[Cite as *State v. Wasmire*, 2017-Ohio-9356.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO Plaintiff-Appellee -vs- KEVIN WASMIRE Defendant-Appellant	JUDGES: Hon. John W. Wise, P. J. Hon. Craig R. Baldwin, J. Hon. Earle E. Wise, J. Case No. 2017 CA 00071 O P I N I O N

CHARACTER OF PROCEEDING:	Criminal Appeal from the Alliance Municipal Court, Case No. 2017 CRB 0200
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	December 29, 2017

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JENNIFER L. ARNOLD LAW DIRECTOR 470 East Market Street Alliance, Ohio 44601	DEREK LOWRY 610 Market Avenue North Canton, Ohio 44702

Wise, John, J.

{¶1} Appellant Kevin E. Wasmire appeals his conviction on one count of menacing following a jury trial in the Alliance Municipal Court.

{¶2} Appellee is the State of Ohio.

STATEMENT OF THE FACTS

{¶3} On February 9, 2017, Appellant Kevin Wasmire was charged with one count of Menacing, a misdemeanor of the 4th Degree. A warrant was issued, and Appellant was arrested on February 12, 2017.

{¶4} The menacing charges arose out of an investigation in which Detective William Johnson of the Alliance Police Department was involved in December, 2016, regarding stolen property. This investigation concerned tens of thousands of dollars of equipment, power tools, auto equipment, trailers and a plow. (T. at 154). Investigation into these stolen items led the Detective to Appellant Kevin Wasmire as a person of interest. As part of the investigation he obtained a search warrant for Appellant's home. (T. at 168). Further, Appellant consented to Det. Johnson searching his cellular telephone. (T. at 168). Upon a search of the cell phone, Det. Johnson saw a great deal of contact with Tyler Sammons, the victim in this matter. (T. at 169).

{¶5} Appellant and Tyler Sammons had previously worked together at T & N Excavating in Alliance, Ohio. (T. at 93-94). In December, 2016, when Appellant was interviewed by Det. Johnson regarding the missing property, he learned the extent of Sammons involvement with Appellant. (T. at 99-100). As a result, Johnson also investigated Sammons. (T. at 180). Sammons ended up being charged as a co-defendant to Appellant in the missing property matter. (T. at 181).

{¶6} The property investigation into Appellant also led Det. Johnson to Zach Clair. (T. at 170, 182). During an interview with Clair, when questioned about the thefts Clair immediately gave over his cell phone to Det. Johnson. (T. at 172). Clair's cell phone revealed messages about Sammons from Appellant to Clair. The messages (Exhibit "A") between Appellant and Clair occurred after Appellant was released from jail on bond on the property charges. (T. at 173). They were from a messaging app such as Facebook Messenger. (T. at 173). Det. Johnson was concerned about the content of the messages, and contacted Sammons' attorney. (T. at 175).

{¶7} During the trial, Clair recalled that he was approached by Det. Johnson in February, 2017, as a result of his communications with Appellant and an ongoing investigation. (T. at 151). At that time, Clair answered questions and also produced the text messages Appellant sent to him about Sammons. (T. at 151). He testified that he did this because he did not think it was right that Appellant was threatening Sammons. (T. at 151).

{¶8} Det. Johnson described Sammons as young, naive, and easily intimidated. (T. at 169). Zachary Clair testified that he went to high school with Sammons and recalled that Sammons was bullied in school. (T. at 148-149). Clair stated Sammons was the type of person who did not stand up for himself, and instead just tried to walk away. (T. at 150).

{¶9} At trial Sammons testified he previously turned Appellant in for "stealing hours" when they worked together. (T. at 95). He stated that Appellant threatened to "clean his clock" after this. (T. at 105). After that Sammons started to get random disturbing text messages from Appellant, i.e. "I see you". (T. at 96-97). Since that time Sammons has been concerned because Appellant always seemed to know where he

was. (T. at 97). After this and as result of Appellant's actions, Sammons sought out and obtained his Concealed Carry License (CCW). (T. at 98).

{¶10} In early 2017, Sammons learned that Appellant was looking for him. (T. at 101). He learned this through seeing the text messages from a mutual acquaintance, Zachary Clair, on February 8, 2017. (T. at 99-100, 102). When Sammons learned of these messages, he testified he became nervous and went into a panic. (T. at 121-122). Sammons believed Appellant would cause him physical harm. (T. at 122).

{¶11} After Sammons learned of these text messages, he attempted to avoid Appellant because he was afraid. (T. at 103). He attempted to ignore the text messages he received from him. (T. at 118). Sammons testified that as long as Appellant was out on the streets, he would be in fear. (T. at 122).

{¶12} Det. Johnson also testified that when he presented the messages to Sammons when he returned to the Alliance Police Department to finish a written statement on February 8, 2017, Sammons was visibly shaken and upset. (T. at 178-179).

{¶13} During the trial, the jury learned that Appellant told Clair the reason he was upset with Sammons and that it involved him going to jail, and it had been in the papers and news. (T. at 156-157). Clair showed Det. Johnson the messages after Johnson told him that Sammons was involved in charges. (T. at 162).

{¶14} Appellant also testified during the trial. Appellant testified that he and Sammons did not have a good relationship. (T. at 227). Appellant admitted that he told Sammons he would "kick his ass", after a work dispute. (T. at 227). Appellant claimed that after he told Sammons he would "kick his ass", Sammons followed directions better and was a better worker. (T. at 227). Appellant also testified that he does not like people

who snitch. (T. at 228).

{¶15} Appellant admitted he had the text conversation with Zach Clair about Sammons. (T. at 229-230). Appellant told the jury he blamed Sammons for getting him in trouble, and that it was all Sammons fault that he was in trouble. (T. at 231).

{¶16} After hearing the evidence, the jury found Appellant guilty of the one count of menacing. The trial court sentenced Appellant to 30 days in Stark County Jail and a $250.00 fine, with sentence imposed immediately.

{¶17} It is from this conviction and sentence Appellant now appeals, raising the following errors for review:

ASSIGNMENTS OF ERROR

{¶18} "I. THE TRIAL COURT ERRED BY IMPROPERLY ADMITTING HEARSAY TESTIMONY.

{¶19} "II. THE TRIAL COURT ERRED IN ADMITTING THE OPINION TESTIMONY OF WITNESSES.

{¶20} "III. THE STATE DENIED THE APPELLANT A FAIR TRIAL BY USING A WITNESS TO VOUCH FOR THE TRUTHFULNESS OF TYLER SAMMONS' STATEMENTS.

{¶21} "IV. THE APPELLANT WAS DENIED HIS RIGHT TO A FAIR TRIAL DUE TO PROSECUTORIAL MISCONDUCT.

{¶22} "V. THE APPELLANT WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

{¶23} "VI. THE TRIAL COURT'S FINDING OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE."

I.

{¶24} In his First Assignment of Error, Appellant argues that the trial court improperly admitted hearsay evidence. We disagree.

{¶25} More specifically, Appellant challenges the statements by Det. Johnson that the victim, Tyler Sammons, was afraid to be in the same room as Appellant.

{¶26} Initially we note that Appellant failed to object to Det. Jonson's statements at trial. We therefore review the admission of the statements for plain error.

{¶27} A plain-error analysis pursuant to Crim.R. 52(B) provides that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Notice of plain error is to be taken with the utmost caution, under exceptional circumstances, and only to prevent a manifest miscarriage of justice. *State v. Granderson,* 177 Ohio App.3d 424, 2008–Ohio–3757, 894 N.E.2d 1290 (5th Dist.), ¶ 63, citing *State v. Long,* 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph three of the syllabus; *State v. Cooperrider,* 4 Ohio St.3d 226, 227, 448 N.E.2d 452 (1983).

{¶28} 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 admission or exclusion of relevant evidence rests in the sound discretion of the trial court. *State v. Sage* (1987), 31 Ohio St.3d 173, 180. As a general rule, all relevant evidence is admissible. Evid.R. 402; cf. Evid.R. 802.

{¶29} "When the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior (hearsay) statements. The Clause does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." *State v. Kemper,* 2nd Dist. Clark Nos. 2002–CA–101 and 2002–CA–102, 2004–Ohio–6055 at ¶36, citing *State v. Marbury,* 2nd Dist. Montgomery No. 19226, 2004–Ohio–1817, ¶38.

{¶30} In the instant case, Tyler Sammons testified and was subject to cross-examination. Even if the admission of Det. Johnson's testimony regarding Sammons' statements constituted a hearsay violation, "[t]he admission of hearsay does not violate the Confrontation Clause if the declarant testifies at trial." *State v. Powell,* 132 Ohio St.3d 233, 2012–Ohio–2577, 971 N.E.2d 865, ¶ 64, citing *California v. Green,* 399 U.S. 149, 155, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970); *State v. Keenan,* 81 Ohio St.3d 133, 142, 689 N.E.2d 929 (1998).

{¶31} Further, under a plain-error analysis, even if the admission of the videotaped statement was non-constitutional error, it "is harmless if there is substantial other evidence to support the guilty verdict." *Powell, supra*, 2012–Ohio–2577 at ¶ 64, citing *State v. Webb,* 70 Ohio St.3d 325, 335, 638 N.E.2d 1023 (1994); Crim.R. 52(A).

{¶32} The instant case is not a close one. We find admission of the statements does not rise to the level of plain error because the outcome of the trial would not have been different absent its admission. Plain error or defect under Crim.R. 52(B) does not occur unless, but for the error, the outcome of the trial clearly would have been otherwise. *State v. Long,* 53 Ohio St.2d 91, 372 N.E.2d 804 (1978), paragraph two of the syllabus. The fact that Tyler Sammons was in fear of Appellant was not in question because other

properly-admitted evidence provided overwhelming evidence of Appellant's guilt, namely Sammons' own testimony, the texts sent by Appellant, and Appellant's own admission that he sent the threatening texts. *See*, *Powell, supra*, 2012–Ohio–2577 at ¶ 65.

{¶33} Appellant's First Assignment of Error is overruled.

II., III.

{¶34} In his Second and Third Assignments of Error, Appellant argues that the trial court erred in allowing the opinion testimony of certain witnesses. We disagree.

{¶35} Appellant argues that it was error for the trial court to allow Det. Johnson to testify that he believed that Tyler Sammons was in fear of Appellant and Zachary Clair to testify that he believed Appellant's words in his text were a threat. Appellant argues that such constituted improper opinion testimony.

{¶36} "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Ohio Evid.R. 701.

{¶37} Lay opinion, inferences, impressions or conclusions are therefore admissible if they are those that a rational person would form on the basis of the observed facts and if they assist the jury in understanding the testimony or delineating a fact in issue. *State v. Harper,* 5th Dist. Licking No. 07 CA 151, 2008–Ohio–6926, ¶ 37, citing *State v. Kehoe,* 133 Ohio App.3d 591, 603, 729 N.E.2d 431 (12th Dist.1999). Evid.R. 701 affords the trial court considerable discretion in controlling the opinion testimony of lay witnesses. *Id.,* citing *City of Urbana ex rel. Newlin v. Downing,* 43 Ohio St.3d 109, 113, 539 N.E.2d 140 (1989) and *Kehoe, supra*, at 603.

{¶38} Here, the challenged statements were the personal opinions of the witnesses and were rationally based on the perception of the witness. As such, we do not find that the trial court erred in allowing such testimony.

{¶39} Appellant's Second and Third Assignments of Error are overruled.

IV.

{¶40} In his Fourth Assignment of Error, Appellant argues that he was denied a fair trial due to prosecutorial misconduct. We disagree.

{¶41} The prosecutor's duty in a criminal trial is two-fold. The prosecutor is to present the case for the State as its advocate and the prosecutor is responsible to ensure that an accused receives a fair trial. *Berger v. U.S.* (1935), 295 U.S. 78; *State v. Staten* (1984), 14 Ohio App.3d 197.

{¶42} Misconduct of a prosecutor at trial will not be considered grounds for reversal unless the conduct deprives the defendant of a fair trial. *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 514 N.E.2d 394; *State v. Maurer* (1984), 15 Ohio St.3d 239, 15 OBR 379, 473 N.E.2d 768. The touchstone of analysis is "the fairness of the trial, not the culpability of the prosecutor." *State v. Underwood* (1991), 73 Ohio App.3d 834, 840-841, 598 N.E.2d 822, 826, citing *Smith v. Phillips* (1982), 455 U.S. 209, 219, 102 S.Ct. 940, 947, 71 L.Ed.2d 78, 87-88. An appellate court should also consider whether the misconduct was an isolated incident in an otherwise properly tried case. *State v. Keenan* (1993), 66 Ohio St.3d 402, 410, 613 N.E.2d 203, 209-210; *Darden v. Wainwright* (1986), 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144.

{¶43} Here, Appellant argues that the State committed misconduct because the prosecutor "engaged in a pattern of misconduct by attempting to improperly bolster the

alleged victim's statements with inadmissible opinion and hearsay testimony." (Appellant's brief at 10).

{¶44} As set forth above, this Court does not find the referenced statements were inadmissible opinion or hearsay statements or that the trial was tainted by the admission of such statements if for no other reason than the victim himself testified as to his fear of Appellant, and his testimony was subject to cross-examination.

{¶45} Appellant's Fourth Assignment of Error is overruled.

V.

{¶46} In his Fifth Assignment of Error, Appellant argues that he was denied the effective assistance of counsel. We disagree.

{¶47} A claim of ineffective assistance of counsel requires a two-prong analysis. The first inquiry is whether counsel's performance fell below an objective standard of reasonable representation involving a substantial violation of any of defense counsel's essential duties to Appellant. The second prong is whether Appellant was prejudiced by counsel's ineffectiveness. *Lockhart v. Fretwell* (1993), 506 U.S. 364, 113 S.Ct. 838; *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052; *State v. Bradley* (1989), 42 Ohio St.3d 136, 538 N.E.2d 373. In order to warrant a finding that trial counsel was ineffective, the petitioner must meet *both* the deficient performance and prejudice prongs of *Strickland* and *Bradley. Knowles v. Mirzayance* (2009), 556 U.S. 111, 129 S.Ct. 1411, 1419, 173 L.Ed.2d 251. We apply the *Strickland* test to all claims of ineffective assistance of counsel, both trial counsel, or appellate counsel. *State v. Turner,* Licking App. No.2006–CA–123, 2007–Ohio–4583; *State v. Godfrey* (Sept. 2, 1999), Licking App. No. 97CA0155, 1999 WL 770253.

{¶48} To show deficient performance, appellant must establish that "counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington,* 466 U.S. at 688, 104 S.Ct. at 2064. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Strickland v. Washington* 466 U.S. at 687, 104 S.Ct. at 2064. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process. *Strickland v. Washington* 466 U.S. at 688, 104 S.Ct. 2052 at 2065.

{¶49} Appellant must further demonstrate that he suffered prejudice from his counsel's performance. *See Strickland*, 466 U .S. at 691 ("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"). To establish prejudice, "[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." *Id.* at 694. To prevail on his ineffective-assistance claim, Appellant must show, therefore, that there is a "reasonable probability" that the trier of fact would not have found him guilty.

{¶50} Further, a properly licensed attorney is presumed competent. *State v. Hamblin,* 37 Ohio St.3d 153, 524 N.E.2d 476 (1988).

{¶51} In the instant case, Appellant argues that counsel was ineffective for failing to object to the admission of hearsay testimony, the admission of improper opinion testimony and Det. Johnson testimony "vouching" for the truthfulness of the victim.

{¶52} Upon review, based on our previous determinations that the subject statements and testimony was not improperly allowed, we find that counsel was not ineffective for failing to object to same. We further find that Appellant has not demonstrated that had counsel objected, the result of the trial would have been otherwise.

{¶53} Appellant's Fifth Assignment of Error is overruled.

VI.

{¶54} In his Sixth Assignment of Error, Appellant argues that his conviction was against the manifest weight and sufficiency of the evidence. We disagree.

{¶55} 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,* 61 Ohio St.3d 259, 574 N.E.2d 492 (1991). "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,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

{¶56} 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,* 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). *See also*, *State v. Thompkins*, 78 Ohio St.3d 380, 1997–Ohio–52, 678 N.E.2d 541. 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.

{¶57} We note the weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 237 N.E.2d 212 (1967). The trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997–Ohio–260, 674 N.E.2d 1159.

{¶58} Appellant, in the case sub judice, was convicted of menacing in violation of R.C. 2903.22, which states:

> No person shall knowingly cause another to believe that the offender will cause 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. In addition to any other basis for the other person's belief that the offender will cause 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 other person's belief may be based on words or conduct of the offender that are directed at or identify a corporation, association, or other organization that employs the other person or to which the other person belongs.

{¶59} Reviewing the evidence in the light most favorable to Appellee, we find every element of menacing. The jury heard testimony from the victim Tyler Sammons stating the he was in fear of Appellant. Further, Appellant admitted that he sent the

threatening text messages because he blamed Sammons for previously getting him in trouble with his employer.

{¶60} Any minor deficiencies in the evidence go to the credibility of the witnesses, which was for the trial court to resolve. The weight of the evidence and the credibility of the witnesses are determined by the trier of fact. *State v. Yarbrough,* 95 Ohio St.3d 227, 231, 2002–Ohio–2126, 767 N.E.2d 216, ¶ 79.

{¶61} We find Appellant's menacing conviction is supported by sufficient evidence and is not against the manifest weight of the evidence. Any rational trier of fact could have found the essential elements of menacing proven beyond a reasonable doubt. Nor is this the exceptional case in which the evidence weighs heavily against a conviction.

{¶62} Appellant's Sixth Assignment of Error is overruled.

{¶63} Accordingly, Appellant's Assignments of Error are overruled.

{¶64} For the reasons stated in the foregoing opinion, the judgment of the Alliance Municipal Court, Stark County, Ohio, is affirmed.

By: Wise, John, P. J.

Baldwin, J., and

Wise, Earle, J., concur.

JWW/d 1214