

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO

: CASE NO. 2011-2092

Plaintiff-Appellee

: On Appeal from the Fayette County
Court of Appeals, 12th Appellate District

vs.

:

KENNETH JACKSON

: Court of Appeals
Case No. CA2010-01-001

Defendant-Appellant

:
Trial Court Case No.: 10CRI00177
:

MEMORANDUM IN OPPOSITION TO JURISDICTION
OF APPELLANT, KENNETH JACKSON

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EXPLANATION AS TO WHY THIS CASE IS NOT OF PUBLIC OR GREAT GENERAL INTEREST AND DOES NOT INVOLVE A SUBSTANTIAL CONSTITUTIONAL QUESTION.

This case is not of public or great general interest and does not involve a substantial constitutional question as the issues brought forward by Appellant have been settled by the Twelfth District in prior decisions. Additionally, none of the Propositions of Law set forth by Appellant contain any issues which are in conflict among the lower courts in the State.

Appellant's First Proposition of Law concerns whether the trial court erred by admitting evidence without proper foundation and authentication. This issue is not an issue of public or great general interest and does not raise a substantial constitutional question. Additionally, the laws of the State of Ohio regarding the authentication of evidence are well settled on this issue and the lower courts are in agreement on this issue.

Appellant's Second Proposition of Law concerns whether the trial court was in error in admitting the testimony of his spouse in violation of the law concerning spousal privilege. The law in the State of Ohio is well settled on this issue and all of the lower courts are in agreement as to the appropriate standard to apply in reviewing cases involving a question of whether the trial court erred in admitting the testimony of a spouse with respect to spousal privilege issues. Additionally, the issue of whether a trial court was in error in admitting such evidence does not present an issue of public or great general interest and does not involve a substantial constitutional question.

Appellant's Third Proposition of Law concerns whether the trial court was in error in overruling Appellant's Motion for Acquittal pursuant to Rule 29. The law in the State of Ohio is well settled on such issue and all of the lower courts are in agreement as to the appropriate

standard to apply in reviewing cases involving a question of whether the trial court erred in denying a defendant Criminal Rule 29 motion for acquittal. Additionally, the issue of whether a trial court erred in overruling a Rule 29 Motion to Acquit does not present an issue of public or great general interest and does not involve a substantial constitutional question.

STATEMENT OF THE CASE AND FACTS

A. Procedural Posture

The Defendant was indicted by a Fayette County Grand Jury on September 10, 2010 for one count of Intimidation of a Witness in violation of R.C. 2921.04(B), a felony of the third degree. The matter proceeded to a jury trial on December 22, 2010. The jury found the Defendant guilty of Intimidation of a Witness. The matter proceeded to sentencing on December 27, 2010. The Defendant was sentenced to four years in prison, a mandatory term of post release control, and ordered to pay court costs.

B. Statement of Facts

In July and August of 2010 the Washington Court House Police Department was conducting a criminal investigation concerning the Defendant, Kenneth Jackson. T. at 26. During the course of that investigation, the Defendant's wife, Courtney Jackson, gave a statement to the police department. Id. Shortly after giving a statement to the police department, Courtney Jackson received a phone call from the Defendant who was in the Fayette County Jail. T. at 19-20.

Prior to the testimony of Courtney Jackson at the Defendant's trial, the Defendant objected to Courtney Jackson's testimony, to the phone call being played, and requested that Courtney Jackson be advised that she had a right not to testify. T. at 12-14. The trial court overruled said objections and found that R.C. 2945.42 provides for an exception to the spousal privilege when the crime charged has been committed against the testifying spouse. T. at 16. The trial court also relied on the exceptions set forth in Evidence Rule 601(B) in finding Courtney Jackson competent to testify. T. at 17. Said exceptions allow for a spouse to be

competent to testify against a spouse when the crime is against the testifying spouse or the testifying spouse elects to testify. Id.

Courtney Jackson, who at the time of the Defendant's trial had been married to the Defendant for one year, testified at his trial. T. at 18-19. Ms. Jackson gave a statement to the Washington Court House Police Department in August of 2010 regarding an investigation being conducted involving the Defendant. T. at 19. On August 27, 2010 Ms. Jackson received a phone call from the Defendant who was in the Fayette County Jail. Id. During the phone call, the Defendant made statements to Ms. Jackson regarding getting a protection order and coming to see her after he got out of prison. T. at 20. The Defendant told Ms. Jackson he would be coming to see her for giving a statement against him. T. at 22. After receiving the phone call, Ms. Jackson made a report to the police department regarding the phone call and subsequently obtained an ex parte civil protection order. T. at 23.

Ptl. Sockman and Ptl. Queen both testified at the Defendant's trial. They both testified to the fact that the police department was conducting an investigation concerning the Defendant and that Courtney Jackson gave a statement as part of that investigation. T. at 26 and 33. Ptl. Sockman took a report from Courtney Jackson regarding the phone call that she received from the Defendant. T. at 26. Ptl. Sockman contacted the Fayette County Sheriff's Office to obtain a recording of the phone call that the Defendant had made to Courtney Jackson. T. at 27. Ptl. Sockman also testified that he listened to the phone call and based on prior experience with the Defendant and Courtney Jackson he was able to identify the male voice as being the Defendant and the female voice as being Courtney Jackson. T. at 28-29. When Courtney Jackson contacted the police department after receiving the phone call from the Defendant she seemed to Ptl. Sockman to be fearful and he assisted her in obtaining a protection order against the

Defendant. T. at 30. Ptl. Queen also testified that Courtney Jackson appeared to be afraid during the time when she was making the report regarding the Defendant's phone call to her. T. at 33-34.

Sgt. Jodi Kelley, who is a communications supervisor at the Fayette County Sheriff's Office, also testified at the Defendant's trial. Sgt. Kelley's duties include overseeing phone recordings at the Fayette County Sheriff's Office. T. at 6. Sgt. Kelley was contacted by the Police Department and requested to "burn" a phone call onto a CD. T. at 7. The phone call was played for the jury and identified by Sgt. Kelley as the call that she placed onto a CD for the Police Department. T. at 10-11.

ARGUMENT

Proposition of Law No. 1:

The Trial Court erred by admitting evidence without proper foundation and authentication: Failing to authenticate State's Exhibit Prior to Admission

Because there was a proper foundation laid as to the authenticity of the recording of the phone call the Defendant placed to Courtney Jackson while he was in the Fayette County Jail and because the recording was properly authenticated the trial court was not in error by admitting the CD containing a recording of the phone call at the Defendant's trial. Evidence Rule 901 states that "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims". See Evid. R. 901. Evidence Rule 901 also sets forth examples of authentication or identification which would conform with the rule. Id. Those examples include testimony of a witness with knowledge and distinctive characteristics. Id. Pursuant to Evidence Rule 1002 in order "to prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by

statute enacted by the General Assembly....". See Evid. R. 1002. As the Twelfth District stated in *State v. Cook* "the admission or exclusion of evidence generally lies within the sound discretion of the trial court". See *State v. Cook*, 1987 Ohio App. LEXIS 8610.

Appellant first argues that a proper foundation was not presented to establish that State's Exhibit 1 was in fact a recording of the phone call the Defendant made from the Fayette County Jail to Courtney Jackson. Appellant is correct that Sgt. Kelley did not necessarily recognize the CD that was marked as State's Exhibit 1, however the recording was played for the jury and Sgt. Kelley testified that she recognized the contents of the call and that the recording was in fact the phone call that the Police Department requested a copy of and that she placed on a CD for the Police Department. Thus, Sgt. Kelley's testimony did lay a proper foundation that State's Exhibit 1 was in fact a CD containing the recording of the phone call at issue in this case.

Appellant next argues that the recording was not properly authenticated. Sgt. Kelley provided sufficient testimony to authenticate that the CD played at the Defendant's trial was the phone call that she had recorded at the request of the Police Department. Courtney Jackson testified that she had received said phone call from the Defendant while he was at the Fayette County Jail and Ptl. Sockman identified the male voice on the recording as being the Defendant and the female voice on the recording as being Courtney Jackson. The combination of this testimony, which would qualify as testimony of a witness with knowledge and distinctive characteristics, was sufficient to authenticate State's Exhibit 1. Sgt. Kelley, Courtney Jackson, and Ptl. Sockman were all witnesses with knowledge and there were also distinctive characteristics identifying the recording that these witnesses testified to. Both a witness with knowledge and distinctive characteristics are accepted methods of authenticating or identifying evidence under Evidence Rule 901.

Therefore, the trial court was not in error by admitting State's Exhibit 1 and the Defendant's conviction should be upheld.

Proposition of Law No. 2:

The Trial Court erred by allowing the testimony of Appellant's Spouse in violation of Privilege Laws: R.C. § 2945.42, Competency of Witnesses

The trial court was not in error by admitting the testimony of Courtney Jackson at the Defendant's trial as she was competent to testify and the spousal privilege does not allow the Defendant to prevent such testimony. As the Twelfth District pointed out in *State v. Adamson*, spousal competency, which is governed by Evidence Rule 601(B) "is a distinct legal concept from the confidential communication privilege (spousal privilege) recognized in R.C. 2945.42. Spousal competency is a broad concept which can operate to bar one spouse from testifying against the other spouse in a criminal proceeding, whether or not the events which would be testified to were confidential. The spousal privilege, on the other hand, only bars a spouse from divulging confidential information learned during the marriage." See *State v. Adamson*, 1994 Ohio App. LEXIS 20.

Evidence Rule 601 states that every person is competent to be a witness and then sets forth exceptions to said rule. Evidence Rule 601(B) covers the exception for spouses. Generally a spouse is not competent to testify against the other spouse who is charged with a crime. Evid. R. 601. However, if the crime is against the testifying spouse or a child of either spouse or the testifying spouse elects to testify a spouse is competent to testify. *Id.*

Although a spouse may be determined to be competent to testify R.C. 2945.42 "confers a substantive right upon the accused to exclude privileged spousal testimony concerning a confidential communication or act done during coverture..." See *State v. Baker*, 137 Ohio App. 3d 628 (2000). As the Twelfth District discussed in *State v. Carpenter*, a "husband or wife shall

not testify concerning a communication made by one to the other, or act done by either in the presence of the other, during coverture, unless the communication was made or act done in the known presence or hearing of a third person competent to be a witness, or in the case of personal injury by either the husband or wife to the other, or rape or felonious sexual penetration in a case in which the offense can be committed against a spouse, or bigamy, or failure to provide for.....” See *State v. Carpenter*, 83 Ohio App. 3d 842 (1992) and R.C. 2945.42. As this Court reasoned in *State v. Mowery*, the purpose of promoting marital peace which underlies marital privilege is not furthered by allowing a spouse who is accused of a crime against another spouse to prevent the victimized spouse from testifying. *State v. Mowery*, 1 Ohio St. 3d 192 (1982). Furthermore, “where evidence shows that incidents of coverture have been relinquished, no legitimate purpose would be served by the exclusion of spousal testimony....Absent coverture, a communication between spouses is not privileged”. See *Baker* citing *State v. Pisani*, 100 Ohio App. 3d 515 (1995).

Courtney Jackson was competent to testify, because she was the victim of the offense of which the Defendant was charged. The Defendant was charged with Intimidation of a Witness with the witness being Courtney Jackson. The charge of Intimidation of a Witness includes the element of an unlawful threat of harm and that threat of harm in this case was to the Defendant’s spouse, Courtney Jackson. Thus, under Evidence Rule 601(B) Courtney Jackson was competent to testify at the Defendant’s trial.

In addressing the issue of whether Courtney Jackson’s testimony was covered by the spousal privilege, the spousal privilege did not apply because, as the trial court stated in overruling the Defendant’s objections to Courtney Jackson’s testimony, “communications pertinent to the crime against the testifying spouse particularly when the communications are an

essential element of the crime charged are certainly not the character of confidential communications that are intended to be protected by the marital privilege...” See T. at 16. The act of threatening harm to ones spouse relinquishes the coverture and permitting the Defendant to prevent Courtney Jackson from testifying concerning such a threat would not further the purpose of the spousal privilege. Thus, Courtney Jackson’s testimony concerning the phone call at issue in this case was not covered by spousal privilege.

Appellant argues that the threat at issue in this case was at best a veiled threat. Such a determination is not for the trial court to make when deciding if a spouse is competent to testify or if the spousal privilege is applicable. The fact that the Defendant was charged with Intimidation of a Witness and that his spouse, Courtney Jackson, was the alleged victim of that offense is the only consideration for the trial court in making these determinations. The strength and the quantity of the evidence, is not relevant to determinations of competency and privilege.

For the aforementioned reasons, the trial court was not in error by admitting Courtney Jackson’s testimony at the Defendant’s trial. Therefore, the Defendant’s conviction should be upheld.

Proposition of Law No. 3:

The Trial Court erred by denying Appellant’s Rule 29 Motion for Acquittal

Because the State presented sufficient evidence at the Defendant’s trial to support the guilty verdict that was returned by the jury, the trial court was not in error by overruling the Defendant’s Criminal Rule 29 motion for acquittal. Pursuant to Criminal Rule 29, “the court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense

or offenses.” See Crim. R. 29. The Twelfth District held in *State v. Krull* that when reviewing a trial court’s denial of a motion for acquittal under Criminal Rule 29 a reviewing court is to apply “the same test as it would in reviewing a challenge based upon the sufficiency of the evidence to support a conviction.” See *State v. Krull*, 154 Ohio App. 3d 219 (2003) citing *State v. Thompson*, 127 Ohio App. 3d 511 (1998). The relevant inquiry in a sufficiency of the evidence review is whether “after 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 could have been proven beyond a reasonable doubt.” See *Id* citing *State v. Jenks*, 61 Ohio St. 3d 259 (1991). It is the duty of an appellate court reviewing a case to determine whether sufficient evidence was presented at trial to support a criminal conviction “to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant’s guilt beyond a reasonable doubt.” See *Jenks*.

As applied to this case and specifically to this issue, there was sufficient evidence presented by the State at the Defendant’s trial to support the guilty verdict returned by the jury for the charge of Intimidation of a Witness. The testimony at the Defendant’s trial, if believed, would clearly convince the average mind of the Defendant’s guilt beyond a reasonable doubt as to the Intimidation of a Witness charge. The testimony at the Defendant’s trial clearly established that the Washington Court House Police Department was conducting an investigation in July and August of 2010 involving the Defendant and that the Defendant’s wife, Courtney Jackson, gave a statement to the police department as part of said investigation. It was also established that, shortly after giving a statement to the police department, Courtney Jackson received a phone call from the Defendant who was at the Fayette County Jail.

Courtney Jackson acknowledged receiving a phone call from the Defendant and the

Defendant identified himself as “Kenny” during the course of the phone call. During the phone call, the Defendant made statements to Ms. Jackson regarding getting a protection order and coming to see her after he got out of prison. The Defendant told Ms. Jackson he would be coming to see her for giving a statement against him. Ms. Jackson made a statement to the Defendant about threatening her. After receiving the phone call, Ms. Jackson made a report to the Police Department regarding the phone call and subsequently obtained an ex parte civil protection order.

Ptl. Sockman of the Washington Police Department identified the female voice in the recording of the call as Courtney Jackson and the male voice as the Defendant. Ptl. Sockman testified that he had dealt with both the Defendant and Ms. Jackson in the past and was familiar with their voices. Ptl. Sockman took a report from Courtney Jackson regarding the phone call that she received from the Defendant. After taking the report, Ptl. Sockman contacted the Fayette County Sheriff’s Office and obtained a recording of the phone call the Defendant made to Courtney Jackson. The recording was placed on a CD, which was played at the Defendant’s trial. When Courtney Jackson contacted the Police Department after receiving the phone call from the Defendant, she seemed to Ptl. Sockman to be fearful and he assisted her in obtaining a protection order against the Defendant. Ptl. Queen also testified that Courtney Jackson appeared to be afraid during the time when she was making the report regarding the Defendant’s phone call to her.

Appellant argues that the State failed to produce evidence that he by unlawful threat of harm attempted to influence the witness, Courtney Jackson. Appellee would first point out that part of the Intimidation charge is not only attempting to influence but also attempting to intimidate or hinder a witness. The jury and the trial court both had the advantage of listening to

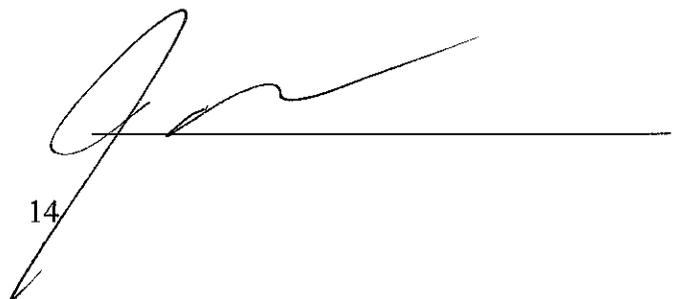
the phone call and being able to hear the tone of the voices during the phone call which obviously aids in determining whether or not the call was of a threatening nature. During the course of the phone call, Ms. Jackson herself acknowledges that the Defendant is threatening her and immediately after receiving the call Ms. Jackson was obviously at least somewhat threatened and fearful as she reported it to the Police Department and sought a protection order. A review of the phone call as well as the testimony of the officers clearly show that the Defendant was in fact attempting to influence, intimidate, or hinder Courtney Jackson by threatening to come see her when he got out and telling her that she needed to obtain a protection order. This threat, also clearly amounts to an unlawful threat of harm to Courtney Jackson.

When looking at the evidence produced by the State at the Defendant's trial it is apparent that there was sufficient evidence to support the guilty verdict returned by the jury. Furthermore, when looking at all the testimony and evidence presented at the Defendant's trial in a light most favorable to the State, any rational trier of fact could have found the essential elements of Intimidation of a Witness. Therefore, the Defendant's conviction should be upheld.

CONCLUSION

The Defendant's conviction for Intimidation of a Witness should be upheld as the trial court was not in error by admitting a recording of the phone call that formed the basis for the charge in this case; the trial court was not in error by admitting testimony of Courtney Jackson; the trial court did not admit improper voice identification; and the Defendant's conviction was supported by sufficient evidence.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on December 19th, 2008 a true and correct copy of the foregoing Memorandum in Opposition was served upon Kenneth Jackson, Appellant in Pro Se at P.O. Box 69, London, Ohio 43140 by ordinary U.S. Mail service.



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