[Cite as *State v. Flannery*, 2015-Ohio-1360.]

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-140426 TRIAL NO. C-14CRB-3593
Plaintiff-Appellee,	:	*O P I N I O N.*
vs.	:	
TODD FLANNERY,	:	
Defendant-Appellant.	:	

Criminal Appeal From: Hamilton County Municipal Court

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: April 8, 2015

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Scott M. Heenan*, Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Josh Thompson, for Defendant-Appellant.

Please note: this case has been removed from the accelerated calendar.

DEWINE, Judge.

{¶1} "I ought to kill you." "I ought to blow your head off." These words and more were hurled at a staffing agency employee by a disappointed job seeker in a profanity-laced tirade. For this, the job seeker was convicted of aggravated menacing. He now appeals.

{¶2} We find merit in one of his arguments. The trial court erred when it refused to allow a witness to testify that he had *not* heard the job seeker threaten the victim. The trial court excluded the testimony as hearsay, but the hearsay rule applies to "statements." Testimony about what someone did not hear someone say does not constitute hearsay. On the record before us, we cannot say that the court's evidentiary miscue amounted to harmless error. We therefore must reverse the judgment of the trial court and remand the case for a new trial.

I. Background

{¶3} The facts adduced during the bench trial are straightforward. Ranstad Staffing set up a telephone interview between Todd Flannery and a potential employer. Following the interview, Matthew Combs, an account manager with Ranstad, called Flannery to tell him that he wasn't getting the job. Mr. Flannery exploded. According to Combs, "[h]e said, 'You wasted my time, you fucking nigger, suck my dick.' * * * And he just kept saying, 'you fucking nigger, I ought to kill you' or 'I ought to blow your head off.' " Mr. Combs testified that he took the threats seriously, and that he called the police "[b]ecause I was afraid. I was afraid that he might try and act out any of this."

{¶4} Mr. Flannery took the stand in his defense. While admitting to a heated exchange and calling him a "nigger," he denied ever threatening Combs. Danny King was called to the witness stand to corroborate Flannery's testimony. Mr. King said that

he had been at Flannery's home and had overheard Flannery's side of the phone conversation. He acknowledged that Flannery was upset and had used "the n word." But when Flannery tried to get King to say that he had not heard him make any threats, the trial court refused to let him answer.

{¶5} In addition, Mr. Flannery attempted to show through cross-examination that Combs didn't really believe he would act on any threats. He also suggested that the police didn't take the threats seriously because Officer Berry Norris, who responded to Combs's report, did not go immediately to Flannery's house to arrest him

{¶6} At the conclusion of the testimony, the court found Flannery guilty of aggravated menacing and sentenced him accordingly. He now appeals, raising three assignments of error. The first challenges the constitutionality of the aggravated-menacing statute, the second the court's exclusion of testimony as hearsay, and the third the weight and sufficiency of the evidence.

II. Mr. Flannery Waived His Challenge to the Constitutionality of the Aggravated-Menacing Statute

{¶7} Mr. Flannery asserts that R.C. 2903.21—the aggravated-menacing statute—is unconstitutionally overbroad and vague. He concedes that he did not raise this issue at the trial court level. The failure to raise a constitutional issue at the trial level acts as "a waiver of such issue and a deviation from this state's orderly procedure, and therefore need not be heard for the first time on appeal." *State v. Awan*, 22 Ohio St.3d 120, 489 N.E.2d 277 (1989), syllabus. We may, in our discretion, review the issue of the statute's constitutionality for plain error. *See In re M.D.*, 38 Ohio St.3d 149, 527 N.E.2d 286 (1988), syllabus. But we ordinarily enforce the waiver doctrine unless there is "some extraordinary reason to disregard it." *Zawahiri v. Alwattar*, 10th Dist. Franklin No. 07AP-925, 2008-Ohio-3473. *See In re C.P.*, 4th Dist. Athens No. 12CA18,

2013-Ohio-889. No such extraordinary reason exists in this case. The first assignment of error is overruled.

III. The Trial Court's Exclusion of Favorable Testimony was Not Harmless

{¶8} In his second assignment of error, Mr. Flannery asserts that the court erred when it excluded admissible, nonhearsay testimony on two occasions. Mr. Flannery contends that he was improperly prevented from questioning Officer Norris about her perception of Combs's level of fear and from presenting King's testimony that he did not hear Flannery threaten Combs.

{¶9} R.C. 2903.21(A) makes it a crime for a person to "knowingly cause another to believe that the offender will cause serious physical harm to the person[.]" Part of Flannery's defense was that nothing he said had caused Combs to believe that he would cause him harm.

{¶10} In addition to challenging Combs's testimony about his perception, Mr. Flannery questioned Officer Norris about her take on the seriousness of the threats. During cross-examination, defense counsel asked the police officer about her actions in responding to Combs's report of the threats. Counsel apparently was attempting to show that no one took the threats seriously. The following exchange took place during cross-examination:

> Defense Counsel: So you weren't concerned about this alleged threat?
>
> Officer Norris: I'm not following.
>
> Defense Counsel: You weren't concerned because you didn't go to the house of the person who had supposedly threatened another person's life?
>
> Officer Norris: Well, I had to figure out who he was before I could proceed.

Defense Counsel: So you went on vacation in February, right?

Assistant Prosecuting Attorney: Objection.

In support of its objection, the state argued that the question was irrelevant because it was the victim's perception of the threat, not the officer's, that mattered. Defense counsel countered that the point was to show that the victim had not manifested the level of fear at the time of the incident that he testified to at trial. The court sustained the objection, stating that "if you want to get whatever his level of fear is in through this officer that would be nothing but hearsay."

{¶11} Here, we cannot conclude that the trial court improperly curtailed the examination. The prosecutor was right that the specific question asked—dealing with how quickly the officer investigated—related to the officer's perception of the threat and was therefore irrelevant. The court did go astray when it suggested that the officer could not testify about the victim's level of fear. Contrary to the court's statement, testimony about the officer's observations of the victim's demeanor would not have been hearsay—at least as long as the officer did not testify about statements made by the victim. But defense counsel never asked any questions about the victim's demeanor. Because no such question was asked and the court did not improperly sustain any objection, there was no error.

{¶12} More troubling was the court's exclusion of part of King's testimony:

Defense Counsel: While you were there, was Mr. Flannery on the phone?

Mr. King: Yes.

Defense Counsel: And to you did he sound upset?

Mr. King: He did.

Defense Counsel: Did he use the N word when he was on the phone?

Mr. King: Yes.

Defense Counsel: Did he ever threaten anybody on the phone?

Mr. King: No.

Assistant Prosecuting Attorney: Objection.

The trial court sustained the objection, concluding that King's answer was hearsay.

{¶13} Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). The testimony at issue here is not hearsay for the simple reason that it did not recount a statement. Mr. King was not attempting to testify about a statement—"an oral or written assertion" or "nonverbal conduct * * * intended as an assertion." *See* Evid.R. 801(A). Rather, the question called for testimony about not hearing something. Because the question didn't call for testimony about a statement or an assertion, it was improper for the court to grant the hearsay objection. *See New York v. Kass*, 59 A.D.3d 77, 874 N.Y.S.2d 475, 481 (N.Y.App.Div.2008).

{¶14} The state concedes that the court should not have excluded King's testimony but argues that the error was harmless in light of the overwhelming evidence of Flannery's guilt. We are not persuaded. This case came down to a credibility determination—Combs's word against Flannery's. Had Mr. King been able to testify about whether he heard a threat, the court could have considered the testimony in making its determination about who was more credible. King's testimony would have bolstered Flannery's position. Because the admission of testimony could have led to a different outcome in the trial, we conclude that its exclusion was not harmless. *See State v. Wetherall*, 1st Dist. Hamilton No. C-000113, 2002 Ohio App. LEXIS 1297, *25 (Mar. 22, 2002). We therefore reverse the court's judgment and remand the case for a new trial. The second assignment of error is sustained.

IV. The Conviction was Supported by Sufficient Evidence

{¶15} In his final assignment of error, Mr. Flannery asserts that his conviction was based on insufficient evidence and was against the weight of the evidence. His manifest-weight argument is moot because we have granted Flannery a new trial in our disposition of the second assignment of error. The sufficiency argument, however, is not moot. While the Double Jeopardy Clause does not preclude retrial of a defendant whose conviction is reversed as against the weight of the evidence, it does bar retrial if the conviction is reversed because it was based on legally insufficient evidence. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), citing *Tibbs v. Florida*, 457 U.S. 31, 47, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). Thus if we were to conclude that Flannery's conviction was based on insufficient evidence, we would vacate his conviction and discharge him from further prosecution.

{¶16} Mr. Flannery centers his sufficiency argument on the statute's requirement that the victim believe that the defendant "will cause" serious physical harm. *See* R.C. 2903.21(A). According to Flannery, Mr. Combs's belief in the likelihood of the threats was belied by his testimony that he "was afraid [Flannery] *might* try to act out any of this." (Emphasis added.) In essence, Mr. Flannery is arguing Combs's use of the word "might" meant that he did not believe Flannery *would* cause serious physical harm.

{¶17} The singular focus on the word "might" is misplaced. When asked if he "really believe[d] that the defendant was going to do something to [him]," Mr. Combs responded, "Yes." Circumstantial evidence also established Combs's belief. *See State v. Henize*, 12th Dist. Brown No. CA99-04-008, 1999 Ohio App. LEXIS 5123 (Nov. 1, 1999). Mr. Combs testified that he had immediately called the police to report the threats and that he had followed the police suggestions not to leave work alone. There was

substantial, credible evidence from which the trial court could have reasonably concluded that the state had proved beyond a reasonable doubt that Combs believed Flannery would cause him serious physical harm. *See State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. The third assignment of error is overruled.

V. Conclusion

{¶18} Because the trial court's error in excluding King's testimony was not harmless, we reverse its judgment convicting Flannery of aggravated menacing. The case is remanded for a new trial.

Judgment reversed and cause remanded.

CUNNINGHAM, P.J., and **FISCHER, J.,** concur.

Please note:

The court has recorded its own entry on the date of the release of this opinion.