[Cite as *State v. Davis*, 2010-Ohio-3571.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Plaintiff-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
ALMOND DAVIS	:	Case No. 2009CA00291
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Court of Common Pleas, Case No. 2009CR01015
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	August 2, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JOHN D. FERRERO Stark County Prosecutor	STEPHEN J. KANDEL 101 Central Plaza South Suite 1003
By: RENEE M. WATSON Assistant Prosecuting Attorney 110 Central Plaza South Suite 510 Canton, OH 44702-1413	Canton, OH 44702

Farmer, J.

{¶1} On July 24, 2009, the Stark County Grand Jury indicted appellant, Almond Davis, on one count of rape in violation of R.C. 2907.02, one count of domestic violence in violation of R.C. 29 19.25, one count of violating a protection order in violation of R.C. 2919.27, and one count of intimidation of an attorney, victim or witness in a criminal case in violation of R.C. 2921.04. Said charges arose following a domestic violence call involving the mother of appellant's children, Bobbi Weir.

{¶2} A jury trial commenced on October 26, 2009. The jury found appellant guilty on all counts except the rape count. By judgment entry filed November 6, 2009, the trial court sentenced appellant to a total term of ten years in prison.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignment of error is as follows:

I

{¶4} "THE APPELLANT'S CONVICTION FOR INTIMIDATION OF A CRIME VICTIM OR WITNESS IN VIOLATION OF R.C. 2919.27 WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE AND WAS NOT PROVEN BEYOND A REASONABLE DOUBT."

I

{¶5} Appellant claims his conviction was against the sufficiency and manifest weight of the evidence. We disagree.

{¶6} On review for sufficiency, a reviewing court is to examine the evidence at trial to determine whether such evidence, if believed, would support a conviction. *State v. Jenks* (1991), 61 Ohio St.3d 259. "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." *Jenks* at paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307. On review for manifest weight, a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin* (1983), 20 Ohio App.3d 172, 175. See also, *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The granting of a new trial "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175.

{¶7} Appellant argues the evidence failed to support the jury's finding that he "knowingly" intimidated the victim, Bobbi Weir, in violation of R.C. 2921.04(B) which states, "[n]o person, knowingly and by force or by unlawful threat of harm to any person or property, shall attempt to influence, intimidate, or hinder the victim of a crime in the filing or prosecution of criminal charges or an attorney or witness involved in a criminal action or proceeding in the discharge of the duties of the attorney or witness."

{¶8} In his brief, appellant argues his statements to Ms. Weir were not knowingly made as they were "conditional and potentially a future threat" and therefore a crime was not committed.

{¶9} In *State v. Cress,* 112 Ohio St.3d 72, 2006-Ohio-6501, ¶38-42, the Supreme Court of Ohio explained the wording "unlawful threat of harm" as follows:

{¶10} "The adjective 'unlawful' modifies the noun 'threat' in R.C. 2921.04(B), and the statute includes no reference to unlawful conduct. 'In construing a statute, it is the duty of the court to give effect to the words used in a statute, not to insert words not used. *Cleveland Elec. Illum. Co. v. Cleveland* (1988), 37 Ohio St.3d 50, 524 N.E.2d 441, paragraph three of the syllabus.' *State v. S.R.* (1992), 63 Ohio St.3d 590, 595, 589 N.E.2d 1319.

{¶11} "Both R.C. 2921.04(A) and (B) prohibit knowing attempts to intimidate a witness. We cannot hypothesize an instance in which the act of threatening a witness would not also constitute intimidation. The term 'threat' represents a range of statements or conduct intended to impart a feeling of apprehension in the victim, whether of bodily harm, property destruction, or lawful harm, such as exposing the victim's own misconduct. See *Planned Parenthood League of Massachusetts, Inc. v. Blake* (1994), 417 Mass. 467, 474, 631 N.E.2d 985 (defining 'threat' as 'the intentional exertion of pressure to make another fearful or apprehensive of injury or harm'). To 'intimidate' means to 'make timid or fearful: inspire or affect with fear: frighten***; *esp.*: to compel to action or inaction (*as by threats*).' (Emphasis added and capitalization omitted.) Webster's Third New International Dictionary at 1184.

{¶12} " 'Intimidation' by definition involves the creation of fear in a victim, and the very nature of a threat is the creation of fear of negative consequences for the purpose of influencing behavior. We simply do not discern a meaningful difference between intimidation of a witness and the making of a threat to a witness. Accordingly, both R.C. 2921.04(A) and (B) prohibit the threatening of witnesses.

{¶13} "An *unlawful* threat must accordingly connote more than just a threat, i.e., more than just a communication to a person that particular negative consequences will follow should the person not act as the communicator demands. The word 'unlawful' in R.C. 2921.04(B) must add substantive meaning, or it is superfluous. Adoption of the state's argument requires us in effect to rewrite R.C. 2921.04(B) by deleting the adjective 'unlawful' from the statute. The interpretation of the court of appeals requires us to rewrite the statute by construing the adjective 'unlawful' as a modifier of the noun 'conduct,' a word not even used in the statute. We do not sanction either approach.

{¶14} "We hold, rather, that the statutory language in R.C. 2921.04(B), proscribing intimidation by an 'unlawful threat of harm,' is satisfied only when the very making of the threat is itself unlawful because it violates established criminal or civil law. For example, where the making of a threat constitutes the offense of coercion, in violation of R.C. 2905.12,***a misdemeanor, that offense would serve as a predicate offense for the crime of witness intimidation as proscribed by R.C. 2921.04(B), a felony." (Citation omitted.)

{¶15} The testimony established that Ms. Weir called police on domestic violence issues involving appellant. The police arrived, found appellant asleep, awakened him, and arrested him. As they were leaving, police overheard appellant telling Ms. Weir "rest in piss, B-I-T-C-H, and then he states, You know I'll be out one day and I will be back." T. at 106. Ms. Weir stated appellant told her to "rot in piss and that he can't go back to jail for another domestic violence because he's been there prior from me and two of his other children's mothers." T. at 30.

{¶16} Appellant testified that "rest in piss" means to have a miserable life and that it was lyrics from a rap song and not a threat. T. at 248-249. Ms. Weir testified she was in fear and felt threatened. T. at 40.

{¶17} On June 30, 2009, appellant sent a letter to Ms. Weir which contained the following excerpts:

{¶18} "Can you not come to court baby. I'll get at least two years. Why did you call the fucking police? Look, if it's over, give my truck to my family.

{¶19} "***'I'll do my time but you better believe when I come home, this time I will kill anybody you fuck with, you and myself. I swear do not come to court at all.' " T. at 33-34; State's Exhibit 16.

{¶20} On July 1, 2009, appellant sent another letter, wherein appellant stated, " 'Don't come to that court date next week. If you do, I'll get some real time. Baby, please, I beg you, I love you and I was wrong that day. I am so stressed, I haven't ate in two days. I can't believe this, baby.' " T. at 35; State's Exhibit 17.

{¶21} Appellant sent another letter on July 6, 2009:

{¶22} " 'How much time do you think I'll get for swinging some damn pearls.'

{¶23} "***

{¶24} " 'I'm so sorry about what happened that night, I swear. And I just pray no man be in my house or car. Please, I'll do my time and get my G.E.D. and this time come home and go to school and make something out of myself' - -

{¶25} "***

{¶26} "- - 'for her and you all and the rest of the crew. Just let it go. It's already enough. I'm in the system. She don't have to go more and more and more because nobody really gives a fuck about us but us." T. at 35-36; State's Exhibit 18.

{¶27} Appellant explained these letters not as threats, but as a way to get Ms. Weir not to come to court. T. at 224. Appellant admitted the letters were intimidating. T. at 246-247. Appellant further stated he did not want people messing with his "materialistic things" and Ms. Weir was one of those things. T. at 226.

{¶28} Ms. Weir testified while she was at Statcare and knew that appellant was in custody, she still did not feel safe. T. at 81. The letters made her fearful, as appellant stated he was going to kill her. T. at 92-93.

{¶29} The jury had the actual words and appellant's explanation as to their meaning. As the trier of fact, the jury chose not to believe appellant's explanation, but to take the words at face value. One of the arresting police officer testified he considered appellant's words at his arrest to be threatening toward Ms. Weir. T. at 106.

{¶30} Upon review, we find sufficient credible evidence to support the jury's finding of an unlawful threat of harm aimed at stopping Ms. Weir from testifying in court, and no manifest miscarriage of justice.

{¶31} The sole assignment of error is denied.

{¶32} The judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By Farmer, J.

Hofffman, P.J. and

Delaney, J. concur.

_s/ Sheila G. Farmer_____

_s/ William B. Hoffman_____

_s/ Patricia A. Delaney_____

JUDGES

SGF/sg 707

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
ALMOND DAVIS	:	
Defendant-Appellant	:	CASE NO. 2009CA00291

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed. Costs to appellant.

s/ Sheila G. Farmer

s/ William B. Hoffman

s/ Patricia A. Delaney

JUDGES