[Cite as *Portsmouth v. Wrage*, 2009-Ohio-3390.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
SCIOTO COUNTY

STATE OF OHIO, CITY OF PORTSMOUTH,	:	
Plaintiff-Appellee,	:	Case No. 08CA3237
vs.	:	
ERIC A. WRAGE,	:	DECISION AND JUDGMENT ENTRY
Defendant-Appellant.	:	**Released 7/2/09**

APPEARANCES:

James H. Banks, Dublin, Ohio, for Appellant.

Michael L. Jones, City Solicitor, and Jerry L. Buckler, Assistant City Solicitor, Portsmouth, Ohio, for Appellee.

Harsha, J.

{¶1} As a result of a domestic incident, Eric A. Wrage faced a trial on multiple criminal charges. Wrage appeals the judgment convicting him of aggravated menacing and contends that conviction is inconsistent with his acquittal on the domestic violence charge. Because demanding consistency between separate verdicts would require speculation into the jury's reasoning, there is no such requirement. Thus, we reject this argument.

{¶2} Wrage also asserts that the trial court committed various evidentiary errors. First, he argues that the court improperly compelled his wife to testify. Because threats do not constitute confidential marital communications and because Wrage is charged with committing a crime against his spouse, the trial court did not abuse its discretion by compelling Mrs. Wrage's testimony. Next he contends that the court

improperly allowed the city to impeach its own witness by "permitting the state to introduce evidence of alleged other bad acts of Defendant-Appellant Wrage * * *." Because that evidence helped show the victim's state of mind regarding Wrage's threat and because Wrage opened the door to this testimony, this argument is meritless.

{¶3} Next, Wrage asserts that there is insufficient evidence to support his aggravated menacing conviction and it is against the manifest weight of the evidence. However, the city's evidence satisfied both the legal requirement of presenting a prima facie case and the rational requirement of persuading a reasonable jury. In essence, the outcome of this case turned upon whether the jury accepted the victim's testimony that she did not believe her husband would harm her. In light of abundant evidence that the victim was fearful of being hurt, the jury chose to disbelieve her testimony that she did not consider Wrage's threats to be serious. Nothing in the record indicates that the jury clearly lost its way in reaching that conclusion. Accordingly, we reject this argument.

{¶4} Finally, Wrage asserts that the verdict form is not sufficient to convict him of aggravated menacing because it fails to state the degree of the offense charged or any aggravating elements. This argument is also baseless. The city charged him with aggravated menacing under R.C. 2903.21, which is a first-degree misdemeanor unless it is enhanced. However, the city did not attempt to do so. Thus, Wrage's assertion that R.C. 2945.75(A)(2) applies is meritless because he was convicted of the least degree of the offense.

{¶5} Accordingly, we overrule all four of Wrage's assignments of error and affirm the trial court's judgment.

I. FACTS

{¶6} In November 2006, Mrs. Wrage called 911 and reported that her husband was intoxicated and shooting a gun outside their home. Scioto County Sheriff's Deputies responded to the report. Upon their arrival, the deputies discovered Mrs. Wrage shaken up and crying; Mr. Wrage smelled strongly of alcohol and appeared to be drunk.

{¶7} Following the incident, Mrs. Wrage filed a statement with the sheriff's office. She explained the incident:

> Eric came home drunk—threatened me that he had some one [sic] with him & if I said or did anything he didn't know what he would do to me. He brought the guy in. I asked him to leave & told my kids to get upstairs.
>
> Later he threatened to have the 'crackhead' who had been here slit my throat with a steak knife.
>
> I went to bed upstairs later & then heard him go into the basement. Then I heard him loading a gun & talking to himself about blowing the car full of shotgun holes. I heard him go outside. I came downstairs but couldn't see him. I heard him shoot the gun 3 times. That's when I went upstairs & called 911.

{¶8} Mr. Wrage subsequently was charged with (1) aggravated menacing, in violation of R.C. 2903.21; (2) domestic violence by threat, in violation of R.C. 2919.25(C); and having a weapon while intoxicated, in violation of R.C. 2923.15(A)(2).[1]

{¶9} At trial, the court ordered Mrs. Wrage to testify and rejected Mr. Wrage's claim of spousal immunity. The court ruled that because Mrs. Wrage is the alleged victim in the case, the court could force her to testify.

{¶10} In contrast to the statement Mrs. Wrage gave to law enforcement officers on the night of the incident, at trial Mrs. Wrage attempted to downplay the incident. She

[1] The three charges were filed under separate case numbers. The only charge before this court is the aggravated menacing charge.

stated that she called 911 after she heard her husband shooting a gun outside of the home. She explained that earlier in the evening, she and her husband had an argument. Mrs. Wrage testified that during the argument, her husband threatened to have the man he brought home earlier that evening to slit her throat. She stated: "We had been arguing for * * * quite some time and * * * he had brought a friend of his home that I didn't know and I was upset and wanted them to leave, wanted the person to leave and * * * we argued after the person left. And I had said I didn't know the person, he could be anybody. I didn't want him in the house or around my children, he could slice their throats, whatever. * * * [A]nd later in the argument he threatened to have the man come back and slice my throat." She stated that she did not believe his threat was serious and that she did not feel threatened. Mrs. Wrage explained that she called 911 because once she heard Mr. Wrage shooting the gun, she became worried about her and the children's safety—she was worried that an accident might happen.

{¶11} In an attempt to discredit Mrs. Wrage's claim that she did not take Mr. Wrage's threat seriously, the city presented evidence, over objection, of a prior incident where Mr. Wrage broke her nose. The court gave the jury a limiting instruction: "Such * * * testimony is not admissible to prove the character of a person in order to show that he * * * acted in conformity with those acts. It is however admissible to prove the element of the belief of a family member that the offender would or could cause imminent physical harm."

{¶12} The jury subsequently found Mr. Wrage guilty of aggravated menacing.

II. ASSIGNMENTS OF ERROR

{¶13} Mr. Wrage raises four assignments of error:

First Assignment of Error:
"Defendant-appellant's conviction on the charge of aggravated menacing and his acquittal on the charge of domestic violence threat are incongruous, such to demonstrate that the jury 'lost its way' and require reversal of his conviction."

Second Assignment of Error:
"The trial court erred in the admission of evidence such to require reversal of defendant's conviction."

Third Assignment of Error:
"Defendant's conviction is manifestly against the weight of the evidence and must be overturned."

Fourth Assignment of Error:
"The verdict form on the charge of aggravated menacing does not support defendant's conviction."

III. CONSISTENCY BETWEEN VERDICTS

{¶14} In his first assignment of error, Wrage argues that the jury's verdicts regarding the domestic violence and aggravated menacing charges are inconsistent. He asserts that the jury's aggravated menacing conviction contradicts its domestic violence acquittal.

{¶15} "[A] verdict that convicts a defendant of one crime and acquits him of another, when the first crime requires proof of the second, may not be disturbed merely because the two findings are irreconcilable." *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, at ¶81; see, also, *State v. Gapen*, 104 Ohio St.3d 358, 2004-Ohio-6548, 819 N.E.2d 1047; *State v. Adams* (1978), 53 Ohio St.2d 223, 7 O.O.3d 393, 374 N.E.2d 137. ""Consistency in the verdict is not necessary. Each count in an indictment is regarded as if it was a separate indictment."" Id., quoting *United States v. Powell* (1984), 469 U.S. 57, 62, 105 S.Ct. 471, 83 L.Ed.2d 461, quoting *Dunn v. United States* (1932), 284 U.S. 390, 393, 52 S.Ct. 189, 76 L.Ed. 356.

"'[I]nconsistent verdicts-even verdicts that acquit on a predicate offense while convicting on the compound offense-should not necessarily be interpreted as a windfall for the Government at the defendant's expense.'" Id., quoting *Powell*, 469 U.S. at 65. "As *Powell* notes, '[i]t is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense.'" Id., quoting *Powell*, 469 U.S. at 65. "[T]he sanctity of the jury verdict should be preserved and could not be upset by speculation or inquiry into such matters to resolve the inconsistency." *State v. Lovejoy* (1997), 79 Ohio St.3d 440, 444, 683 N.E.2d 1112; see, also, *State v. Ball*, Hocking App. No. 07CA2, 2008-Ohio-337; *State v. Reine*, Scioto App. No. 06CA3102, 2007-Ohio-7221. Although the case at bar does not involve a multi-count indictment but instead three separate complaints that were tried together, these same principles apply.

{¶16} Furthermore, while a domestic violence[2] conviction requires proof that the offender threatened *imminent* physical harm, an aggravated menacing[3] conviction does not. See *State v. Ali*, 154 Ohio App.3d 493, 2003-Ohio-5150, 797 N.E.2d 1019, at ¶26. "[A] conditional or future threat can constitute a violation of menacing laws." Id.; see, also, *State v. Collie* (1996), 108 Ohio App.3d 580, 671 N.E.2d 338. "'[T]he crime of menacing can encompass a present state of fear of bodily harm and a fear of bodily harm in the future.'" *Ali*, 154 Ohio App.3d at 502, quoting *W. Lafayette v. Deeds* (Oct. 23, 1996), Coshocton App. No. 96CA3; see, also, *State v. Lewis* (Aug. 22, 1997),

[2] R.C. 2919.25(C) states: "No person, by threat of force, shall knowingly cause a family or household member to believe that the offender will cause imminent physical harm to the family or household member."

[3] R.C. 2903.21(A) states: "No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family."

Portage App. No. 96-P-0272 (noting that threats of potential harm are sufficient).

{¶17} Here, the jury could have determined that the city failed to prove that Wrage threatened his wife with imminent physical harm but did threaten her with non-imminent, serious physical harm. In any event, the cases are clear that consistency between the two verdicts is not necessary. Accordingly, we overrule Wrage's first assignment of error.

IV. EVIDENTIARY ISSUES

{¶18} Wrage raises multiple issues in his second assignment of error. He asserts that (1) the trial court improperly compelled his wife to testify, (2) the court wrongly permitted the city to impeach its own witness, and (3) the trial court erred by admitting evidence that he previously engaged in violence against his wife.

A. STANDARD OF REVIEW

{¶19} Generally, evidentiary rulings made at trial rest within the sound discretion of the trial court. See, e.g., *State v. Jeffers*, Gallia App. No. 08CA7, 2009-Ohio-1672, at ¶17, citing *State v. Sage* (1987), 31 Ohio St.3d 173, 180, 510 N.E.2d 343. We give substantial deference to the trial court unless we determine that the court's ruling was an abuse of discretion. See *State v. Walton*, Cuyahoga App. No. 87347, 2006-Ohio-4771, at ¶4, citing *State v. Tankersley* (April 23, 1998), Cuyahoga App. Nos. 72398 and 72399. "The term abuse of discretion connotes more than error of law or judgment. It implies that the court's attitude is unreasonable, arbitrary, or unconscionable." *Nielson v. Meeker* (1996), 112 Ohio App.3d 448, 679 N.E.2d 28. "An abuse of discretion * * * implies a decision which is without a reasonable basis or one which is clearly wrong."

Angelkovski v. Buckeye Potato Chips Co. (1983), 11 Ohio App.3d 159, 463 N.E.2d 1280.

B. SPOUSAL TESTIMONY

{¶20} For spousal testimony to be admissible, it must be competent under Evid.R. 601(B) and it must not be privileged under R.C. 2945.42. "Spousal privilege and spousal competency are distinct legal concepts which interrelate and provide two different levels of protection for communications between spouses. Under R.C. 2945.42, an accused may prevent a spouse from testifying about private acts or communications. However, even when the privilege does not apply because [an exception applies], a spouse still is not competent to testify about those acts or communications unless" an exception to the competency rule applies. *State v. Adamson* (1995), 72 Ohio St.3d 431, 433, 650 N.E.2d 875. But, see, *State v. Mowery* (1982), 1 Ohio St.3d 192, 194, 438 N.E.2d 897 (stating that Evid.R. 601(B) supersedes R.C. 2945.42).

1. Privilege

{¶21} R.C. 2945.42 codifies the spousal privilege and states:

> * * * Husband and wife are competent witnesses to testify in behalf of each other in all criminal prosecutions * * *. A spouse may testify against his or her spouse in a prosecution under a provision of sections 2903.11 to 2903.13, 2919.21, 2919.22, or 2919.25 of the Revised Code for cruelty to, neglect of, or abandonment of such spouse, in a prosecution against his or her spouse under section 2903.211 or 2911.211, of the Revised Code for the commission of the offense against the spouse who is testifying * * *. 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 * * *.

The statute "'confers a substantive right upon the accused to exclude privileged spousal testimony concerning a confidential communication * * *.'" *Adamson* (1995), 72 Ohio

St.3d at 433, quoting *State v. Rahman* (1986), 23 Ohio St.3d 146, 23 OBR 315, 492 N.E.2d 401, syllabus. However, the privilege is not absolute. The statute lists several instances in which the privilege does not apply. Notably, the statute contains an exception to the privilege when the crime charged has been committed against the testifying spouse. See *State v. Antill* (1964), 176 Ohio St. 61, 64, 197 N.E.2d 548; *State v. Purvis*, Medina App. No. 05CA53-M, 2006-Ohio-1555, at ¶5. Moreover, privileged communications do not include threats against a spouse. See *State v. Vanhoy* (June 22, 2000), Henry App. No. 7-2000-01 ("Communications appurtenant 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."); *State v. Bryant* (1988), 56 Ohio App.3d 20, 21-22 564 N.E.2d 709 (stating that threats are not confidential communications).

{¶22} In this case, the trial court did not abuse its discretion by compelling Mrs. Wrage to testify despite claims of spousal privilege. The spousal privilege statute does not shield her testimony regarding her husband's threats toward her or the crimes he allegedly committed against her. See *Antill*; *Purvis*; *Vanhoy*; *Bryant*. Consequently, Wrage's assertion that the trial court erred by failing to prohibit Mrs. Wrage's testimony under the spousal privilege statute is meritless.

2. Competency

{¶23} Wrage additionally asserts that his wife was not a competent witness to testify against him. "Competency determinations are the province of the trial judge." *Adamson*, 72 Ohio St.3d at 433, citing *State v. Clark* (1994), 71 Ohio St.3d 466, 469,

644 N.E.2d 331, 334. Thus, we will not disturb a trial court's competency determination absent an abuse of discretion.

{¶24} Evid.R. 601(B) governs the competency of a spouse as a witness and states:

> Every person is competent to be a witness except:
> * * * *
> (B) A spouse testifying against the other spouse charged with a crime except when either of the following applies:
> (1) a crime against the testifying spouse or a child of either spouse is charged;
> (2) the testifying spouse elects to testify.

{¶25} The rule thus provides that a spouse is competent to testify against a spouse who is charged with a crime committed against the testifying spouse. This is the exact situation in the case at bar. Wrage is charged with committing a crime against his spouse. Thus, under Evid.R. 601(B)(1), Mrs. Wrage is a competent witness. See *Antill*, 176 Ohio St. at 64; *State v. Smith*, Seneca App. No. 13-03-25, 2003-Ohio-5461. Consequently, Wrage's argument to the contrary is meritless.

B. IMPEACHMENT

{¶26} Wrage next complains that the trial court erred by allowing the city to impeach his wife by questioning her about a prior domestic incident that resulted in her nose being broken. At trial, Wrage did not object to the testimony on the grounds that the state could not impeach its own witness; rather he objected on the basis of Evid.R. 404(B), "character evidence." Because he failed to call this issue to the trial court's attention at a time when the court could have corrected it, he has waived all but plain error. We may notice plain errors or defects affecting substantial rights despite an appellant's failure to bring them to the trial court's attention at a time when they could

have been corrected. Crim.R. 52(B). We will notice an error as plain only if it is an obvious error that affects "substantial rights," which means the appellant must show that "'but for the error, the outcome of the trial clearly would have been otherwise.'" *State v. Litreal*, 170 Ohio App.3d 670, 2006-Ohio-5416, 868 N.E.2d 1018, at ¶11, quoting *State v. Barnes*, 94 Ohio St.3d 21, 27, 2002-Ohio-68, 759 N.E.2d 1240. The defendant must demonstrate error on the record before we will find plain error. *In re Nibert*, Gallia App. No. 03CA19, 2004-Ohio-429, at ¶11. Moreover, we take notice of plain error with the utmost of caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, at ¶78; *State v. Patterson*, Washington App. No. 05CA16, 2006-Ohio-1902, at ¶13. A reviewing court should consider noticing plain error only if the error """seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."""" *Barnes*, 94 Ohio St.3d at 27, quoting *United States v. Olano* (1993), 507 U.S. 725, 736, 113 S.Ct. 1770, 123 L.Ed.2d 508, quoting in turn *United States v. Atkinson* (1936), 297 U.S. 157, 160, 56 S.Ct. 391, 80 L.Ed. 555. Wrage has not demonstrated that this is one of the exceptional cases that merits a finding of plain error.

D. OTHER ACTS EVIDENCE[4]

{¶27} Wrage contends the trial court abused its discretion because of the substance of that testimony, i.e., evidence regarding a prior incident of domestic violence. "[T]he decision to admit Evid. R. 404(B) prior acts evidence rests in the trial court's sound discretion and that decision should not be reversed absent an abuse of

[4] Evid.R. 607 prohibits a party from impeaching its own witness with a prior inconsistent statement absent surprise and affirmative damage. The rule states: "The credibility of a witness may be attacked by any party except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon a showing of surprise and affirmative damage." However, Wrage

discretion." *State v. Hairston*, Scioto App. No. 06CA3089, 2007-Ohio-3707, at ¶38; see, also, *State v. Bey* (1999), 85 Ohio St.3d 487, 490, 709 N.E.2d 484.

{¶28} Evid.R. 404(B) prohibits the use of character evidence to show that an accused has the propensity to commit the crime with which he stands charged. However, the rule permits such evidence when introduced for "other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Evid.R. 404(B); see, also, *State v. Lowe* (1994), 69 Ohio St.3d 527, 530, 634 N.E.2d 616. In addition, there must be "substantial proof" that the defendant committed the other acts. *Lowe*.

{¶29} Thus, other acts evidence is never admissible when its sole purpose is to establish that the defendant committed the act alleged in the indictment. *State v. Dyer*, Scioto App. No. 07CA3163, 2008-Ohio-2711, at ¶42; *State v. Jones*, Scioto App. 06CA3116, 2008-Ohio-968, at ¶33. The admissibility of other acts evidence is "carefully limited because of the substantial danger that the jury will convict the defendant solely because it assumes that the defendant has a propensity to commit criminal acts, or deserves punishment regardless of whether he or she committed the crime charged in the indictment." *In re Sturm*, Washington App. No. 05CA35, 2006-Ohio-7101, at ¶51, citing *State v. Schaim* (1992), 65 Ohio St.3d 51, 59, 600 N.E.2d 661.

{¶30} In *State v. Collie* (1996), 108 Ohio App.3d 580, 671 N.E.2d 338, the court permitted other acts evidence to prove the element under R.C. 2919.25 that the victim believed the offender was about to cause imminent physical harm. The court explained:

> In this regard, although the roles of the victim and the defendant are reversed, this is analogous to permitting evidence of a victim's prior

---

does not complain about the city's use of her prior inconsistent statement to the deputy. Accordingly, we do not address that issue.

> specific instances of conduct to show the defendant's state of mind in a self-defense case, where the defendant's state of mind is crucial in determining whether self-defense was justified under the circumstances. There, as here, such prior acts would not be properly admitted unless knowledge of the specific acts prior to the confrontation was established by the party who needed to prove the requisite state of mind. Cf. *State v. Marsh* (1990), 71 Ohio App.3d 64, 69, 593 N.E.2d 35, 39.

Id. at 584.

{¶31} However, the court cautioned:

> Because of the great potential for prejudice arising from 'other acts' testimony, in a domestic violence case brought under R.C. 2919.25(C), testimony of other acts of violence toward the same victim must be completely specific as to time and place. Properly particularized past behavior should be permitted to prove this element of the offense; generalizations should not. An excellent example of this distinction is found in *State v. Bolds* (Jan. 19, 1993), Stark App. No. CA-9058, unreported.
>
> In *Bolds*, much as in this case, the defendant, while drunk, approached the apartment of the mother of his two children, stood outside, and repeatedly yelled and threatened to harm her. He did not get inside, and no actual harm occurred. The woman was able to call the police from a neighbor's apartment. When the police arrived, they found the woman very shaken, and Bolds taunting.
>
> Bolds was charged under R.C. 2919.25(C). At trial, the court allowed evidence of specific prior acts (which included dates and descriptions of exactly what had happened) to prove the element of the victim's belief that the defendant would imminently harm her when he stood on the porch yelling threats. The court specifically disallowed testimony that the defendant "had done many things" to her in the past and directed counsel for the state to keep the victim's testimony specific as to time and place. Finally, the court instructed the jury that the evidence of specific other acts could be considered only to prove the victim's belief that harm was imminent. The court of appeals affirmed the conviction on this basis, noting that "the event triggering prosecution is generally a conclusion to a series of events and is not always the most serious conduct." Id. at 3.

State v. Collie (1996), 108 Ohio App.3d 580, 584-585, 671 N.E.2d 338; see, also, *State v. Morrow*, Summit App. No. 23960, 2008-Ohio-3958, at ¶16 (stating that "'prior bad

acts by a defendant against the same victim are * * * admissible in domestic violence cases to prove the defendant's intent'") (quotations omitted).

{¶32} Similarly, the trial court in this case acted within its discretion by allowing the city to inquire about a recent act of domestic violence. The trial court could have reasonably determined that evidence of a prior violent act in which Wrage broke his wife's nose helped establish the element concerning the victim's state of mind, i.e., that he caused his wife to believe that he would cause her serious physical harm. The court did not permit the testimony for the sole purpose of showing that Wrage acted in conformity with his past conduct. Moreover, the trial court carefully limited the evidence regarding prior acts to those occurring close in time to the charged incident. And, the court gave the jury a limiting instruction that it could not consider the evidence to find that Wrage committed the crime charged but only to determine the victim's state of mind.

{¶33} Furthermore, Wrage opened the door to the line of questioning to which he now objects. During the defense's cross-examination of Mrs. Wrage, defense counsel asked: "And you'd been with him for many years and you had arguments before?" She stated, "[y]es." During the city's re-direct examination of Mrs. Wrage, the prosecutor questioned her whether her husband had previously harmed her during an argument. She responded, "[y]es." The prosecutor continued: "That would've occurred, I believe, if my records are correct, on April Twenty Sixth, Two Thousand Six, which would've been about seven months before this incident, is that correct?" Mrs. Wrage stated, "Sounds about right." The prosecutor then asked her whether her husband injured her during this incident, and she stated that he had broken her nose.

{¶34} Wrage opened the door to the challenged testimony. Mrs. Wrage's redirect testimony expanded upon her testimony on cross-examination regarding her prior arguments with her husband. Once defense counsel posed the question regarding prior arguments, he opened the door to further questioning on that issue. Consequently, Wrage may not complain on appeal that the trial court erroneously allowed the testimony. See *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, at ¶74. Accordingly, we overrule Wrage's second assignment of error.

V. MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE

{¶35} Wrage frames his third assignment of error as a manifest weight of the evidence argument, but in substance he argues that the city failed to present sufficient evidence to convict him of aggravated menacing. Wrage's argument fails to acknowledge these two conceptually different standards, but we will address both.

A. SUFFICIENCY OF THE EVIDENCE

{¶36} An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is 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, e.g., *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus. The relevant inquiry 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 proven beyond a reasonable doubt. Id. at paragraph two of the syllabus, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560. A sufficiency-of-the-evidence challenge tests whether the state's case is legally adequate to satisfy the requirement

that it contain prima facie evidence of all the elements of the charged offense. See *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. Our evaluation of the sufficiency of the evidence raises a question of law and does not permit us to weigh the evidence. *State v. Simms*, 165 Ohio App.3d 83, 2005-Ohio-5681, 844 N.E.2d 1212, at ¶9, citing *Martin*, 20 Ohio App.3d at 175. In this case, the city presented sufficient evidence so that any rational trier of fact could have found the essential elements of aggravated menacing proven beyond a reasonable doubt.

{¶37} R.C. 2903.21(A) defines the offense of aggravated menacing: "(A) No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of the other person * * *." Mrs. Wrage testified that her husband threatened to have a man slit her throat. This evidence satisfies all elements of the statute except for whether Wrage knowingly caused Mrs. Wrage to believe that he would cause her this serious physical harm. Mrs. Wrage denied that she believed his threat, but the city tested her credibility. In addition to the other acts evidence discussed above, it presented evidence from the responding officers that on the night of the incident, she was visibly shaken. This circumstantial evidence of her fear that she would suffer serious physical harm was sufficient to allow the jury to receive the case. The city satisfied its burden to produce sufficient evidence to sustain Wrage's conviction.

B. MANIFEST WEIGHT OF THE EVIDENCE

{¶38} "Although a court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence." *State v. Thompkins* (1997), 78 Ohio

St.3d 380, 678 N.E.2d 541. When an appellate court considers a claim that a conviction is against the manifest weight of the evidence, the court must dutifully examine the entire record, weigh the evidence and consider the credibility of witnesses. The reviewing court must bear in mind, however, that credibility generally is an issue for the trier of fact to resolve. See *State v. Issa* (2001), 93 Ohio St.3d 49, 67, 752 N.E.2d 904; *State v. Thomas* (1982), 70 Ohio St.2d 79, 80, 434 N.E.2d 1356; *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, paragraph one of the syllabus. Once the reviewing court finishes its examination, the court may reverse the judgment of conviction only if it appears that the fact finder, in resolving conflicts in evidence, "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins*, 78 Ohio St.3d at 387, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717.

{¶39} If the prosecution presented substantial evidence upon which the trier of fact reasonably could conclude beyond a reasonable doubt that the essential elements of the offense had been established, the judgment of conviction is not against the manifest weight of the evidence. See *State v. Eley* (1978), 56 Ohio St.2d 169, 383 N.E.2d 132, syllabus. A reviewing court should find a conviction against the manifest weight of the evidence only in the "exceptional case in which the evidence weighs heavily against conviction." *Thompkins*, 78 Ohio St.3d at 387, quoting *Martin*, 20 Ohio App.3d at 175); see, also, *State v. Lindsey* (2000), 87 Ohio St.3d 479, 483, 721 N.E.2d 995; *State v. Brooker*, 170 Ohio App.3d 570, 2007-Ohio-588, 868 N.E.2d 683, at ¶16-17.

{¶40} This is not one of those exceptional cases in which the evidence weighs heavily against conviction. Essentially, this case boils down to whether the jury believed Mrs. Wrage's testimony that she did not take her husband's threat seriously. In light of conflicting evidence about her demeanor that evening, the jury obviously did not find her testimony credible on this issue. We find nothing in the record to suggest that the jury clearly lost its way in resolving whether Mrs. Wrage was fearful of being harmed by her husband. Thus, Wrage's conviction is not against the manifest weight of the evidence and we overrule Wrage's third assignment of error.

VI. VERDICT FORM

{¶41} In his fourth assignment of error, Wrage argues that in light of R.C. 2945.75(A)(2), the verdict form is not sufficient to convict him of aggravated menacing because it fails to state either the degree of the offense or the aggravating element. He contends that the verdict form is sufficient only to convict him of the least degree of the offense charged, which Wrage asserts is R.C. 2903.22 menacing, a fourth-degree misdemeanor.

{¶42} Wrage failed to object to the verdict form. However, the Supreme Court of Ohio has recognized error, even in the absence of an objection at trial, when a verdict form fails to comply with R.C. 2945.75(A)(2). See *State v. Pelfrey*, 112 Ohio St.3d 422, 2007-Ohio-256, 860 N.E.2d 735.

{¶43} R.C. 2945.75(A)(2) provides:

> (A) When the presence of one or more additional elements makes an offense one of more serious degree:
>
> * * * *
>
> (2) A guilty verdict shall state either the degree of the offense of which the offender is found guilty, or that such additional element or

> elements are present. Otherwise, a guilty verdict constitutes a finding of guilty of the least degree of the offense charged.

{¶44} "Pursuant to the clear language of R.C. 2945.75, a verdict form signed by a jury must include either the degree of the offense of which the defendant is convicted or a statement that an aggravating element has been found to justify convicting a defendant of a greater degree of a criminal offense." *Pelfrey*, syllabus. Here, the verdict form does not state either the degree of the offense charge or any aggravating elements. The verdict form reads: "We the Jury in this case, find the Defendant, Eric A. Wrage, guilty of the offense charged in the complaint." However, as we explain below, neither R.C. 2945.75(A)(2) nor *Pelfrey* applies in this case.

{¶45} The city charged Wrage with aggravated menacing under R.C. 2903.21. That statute provides: "(A) No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family." The statute then sets forth the penalties for violating the statute and reads:

> (B) Whoever violates this section is guilty of aggravated menacing. Except as otherwise provided in this division, aggravated menacing is a misdemeanor of the first degree. If the victim of the offense is an officer or employee of a public children services agency or a private child placing agency and the offense relates to the officer's or employee's performance or anticipated performance of official responsibilities or duties, aggravated menacing is a felony of the fifth degree or, if the offender previously has been convicted of or pleaded guilty to an offense of violence, the victim of that prior offense was an officer or employee of a public children services agency or private child placing agency, and that prior offense related to the officer's or employee's performance or anticipated performance of official responsibilities or duties, a felony of the fourth degree.

{¶46} In this case, the city did not charge any penalty enhancements. The complaint alleged a first-degree misdemeanor violation of R.C. 2903.21. The city

charged him with and the jury found him guilty of the least degree (first-degree misdemeanor) of the offense (aggravated menacing). Because the city did not seek to convict Wrage of a greater degree of the offense, neither R.C. 2945.75(A)(2) nor *Pelfrey* applies.

{¶47} Wrage's assertion that the verdict form is sufficient only to convict him of menacing under R.C. 2903.22 is meritless. The city properly charged him with aggravated menacing under R.C. 2903.21, which adds the element of "serious physical harm." R.C. 2903.22[5] is a separate offense, not a lesser offense of R.C. 2903.21 as contemplated within R.C. 2945.75(A)(2) and *Pelfrey*. R.C. 2945.75(A)(2) and *Pelfrey* apply when additional elements contained within a particular criminal statute enhance the penalty. Accordingly, we overrule Wrage's fourth assignment of error and affirm the trial court's judgment.

JUDGMENT AFFIRMED.

[5] R.C. 2903.22 provides: "(A) No person shall knowingly cause another to believe that the offender will cause physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family."

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED and that Appellant shall pay the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Portsmouth Municipal Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Kline, P.J. & Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.