[Cite as *State v. Norris*, 2015-Ohio-624.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 26147
v.	:	T.C. NO. 14CRB607
GREGORY NORRIS	:	(Criminal appeal from Municipal Court)
Defendant-Appellant	:	
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O P I N I O N

Rendered on the 20th day of February, 2015.

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FROELICH, P.J.

{¶ 1} Gregory Norris appeals from a judgment of the Dayton Municipal Court, which found him guilty of domestic violence following a bench trial and sentenced him accordingly. For the following reasons, the judgment of the trial court will be affirmed.

Facts and Procedural History

{¶ 2} On January 30, 2014, Patria Battle called 911 from a residence on Ridge Avenue in Dayton; she reported that she was being hit by her daughter's father. She identified the perpetrator as Norris, stated that he was still inside the house, and answered affirmatively when the dispatcher asked if she needed a medic, as well as the police.

{¶ 3} Officer Jeffrey Holmes of the Dayton Police Department testified that he arrived at the home about 10 minutes after the dispatch, and Battle answered the door. She was crying, her eyes were red, she was "dabbing blood with a tissue from her nose," bleeding slightly from her upper lip, and her nose, right cheek, and upper lip were "slightly swollen." When Holmes asked Battle what had happened, she said, "he hit me," referring to Norris, who was sitting on a nearby couch. One child was also at the home.

{¶ 4} Sergeant Brian Lewis of the Montgomery County Sheriff's Department testified as the custodian of the 911 call records. He produced a copy of Battle's 911 call on CD, which was played at trial. On the 911 call, Battle stated that Norris (whom she identified by name and as her daughter's father) was fighting her and hit her. She also provided a physical description of Norris and stated that he was still in the house, "probably" intoxicated. Battle remained on the line awaiting the arrival of the police; the call lasted about 12½ minutes.

{¶ 5} Norris was charged with domestic violence and assault. Holmes and Lewis testified for the State, and the 911 call was admitted into evidence; the defense did not call any witnesses. Norris filed a Crim.R. 29 motion for acquittal at the close of the State's case, which was overruled. The trial court convicted Norris of both offenses, but merged the assault into the domestic violence at sentencing. The court sentenced Norris to three days in jail, with three days suspended, placed him on community control for six months on the conditions that he get an alcohol and drug assessment and attend AA and anger management classes, and fined him $100 plus court costs.

{¶ 6} In March 2014, Norris filed his notice of appeal. In December 2014, we filed an order to show cause why Norris's appeal should not be dismissed as moot, because it appeared that he had fully served his community control sentence. He filed a response in which he pointed out that, although his community control sentence had been served, the case remained open, and he therefore faced the potential imposition of the three-day suspended sentence. Because it is unclear from the record and the municipal court website whether the other aspects of Norris's community control, such as anger management class and drug assessments, have been completed, we concur with Norris's assertion that he may still be subject to the suspended sentence. As such, his appeal is not moot.

{¶ 7} Norris raises four assignments of error on appeal.

Evidentiary Issues

{¶ 8} The first two assignments challenge the admission at trial of statements Battle made to the dispatcher on the 911 call and to Officer Holmes when he responded to the home. Norris claims that he was denied his right to confront a witness against him

when Officer Holmes testified to statements Battle had made. He also asserts that the 911 call was "testimonial" and violated his Sixth Amendment right to confront witnesses against him. In both instances, Norris relies on the fact that Battle provided information in response to questions by Officer Holmes and the dispatcher and did not make her statements spontaneously. He further claims that all of Battle's statements were inadmissible hearsay, because the statements were not excited utterances or present sense impressions constituting exceptions to the hearsay rule, Evid.R. 803. He contends that any "startling occurrence had long since passed by the time Officer Holmes arrived" at the home ten minutes after the call to 911.

{¶ 9} "Hearsay" 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). In general, hearsay is not admissible. Evid.R. 802. However, there are several exceptions to the hearsay rule.

{¶ 10} Evid.R. 803(1) permits the admission of a "present sense impression," which is defined as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness." Similarly, Evid.R. 803(2) excludes an excited utterance from the hearsay rule. An excited utterance is "[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."

{¶ 11} The excited utterance and present sense impression exceptions to the definition of hearsay reflect "an assumption that statements or perceptions that describe

events uttered during or within a short time from the occurrence of the event are more trustworthy than statements not uttered at or near the time of the event. Moreover, the key to the statement's trustworthiness is the spontaneity of the statement, either contemporaneous with the event or immediately thereafter. By making the statement at the time of the event or shortly thereafter, the minimal lapse of time between the event and statement reflects an insufficient period to reflect on the event perceived – a fact which obviously detracts from the statement's trustworthiness." (Internal citations omitted.) *State v. Crowley*, 2d Dist. Clark No. 2009 CA 65, 2009-Ohio-6689, citing *State v. Travis*, 165 Ohio App.3d 626, 2006-Ohio-787, 847 N.E.2d 1237, ¶ 35 (2d Dist.).

{¶ 12} In keeping with this rationale, 911 calls are usually admissible under the excited utterance or the present sense impression exception to the hearsay rule. *Ratliff v. Brannum*, 2d Dist. Greene No. 2008-CA-5, 2008-Ohio-6732, ¶ 132 (911 calls are admissible as excited utterances), citing *State v. Williams*, 2d Dist. Montgomery No. 20368, 2005-Ohio-213, at ¶ 17; *State v. Jackson*, 2d Dist. Champaign No. 2004-CA-24, 2005-Ohio-6143, ¶ 15 (911 tape was properly admissible as a present sense impression); *Crowley*. "The controlling factor is whether the declaration was made under such circumstances as would reasonably show that it resulted from impulse rather than reason and reflection." *Crowley*, citing *State v. Humphries*, 79 Ohio App.3d 589, 598, 607 N.E.2d 921 (12th Dist.1992). Whether a statement is made in response to a question from the dispatcher is relevant, but not determinative.

{¶ 13} Moreover, the Sixth Amendment right to confrontation of witnesses does not extend to nontestimonial hearsay. *State v. Stahl*, 111 Ohio St.3d 186, 2006-Ohio-5482, 855

N.E.2d 834, ¶ 21. Testimonial statements have been defined to include statements "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. Thus statements made to police without an ongoing emergency are testimonial when the circumstances objectively indicate that * * * the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (Internal citations omitted.) *State v. Lewis*, 1st Dist. Hamilton No. C-050989 and C-060010, 2007-Ohio-1485, ¶ 31, citing *Crawford v. Washington*, 541 U.S. 36, 68, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). We have generally held that a 911 call made by a domestic assault victim is not testimonial in nature and that, where the excited utterance exception to the hearsay rule applies, the admission of such a statement does not violate the Sixth Amendment right to confrontation of witnesses. *State v. Byrd*, 160 Ohio App.3d 538, 2005-Ohio-1902, 828 N.E.2d 133, ¶ 17 (2d Dist.), citing *State v. Williams*, 2d Dist. Montgomery No. 20368, 2005-Ohio-213, ¶ 20.

{¶ 14} A trial court has broad discretion regarding the admission or exclusion of evidence, and its exercise of that discretion will not be disturbed on appeal absent an abuse of discretion. *State v. Woling*, 98 Ohio St.3d 44, 2002-Ohio-7044, 781 N.E.2d 88. An "abuse of discretion" implies an arbitrary, unreasonable, or unconscionable attitude on the part of the court. *State v. Ulery*, 2d Dist. Clark No. 2010-CA-89, 2011-Ohio-4549, ¶ 9, citing *State v. Adams*, 62 Ohio St.2d 151, 404 N.E.2d 144 (1980).

{¶ 15} The trial court's conclusion that Battle's statements to the 911 dispatcher and to Officer Holmes were excited utterances and/or present sense impressions and, thus, exceptions to the hearsay rule, was supported by the following evidence: the statements were

made during Battle's 911 call or within 10-15 minutes thereafter, when the police arrived at her home and began their investigation; Norris was still in the home with Battle when the statements were made, as was a child who was apparently Battle's daughter; and Battle was injured, had not been treated for her injuries, and believed that she was in need of medical assistance, as indicated by her request that the dispatcher send a "medic." According to Officer Holmes, Battle was crying and bleeding when he arrived. Battle reported to the dispatcher and to Holmes that Norris had hit her. All of these factors support the conclusion that Battle was focused on and upset by her immediate circumstances when the statements were made, that she had not had time to reflect on how those statements might later be used, and that they were not testimonial. The trial court did not abuse its discretion or violate Norris's right to confront the witnesses against him when it permitted Battle's statements to be admitted at trial.

{¶ 16} In his brief, Norris relies on *Byrd*, 160 Ohio App.3d 538, 2005-Ohio-1902, 828 N.E.2d 133 (2d Dist.), in support of his arguments. With respect to the use of statements made during a 911 call, the holding in *Byrd* is consistent with our conclusion in this case; the statements during the 911 call in *Byrd* were admitted under the excited utterance exception to the hearsay rule. *Byrd* differed in holding that incriminating statements about Byrd made by Byrd's girlfriend to the police during their investigation at the scene were testimonial and should not have been admitted as an exception to the hearsay rule. Byrd's girlfriend did not testify at trial, and we found that the use of her prior statements violated Byrd's right to confront a witness against him. However, this conclusion was based on the particular facts of that case.

{¶ 17} We noted in *Byrd*, for example, that "the evidence demonstrate[d] that [the girlfriend] was the primary aggressor" in the incident, *id.* at ¶ 3, and that Byrd had been arrested only because "the domestic violence protocol necessitated that an arrest be made." *Id.* at ¶ 4. (Byrd had not wanted his girlfriend to be arrested, because she was pregnant. *Id*.) *Byrd* is unlike most assault/domestic violence cases in that the girlfriend, whose statements to a police officer were used against Byrd, might also have been charged as the perpetrator of the assault. As such, the testimonial nature of her statements (i.e., whether she had reflected on the possibility that they might be used against Bryd and/or deflect attention from her own role) was more apparent. *Byrd* does not compel a broad conclusion that all statements to the police by a victim are testimonial in nature, as evidenced by our holdings in numerous other cases. *See, e.g, State v. McDaniel*, 2d Dist. Montgomery No. 24423, 2011-Ohio-6326; *State v. Rockwell*, 2d Dist. Montgomery No. 19454, 2002-Ohio-6789; *see also State v. Mauldin*, 7th Dist. Mahoning No. 08-MA-92, 2010-Ohio-4192; *State v. Cannaday*, 10th Dist. Franklin No. 04AP-109, 2005-Ohio-1513.

{¶ 18} The first and second assignments of error are overruled.

Authentication

{¶ 19} In his third assignment of error, Norris contends that the State failed to authenticate the identity of the 911 caller and that the recording should have been excluded on that basis.

{¶ 20} Evid.R. 901(A) provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the material in question is what its proponent claims."

{¶ 21} Norris points out that Battle did not testify at trial, that Officer Holmes did not testify that he had verified whether Battle was the person who called 911, and that Sgt. Lewis, who testified to the chain of custody and how the CD was prepared, did not verify whose voice was on the recording.

{¶ 22} At trial, Norris objected to the 911 recording on the basis that it was "being offered by the prosecution to prove essential elements of the crimes"; he did not object on the basis of the State's failure to adequately authenticate the recording. Thus, he has waived all but plain error with respect to the authentication of the 911 tape. *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, 854 N.E.2d 1038, ¶ 187; *Akron v. Stalnaker*, 9th Dist. Summit No. 23617, 2007-Ohio-6789, ¶ 12. In order to constitute plain error, the error must be an obvious defect in the trial proceedings, and the error must have affected substantial rights. *State v. Haynes*, 2d Dist. Clark No. 13 CA 90, 2014-Ohio-2675, ¶ 7, citing *State v. Barnes*, 94 Ohio St.3d 21, 2002-Ohio-68, 759 N.E.2d 1240.

{¶ 23} Sgt. Lewis testified that the CD he produced contained the call from the Ridge Avenue address to the regional dispatch center on the date and time in question. Officer Holmes testified that, upon responding to that dispatch, he found Battle bleeding and crying at the home; Battle described having been hit, just as the 911 caller had done. On the tape itself, the caller stated the address to which Officer Holmes responded, and the caller informed the dispatcher that the police had arrived just as the dispatcher stated, "They should be pulling up outside Ma'am."

{¶ 24} These statements leave little doubt that Battle was, in fact, the 911 caller. Moreover, we have held that 911 recordings are sufficiently authenticated when the keeper

of such records testifies that he or she keeps such records, about how such records are recorded and stored or transferred to CDs, and about how they are retrieved from the system. *State v. Eicholtz*, 2d Dist. Clark No. 2012-CA-7, 2013-Ohio-302, ¶ 30-31. Sgt. Lewis provided such testimony in this case with regard to his retrieval of the 911 call that triggered the dispatch to Ridge Avenue on January 30, 2014. The threshold standard for authenticating evidence pursuant to Evid.R. 901(A) is low; it does not require conclusive proof of authenticity, but only sufficient foundational evidence for the trier of fact to conclude that the evidence is what its proponent claims it to be. *State v. Arrone*, 2d Dist. Greene No. 2005 CA 89, 2006-Ohio-4144, ¶ 146.

{¶ 25} There was no error, let alone plain error, in admitting the recording of the 911 call.

{¶ 26} The third assignment of error is overruled.

Sufficiency of the Evidence

{¶ 27} In his fourth assignment of error, Norris contends that the trial court should have granted his Crim.R. 29 motion for acquittal on the charges against him, because Officer Holmes's testimony, along with the recording of the 911 call, did not prove the elements of domestic violence. Specifically, Norris claims that the State's evidence did not prove that he acted knowingly, rather than negligently or recklessly, when he hit Battle, that Battle was harmed, or that he was a family member of Battle's, as required by the domestic violence statute.

{¶ 28} When reviewing the denial of a Crim.R. 29(A) motion, an appellate court applies the same standard as is used to review a claim based on the sufficiency of the

evidence. "A sufficiency of the evidence argument disputes whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or sustain the verdict as a matter of law." *State v. Wilson*, 2d Dist. Montgomery No. 22581, 2009-Ohio-525, ¶ 10, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N .E.2d 541 (1997). The relevant inquiry is whether any rational finder of fact, after viewing the evidence in a light most favorable to the State, could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 430, 683 N.E.2d 1096 (1997). A guilty verdict will not be disturbed on appeal unless "reasonable minds could not reach the conclusion reached by the trier-of-fact." *Id*.

{¶ 29} Insofar as it is relevant to this case, the offense of assault is defined as knowingly causing or attempting to cause physical harm to another. R.C. 2903.13(A). The definition of domestic violence is defined identically in the section under which Norris was charged, R.C. 2919.25(A), except that it specifies that the victim is a family or household member. The definition of a "family or household member" includes "[t]he natural parent of any child of whom the offender is the other natural parent or is the putative other natural parent." R.C. 2919.25(F)(1)(b).

{¶ 30} On the 911 call that was played at trial, the caller stated that "[her] daughter's dad" was "trying to fight" her (the caller), and she identified the man as Gregory Norris. Norris argues that the statement establishing their family relationship was "testimonial," and therefore should have been excluded and not considered as evidence against him. As discussed above, the trial court did not err in concluding that the statements contained in the 911 call were not "testimonial," and that they were admissible under the

excited utterance and/or present sense impression exceptions to the hearsay rule.

{¶ 31} Officer Holmes's description of Battle's injuries and her statement during the 911 call that Norris had hit her supported the trial court's conclusion that there was sufficient evidence that Battle's injuries had been inflicted knowingly and that Norris had caused her physical harm. Moreover, Battle's statement during the 911 call that Norris was her daughter's father provided sufficient evidence that Norris was a "family member" of Battle, as required for a conviction of domestic violence.

{¶ 32} The trial court did not err in denying Norris's Crim.R. 29 motion for acquittal.

{¶ 33} The fourth assignment of error is overruled.

{¶ 34} The judgment of the trial court will be affirmed.

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FAIN, J. and HALL, J., concur.

Copies mailed to:

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