¹ The declarant was not asked about her state of mind and the court noted that there was insufficient foundational testimony to support the hearsay exception. The declarant's subjective state was not considered. In short, there was insufficient testimony to support a finding that the declarant's 911 statements were excited utterances. The appellate court's finding is inconsistent with the holding of the Eleventh District in *Kalia* and sets an improper and confusing legal precedent. Further review is necessary to correct this error.

¹ The Court further noted in *Kalia*, that, "We would caution that this court's opinion on this issue in this case is not to be viewed as an opening of the floodgates to the objective test factors required for this exception to the hearsay rule." *Kalia*, at ¶21.

SECOND PROPOSITION OF LAW

Before an appellate court can reverse a factual finding that there was insufficient evidence in the record to establish an exception to the general prohibition against hearsay, the appellate court must find that the decision of the trial court constituted an abuse of discretion.

The trial court factually determined that the 911 tapes did not fall within any of the exceptions to the hearsay rule identified by the prosecutor. The trial court has broad discretion in the admission or exclusion of evidence. *State v. Sage* (1987), 31 Ohio St.3d 173. An abuse of discretion is more than an error of judgment, but instead demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, an appellate court may not substitute its judgment for that of the trial court unless the "court's attitude is unreasonable, arbitrary or unconscionable." *Gray*, at ¶7; *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

It is axiomatic that before the Court of Appeals can reject the evidentiary finding of the trial court, it must find that there judge's decision that there was insufficient foundational evidence (Tr. 29-29) amounted to an abuse of discretion. This Court made no such finding.

It is also clear from the record that the admission of the 911 tape was a deciding factor for the court. The court indicated in its oral findings of fact that it found the 911 tape to be persuasive and important to its decision to convict Appellant. The court noted the following:

She didn't seem to have any hidden agenda, which I was looking for, quite frankly; and I let you go into, under cross-examination, all of the different areas that I felt potentially could uncover some bias or motive on her part

for gaining an advantage. I didn't find her that particularly sophisticated. I'm sorry to say that, but I didn't find her that particularly sophisticated that she had that on her mind and manufactured an injury and called 911. I didn't find that to amount to an area of doubt.

The 911 tape was consistent with the injuries, the time and the victim's testimony. So I felt that the recording, that was properly authenticated. It corroborated the testimony. I listened very carefully, as you instructed me to do in your closing argument, as to all of the things that were said. And I played them back and listened to them again, and I found that the tape added to the - - added to my decision to convict in this case.

The Tenth District's holding suggests that the circumstances in the present case were such that an objectively reasonable person could have been in an excited state. Instead, the Court of Appeals should have determined whether there was sufficient evidence in the record to demonstrate that the declarant's actual emotional state was sufficient to establish the hearsay exception. The prosecution failed to elicit critical foundational evidence to support the admission of the testimony. Most importantly, as noted above, the Court of Appeals must find that trial court abused its discretion in holding that the 911 statements were not excited utterances. This is the standard of review that the Court should have applied.

The statements contained in the 911 tape were not just cumulative; they were critical to the outcome of the case. The court's findings clearly indicate the prejudicial effect of the evidence. Instead of determining whether the trial court abused its discretion in its evidentiary ruling, the appellate court conducted a de novo review of the record and determined that the 911 tapes were properly admitted under a hearsay exception rejected by the trial court. This error creates dangerous precedent for civil and criminal cases alike. It should be reviewed and rejected by this Court.

V. CONCLUSION

For the foregoing reasons, further review is appropriate. The Supreme Court should accept jurisdiction in this case as it involves matters of public and great general interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Support of Jurisdiction was delivered by hand to the office of the Columbus Prosecuting Attorney, 375 South High Street, Columbus, Ohio 43215, on this 9th day of May, 2007.

Paul Skendelas
PAUL SKENDELAS
Counsel for Appellant

IN THE SUPREME COURT OF OHIO

State of Ohio,
Plaintiff-Appellee,

vs.

Jeffrey E. Gray,
Defendant-Appellant.

On Appeal from the
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APPENDIX

Judgment Entry, March 30, 2007A-1
Opinion, March 30, 2007A-2

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State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 06AP-15
v.	:	(M.C. No. 2005 CR B 019356)
	:	
Jeffrey E. Gray,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on March 30, 2007, appellant's assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Municipal Court is affirmed. Costs shall be assessed against appellant.

BOWMAN, BRYANT, and PETREE, JJ.

By Donna Bowman
Judge Donna Bowman

BOWMAN, J., retired of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.

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Paul Skendelas, APD

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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State of Ohio,	:	
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Plaintiff-Appellee,	:	
	:	No. 06AP-15
v.	:	(M.C. No. 2005 CR B 019356)
	:	
Jeffrey E. Gray,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

O P I N I O N

Rendered on March 30, 2007

Richard C. Pfeiffer, Jr., City Attorney, Lara N. Baker, Chief Prosecutor, Matthew A. Kanai, and Tannisha D. Bell, for appellee.

Yeura R. Venters, Public Defender, and Paul Skendelas, for appellant.

APPEAL from the Franklin County Municipal Court.

BOWMAN, J.

{¶1} Defendant-appellant, Jeffrey E. Gray, was charged with assault, a violation of Columbus City Code 2303.13, and domestic violence, a violation of R.C. 2919.25. After a bench trial, appellant was found guilty of both charges. He was sentenced on the domestic violence count to 180 days of incarceration, of which he was credited with two days served, 177 days were suspended on the condition that he

successfully complete one year of reporting probation, leaving one day to be served. The trial court also ordered appellant to pay court costs of \$150.

{¶2} Appellant filed a notice of appeal and raises the following assignments of error:

FIRST ASSIGNMENT OF ERROR

The trial court erred in admitting two 911 calls to the police in an effort to bolster the testimony of the alleged victim. This violated Rules 801 and 802 of the Ohio Rules of Evidence.

SECOND ASSIGNMENT OF ERROR

There was insufficient evidence to support the guilty verdict, and the verdict was against the manifest weight of the evidence, thereby, depriving Appellant of his due process protections under that state and federal Constitutions.

{¶3} The charges arose out of an incident which occurred on August 7, 2005. The first witness to testify was Columbus Police Officer Zachary Weekley, who stated that, on that date, he responded to a domestic violence incident, interviewed the victim, Melinda Gray, and took photos of a bruise on her right eye. After the interview, he filed charges against appellant.

{¶4} Melinda Gray testified that she was married to appellant, but in the process of divorcing him. At the time of the incident, appellant was returning their two children after weekend visitation. Melinda and the children were standing on the porch and appellant was in the yard. Appellant asked Melinda about a gun he owned and wanted returned, but she stated she had given it to someone for safe keeping. He was angry and they were fighting. Appellant told Melinda that their daughter, who was two years old, had an accident and wet pants. Melinda was angry because this was not the first time appellant had returned their daughter with wet pants. Melinda bent over to

check her daughter's pants and was struck on the right side of her face. Appellant was standing in the yard, approximately one to one-and-a-half feet away from her. Appellant ran and entered the passenger seat of the vehicle and his girlfriend drove away. Melinda went inside and called 911. A few minutes later she called back to cancel the medic because she realized she could treat her injuries herself.

{¶5} Donna Hall, appellant's girlfriend, testified. She was driving the car and stayed in the car while appellant took his children to the porch. They usually return the children between 6:00 and 6:30 p.m., but appellant needed to drive to Chillicothe to pick up his brother so he called Melinda to arrange to drop off the children early. They stopped at McDonald's on the way and arrived at Melinda's house between 4:00 and 4:30 p.m. Appellant carried his daughter to the porch and asked Melinda about a gun he owned. Melinda said something back to him but he walked away and got back into the car. As they drove away, Melinda yelled: " 'Watch out, he'll hit you.' " (Tr. at 74.) Donna did not see appellant strike Melinda or touch her.

{¶6} Finally, appellant testified. He stated that he talked to Melinda about bringing the children back early and he arrived between 4:00 and 4:30 p.m. He placed his daughter on the porch and told Melinda she had wet pants and asked about his gun. They had a small argument about the gun, but "[i]t wasn't heated that bad where anybody was struck[,]" and then he left. (Tr. at 82.) He stated that he did not go onto the porch and did not hit Melinda.

{¶7} By the first assignment of error, appellant contends that the trial court erred in admitting two 911 calls to the police in violation of Evid.R. 801 and 802. The trial court has broad discretion in the admission or exclusion of evidence and, in the

absence of an abuse of discretion which results in material prejudice to a defendant, an appellate court should be slow to reverse evidentiary rulings. *Krischbaum v. Dillon* (1991), 58 Ohio St.3d 58, 66. An abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶8} At trial, appellant's initial objection was based upon hearsay.¹ The trial court determined that the 911 call was not hearsay, but that it was admissible as a recording under Article V of the Ohio Rules of Evidence, contents of writing, recordings and photographs, and, since it was authenticated, it was admissible. (Tr. at 28.) The trial court found the statement did not constitute a present sense impression, excited utterance or mental or other physical condition exception to the hearsay rule. (Tr. at 29.) Melinda testified that the voice in the 911 call was hers and the recording was a fair and accurate representation of the call she made immediately after being struck. (Tr. at 30-31.) While we disagree with the trial court's stated basis for admitting the calls, we find that the trial court did not err in admitting them.

{¶9} Hearsay is defined in Evid.R. 801(C) as "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." Evid.R. 803 provides exceptions to the hearsay, including excited utterances, as follows:

- (2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

¹ Appellee argues that appellant did not object to the telephone calls based upon hearsay, thereby waiving appellate review, but the initial objection was based on hearsay. (Tr. at 25.)

{¶10} In *State v. Taylor* (1993), 66 Ohio St.3d 295, 300-301, the Ohio Supreme Court outlined the requirements for admission of evidence as an excited utterance, as set forth in *Potter v. Baker* (1955), 162 Ohio St. 488, as follows:

"Such testimony as to a statement or declaration *may be* admissible under an exception to the hearsay rule for spontaneous exclamations where the trial judge reasonably finds (a) that there was some occurrence startling enough to produce a nervous excitement in the declarant, which was sufficient to still his reflective faculties and thereby make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, and thus render his statement or declaration spontaneous and unreflective, (b) that the statement or declaration, even if not strictly contemporaneous with its exciting cause, was made before there had been time for such nervous excitement to lose a domination over his reflective faculties, so that such domination *continued* to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs, (c) that the statement or declaration related to such startling occurrence or the circumstances of such startling occurrence, and (d) that the declarant had an opportunity to observe personally the matters asserted in his statement or declaration."
(Emphasis *sic.*) * * *

{¶11} Melinda's first telephone call meets these requirements. The assault constitutes a startling event and the telephone call was made within a couple minutes of the assault, before there was time for such nervous excitement to lose domination over her reflective faculties. The statement related to the startling occurrence and Melinda had an opportunity to personally observe the matters asserted in her statement. The telephone call fits within the excited utterance hearsay exception and is admissible. 911 calls are generally admissible as excited utterances or present sense impressions. See *State v. Banks*, Franklin App. No. 03AP-1286, 2004-Ohio-6522; *State v. Holloway*,
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Franklin App. No. 02AP-984, 2003-Ohio-3298.

{¶12} The second 911 call, while arguably not fitting within the excited utterance exception, even if admitted in error, is harmless. Although Melinda identified the voice as hers and stated that the recording was a fair and accurate representation of the telephone call, there was no information given in the call necessary to prove the elements of the offense. In the second call, Melinda merely told the operator to cancel sending the medic. No information that the prosecution relied upon was provided in that call. Even though the trial court may have used the wrong reasoning, it reached the correct result in admitting the 911 calls. Appellant's first assignment of error is not well-taken.

{¶13} By the second assignment of error, appellant contends that there was insufficient evidence to support the guilty verdict, and the verdict was against the manifest weight of the evidence, thereby depriving him of his due process protections under the state and federal constitutions. The standard of review for sufficiency of the evidence is if, while 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. *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386 .

{¶14} The test for determining whether a conviction is against the manifest weight of the evidence differs somewhat from the test as to whether there is sufficient evidence to support the conviction. With respect to manifest weight, the evidence is not construed most strongly in favor of the prosecution, but the court engages in a limited

weighing of the evidence to determine whether there is sufficient competent, credible evidence which could convince a reasonable trier of fact of appellant's guilt beyond a reasonable doubt. See *State v. Conley* (Dec. 16, 1993), Franklin App. No. 93AP-387.

* * * 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. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the *greater amount of credible evidence* sustains the issue which is to be established before them. Weight is not a question of mathematics, but depends on its *effect in inducing belief*." (Emphasis added.) Black's [Law Dictionary (6th Ed.1990)] at 1594). *Thompkins*, at 387.

{¶15} The state presented evidence that Melinda had a bruise on her right eye and Melinda testified that she and appellant were fighting about a gun. Although she did not see appellant hit her because she had bent over to check her daughter's wet pants, she testified appellant struck her on the right side of her face. Appellant was standing in the yard, approximately one foot to one-and-a-half feet away from her. Appellant ran and entered the passenger seat of the vehicle and his girlfriend drove away.

{¶16} Although appellant and his girlfriend testified that appellant did not hit Melinda, they both testified that Melinda and appellant had an argument and, as they were driving away, Melinda yelled to Donna: "Watch out, he'll hit you." (Tr. at 74; 86.)

{¶17} Appellant argues that the discrepancy over the time of the incident supports his innocence. Melinda testified that the normal drop-off time was approximately 6:00 p.m., and this incident occurred between 6:00 and 6:15 p.m. Within a few minutes she called 911 and approximately ten minutes later called back and the

police arrived approximately twenty minutes later. Donna Hall and appellant testified that they returned the children early, between 4:00 and 4:30 p.m., because they were driving to Chillicothe. Appellant's counsel questioned Melinda about her written statement to the police, in which she stated the incident occurred at 5:05 p.m. (Tr. at 36-37.) Officer Weekley arrived at Melinda's house at 6:41 p.m.

{¶18} The existence of conflicting evidence does not render the evidence insufficient as a matter of law. *State v. Murphy* (2001), 91 Ohio St.3d 516, 543. Nor is a conviction against the manifest weight of the evidence solely because there was inconsistent testimony. *State v. Kendall* (June 29, 2001), Franklin App. No. 00AP-1098. The trier of fact makes determinations of credibility and the weight to be given to the evidence. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶19} Appellant also argues that he was too far away from Melinda to hit her. He testified that the porch is approximately four feet high and he was standing beside the porch. However, both Melinda and appellant testified that Melinda bent down to check her daughter. Melinda testified that appellant was approximately one to one-and-a-half feet away from her. Appellant testified that he was standing at an angle to her right shoulder and Melinda was hit on the right side of her face. In this case, there was sufficient evidence that, while 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, and even if the evidence is not construed most strongly in favor of the prosecution, there is sufficient competent, credible evidence which could convince a reasonable trier of fact of appellant's guilt beyond a reasonable doubt. Appellant's second assignment of error is not well-taken.

{¶20} For the foregoing reasons, appellant's two assignments of error are overruled, and the judgment of the Franklin County Municipal Court is affirmed.

Judgment affirmed.

BRYANT and PETREE, JJ., concur.

BOWMAN, J., retired of the Tenth Appellate District, assigned to active duty under authority of Section 6(C), Article IV, Ohio Constitution.
