[Cite as *State v. Scott*, 2009-Ohio-4961.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO	)	CASE NO. 07 MA 152
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
CEIL C. SCOTT	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Criminal Appeal from the Youngstown Municipal Court of Mahoning County, Ohio
Case No. 07 CRB 1368

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:

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Youngstown City Prosecutor
Atty. John H. Marsh
Assistant Prosecuting Attorney
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For Defendant-Appellant:

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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Joseph J. Vukovich

Dated: September 14, 2009

[Cite as *State v. Scott*, 2009-Ohio-4961.]
WAITE, J.

{¶1} Appellant, Ceil C. Scott, appeals her conviction by jury in Youngstown Municipal Court for aggravated menacing, in violation of R.C. 2903.21, a misdemeanor of the first degree. R.C. 2903.21(A) reads, in its entirety, "[n]o 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."

{¶2} Appellant contends that the trial court's interpretation of the aggravated menacing statute was overly broad and contrary to law. She argues that the trial court committed plain error based on several instructions in the jury charge. Appellant further argues that there was insufficient evidence to convict her and that the greater weight of the evidence favored acquittal.

{¶3} Based on a review of the law and evidence in this case, the trial court properly interpreted R.C. 2903.21(A), and did not commit plain error when instructing the jury. Furthermore, the evidence adduced at trial was sufficient to support Appellant's conviction for aggravated menacing. Accordingly, all of Appellant's assignments of error are overruled and the judgment of the trial court is affirmed.

Facts

{¶4} Appellant filed a written report with the Youngstown Police Department accusing her sister, Cynthia Whitsett, of stealing money from her bank account. (Trial Tr., pp. 89-90.) She told the detective investigating the charge, Detective Sergeant Ramon Cox, that the funds that were stolen from her bank account were the proceeds of Social Security checks and PELL money. (Trial Tr., p. 96.) Inmates

receive PELL money when they are released from prison. Detective Sergeant Cox testified that Appellant provided to him documentation that confirmed that she had been incarcerated as a result of a felony assault conviction.

{¶5} During his investigation, Det./Sgt. Cox determined that Whitsett was a co-signatory on the bank account in question. As such, she could not be charged with theft. (Trial Tr., p. 91.) According to Det./Sgt. Cox's testimony at trial, when he called Appellant on April 30, 2007 to inform her that he could not file charges against her sister, she became "irate" and stated that she was going to make the Youngstown Police Department and Boardman Police Department "pay" for their refusal to charge Whitsett with theft. (Trial Tr., pp. 91-92.) More specifically, Appellant said that she was going to get an AK-47 and "shoot it up," making the shooting spree at Virginia Tech, which had occurred approximately two weeks prior to their conversation, "look like it was nothing." (Trial Tr., pp. 92-93.)

{¶6} Because of Appellant's behavior on the phone, Det./Sgt. Cox reported the conversation to Captain Centorame. (Trial Tr., p. 97.) Capt. Centorame advised Cox to call the Boardman Police Department and inform them that a threat had been made against the department. (Trial Tr., p. 98.) Next, Det./Sgt. Cox prepared a police report memorializing his conversation with Appellant.

{¶7} According to the report, Appellant stated that she would take revenge on her sister, and make the Youngstown Police Department and the Boardman Police Department "pay" for not pursuing her charges. (4/30/07 Case Report, p. 1.) She further stated that her mother was not going to be the only one crying when this

was over, and that she planned to "buy an AK-47" and "take care of business." (4/30/07 Case Report, p. 1.)

{¶8} The following day, May 1, 2007, a complaint was filed in Youngstown Municipal Court charging that Appellant "DID, KNOWINGLY, CAUSE DET. SGT. RAMON COX TO BELIEVE THAT [SHE] WOULD CAUSE SERIOUS HARM TO THE PERSON OR PROPERTY OF CITIZENS OF YOUNGSTOWN, OR MEMBER OF THEIR IMMEDIATE FAMILY, TO-WIT: THREATENED TO MAKE THE VIRGINIA TECH SHOOTING LOOK LIKE IT WAS NOTHING, IN VIOLATION OF SECTION 2903.21 OF THE OHIO REVISED CODE." The complaint was read into the jury instructions, and ultimately served as the only definition of aggravated menacing provided to the jury. (Trial Tr., p. 157.)

{¶9} Although a motion for sanity and competency evaluations was filed, as well as a written plea of not guilty by reason of insanity, the disposition of these matters is not reflected in the record. The case proceeded to trial and Det./Sgt. Cox was the state's only witness. When asked on cross-examination whether he was in fear of Appellant, Cox responded, "I could have been, but probably not." (Trial Tr., p. 106.) On redirect, Det./Sgt. Cox clarified this statement, conceding that he, "didn't think that this was [Appellant] around the corner with an AK-47, waiting to open up," but explaining that he, "believed that [Appellant] would follow through with those actions." (Trial Tr., p. 107.) He testified that it was his fear that prompted him to speak to Capt. Centorame.

{¶10} At the conclusion of Det./Sgt. Cox's testimony, Appellant's trial counsel moved for a judgment of acquittal pursuant to Crim. R. 29. He argued that R.C. 2903.21 must be strictly construed against the state and that Appellant's alleged threats were not made against, "a hearer of the threat or a member of the hearer's family." (Trial Tr., pp. 109-110.) Appellant argued that the alleged threats were made against the respective police departments rather than Cox, specifically Appellant also argued that Det./Sgt. Cox's testimony established that he did not believe that Appellant intended to injure him personally.

{¶11} In support of the motion, Appellant's trial counsel cited two cases, one from this district, *State v. Richard* (1998), 129 Ohio App.3d 556, 718 N.E.2d 508, and another from the Fifth District, *State v. Hileman*, 5th Dist. No. 04 COA 48, 2005-Ohio-1698. Both cases stand for the proposition that a threat made to a third party who is not related to the subject of the threat cannot be the basis of a charge of aggravated menacing. The trial court denied the motion, reasoning that Det./Sgt. Cox was "A MEMBER OF THE CLASS OF PERSONS THAT WAS THREATENED," that is, the Youngstown Police Department. (Trial Tr., p. 113.)

{¶12} Appellant took the stand in her own defense and testified that she suffers from bipolar disorder and manic-depression. (Trial Tr., p. 117.) She testified that she had been incarcerated for forty-four days in late February and early March for, "biting a Youngstown police officer's glove." (Trial Tr., p. 117.)

{¶13} According to Appellant's testimony, Whitsett moved to Youngstown to assist her because she had no family in town. (Trial Tr., p. 119.) After she was

released from prison, Appellant lived with Whitsett for approximately one month until Whitsett called the police and asked them to remove Appellant from the apartment. (Trial Tr., pp. 131-132.)

{¶14} Appellant accused Whitsett of stealing her money, and accused Det./Sgt. Cox of refusing to press charges against Whitsett because he was attending music concerts with her. (Trial Tr., pp. 127, 129.) She testified that she was not upset with Cox, because she believed that she could file theft charges with the Boardman Police Department, and she denied ever threatening him. Finally, she claimed that she was not aware of the shootings that occurred at Virginia Tech. (Trial Tr., p. 131.)

{¶15} The jury returned a verdict of guilty. On August 15, 2007, Appellant was sentenced to 18 months of intensive probation supervision and 40 hours of community service and ordered to submit to a mental health evaluation by Turning Point, with the trial court to monitor any treatment requirements.

{¶16} Appellant asserts eight assignments of error, however, the first part of her fourth assignment of error involves a question of law and, as a consequence, should be addressed first.

ASSIGNMENT OF ERROR NUMBER FOUR

{¶17} "THE TRIAL COURT ERRED WHEN IT DENIED DEFENDANT/APPELLANT'S CRIMINAL RULE 29 MOTION FOR JUDGMENT OF ACQUITTAL; ALTERNATIVELY, THE DEFENDANT/APPELLANT'S CONVICTION

IS BASED UPON INSUFFICIENT EVIDENCE AND THEREFORE MUST BE REVERSED."

{¶18} In the first part of her fourth assignment of error, Appellant contends that the trial court erred in denying her Crim.R. 29 motion for acquittal. The resolution of Appellant's claim turns on our interpretation of the aggravated menacing statute. R.C. 2903.21(A) reads, in its entirety, "[n]o 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 trial court interpreted the statute to include Cox because he was a, "member of the class of persons that was threatened," that is, the Youngstown Police Department.

{¶19} The interpretation of a statute or ordinance is a question of law. *State v. Frey*, 166 Ohio App.3d 819, 2006-Ohio-2452, 853 N.E.2d 684, ¶9. In interpreting a criminal statute, courts must construe the statute strictly against the state and liberally in favor of the accused. R.C. 2901.04(A); *State v. Gray* (1992), 62 Ohio St.3d 514, 515, 584 N.E.2d 710. However, strict construction should not override common sense and evident statutory purpose. *State v. Sway* (1984), 15 Ohio St.3d 112, 116, 472 N.E.2d 1065. "[I]f it is reasonably possible, courts should construe statutes so as to avoid ridiculous or absurd results because it is presumed that the legislature did not intend such results." *Ravenna Twp. Trustees v. City of Ravenna* (1997), 117 Ohio App.3d 152, 155, 690 N.E.2d 49, citing *State ex rel. Haines v. Rhodes* (1958), 168 Ohio St. 165, 151 N.E.2d 716, at paragraph two of the syllabus.

{¶20} A small body of caselaw has developed interpreting the Ohio menacing statutes. For instance, the crime of menacing can encompass a present state of fear of bodily harm and a fear of bodily harm in the future. *State v. Ali* (2003), 154 Ohio App.3d 493, 2003-Ohio-5150, 797 N.E.2d 1019 at ¶26; *Village of W. Lafayette v. Deeds* (Oct. 23, 1996), 5th Dist. No. 96CA3. The threat need not be made directly to the victim, it may be made indirectly if there is evidence to support the conclusion that the offender knew the threat would probably reach the victim. *In re Cunningham*, 7th Dist. No. 02-537-CA, 2002-Ohio-5875, ¶23. Furthermore, appellate courts have concluded that the state does not need to prove the offender's ability to carry out the threat or any movement toward carrying it out. *Ali* at ¶27; *State v. Schwartz* (1991), 77 Ohio App.3d 484, 602 N.E.2d 671. The sufficiency of the threat is a factual question reserved for the trier of fact. *Dayton v. Dunnigan* (1995), 103 Ohio App.3d 67, 71, 658 N.E.2d 806.

{¶21} The plain language of the statute criminalizes a person's threats of violence that create fear or cause apprehension of serious physical harm in another person. A threat to shoot up the Youngstown Police Department with an AK-47, if believed, would reasonably cause a member of the department to fear serious physical harm.

{¶22} In *In re Cunningham*, supra, we concluded that a student who left a letter at her school containing threats against her teachers had knowingly threatened those teachers. Id. at ¶23. Because she did not deliver the letter to the threatened teachers, the student argued that she could not be guilty of menacing. Id. at ¶21.

However, we reasoned that the student could have intended for the threats to reach the teachers through an indirect method. Id. at ¶23.

{¶23} The same is true in the case sub judice. Here, Appellant threatened to shoot up the Youngstown Police Department. Obviously, if she had threatened to shoot Det./Sgt. Cox, she would have acted knowingly in causing Cox to believe that she would cause serious physical harm to him. The fact that she chose to threaten the entire police department does not change the fact that she knowingly caused Det./Sgt. Cox to believe that she would cause serious physical harm to him as a member of the department.

{¶24} The remainder of Appellant's fourth assignment of error, her fifth assignment of error, and a part of the third assignment of error challenge the jury instructions and the evidence provided in this case as they relate to the essential elements of the crime, and, as such, will be discussed together for the purpose of judicial economy.

ASSIGNMENT OF ERROR NUMBER THREE

{¶25} "THE TRIAL COURT ERRED IN FAILING TO CORRECTLY INSTRUCT THE JURY WITH REGARD TO THE ELEMENTS OF THE OFFENSE CHARGED."

ASSIGNMENT OF ERROR NUMBER FIVE

{¶26} "THE DEFENDANT/APPELLANT'S CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶27} Appellant premises her sufficiency and manifest weight of the evidence arguments on essentially the same issues: (1) the threat at issue was not directed at Det./Sgt. Cox personally; (2) Appellant's anger was directed at her sister, rather than Cox; (3) he was not fearful that Appellant was going to hurt him; (4) the citizens of Youngstown were never made aware of the threat; and (5) Appellant did not act knowingly because she did not know whether Det./Sgt. Cox would communicate her threat to the citizens of Youngstown.

{¶28} Appellant's most compelling argument amounts to two lines at the conclusion of her manifest weight of the evidence challenge. She states, "the evidence, if not the charge, is vague, uncertain, conflicting or fragmentary. The court's confusion with regard to the charge itself, let alone the evidence, is demonstrated by the court's argument * * * that a class of persons was contemplated by ORC 2903.21, which is a stretch to say the least." (Appellant's Brf., p. 17.)

{¶29} Consequently, although it is buried in her manifest weight argument, Appellant appears to take issue for the first time on appeal with the definition of the elements of the crime in the jury charge. Likewise, she argues in her third assignment of error that the trial court erred in failing to explain, "what constitutes the citizens of Youngstown or members of their immediate family." (Appellant's Brf., p. 11.) Because the jury charge parroted the language of the complaint, the foregoing arguments also challenge, albeit indirectly, the sufficiency of the complaint.

{¶30} By way of example, Appellant claims in her third assignment of error:

{¶31} "Clearly, the court was uncomfortable with the awkward identification of the alleged victim in the complaint and failed to fashion a proper jury instruction with regard to who exactly the jury could find had in fact been menaced in an aggravated way by Defendant/Appellant. Instead, the trial court, out of the hearing of the jury, stated on the record, that Detective Cox, the only person to whom the threat was ever communicated by Defendant/Appellant, was a member of the 'class' contemplated by Ohio Revised Code Section 2903.21 (Transcript at page 113). It would seem that the court engaged in fact finding in this regard and clearly invaded the province of the jury rather than attempt [sic] to fashion a proper jury instruction for this awkwardly worded complaint not contemplated by the aggravated menacing statute as found in Ohio Revised Code Section 2903.21." (Appellant's Brf., p. 11.)

{¶32} In the state's merit brief, the state concedes that, "[t]he appellant threatened to shoot up the Youngstown police." (Appellee's Brf., p. 13.) Then, in an eleventh-hour effort to harmonize the definition of the elements of the crime in the complaint and jury instructions and the evidence adduced at trial, the state asserts:

{¶33} "Any harm appellant caused would have affected the citizens of Youngstown by either diminished services by harming or causing the death of members of the Youngstown police or the expenditure of monetary funds to repair the damaged property or both. The salaries and the property owned by the Youngstown police are paid through the taxes collected from the citizens of Youngstown. Any harm inflicted on this taxpayer funded agency affects the citizens of Youngstown.

{¶34} "Either way the appellant's threats caused Det/Sgt Cox to believe that she would inflict serious physical harm on the Citizens of Youngstown by inflicting harm on the personnel or property of the Youngstown police. The appellant's threat having been communicated to a member of the intended target and a citizen of the city of Youngstown negated the need for her threat to be communicated to other members of her intended targets." (Appellee's Brf., p. 13.)

{¶35} Crim.R. 7(B) plainly states that an, "indictment shall * * * contain a statement that the defendant has committed a public offense specified in the indictment." The rule further states, "[t]he statement may be in the words of the applicable section of the statute, provided the words of that statute charge an offense, or in words sufficient to give the defendant notice of all the elements of the offense with which the defendant is charged." An indictment that omits an essential element fails to charge an offense. *State v. Colon*, 118 Ohio St.3d 26, 2008-Ohio-1624, 885 N.E.2d 917, ¶38 ("*Colon I*"), citing *State v. Wozniak* (1961), 172 Ohio St. 517, 178 N.E.2d 800.

{¶36} The complaint and jury instructions in this case, in addition to failing to reflect the evidence adduced at trial, effectively omitted an essential element of the crime, that is, that the threat was directed at the "hearer" of the threat. In other words, based upon the defective indictment, the jury was instructed that the state must prove that Det./Sgt. Cox believed Appellant would cause serious physical harm to the citizens of Youngstown, not that he believed she would cause physical harm to him personally as a citizen of Youngstown.

{¶37} As a consequence, we conclude that the trial court did not properly instruct the jury on one of the essential elements of the crime, and that the complaint, which was transposed in its entirety into the jury instructions and served as the jury's only definition of the crime of aggravated menacing, was deficient. Recognizing the errors in the complaint and jury instructions, we must next determine whether to undertake a structural error analysis or review for plain error due to the fact that Appellant failed to challenge either the complaint or the jury instructions before the trial court.

{¶38} The Ohio Supreme Court has cautioned against the application of structural error in all but those rare cases where multiple violations of a defendant's rights follow the defective indictment. *State v. Colon*, 119 Ohio St.3d 204, 2008-Ohio-3749, 893 N.E.2d 169, ¶6 ("*Colon II*"), citing *Colon I* at ¶29. In cases where errors in the complaint do not, " 'permeate the trial from beginning to end and put into question the reliability of the trial court in serving its function as a vehicle for determination of guilt or innocence,' " the plain-error analysis under Crim.R. 52(B) is the proper standard of review. *Colon II*, ¶8 citing *Colon I*, at ¶23, citing *State v. Perry*, 101 Ohio St.3d 118, 2004-Ohio-297, 802 N.E.2d 643, at ¶17. In *Colon II*, the Ohio Supreme Court instructed: "Seldom will a defective indictment have this effect, and therefore, in most defective indictment cases, the court may analyze the error pursuant to Crim.R. 52(B) plain-error analysis." Id. at ¶8.

{¶39} Turning to the jury instruction, "[a]s a general rule, a defendant is entitled to have the jury instructed on all elements that must be proved to establish

the crime with which he is charged * * *." *State v. Adams* (1980), 62 Ohio St.2d 151, 153, 404 N.E.2d 144. However, the failure to instruct on each element of an offense is not necessarily reversible as plain error. Id. at 154.

{¶40} To constitute plain error, the error must be obvious on the record, palpable, and fundamental, so that it should have been apparent to the trial court without objection. See *State v. Tichon* (1995), 102 Ohio App.3d 758, 767, 658 N.E.2d 16. Moreover, plain error does not exist unless the appellant establishes that the outcome of the trial clearly would have been different but for the trial court's allegedly improper actions. *State v. Waddell* (1996), 75 Ohio St.3d 163, 166, 661 N.E.2d 1043. Notice of plain error is to be taken with utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Phillips* (1995), 74 Ohio St.3d 72, 83, 656 N.E.2d 643.

{¶41} In *Colon*, the indictment omitted the mens rea element of recklessness, which was also omitted from the jury charge. The Supreme Court concluded that the defective indictment constituted structural error because of several constitutional violations: the indictment did not include all of the elements of the offense charged, which impinged upon the defendant's right to a grand jury indictment; there was no evidence on the record that the defendant was aware that recklessness was an element of the crime or that the state produced any evidence that the defendant acted recklessly, which violated his due process rights; and the defect allowed the state to treat aggravated burglary as a strict liability crime in its closing argument. *Colon* at ¶32.

{¶42} Clearly, the constitutional issues raised in *Colon* are not present in the case sub judice. Here, there was no violation of Appellant's right to a grand jury indictment because aggravated menacing is a misdemeanor offense. Further, it is clear from Appellant's Rule 29 motion that her trial counsel was aware of the threat to the "hearer" element of the crime. Initially, there was testimony at trial that Det./Sgt. Cox believed that Appellant would carry out her threats, and the state, in its closing argument, asserted that Det./Sgt. Cox was afraid that Appellant would carry out her threats.

{¶43} An essential element of the crime of aggravated menacing was omitted from both the complaint and jury instructions in this case. Despite the omission, it is clear from the record that the trial court, the state, and Appellant's trial counsel were aware of the elements of the crime, and that evidence was offered in support of each of the elements of aggravated menacing. Accordingly, we find that the omissions in the complaint and jury instructions do not constitute structural error. Thus, we are left to review the trial record to determine whether the outcome of the trial would have been different but for the omissions in the complaint and jury instructions.

{¶44} The evidence adduced at trial established that Appellant threatened to punish YPD for not pursuing her case; she threatened to get an AK-47 and "shoot it up," and Cox believed that she would follow through on her threats. His testimony that he believed that Appellant would carry out her threats can reasonably be interpreted to mean that he feared for his own safety and the safety of the department.

{¶45} Consequently, Appellant has not demonstrated that the outcome of the trial would have been different but for the defect in the indictment or the deficient jury charge. We recognize, however, that this was not the textbook case and that this matter could have been handled more directly. The jury in this case appears to have convicted Appellant for knowingly causing Det./Sgt. Cox to believe that she would cause serious physical harm to the residents of the City of Youngstown in general, which does not constitute the crime of aggravated menacing. However, absent structural error and under the current state of the law, a defendant who fails to challenge the sufficiency of his or her complaint and/or the propriety of his or her jury instructions before the trial court waives all but outcome-determinative error. Here, there was sufficient evidence adduced at trial to convict Appellant of aggravated menacing of Det./Sgt. Cox and the Youngstown Police Department. Therefore, the defects in the indictment and the jury charge do not constitute plain error.

{¶46} Accordingly, we find that the trial court did not commit plain error when instructing the jury on the elements of aggravated menacing. The foregoing analysis supports the conclusion that the evidence was both sufficient and sufficiently persuasive to survive Appellant's sufficiency and manifest weight arguments. Therefore, the remainder of Appellant's fourth assignment of error, the second part of her third assignment of error, and her fifth assignment of error are overruled.

{¶47} In the remainder of Appellant's third assignment of error, she argues that the trial court gave a confusing and unnecessary instruction involving the definitions of the terms of "cause," "risk," and "substantial risk." Appellant raises her

objection for the first time on appeal, and, consequently, must prove that the trial court committed plain error.

{¶48} The jury instructions read, in pertinent part:

{¶49} "CAUSE IS AN ESSENTIAL ELEMENT OF THE OFFENSE. CAUSE IS AN ACT WHICH IN A NATURAL AND CONTINUOUS SEQUENCE DIRECTLY PRODUCES THE DEATH OR PHYSICAL HARM TO PERSONS OR PROPERTY, AND WITHOUT WHICH IT WOULD NOT HAVE OCCURRED.

{¶50} "* * *

{¶51} "RISK MEANS A SIGNIFICANT POSSIBILITY, AS CONTRASTED WITH A REMOTE POSSIBILITY, THAT A CERTAIN RESULT MAY OCCUR OR THAT CERTAIN CIRCUMSTANCES MAY EXIST.

{¶52} "SUBSTANTIAL RISK MEANS A STRONG POSSIBILITY, AS CONTRASTED WITH A REMOTE OR SIGNIFICANT POSSIBILITY, THAT A CERTAIN RESULT MAY OCCUR OR THAT CERTAIN CIRCUMSTANCES MAY EXIST." (Tr., pp. 158-160.)

{¶53} Other than characterizing the foregoing definitions in the jury instructions as "mysterious" and "misplaced," Appellant does not demonstrate that she suffered any prejudice as a result of the instructions. (Appellant's Brf., p. 10.) Although she states that, "the trial court failed to correctly instruct as to the essential elements of the offense charged," Appellant does not articulate how the outcome of the trial was affected. (Appellant's Brf., p. 10.) Based on the above, the trial court did not commit plain error when it included the definitions of "cause," "risk," and

"substantial risk" in the jury instructions, and the remainder of Appellant's third assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER ONE

{¶54} "THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION WHEN IT GAVE THE DEADLOCKED JURY THE HOWARD CHARGE INSTEAD OF THE MARTENS JURY CHARGE."

{¶55} In her first assignment of error, Appellant argues that the trial court erred when it gave a supplemental instruction to the jury after the jury inquired into the consequences of failing to reach a unanimous verdict. Appellant's trial counsel did not object to the supplemental instruction, and, as a result, we must review the trial court's decision for plain error

{¶56} In *State v. Howard* (1989), 42 Ohio St.3d 18, 537 N.E.2d 188, the Supreme Court of Ohio approved a supplemental charge to be given to a jury deadlocked as to judgment or acquittal. The *Howard* charge, which was read to the jury in this case verbatim, states:

{¶57} "In a large proportion of cases, absolute certainty cannot be attained or expected. Although the verdict must reflect the verdict of each individual juror and not mere acquiescence in the conclusion of your fellows, each question submitted to you should be examined with proper regard and deference to the opinions of others. You should consider it desirable that the case be decided. You are selected in the same manner, and from the same source, as any future jury would be. There is no reason to believe the case will ever be submitted to a jury more capable, impartial, or

intelligent than this one. Likewise, there is no reason to believe that more or clearer evidence will be produced by either side. It is your duty to decide the case, if you can conscientiously do so. You should listen to one another's arguments with a disposition to be persuaded. Do not hesitate to reexamine your views and change your position if you are convinced it is erroneous. If there is disagreement, all jurors should reexamine their positions, given that a unanimous verdict has not been reached. Jurors for acquittal should consider whether their doubt is reasonable, considering that it is not shared by others, equally honest, who have heard the same evidence, with the same desire to arrive at the truth, and under the same oath. Likewise, jurors for conviction should ask themselves whether they might not reasonably doubt the correctness of a judgment not concurred in by all other jurors." Id. at 25-26.

{¶58} Appellant argues that the trial court abused its discretion by failing to give a *Martens* charge. See *State v. Martens* (1993), 90 Ohio App.3d 338, 629 N.E.2d 462. The proposed charge in *Martens*, which was taken from 4 Ohio Jury Instructions (1992) 118, Section 415.50(4), reads:

{¶59} "It is conceivable that after a reasonable length of time honest differences of opinion on the evidence may prevent an agreement upon a verdict. When that condition exists you may consider whether further deliberations will serve a useful purpose. If you decide that you cannot agree and that further deliberations will not serve a useful purpose you may ask to be returned to the courtroom and

report that fact to the court. If there is a possibility of reaching a verdict you should continue your deliberations." Id. at 343.

{¶60} The *Martens* Court recognized that the foregoing instruction, "changes the focus of deliberations by asking the jury to decide whether any verdict can be reached through further deliberations." Id. As a consequence, the *Martens* Court cautioned that the instruction, if given prematurely, may be contrary to the goal of the *Howard* charge of encouraging a verdict where one can conscientiously be reached. Id.

{¶61} The record does not reflect the amount of time the jury deliberated before asking the trial court what would occur if they reached an impasse. The jury question read, "WE'VE TAKEN 4 VOTES, THE LAST 2 WERE 7-1. IF WE CAN'T REACH A CONSENSUS WHAT DO WE DO?" (Tr., p. 166.)

{¶62} The Supreme Court of Ohio has repeatedly upheld the use of the *Howard* charge, rather than a *Martens* charge, specifically finding that, "such an instruction is not coercive, and, in fact, 'is intended for a jury that believes it is deadlocked, so as to challenge them to try one last time to reach a consensus.' " *State v. Brown*, 100 Ohio St.3d 51, 2003-Ohio-5059, 796 N.E.2d 506, ¶38. The *Howard* charge served that very purpose in this case, and, therefore, the trial court did not commit plan error when it instructed the jury pursuant to *Howard*. Accordingly, Appellant's first assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER TWO

{¶63} "THE TRIAL COURT ERRED IN ITS INSTRUCTIONS TO THE JURY BY SUBSTITUTING A GREATER WEIGHT OF THE EVIDENCE STANDARD FOR THE PROOF BEYOND A REASONABLE DOUBT STANDARD WHEN INSTRUCTING THE JURY ON INFERENCES. [SIC] THEREBY DEPRIVING THE DEFENDANT/APPELLANT OF HER DUE PROCESS RIGHTS."

{¶64} Like the previous challenges to the jury charge, Appellant raises this objection for the first time on appeal. As such, she waives all but a plain error analysis. The trial court erroneously provided the civil jury instruction, rather than the criminal jury instruction, on inferences.

{¶65} The jury instructions read, in pertinent part, "YOU MAY INFER A FACT OR FACTS ONLY FROM OTHER FACTS OR CIRCUMSTANCES THAT HAVE BEEN PROVED BY THE GREATER WEIGHT OF THE EVIDENCE, BUT YOU MAY NOT MAKE INFERENCES FROM A SPECULATIVE OR REMOTE BASIS THAT HAS NOT BEEN ESTABLISHED BY THE GREATER WEIGHT OF THE EVIDENCE." (Tr., p. 153.) Appellant asserts that the Committee Comment for Ohio Jury Instruction 5.10 clearly states that the foregoing instruction should be used in civil cases only.

{¶66} Last year, we addressed the very same challenge to the use of civil inference instruction in a criminal trial in *State v. Young*, 7th Dist. No. 07MA120, 2008-Ohio-5046. In that case, we relied on numerous references to the "reasonable doubt" standard in the remainder of the jury instructions to conclude that, "one erroneous instruction was insufficient to mislead the jury or to taint the entire pool of

instructions when, otherwise, the proper instructions regarding the reasonable doubt burden of proof and evidentiary standard were provided to the jury." Id. at ¶36, quoting *State v. Coe* (June 4, 1998), 3rd Dist. No. 13-97-46.

{¶67} The same is true here. The trial court properly defined the standard to the jury. See R.C. 2901.05(D). The court also made numerous references to the reasonable doubt standard in the remainder of the charge:

{¶68} "THE DEFENDANT IS PRESUMED INNOCENT UNTIL HER GUILT IS ESTABLISHED BEYOND A REASONABLE DOUBT. THE DEFENDANT MUST BE ACQUITTED UNLESS THE STATE PRODUCES EVIDENCE WHICH CONVINCES YOU BEYOND A REASONABLE DOUBT OF EVERY ESSENTIAL ELEMENT OF THE CRIME CHARGED IN THE COMPLAINT.

{¶69} "REASONABLE DOUBT IS PRESENT WHEN, AFTER YOU HAVE CAREFULLY CONSIDERED AND COMPARED ALL THE EVIDENCE, YOU CANNOT SAY YOU ARE FIRMLY CONVINCED OF THE TRUTH OF THE CHARGE. REASONABLE DOUBT IS BASED ON REASON AND COMMON SENSE. REASONABLE DOUBT IS NOT MERE POSSIBLE DOUBT, BECAUSE EVERYTHING RELATING TO HUMAN AFFAIRS OR DEPENDING ON MORAL EVIDENCE IS OPEN TO SOME POSSIBLE OR IMAGINARY DOUBT. PROOF BEYOND A REASONABLE DOUBT IS PROOF OF SUCH CHARACTER THAT AN ORDINARY PERSON WOULD BE WILLING TO RELY AND ACT UPON IT IN THE MOST IMPORTANT OF HIS LIFE AFFAIRS.

{¶70} "* * *

{¶71} "THE DEFENDANT IS CHARGED WITH AGGRAVATED MENACING. BEFORE YOU CAN FIND THE DEFENDANT GUILTY OF AGGRAVATED MENACING, YOU MUST FIND BEYOND A REASONABLE DOUBT THAT ON OR ABOUT THE 30TH DAY OF APRIL, 2007, AND IN THE CITY OF YOUNGSTOWN, MAHONING COUNTY, OHIO, THE DEFENDANT KNOWINGLY CAUSED DETECTIVE SERGEANT RAMON COX TO BELIEVE THAT [SHE] WOULD CAUSE SERIOUS PHYSICAL HARM TO THE PERSON OR PROPERTY OF RESIDENTS OF THE CITY OF YOUNGSTOWN OR MEMBERS OF THEIR IMMEDIATE FAMILIES BY THREATENING TO MAKE THE VIRGINIA TECH SHOOTING LOOK LIKE IT WAS NOTHING.".

{¶72} "* * *

{¶73} "IF YOU FIND THAT THE STATE PROVED BEYOND A REASONABLE DOUBT ALL THE ESSENTIAL ELEMENTS OF THE OFFENSE OF AGGRAVATED MENACING, YOUR VERDICT MUST BE GUILTY."

{¶74} "IF YOU FIND THAT THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT ANY ONE OF THE ESSENTIAL ELEMENTS OF THE OFFENSE OF AGGRAVATED MENACING, THEN YOUR VERDICT MUST BE NOT GUILTY." (Tr., pp. 155-160.)

{¶75} Because the jury instructions read in their entirety properly explained the state's burden of proof, Appellant has failed to demonstrate that the trial court committed plain error. Accordingly, Appellant's second assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER SIX

{¶76} "THE COURT ERRED IN ADMITTING IMPERMISSIBLE OTHER ACTS/CHARACTER EVIDENCE OF DEFENDANT/APPELLANT IN VIOLATION OF RULE 404 AND RULE 403 OF THE OHIO RULES OF EVIDENCE AND WHEN IT PERMITTED INADMISSIBLE HEARSAY TESTIMONY IN VIOLATION OF EVIDENCE RULE 802."

{¶77} Appellant contends that the trial court should have excluded any evidence referring to Appellant's felony conviction for assaulting a police officer due to unfair prejudice, as well as Det./Sgt. Cox's testimony about the Virginia Tech shooting, because he had not demonstrated any personal knowledge of that incident.

{¶78} Relevant evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. Evid.R. 403(A). Additionally, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Evid.R. 404(B).

{¶79} In this case, Appellant's felony assault conviction was not admitted for the purpose of proving that she was likely to commit another assault. The conviction was admitted to demonstrate Det./Sgt. Cox's fear that she would carry out her threats of violence was reasonable. As stated earlier, the crime of aggravated menacing is not based upon the actual execution of the threatened action, but, instead, the fear or apprehension of serious physical harm instilled in the victim. Therefore, evidence of Appellant's prior assault conviction was not admitted for an improper purpose, but,

instead, to show Cox's state of mind when Appellant threatened to take revenge on the Youngstown Police Department.

{¶80} At trial, Det./Sgt. Cox stated that the shootings at Virginia Tech took place on April 16th, 50 people were shot, and 30 or 31 people died. (Tr., p. 93.) He testified that his knowledge of the Virginia Tech shootings was based upon television news coverage. (Tr., pp. 93-94.) Appellant's counsel did not object to Det./Sgt. Cox's testimony regarding the Virginia Tech incident at trial. We review the decision of the trial court for plain error.

{¶81} Hearsay is an out-of-court statement offered in court to prove the truth of the matter asserted. Evid.R. 801(C). Generally, hearsay is inadmissible. Evid.R. 802.

{¶82} The events at Virginia Tech were a matter of national concern and the subject of intense media coverage. Furthermore, the witness' testimony regarding the Virginia Tech shootings was admitted to show his awareness of the event at the time that Appellant threatened the Youngstown Police Department, not to prove the truth of the matter asserted. Accordingly, the trial court did not commit plain error in admitting Det./Sgt. Cox's testimony regarding Appellant's prior felony conviction or the shootings at Virginia Tech, and her sixth assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER SEVEN

{¶83} "THE STATE OF OHIO COMMITTED PROSECUTORIAL MISCONDUCT IN ITS QUESTIONING OF THE DEFENDANT/APPELLANT AS WELL AS IN ITS CLOSING ARGUMENT."

{¶84} Appellant contends that the prosecutor committed misconduct when he referred to her as "mentally ill" in his cross-examination, (Tr., p. 134), and when he told the jury to consider her violent tendencies during his closing argument. (Tr., p. 143.)

{¶85} "A prosecutor's remarks constitute misconduct if the remarks were improper and if the remarks prejudicially affected an accused's substantial rights." *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, 793 N.E.2d 446, at ¶44, citing *State v. Smith* (1984), 14 Ohio St.3d 13, 14, 14 OBR 317, 470 N.E.2d 883. In determining whether the prosecutor's statements affected a substantial right of the defendant, an appellate court should consider the following factors: "(1) the nature of the remarks; (2) whether an objection was made by defense counsel; (3) whether the court gave any corrective instructions; and (4) the strength of the evidence presented against the defendant." *State v. Breland*, 11th Dist. No. 2003-A-0066, 2004-Ohio-7238, ¶29. Prosecutorial misconduct will not provide a basis for reversal unless the misconduct can be said to have deprived the appellant of a fair trial based on the entire record. *State v. Lott* (1990), 51 Ohio St.3d 160, 166, 555 N.E.2d 293. Here, Appellant's trial counsel did not raise any objection to the prosecutor's statements before the trial court. Therefore, she has waived all but a plain error review.

{¶86} Appellant testified on direct examination that she suffers from bipolar disorder and manic-depression. On cross-examination, the prosecutor asked Appellant to list the medications she has been prescribed to treat her mental

illnesses. The prosecutor's question was not prejudicial, as Appellant had already conceded on direct-examination that she suffered from mental disorders.

{¶87} During his closing argument, the prosecutor stated:

{¶88} "[Appellant] was convicted of a felony assault, knowledge that [Cox] had at the time he filed the charges of aggravated menacing that she had violent tendencies.

{¶89} "It goes to his belief of whether or not this woman could or would follow up on the threats that she made. He believed the answer to be yes. He has had contact with her." (Trial Tr., pp. 143-144.)

{¶90} The foregoing statement merely summarized the evidence admitted at trial. Therefore, the challenged statements were not prejudicial, nor did they deprive Appellant of a fair trial. Accordingly, Appellant's seventh assignment of error is overruled.

ASSIGNMENT OF ERROR NUMBER EIGHT

{¶91} "DEFENDANT/APPELLANT WAS DENIED A FAIR TRIAL DUE TO THE CUMULATIVE EFFECT OF THE ERRORS AS SET FORTH HEREIN."

{¶92} Appellant contends that even if each single error alleged in her assignments of error is not worthy of reversal, the cumulative effect of these errors denied her a fair trial. However, errors do not become prejudicial, "by sheer weight of numbers." *State v. Frazier*, 115 Ohio St.3d 139, 2007-Ohio-5048, 873 N.E.2d 1263, ¶241. Cumulative error may only be found when the effect of multiple errors,

individually found to be harmless, acts to deprive the defendant of his constitutional right to a fair trial. *State v. Garner* (1995), 74 Ohio St.3d 49, 64, 656 N.E.2d 150.

{¶93} The Ohio Supreme Court has observed that an assignment of error that simply intones the phrase "cumulative error" but offers no analysis or argument constitutes an assignment of error without substance. See *State v. Bethel*, 110 Ohio St.3d 416, 2006-Ohio-4853, 854 N.E.2d 150, ¶197. Appellant offers no analysis or argument in her brief.

{¶94} Although we have concluded that the trial court committed harmless error with respect to the definitions of the essential elements of the crime, cause, risk, and substantial risk, and the instruction on inferences, we cannot conclude that the trial court's errors acted in concert to deprive Appellant of a fair trial. There is no evidence on the record that suggests that a properly charged jury would have reached a different conclusion regarding Appellant's guilt.

{¶95} The jury obviously credited Det./Sgt. Cox's account of their April 30th phone conversation. Moreover, even though Cox conceded that he did not think Appellant was around the corner with an assault rifle, he testified that he feared she would carry out her threats in the future, and that his fear prompted him to report Appellant's call to Capt. Centorame. Because the trial court's errors did not deprive Appellant of her constitutional right to a fair trial, her eighth assignment of error is overruled.

{¶96} In summary, the facts adduced at trial fit squarely within the plain language of the aggravated menacing statute. To the extent that the sufficiency of

the threat is a jury question, the trial court did not err when it denied Appellant's motion for acquittal. Although the trial court provided several incomplete or inappropriate instructions to the jury, the record supports the conclusion that the jury would have convicted Appellant despite the trial court's errors. Likewise, the trial court did not commit plain error when it admitted Appellant's prior felony conviction. Finally, the prosecutor's comments during the trial and closing argument did not prejudice Appellant. Because the errors committed by the trial court were harmless errors, and they did not act in concert to deprive Appellant of a fair trial, all of Appellant's assignments of error are overruled, and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Vukovich, P.J., concurs.

APPROVED:

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CHERYL L. WAITE, JUDGE