[Cite as *State v. Hersh*, 2012-Ohio-3807.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 97592

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

MARCI E. HERSH

DEFENDANT-APPELLANT

JUDGMENT:
REVERSED AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-523165 and CR-523723

BEFORE: Jones, J., Boyle, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: August 23, 2012

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LARRY A. JONES, SR., J.:

{¶1} Defendant-appellant, Marci Hersh, appeals her menacing by stalking conviction, which was rendered after a bench trial. Hersh also appeals the trial court's judgment ordering an additional period of conditional release. We reverse the trial court's judgments.

I. Procedural History

{¶2} In April 2009, Hersh was charged with crimes in two cases. In the first, Case No. CR-523165, Hersh was charged with two counts of menacing by stalking and two counts of telecommunications harassment. In the second, Case No. CR-523723, Hersh was charged with three counts of menacing by stalking. The cases were transferred to the mental health docket of the Cuyahoga County Court of Common Pleas.

{¶3} During the pretrial proceedings, Hersh's competency to stand trial was raised. Hersh was deemed incompetent to stand trial, but was treated and restored to competency. The cases proceeded to a bench trial in July 2010, and after the testimony of one witness, an alleged victim named in the first case, the trial court questioned Hersh's sanity at the times of the crimes. The trial was stayed so that the issue could be pursued.

{¶4} Two evaluations and reports were completed relative to Hersh's sanity. Both found that Hersh was insane at the time she committed the alleged crimes that were the subject of the first case, but sane at the time she committed the alleged crimes that

were the subject of the second case. Thus, relative to the first case, the defense sought, and was granted permission, to change Hersh's not guilty plea to not guilty by reason of insanity. The defense and state stipulated to the medical and police reports, the trial court found Hersh not guilty by reason of insanity, dismissed the case, and referred Hersh for civil commitment proceedings.

{¶5} Subsequently, relative to the first case, the trial court found Hersh to be a mentally ill person subject to civil commitment and ordered that she be conditionally released and monitored by Jewish Family Services. The court indicated that it would retain jurisdiction over the case for 18 months, the maximum time Hersh could have received had she been found guilty. Ten months later, after the case had been assigned to a new mental health docket judge, the trial court extended the period of conditional release for an additional five years.

{¶6} The second case, three counts of menacing by stalking, proceeded to a bench trial. Each count related to different victims: the named victim in Count 1 was James Zull; the named victim in Count 2 was Susan Zull; and the named victim in Count 3 was Judith Weiss.

{¶7} The defense made a Crim.R. 29 motion for acquittal at the conclusion of the state's case and the conclusion of the presentation of all the evidence; both motions were denied. The court found Hersh not guilty of Counts 1 and 2 relative to James and Susan Zull, but guilty of Count 3, which was relative to Judith Weiss. The trial court incorporated the conditional release plan from the first case, including the additional time,

into the second case. Hersh now presents the following two assignments of error for our review:

> I. The trial court erred in extending Defendant's conditional release beyond the maximum term of imprisonment for which Defendant could have received if the Defendant had been convicted of the most serious offense with which the Defendant was charged and for which the Defendant was found not guilty by reason of insanity.
>
> II. The trial court erred in entering a judgment of conviction of Defendant of the offense of menacing by stalking, which was based on evidence that was insufficient to convict as a matter of law.

II. Facts

{¶8} The facts, relevant to Count 3, menacing by stalking, in the second case, with Judith Weiss as the named victim, are as follows. In 2006, Weiss contacted the police about Hersh, claiming that Hersh harassed her on a daily basis. Weiss testified that the harassment included threats and made her feel concerned for her own, as well as her family's, safety. At the time, Weiss and Hersh lived in the same apartment building and both worked at Case Western Reserve University. According to Weiss, the two were not friends, social acquaintances, or even colleagues. As a result of Weiss's complaints, Hersh was prosecuted and found guilty of menacing by stalking in 2008. Hersh was ordered to have no contact with Weiss or her family for six months.

{¶9} Weiss testified that after Hersh's 2008 conviction, she did not see Hersh again until April 8, 2009, when the incident giving rise to Count 3 occurred. On that date, Weiss, who still worked at Case Western Reserve University, went on her lunch break to Dave's Supermarket in the Cedar-Fairmount area of Cleveland Heights. Her

plan was to purchase a few items, take them home to her apartment on Shaker Square, and return to work. As she was sitting in her car across the street from the market waiting for the light to change, Weiss saw Hersh. Weiss testified that she and Hersh made eye contact. Weiss admitted that she knew Hersh frequented the Cedar-Fairmount area.

{¶10} When the light turned green, and Weiss started to drive, she saw Hersh cross the street and walk in the direction of the front of the market. Weiss drove to the parking lot, which was located to the rear of the market, parked, and went into the store.

{¶11} Shortly after entering, Weiss saw Hersh in the store. According to Weiss, as she moved from aisle to aisle, Hersh would follow her, appearing at the opposite end of the aisle from Weiss, and ducking. Weiss quickly gathered a few items to purchase, and paid for them at the customer service desk, which was located near the rear door of the store. Weiss testified that as she was purchasing her items, Hersh was near the front door of the store, talking to someone and pointing at her. Weiss admitted that Hersh had no direct contact with her.

{¶12} A surveillance video from the store showing Weiss and Hersh was admitted into evidence. The video demonstrated that Hersh entered and exited the market before Weiss. Both women were in the market for approximately two minutes and were not captured in the same frames by the surveillance cameras.

{¶13} The testimony relative to the named victims in Counts 1 and 2, James and Susan Zull, Weiss's parents, was that they had each had encounters with Hersh in March

2009. Weiss testified that when she encountered Hersh at the store, she was aware of her parents' March encounters with Hersh. The trial court acquitted Hersh on Counts 1 and 2.

III. Analysis

{¶14} For ease of discussion, we first consider Hersh's sufficiency of the evidence argument, as set forth in her second assignment of error.

A. Sufficiency of the Evidence

{¶15} Crim.R. 29 mandates that the trial court issue a judgment of acquittal where the state's evidence is insufficient to sustain a conviction for the offense. Crim.R. 29(A) and a sufficiency of the evidence review require the same analysis. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, 847 N.E.2d 386, ¶ 37. In analyzing whether a conviction is supported by sufficient evidence, the reviewing court must view the evidence "in the light most favorable to the prosecution" and ask whether "any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶16} Menacing by stalking is governed by 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."

{¶17} Hersh contends that the state failed to present sufficient evidence to demonstrate a "pattern of conduct." "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). According to Hersh, there was only one relevant encounter between Hersh and Weiss — the April 8, 2009 supermarket encounter — and that one encounter could not be the basis for a "pattern of conduct."

{¶18} We agree with Hersh that the encounters the two women had in 2006, which resulted in the 2008 menacing by stalking conviction, were not "closely related in time" to the supermarket encounter (as conceded by the state),[1] but we consider the state's contention that Hersh's encounters in March 2009 with Weiss's parents properly served as the basis for the "pattern of conduct." The state cites three cases in support of its contention: *Middleton v. Jones*, 167 Ohio App.3d 679, 2006-Ohio-3465, 856 N.E.2d 1003 (12th Dist.); *State v. Arnott*, 9th Dist. No. 21989, 2005-Ohio-3; and *State v. Halgrimson*, 9th Dist. No. 99CA007389, 2000 Ohio App. LEXIS 5162 (Nov. 8, 2000).

{¶19} In *Jones*, the defendant was convicted of menacing by stalking after he had been following the victims — a mother and her young daughter — for several years. The defendant challenged his conviction contending, in part, that the city had failed to demonstrate that he had engaged in a "pattern of conduct closely related in time." Specifically, the defendant contended that several years had lapsed between the first

[1] *See* tr. 260.

incident in 2001, and the incident leading to his arrest in 2004.

{¶20} The Twelfth Appellate District disagreed with the defendant. The court noted that four incidents were reported to the police during the time period, two of which occurred in March 2004, and that the mother had testified that there were "numerous" other incidents that she did not report to the police. The court held that the two March 2004 incidents, standing alone, constituted a "pattern of conduct" for a menacing by stalking conviction. The court further held that when the two March 2004 incidents were "viewed in the context of appellant's actions over the course of the prior four years [there was] overwhelming evidence of his pattern of conduct." *Id.* at ¶ 11.

{¶21} *Jones* is distinguishable from this case for two reasons. First, the incidents that served as the pattern of conduct in *Jones* were directed specifically at the victims. In this case, the incidents that the state contends formed the pattern of conduct did not specifically involve Weiss. Second, in *Jones* there was no indication that in the years involved there was any significant "break" in the defendant's actions toward the victims. The mother testified that "numerous" incidents occurred and she did not call the police. The court found that "for a period of years, appellant *continued* to place himself near [the mother's] residence and approached her daughter on at least one occasion." (Emphasis added.) *Id.* at ¶ 14. Here, Weiss testified that her first encounter with Hersh since 2006 was the supermarket incident in 2009.

{¶22} In light of the above, *Jones* does not stand for the proposition that a defendant's alleged menacing contact with third parties associated with a victim

constitutes a pattern of conduct.

{¶23} In *Arnott*, the defendant was convicted, among other crimes, of menacing by stalking. During trial, the victim testified to several uncharged "bad acts" that the defendant had committed against her. The victim's daughter also testified that the defendant "terrorized" her mother and her family for years. *Id.* at ¶ 30.

{¶24} On appeal, the defendant contended that the victim and her daughter's testimonies were impermissible "other bad acts" evidence. The state contended that the evidence was permissible to show a "pattern of conduct contemporaneous with the acts alleged in the indictment." *Id.* at ¶ 34. The Ninth Appellate District found that the trial court did not abuse its discretion in allowing the evidence.

{¶25} *Arnott*, however, is also distinguishable from this case. *Arnott* addresses a "pattern of conduct" in the context of "other bad acts," a situation different from here, where the state used the "bad acts" with Weiss's parents to prove an element of the crime of menacing by stalking. Further, all of the "other bad acts" in *Arnott* involved the victim, a situation different from here.

{¶26} We similarly do not find that *Halgrimson* supports the state's contention that a defendant's alleged menacing contact with people associated with a victim can serve as the basis for the "pattern of conduct" required for a menacing by stalking conviction. In *Halgrimson*, the defendant was a student at Oberlin College, and was studying at the school's Conservatory. The victim was his music tutor, and suspected that the defendant had been stalking her. The defendant eventually had to go on a medical leave of

absence for psychological issues and sought treatment in his hometown of Denver, Colorado.

{¶27} While the defendant was in Denver, the victim was a performer at the Denver Performing Arts Complex; the defendant was a volunteer at the same complex and at the same time the victim was performing. The victim obtained a restraining order against the defendant. Under the order, the defendant was restrained from entering the complex and was required to stay at least 100 yards away from the victim.

{¶28} Eventually, the defendant was invited to return to Oberlin, and he made a visit to the campus to complete the necessary paperwork for readmission. Meanwhile, the defendant's name remained on the school's "no trespassing list" as a result of his prior incidents with the victim. While in town, the defendant attended a concert at Oberlin, the victim saw him, and called campus security. Security officers responded and informed the defendant he was under arrest for trespassing. The defendant ran, knocking one of the officers, and resisted arrest once he was apprehended. The defendant was indicted, in part, for menacing by stalking. After a bench trial, he was found not guilty of that charge.

{¶29} On appeal, the defendant contended that the trial court impermissibly admitted "other acts evidence." The evidence the defendant complained of was testimony relative to his dealings with his psychiatrist in Colorado during which he expressed his desire to return to Oberlin, and an arrest in Chicago that allegedly related to contact he had with a friend of the victim.

{¶30} The Ninth District found that there was no error by the trial court in allowing the testimony, stating:

> This court has previously held that "[o]ther acts evidence can be particularly useful in prosecutions for menacing by stalking because it can assist the jury in understanding that a defendant's otherwise innocent appearing acts, when put into the context of previous contacts he has had with the victim, may be knowing attempts to cause mental distress."

Id., quoting *State v. Tichon*, 102 Ohio App.3d 758, 768, 658 N.E.2d 16 (9th Dist.1995), and *State v. Bilder*, 99 Ohio App.3d 653, 658, 651 N.E.2d 502 (9th Dist.1994).

{¶31} Thus, as with *Arnott*, the Ninth Appellate evaluated the "pattern of conduct" testimony in terms of whether it was permissible "other bad acts" evidence. The court did not consider whether the testimony was permissible to prove a "pattern of conduct" "closely related in time" as necessary elements of the crime of menacing by stalking. And, furthermore, the *Halgrimson* trial court acquitted the defendant of the menacing by stalking charge.

{¶32} In light of the above, the cases cited by the state do not support its contention that a "pattern of conduct" can be established by a defendant's alleged menacing interactions with third parties associated with a victim. Further, we have found no cases dealing with that particular issue, or the issue of whether charges on which a defendant was acquitted can form the basis of a pattern of conduct.[2]

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[2]Although R.C. 2903.211(D)(1) defines "pattern of conduct" as incidents "whether or not there has been a prior conviction based on any of those actions or incidents," we have not found case law where the incidents were charges on which a defendant was acquitted. Rather, the case law we have reviewed deals with incidents that were never charged or were charged and the defendant was

{¶33} On this case of apparent first impression, we hold that under the facts presented here, the state failed to present sufficient evidence of a "pattern of conduct." Even if we were to consider the encounters Hersh had with the Zulls in determining the menacing by stalking count with Weiss as the victim, the state failed to present sufficient evidence that Hersh's encounters with the Zulls knowingly caused Weiss to believe that Hersh would cause her physical harm or mental distress.

{¶34} The testimony of the Zulls was that they encountered Hersh in public places, without belief or evidence that Hersh had followed them,[3] and Hersh said hello to them, but they ignored her. James Zull was the first to encounter Hersh, and he testified that he really did not think much of the encounter and only reported it after his wife's encounter with Hersh approximately ten days later. Although Susan Zull testified that she found the encounter "unnerving," other than Hersh saying hello to the Zulls, she did not otherwise talk to them. Further, although Weiss testified that when she encountered Hersh she was aware that her parents had previously encountered her, Weiss did not testify that her parents' encounter with Hersh made her believe that Hersh would cause her physical harm or mental distress.

{¶35} Given the particular facts of this case, the state failed to present sufficient

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convicted.

[3]The encounter with Susan Zull occurred in the Cedar-Fairmount area, where Hersh was known to frequent. Although Susan testified that she believed Hersh followed her into a Starbucks, Hersh was already in the general area as Zull was approaching the Starbucks and, therefore, there was no evidence that Hersh planned the initial encounter.

evidence that Hersh engaged in a "pattern of conduct" toward Weiss to knowingly cause Weiss to believe that she would cause Weiss physical harm or mental distress. The second assignment is therefore sustained, and upon remand, the conviction is ordered vacated.

B. Extension of Conditional Release

{¶36} For her first assigned error, Hersh contends that the trial court erred by extending her conditional release period to five years, which was originally done in the first case and then incorporated into the second case. Hersh cites R.C. 2945.401(J)(1) in support of her contention. That section provides as follows:

> A defendant or person who has been committed pursuant to section 2945.39 or 2945.40 of the Revised Code continues to be under the jurisdiction of the trial court until the final termination of the commitment. For purposes of division (J) of this section, the final termination of a commitment occurs upon the earlier of one of the following:
>
> * * *
>
> (b) The expiration of the maximum prison term or term of imprisonment that the defendant or person could have received if the defendant or person had been convicted of the most serious offense with which the defendant or person is charged or in relation to which the defendant or person was found not guilty by reason of insanity.

{¶37} Weiss contends that conditional release could be imposed upon her for only 18 months, the maximum term of imprisonment that she could have received for the fourth degree felony charges. The state agrees, but contends that the trial court was permitted to place Hersh on five years of community control sanctions and require her to abide by the current treatment plan, and requests that we overrule the error as it relates to

the second case. Because we find the conviction not supported by sufficient evidence, this assignment of error is moot as it relates to the second case. But, under the statute, the assignment of error is sustained as to the first case. Accordingly, the first assignment of error is moot as it relates to the second case, and sustained as it relates to the first case.

{¶38} Judgments reversed. The case is remanded to the trial court to vacate the menacing by stalking conviction in Case No. CR-523723 and to vacate the extension of Hersh's conditional release in Case No. CR-523165.

It is ordered that appellant recover from appellee 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. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

LARRY A. JONES, SR., JUDGE

MARY J. BOYLE, P.J., and
JAMES J. SWEENEY, J., CONCUR