[Cite as *State v. O'Reilly*, 2009-Ohio-6099.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92210

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

DANIEL O'REILLY

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-510645

BEFORE: Celebrezze, J., Gallagher, P.J., and McMonagle, J.

RELEASED: November 19, 2009
JOURNALIZED:
ATTORNEY FOR APPELLANT

Myriam A. Miranda
11510 Buckeye Road
Cleveland, Ohio 44104

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
BY: Mary Court Weston
Assistant Prosecuting Attorney
The Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Defendant-appellant, Daniel O'Reilly ("appellant"), appeals his convictions for menacing by stalking in violation of R.C. 2903.211 and aggravated menacing in violation of R.C. 2903.21. Finding no merit to this appeal, we affirm.

{¶ 2} On Friday, May 2, 2008, Crystal Luks ("Luks"), an employee at the Gold and Diamonds kiosk in Tower City Center, was approached by appellant, who indicated he was a prophet from God. Appellant told Luks he knew things about her; he proceeded to tell her that her father passed away, and she had an older brother and sister. After informing appellant that this information was untrue, Luks asked appellant to leave. Appellant refused to leave, persisted that he was a prophet, and kept reciting what Luks perceived to be biblical scripture.

{¶ 3} Luks eventually left the kiosk and went to the store where her brother was working, located just a few feet away from her kiosk. She told her brother that appellant was "crazy" and was bothering her. Luks and her brother asked appellant to leave, but he began making false statements about Luks's brother and refused to leave. At this point, Luks and her brother called mall security.

{¶ 4} While Luks and her brother were waiting for the security officer to arrive, appellant continued to ramble, became increasingly agitated, and

began threatening Luks. Specifically, he told Luks that he would ensure that she did not get what she wanted in life and indicated that he was going to cause damage to her face in some way. The security officer arrived and asked appellant to leave, but he refused to cooperate. The security officer had to become more forceful with appellant, advising him that he had no choice but to leave the mall.

{¶ 5} The following Monday, May 5, 2008, appellant returned to Tower City and again approached the Gold and Diamonds kiosk where Luks was working. According to Luks, appellant was very angry when he approached, came to the edge of the kiosk where she was standing, and put his arms on the door as if he were going to come inside. Appellant made various threats to Luks, claiming she would get what she deserved, she had something coming to her, and he was going to injure her face.

{¶ 6} In fear of what appellant might do, Luks got the attention of a nearby security guard, Brandon Slay. Alerted by the loud noises and commotion occurring at the Gold and Diamonds kiosk, another security guard, Annie Ervin, also approached. As Officers Slay and Ervin approached, they both heard appellant threatening Luks. Because the security guards at Tower City are not permitted to physically apprehend individuals who are causing a disturbance, Officer Ervin radioed for backup from the Cleveland Police Department ("CPD").

{¶ 7} While waiting for the CPD to arrive, Officers Ervin and Slay attempted to calm appellant. They asked him to leave, but he continued "jerking" his body as if he were going to attack Luks. A moment or so later, Detective David Borden with the CPD, who was working part-time at Tower City, arrived at the kiosk. Detective Borden testified that he heard appellant screaming and told him that he had to calm down and let go of the door to the kiosk. Appellant told Detective Borden that he used to be homeless, but had become a "street preacher," that Luks disrespected him, and he was going to "smash her face." Detective Borden then took appellant into custody.

{¶ 8} Appellant was indicted on one count of menacing by stalking in violation of R.C. 2903.211, a fourth degree felony, and one count of aggravated menacing in violation of R.C. 2903.21, a first degree misdemeanor. Appellant was referred to the psychiatric clinic to determine if he was competent to stand trial, sane at the time of the incident, and whether his case should be transferred to the mental health docket. Appellant was uncooperative during this psychiatric evaluation. On July 7, 2008, Dr. George Schmedlen with the Court Psychiatric Clinic wrote a letter to the trial court indicating that if appellant's competency was a genuine issue, he should be advised to cooperate with the evaluation.

{¶ 9} Dr. Schmedlen went on to say: "As the Court may be aware, there is a crisis with respect to competency restoration beds. There are

approximately 30 individuals waiting for restoration at Northcoast Behavioral Healthcare – Cleveland Campus. This translates to a three to four month wait between the time a Judge orders restoration and when the defendant is actually seen for restoration at Northcoast.

{¶ 10} "One of the contributing factors to this crisis is the use of restoration beds for 20-day inpatient competency assessments. Although there may be appropriate cases when this is required — such as a case where it is difficult to distinguish malingering from mental illness — we are making a concerted effort to reduce the number of such evaluations. This is particularly true when the main issue appears to be the defendant's simple refusal to cooperate with the evaluation * * *."

{¶ 11} After this letter was issued, appellant's trial counsel withdrew her motion for a competency evaluation, assured the trial court that she and appellant both felt he was competent to stand trial, and informed the court that appellant felt his mental health issues had no relevancy with respect to the charges against him. Appellant's jury trial then began on August 20, 2008.

{¶ 12} At the conclusion of the trial, the trial court granted appellant's Crim.R. 29 motion for acquittal in part and denied it in part. The trial court ruled there was no evidence to prove appellant trespassed, which was an

alternative theory in the menacing-by-stalking charge. Both counts went to the jury as amended and a guilty verdict was returned on August 22, 2008.

{¶ 13} Appellant was then referred for a presentence investigation. During his presentence investigation, appellant indicated that he had mental health issues and was again referred to the psychiatric clinic for evaluation. Appellant again refused to participate in this evaluation and indicated to the treating psychiatrist that he was going to obtain independent counsel. This information was discussed at a September 22, 2008 sentencing hearing. Appellant's trial counsel then advised the court that she had discussed appellant's mental health issues with appellant and she and appellant both felt he was competent to stand trial. The trial court then sentenced appellant to six months of community control sanctions.

{¶ 14} Appellant came before the trial court on October 10, 2008 after refusing to sign the documents specifying the terms and conditions of his community control sanctions. At this juncture, he was represented by new counsel who indicated to the court that he felt appellant's psychiatric issues needed to be addressed. Counsel informed the court that appellant was bipolar, had been hospitalized approximately 20 times prior to 2008, had a low thyroid level, and also had diabetes, which contributed to metabolic issues that would, in turn, contribute to appellant's psychiatric condition. Counsel then requested that the court again refer appellant to the psychiatric

clinic. Based on this information, the trial court referred appellant for a third psychiatric evaluation.

{¶ 15} On October 29, 2008, appellant appeared before the trial court to discuss his psychiatric evaluation. Dr. Peter Barish wrote a letter to the trial court explaining that appellant refused to participate in the evaluation process. When asked why he refused to participate in the evaluation, appellant told the trial court that he was under a misunderstanding with regard to the services offered by the county. Specifically, appellant told the trial judge, "I said, now that I'm seeing that it's a program to assist me in that type of way to find psychiatric help, I said, I really don't need that. I have a psychiatrist. You know, the psychiatrist does a well job, medication works. I just need to get to the things I need to get to to help me." Appellant also told the trial court he was not taking his medication when he engaged in the alleged activities at Tower City.

{¶ 16} The trial judge advised appellant that she was trying to act in appellant's best interests, but because of appellant's refusal to cooperate, she was compelled to impose a jail sentence. The trial court sentenced appellant to a term of six months in the Cuyahoga County jail. Appellant was released on April 27, 2009.

{¶ 17} Appellant appeals his convictions and raises four assignments of error for our review.

{¶ 18} "I. The evidence was insufficient to sustain a finding of guilt as to menacing by stalking in violation of R.C. 2903.211."

{¶ 19} "II. The evidence was insufficient to sustain a finding guilt as to aggravated menacing in violation of R.C. 2903.21."

{¶ 20} "III. The verdict was against the manifest weight of the evidence."

{¶ 21} "IV. Mr. O'Reilly was denied the effective assistance of counsel."

Law and Analysis

{¶ 22} We note at the outset that appellant has completed his jail sentence and has been released from confinement. The record is devoid of any request to stay execution of his sentence pending appeal, so we must consider whether we have jurisdiction to consider this appeal.

{¶ 23} "Where a criminal defendant, convicted of a misdemeanor, voluntarily satisfies the judgment imposed upon him or her for that offense, an appeal from the conviction is moot unless the defendant has offered evidence from which an inference can be drawn that he or she will suffer some collateral legal disability or loss of civil rights stemming from that conviction." *State v. Stewart*, 8th Dist. No. 86411, 2006-Ohio-813, at ¶8, citing *State v. Golston*, 71 Ohio St.3d 224, 226, 1994-Ohio-109, 643 N.E.2d 109. See, also, *State v. Smith*, Cuyahoga App. No. 81344, 2003-Ohio-3215, ¶ 33-37.

{¶ 24} After appellant refused to comply with the terms and conditions of his community control sanctions, he was sentenced to six months in the Cuyahoga County jail. The burden is on appellant to prove that this imprisonment caused a loss of his civil rights. *Stewart*, supra. Appellant failed to meet this burden. In fact, appellant offered no evidence indicating how his imprisonment resulted in a specific loss of his civil rights. As such, the appeal for appellant's misdemeanor conviction for aggravated menacing is moot. Appellant's felony conviction for menacing by stalking, however, requires a different analysis. Id.

{¶ 25} Due to the obvious stigma that accompanies an individual being labeled a convicted felon, "an appeal from a felony conviction is not moot even if the entire sentence has been served before the appeal is decided[.]" Id. at ¶9, citing *Golston*, supra, at 227. For example, convicted felons may not act as jurors, hold certain offices, or engage in certain occupations. Id. "Given the numerous adverse collateral consequences imposed upon convicted felons, a person convicted of a felony has a substantial stake in the judgment of conviction which survives the satisfaction of the judgment imposed." Id. Although appellant's completion of his sentence renders his second assignment of error moot, it does not affect the appeal of his felony conviction.

{¶ 26} Before addressing the remainder of appellant's assignments of error, we must evaluate the trial court's actions with regard to appellant's psychiatric condition. Because appellant does not raise an assignment of error based on the trial court's actions, we must utilize a plain error analysis. 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*, 75 Ohio St.3d 163, 166, 1996-Ohio-100, 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*, 74 Ohio St.3d 72, 83, 1995-Ohio-171, 656 N.E.2d 643.

{¶ 27} In the case sub judice, counsel withdrew her motion for referral to the psychiatric clinic for evaluation of competency, eligibility for the mental health docket, and evaluation of sanity at the time of the act. She was apparently satisfied that appellant was competent to stand trial and to make the necessary decisions appurtenant thereto; nothing in the record clearly and convincingly indicates any error in this evaluation.

{¶ 28} It is obvious from a review of this record that the trial court appropriately attempted to ascertain appellant's competency, abandoning the evaluation only when counsel assured the court that she was satisfied appellant was competent. Nothing in this record convinces us that this was plain error. As such, we now address appellant's remaining arguments (Assignments of Error I, III, and IV) as they relate to his felony conviction.

Sufficiency of the Evidence

{¶ 29} In his first assignment of error, appellant argues that the evidence presented at trial was insufficient to support his conviction for menacing by stalking. In *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, the Ohio Supreme Court re-examined the standard of review to be applied by an appellate court when reviewing a claim of insufficient evidence.

{¶ 30} "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 defendant's guilt beyond a reasonable doubt. 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. (*Jackson*

v. Virginia [1979], 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560, followed.)" Id. at paragraph two of the syllabus.

{¶ 31} More recently, in *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, the Ohio Supreme Court defined sufficiency as "'a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law.' Black's Law Dictionary (6 Ed.1990) 1433. See, also, Crim.R. 29(A) (motion for judgment of acquittal can be granted by the trial court if the evidence is insufficient to sustain a conviction)." Id. at 386.

{¶ 32} In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486, 124 N.E.2d 148. A conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 72 L.Ed.2d 652, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 33} Appellant was charged with menacing by stalking in violation of R.C. 2903.211(A)(1), which provides that "[n]o person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person." The crux of appellant's argument is that his interaction

with Luks on only two occasions was insufficient to establish a "pattern of conduct" as required by statute. "Pattern of conduct" is defined as "two or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents." R.C. 2903.211(D)(1).

{¶ 34} The evidence presented by the state shows the two incidents occurred in close proximity to one another — the first on May 2, 2008 and the second on May 5, 2008 — as required by the menacing by stalking statute. Two incidents are sufficient to establish a pattern of conduct for a menacing-by-stalking conviction. *State v. Rucker*, 12th Dist. No. CA2001-04-076, 2002-Ohio-172, at ¶2. Appellant essentially argues that Luks only felt threatened during the second encounter with him, and thus, no pattern of conduct was proven beyond a reasonable doubt.

{¶ 35} At trial, Luks testified that she felt threatened on both occasions. She testified that appellant threatened to cause some sort of injury to her face on both occasions, told her she would get what she deserved, and that he would make sure she did not get what she wanted in life. The evidence showing two incidents where appellant approached Luks and made threatening remarks to her were sufficient to demonstrate a pattern of conduct as required to support a conviction for menacing by stalking.

{¶ 36} Appellant also contends that the state failed to produce evidence showing that he acted knowingly, as required by R.C. 2903.211(A)(1). "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B). In support of his argument, appellant points to the testimony of Luks and Detective Borden describing him as "crazy" and irrational. This argument is misleading.

{¶ 37} The testimony at trial indicated that throughout both events appellant's attention was directed solely at Luks. It was not until the security officers took additional efforts to divert appellant's attention that he acknowledged their requests to leave Tower City. Even after he heard their requests to leave, appellant refused to comply and became increasingly aggressive. In addition, it appears that appellant's sole purpose in returning to Tower City on December 5, 2007 was to find and threaten Luks.

{¶ 38} Appellant's menacing by stalking conviction was based on sufficient evidence. The state proved that, on two separate occasions, appellant knowingly engaged in aggressive and threatening behavior toward Crystal Luks. The state presented further evidence to show that Luks feared for her personal safety on both occasions. Viewing the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact

could find that the elements of menacing by stalking were proven beyond a reasonable doubt. Appellant's first assignment of error is overruled.

Manifest Weight of the Evidence

{¶ 39} In his third assignment of error, appellant claims that his conviction was against the manifest weight of the evidence. Manifest weight of the evidence is subjected to a different standard than sufficiency of the evidence. Article IV, Section 3(B)(3) of the Ohio Constitution authorizes appellate courts to assess the weight of the evidence independently of the factfinder. Thus, when a claim is assigned concerning the manifest weight of the evidence, an appellate court "has the authority and duty to weigh the evidence and to determine whether the findings of * * * the trier of fact were so against the weight of the evidence as to require a reversal and a remanding of the case for retrial." *State ex rel. Squire v. City of Cleveland* (1948), 150 Ohio St. 303, 345, 82 N.E.2d 709.

{¶ 40} The United States Supreme Court recognized the distinctions in considering a claim based upon the manifest weight of the evidence as opposed to sufficiency of that evidence. The Court held in *Tibbs v. Florida*, supra, that, unlike a reversal based upon the insufficiency of the evidence, an appellate court's disagreement with the jurors' weighing of the evidence does not require special deference accorded verdicts of acquittal, i.e., invocation of the double jeopardy clause as a bar to relitigation. Id. at 43.

{¶ 41} Upon application of the standards enunciated in *Tibbs*, the court in *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, has set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated: "The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Id. at 720.

{¶ 42} Applying the standard delineated in *Martin*, appellant's conviction is not against the manifest weight of the evidence. The state presented four witnesses whose stories did not differ from one another in any significant fashion. The evidence clearly indicated that appellant approached Luks on two separate occasions, made threatening remarks, and refused to leave when asked.

{¶ 43} Appellant gives great weight to the fact that he purported to be a prophet, thus implying that he originally intended only to help Luks. This argument is unpersuasive. Regardless of his initial intentions, appellant made several threatening remarks to Luks, many of which were overheard by two Tower City security officers and one CPD detective. There was no "manifest miscarriage of justice" in this case and the jury did not "lose its

way" in finding appellant guilty of menacing by stalking. Appellant's third assignment of error is overruled.

Ineffective Assistance of Counsel

{¶ 44} In his fourth assignment of error, appellant argues that he was denied the effective assistance of counsel. In order to substantiate a claim of ineffective assistance of counsel, appellant is required to demonstrate that: 1) the performance of defense counsel was seriously flawed and deficient, and 2) the result of the trial or legal proceeding would have been different had defense counsel provided proper representation. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Brooks* (1986), 25 Ohio St.3d 144, 495 N.E.2d 407.

{¶ 45} In reviewing a claim of ineffective assistance of counsel, it *must* be presumed that a properly licensed attorney executes his legal duty in an ethical and competent manner. *State v. Smith* (1985), 17 Ohio St.3d 98, 477 N.E.2d 1128; *Vaughn v. Maxwell* (1965), 2 Ohio St.2d 299, 209 N.E.2d 164.

{¶ 46} The Ohio Supreme Court held in *State v. Bradley* (1989), 42 Ohio St.3d 136, 141-142, 538 N.E.2d 373, that "'[w]hen considering an allegation of ineffective assistance of counsel, a two-step process is usually employed. First, there must be a determination as to whether there has been a substantial violation of any of defense counsel's essential duties to his client. Next, and analytically separate from the question of whether the defendant's

Sixth Amendment rights were violated, there must be a determination as to whether the defense was prejudiced by counsel's ineffectiveness.' *State v. Lytle* (1976), 48 Ohio St.2d 391, 396-397, 2 O.O.3d 495, 498, 358 N.E.2d 623, 627, vacated in part on other grounds (1978), 438 U.S. 910. This standard is essentially the same as the one enunciated by the United States Supreme Court in *Strickland v. Washington* (1984), 466 U.S. 668.' * * *

{¶ 47} "Even assuming that counsel's performance was ineffective, this is not sufficient to warrant reversal of a conviction. 'An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States v. Morrison,* 449 U.S. 361, 364-365 [101 S.Ct. 665, 667-68, 66 L.Ed.2d 564] (1981).' *Strickland,* supra, 466 U.S. at 691, 104 S.Ct. at 2066. To warrant reversal, '[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' *Strickland,* supra, at 694, 104 S.Ct. at 2068. In adopting this standard, it is important to note that the court specifically rejected lesser standards for demonstrating prejudice. * * *

{¶ 48} "Accordingly, to show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a

reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."

{¶ 49} Appellant has not met this burden. He argues that his trial counsel should have insisted on a full psychiatric evaluation in order to determine whether he was competent to stand trial and sane when the event occurred. But when the trial court originally referred appellant for a psychiatric evaluation, he refused to comply. At trial, appellant's attorney indicated that she had spoken with appellant and both she and appellant felt he was competent to stand trial. This was not the only occasion on which appellant was referred for a psychiatric evaluation and refused to participate.

{¶ 50} Trial counsel's decision not to seek further evaluations, for which there was no guarantee appellant would comply, does not reflect unreasonable professional judgment. *State v. Williams*, 99 Ohio St.3d 439, 2003-Ohio-4164, 793 N.E.2d 446, at ¶65-66. "Counsel knew their client and could best determine whether he was able to assist them in his defense or whether a competency hearing or psychiatric examination was needed." Id. at ¶65.

{¶ 51} In *Williams*, defense counsel had already had extensive psychological evaluations of the defendant performed. Although several evaluations of appellant were not completed here, several attempts were

made to refer appellant to the psychiatric unit. Appellant refused to comply on each attempt, through no fault of his trial attorney.

{¶ 52} Appellant is further unable to show that, had these psychiatric evaluations been performed, the outcome of his trial would have been different. Appellant points to instances in the trial where witnesses referred to him as "crazy" or irrational. These assertions are insufficient to prove that he would not have been convicted had he undergone further psychological investigation.

{¶ 53} Because appellant is unable to show that he was denied effective assistance of counsel, appellant's fourth assignment of error is overruled.

Conclusion

{¶ 54} Appellant failed to show that his conviction for menacing by stalking was not supported by sufficient evidence or was against the manifest weight of the evidence. Appellant is also unable to show that he was denied the effective assistance of counsel as guaranteed by the Ohio and United States Constitutions. We find no merit to appellant's assignments of error.

Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

FRANK D. CELEBREZZE, JR., JUDGE

SEAN C. GALLAGHER, P.J., and
CHRISTINE T. McMONAGLE, J., CONCUR