[Cite as *State v. Ansell*, 2009-Ohio-4802.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-P-0111**
- vs -	:	
MATTHEW T. ANSELL,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Kent Division, Case No. 2008 CRB 1885 K.

Judgment: Reversed.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Chris J. Sestak, Student Legal Services, Inc., Kent State University, P.O. Box 5190, Kent, OH 44242 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Matthew T. Ansell, appeals from the judgment entry of the Portage County Municipal Court, Kent Division, convicting him of criminal damaging, a misdemeanor of the second degree. For the reasons discussed below, appellant's conviction is reversed.

{¶2} At the time of the incident, appellant was leasing a three-bedroom apartment with two other roommates, Carly Williams and Terren Wagner, the

complainant. The evidence at trial indicated that appellant and Ms. Wagner had regular disagreements about the latter's alleged refusal to share in the responsibility of the apartment's upkeep. On August 29, 2008, Ms. Wagner agreed to clean the apartment before leaving for the evening. She failed to do so. Angry with the condition in which he later found the apartment, appellant lashed out, striking "different walls and doors inside the apartment."

{¶3} Ms. Williams was in the apartment watching television when appellant lost his temper. She testified she did not directly observe appellant strike anything in the apartment. Rather, after hearing the commotion, she located appellant, and merely encouraged him to relax. Appellant calmed and the evening concluded without further incident. Ms. Williams testified she observed no specific damage to the apartment or any of its furnishings at that time.

{¶4} Ms. Wagner returned to the apartment the following day and contacted police. Police arrived and Ms. Wagner signed a criminal complaint alleging appellant damaged the door to her bedroom. On September 3, 2008, a criminal complaint was filed alleging appellant "did knowingly cause, or create a substantial risk of physical harm to the property of another, Terren D. Wagner, without said owner's consent, to wit: Door frame to Wagner's bedroom," in violation of R.C. 2909.06(A)(1). Appellant entered a plea of not guilty and the matter was set for a bench trial. Ms. Wagner was ultimately subpoenaed to testify regarding her accusations, but failed to appear on the day of trial. In light of Ms. Wagner's absence, appellant, through counsel, moved the court to dismiss the charge. The court overruled the motion and trial commenced.

{¶5} At trial, Officer Nicholas Shearer, of the Kent Police Department, testified that he responded to the scene on August 30, 2008. Upon his arrival, he testified that Ms. Wagner explained the alleged circumstances surrounding her call. Over defense counsel's objection, the officer related Ms. Wagner's version of what occurred, viz., the door to her bedroom was not damaged before she left the apartment the night before; however, upon her return, it was damaged.

{¶6} Next, Ms. Williams was called as a witness for the state. She testified that although she heard appellant striking things, the damage Ms. Wagner alleged was not visible when the bedroom door was closed. Because she did not see appellant strike the door and because Ms. Wagner always kept the door closed, Ms. Williams stated she could not testify appellant caused the damage.

{¶7} At the close of evidence, defense counsel renewed his objection relating to Officer Shearer's hearsay testimony, and argued the state failed to produce sufficient evidence to prove appellant committed the crime of criminal damaging. With respect to the former, counsel asserted the officer's testimony was improper, and argued Ms. Wagner's personal testimony, as the complaining witness, was a procedural necessity. In overruling the objection, the court characterized counsel's position as "ludicrous." The court also overruled counsel's sufficiency argument. Appellant was subsequently found guilty of the charge and sentenced to 90 days in jail and a fine of $750. Appellant's jail term and $700 of the fine were suspended based upon a series of conditions. This appeal followed.

{¶8} Appellant assigns three errors for this court's review. His first assignment of error provides:

{¶9} "The trial court committed reversible error by allowing hearsay testimony into evidence in violation of Rule 802 of the Ohio Rules of Evidence and the Confrontation Clause of the United States Constitution."

{¶10} Evidentiary rulings rest with the sound discretion of the trial court. *State v. Long* (1978), 53 Ohio St.2d 91, 98. The court's ruling on such matters will not be disturbed absent an abuse of discretion which affects a material prejudice upon the defendant. Id. An abuse of discretion consists of more than an error of law or judgment; rather, it implies the court's attitude is unreasonable, arbitrary or unconscionable. *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169. Reversal under an abuse of discretion standard is not warranted merely because an appellate court disagrees with the trial court's resolution. Id. On the contrary, reversal is appropriate only if the abuse of discretion renders "'the result *** palpably and grossly violative of fact and logic [so] that it evidences not the exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias.'" *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, quoting *Spalding v. Spalding* (1959), 355 Mich. 382, 384-385.

{¶11} In the case at bar, the complaining witness, Ms. Wagner, failed to appear for trial. In lieu of Ms. Wagner's direct testimony relating to the factual basis of the crime, the state offered her out of court statements, via Officer Shearer, to prove appellant caused the damage at issue. The following exchange took place at trial:

{¶12} "Officer: I received a call that - - initially received a call for a burglary at 1668 Sassafras, Apartment 256.

{¶13} "Prosecutor: That's located in Kent, Portage County, State of Ohio?

{¶14} "Officer: That's correct.

{¶15} "Prosecutor: Okay. What occurs?

{¶16} "Officer: I arrived on the scene, and I met with the complaining witness, who unfortunately isn't here today.

{¶17} "Prosecutor: What's her name?

{¶18} "Officer: Her name is Terren Wagner. I met with her outside of the complex. She indicated to me that she had returned home. - -

{¶19} "Defense counsel: Judge, I'm going to object to anything that Ms. Wagner allegedly said. She's not here and she's available - -

{¶20} "The Court: Well, it depends on whether it's an excitable utterance or not. I don't know. We'll have to hear the facts before I can determine that.

{¶21} "If it's something that happened and she makes a statement out of an emotional state, it's excited utterance, and it's an exception to the hearsay rule.

{¶22} "Go ahead, officer.

{¶23} "***

{¶24} "Officer: When I arrived on the scene, Ms. Wagner was outside waiting for me to arrive.

{¶25} "She indicated that she was not comfortable being in the apartment with the Defendant. She indicated that the two of them had conflict, recent conflict between the two of them.

{¶26} "***

{¶27} "Prosecutor: And when you spoke to the reporting party, can you indicate how she was acting[?]

{¶28} "Officer: She was acting normal to me, seemed in a very typical state of mind. Like I said, she did indicate that she was not comfortable being around the Defendant, and she didn't want to go into the apartment without law enforcement officer's presence.

{¶29} "***

{¶30} "Prosecutor: And based on what she tells you, what do you do?

{¶31} "Officer: Um, we go into the apartment to investigate. She said that she felt that someone had gained entry into her bedroom. We - -

{¶32} "Defense counsel: I don't mean to be rude, but I'm just going to renew my Objection because he just testified she seemed normal and typical. He didn't say she was agitated or excessively - -

{¶33} "The Court: No, but I think he's just telling me why they're investigating because *** I think that's hearsay.

{¶34} "Okay, go ahead."

{¶35} The officer later testified that Ms. Wagner told him the damage at issue was not pre-existing and thus must have occurred after she left the apartment on August 29, 2009. The trial court admitted the entirety of the officer's hearsay testimony.

{¶36} The Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right * * * to be confronted with the witnesses against him * * *." Id. This fundamental procedural guarantee applies to both federal and state prosecutions. *Pointer v. Texas* (1965), 380 U.S. 400, 406. The "central concern" of this constitutional provision is "to ensure the reliability of the evidence against a criminal defendant by subjecting it to

rigorous testing in the context of an adversary proceeding before the trier of fact." *Maryland v. Craig* (1990), 497 U.S. 836, 845. In practice, the Confrontation Clause: "'(1) insures that the witness will give his statements under oath -- thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the "greatest legal engine ever invented for the discovery of truth"; [and] (3) permits the jury that is to decide the defendant's fate to observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.'" Id. at 845-846, quoting *California v. Green* (1970), 399 U.S. 149, 158.

{¶37} It is necessary to point out that not all hearsay implicates the Sixth Amendment's core concerns. *Crawford v. Washington* (2004), 541 U.S. 36, 51. Rather, the primary evil at which the Confrontation Clause is directed was the civil-law mode of criminal procedure. Id. at 50. Such procedures permitted governmental officials to independently examine witnesses in private and utilize the fruits of such ex parte examinations as evidence against the accused. Id. at 50. Accordingly, the Confrontation Clause "applies to 'witnesses' against the accused - - in other words, those who 'bear testimony.' *** 'Testimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact. *** An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement." (Internal citations omitted.) Id.

{¶38} The Supreme Court of the United States has therefore held that the Confrontation Clause prohibits the admission or use of testimonial statements of a witness who does not appear at trial *unless* that witness is unavailable to testify, and the defendant has had a prior opportunity for cross-examination.[1] *Crawford,* supra, at 68. Given this formulation, only testimonial statements "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause" *Davis v. Washington* (2006), 547 U.S. 813, 821. For purposes of the Confrontation Clause, "a testimonial statement includes one made 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" *State v. Stahl,* 111 Ohio St.3d 186, 2006-Ohio-5482, at paragraph one of the syllabus, quoting *Crawford.* As the Confrontation Clause bars "testimonial statements," it follows they are not subject to hearsay exceptions developed by the rules of evidence.[2] *Davis,* supra. (Observing that "[i]t is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause.")

{¶39} Pursuant to *Crawford*, supra, Officer Shearer's testimony was barred by operation of the Confrontation Clause. First, the evidence of Ms. Wagner's statements was clearly testimonial, i.e., her statements to which Officer Shearer testified were the basis of the complaint which led to appellant's criminal trial and eventual conviction. Further, Ms. Wagner had not been previously cross-examined regarding her statements

1. However, as the Sixth Amendment right to confrontation may be invoked only under situations where hearsay is offered into evidence, it "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford,* supra, at 60 n.9.

2. By reciprocal implication, non-testimonial hearsay submitted against a criminal defendant does not violate the Confrontation Clause if "the statement falls within a firmly rooted hearsay exception, or otherwise carries a particularized guarantee of trustworthiness." *United States v. Baker* (C.A. 11, 2005), 432 F.3d 1189, 1204.

and nothing in the record indicates she was unavailable for trial. Given these facts, appellant was denied his right to confront his accuser in violation of the Sixth Amendment to the Constitution. The trial court therefore abused its discretion in admitting Officer Shearer's testimony relating to Ms. Wagner's out-of-court, testimonial statements.[3]

{¶40} Appellant's first assignment of error has merit.

{¶41} Appellant's second assignment of error alleges:

{¶42} "The evidence was not legally sufficient to support the trial court's judgment."

{¶43} Evidential sufficiency invokes an inquiry into due process, and examines whether the state introduced adequate evidence to support the verdict as a matter of law. *State v. Schlee* (Dec. 23, 1994), 11th Dist. No. 93-L-082, 1994 Ohio App. LEXIS 5862, *13. "An appellate court reviewing whether the evidence was sufficient to support a criminal conviction examines the evidence admitted at trial and determines whether such evidence, if believed, would convince the mind of the average juror of the defendant's guilt beyond a reasonable doubt." *State v. Troisi*, 179 Ohio App.3d 326, 329, 2008-Ohio-6062. A reviewing court may not reweigh or reinterpret the evidence; rather, the proper inquiry is, after viewing the evidence most favorably to the

3. The trial court admitted the evidence based upon its view that Ms. Wagner's statements fell under the excited utterance exception to the general bar on hearsay. As discussed above, the statements were testimonial and, therefore, absent compliance with the rule announced in *Crawford,* they must be excluded as violative of the Confrontation Clause. As an aside, however, even if the statements were non-testimonial, they were not excited utterances. An excited utterance requires a statement to be unreflective or made while a declarant was under the stress of a startling occurrence. *State v. Taylor* (1993), 66 Ohio St.3d 295, 301; see, also, Evid.R. 803(2). Although Ms. Wagner may have been irritated or upset, merely being upset does not meet the standard for admissibility under Evid.R. 803(2). *Taylor,* supra. In fact, the officer's testimony that Ms. Wagner was acting "normal" and appeared to be in a "typical" state of mind indicates her statements to the officer were a product of reflective thought thereby

prosecution, whether the jury could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273.

{¶44} To convict appellant of criminal damaging, the state was required to prove, beyond a reasonable doubt, that he knowingly caused or created a substantial risk of physical harm to Ms. Wagner's property without her consent. See R.C. 2909.06(A)(1). Given our disposition of appellant's first assignment of error, all out-of-court testimonial statements made by Ms. Wagner, admitted through the testimony of Officer Shearer, must be disregarded. Excluding this evidence, the record contains insufficient evidence that appellant, on the evening in question, damaged Ms. Wagner's property.

{¶45} Specifically, there was no evidence that the property at issue, the door to an apartment under lease, was Ms. Wagner's property. Moreover, and, perhaps more problematic, is the lack of evidence that the door was damaged on the evening of August 29, 2008 by appellant's specific actions. The only evidence submitted to provide this crucial link was Ms. Wagner's out-of-court allegations that the door was not damaged when she left the apartment, but was damaged when she returned. This information was improperly submitted into evidence via Officer Shearer; without some competent evidence to show appellant caused the damage to the door on August 29, 2008, the state failed to meet its burden of production. We therefore hold appellant's conviction is premised on insufficient evidence.

{¶46} Appellant's second assignment of error is sustained.

{¶47} Appellant's third assignment of error provides:

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lacking the "spontaneous quality necessary for an excited utterance." *State v. Butcher,* 170 Ohio App.3d 52, 2007-Ohio-118, at ¶34.

{¶48} "The trial court's judgment was against the manifest weight of the evidence."

{¶49} Because appellant's second assignment of error is dispositive of the instant appeal, his third assignment of error is moot.

{¶50} For the reasons discussed in this opinion, appellant's first and second assignments of error are well taken. It is therefore the judgment of this court that the judgment of the Portage County Municipal Court, Kent Division, is reversed.

MARY JANE TRAPP, P.J.,

TIMOTHY P. CANNON, J.,

concur.