[Cite as *State v. Swint,* 2018-Ohio-5384.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	JUDGES:
	:	
	:	Hon. John W. Wise, P.J.
Plaintiff-Appellee	:	Hon. William B. Hoffman, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	Case No. 2018CA00057
	:	
DAVID SWINT IV	:	
	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Appeal from the Stark County Court of Common Pleas, Case No. 2018CR0261
JUDGMENT:	AFFIRMED
DATE OF JUDGMENT ENTRY:	December 21, 2018

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
JOHN D. FERRERO, JR. STARK CO. PROSECUTOR KRISTINE BEARD 110 Central Plaza S., Ste. 510 Canton, OH 44702-1413	EUGENE CAZANTES 101 Central Plaza S., Ste. 1000 Canton, OH 44702

Delaney, J.

{¶1} Appellant David Swint IV appeals from the judgment entry of the Stark County Court of Common Pleas convicting him upon one count of aggravated menacing. Appellee is the state of Ohio.

FACTS AND PROCEDURAL HISTORY

{¶2} Appellant and Jane Doe have been in a relationship for six years and lived together in an apartment on Kennet Court in Canton. Appellant has several domestic violence convictions and stipulated to two of those prior convictions at trial in the instant case.

{¶3} On January 30, 2018, Doe came home from work and heard appellant arguing in a neighboring apartment with Paul Williams, a friend of both Doe and appellant. Appellant accused Williams of taking his money and Williams denied it. Doe went to Williams' apartment and joined the argument on behalf of Williams, telling Williams he "shouldn't let [appellant] talk to him that way."

{¶4} Appellant then focused his attention on Doe. According to Doe's trial testimony, appellant verbally threatened her and pulled out a small blue pocket knife and threatened her with it. Doe testified that appellant said "you going to make me kill you" while waving the knife. Doe also testified that appellant kicked her in the lower part of her back.

{¶5} Doe testified she was afraid of appellant and believed he would carry out his threats to cause her physical harm. She called 911.

{¶6} Doe went downstairs to wait for police to arrive and appellant accompanied her. They were standing together when Ptl. Billy Lott and his partner arrived on the scene.

Doe approached the officers and appellant went into a downstairs apartment. Lott went around the back of the building in case appellant attempted to flee, but appellant then came back outside the apartment through the front door.

{¶7} There was dispute at trial about appellant's motivation in entering the downstairs apartment. This apartment is the residence of a female neighbor that Doe believes appellant is sexually involved with. Doe asserted appellant went into the woman's apartment to hide the knife. When police knocked on the door, the woman opened the door only a crack, was not cooperative, and did not turn over a knife or permit the officers to look for one.

{¶8} Doe was cooperative with police. She told them appellant put the knife to her throat and that Williams witnessed the incident. Police spoke to Williams but didn't question appellant. Appellant was arrested and transported. During the ride, he told them Doe called 911 because she found out about his relationship with the downstairs neighbor.

{¶9} Lott acknowledged that when he came upon Doe and appellant standing together in the apartment foyer, it was apparent they were arguing but Doe did not appear to be distressed or scared. She didn't complain of any physical injuries and did not request medical attention. She didn't tell police appellant kicked her.

{¶10} Williams was called as a witness by appellee and was not cooperative. He recalled the argument with appellant over missing money, but said he didn't recall anything that happened between appellant and Doe. He "vaguely" remembered talking to police but was "tuned up," or drunk, at the time, and didn't know what he was saying. Police did not take a written statement from Williams so he was confronted with the

bodycam video of his interview with Lott. Williams insisted he failed to recall anything that happened between appellant and Doe; he didn't hear any threats and he never saw a knife.

{¶11} Appellant was charged by indictment with one count of domestic violence pursuant to R.C. 2919.25(A), a felony of the third degree, and one count of aggravated menacing pursuant to R.C. 2903.21(A), a misdemeanor of the first degree.[1] Appellant entered pleas of not guilty and the matter proceeded to trial by jury. Appellant moved for a judgment of acquittal at the close of appellee's evidence; the motion was overruled. Appellant was found not guilty of domestic violence and guilty of aggravated menacing. The trial court immediately sentenced appellant to a jail term of six months.

{¶12} Appellant now appeals from the trial court's judgment entry of conviction and sentence dated April 27, 2018.

{¶13} Appellant raises three assignments of error:

ASSIGNMENTS OF ERROR

{¶14} "I. THE TRIAL COURT SHOWED IMPROPER FAVORITISM TO THE STATE IN FRONT OF THE JURY WHEN THE JUDGE OFFERED TESTIMONY ON THE PLAUSIBILITY OF SECURING A SEARCH WARRANT."

{¶15} "II. THE TRIAL COURT ERRED IN SUBMITTING THE CASE TO THE JURY AS THERE WAS INSUFFICIENT EVIDENCE TO OVERCOME DEFENSE'S RULE 29 MOTION."

[1] Appellant was also charged with one count of intimidation of a witness pursuant to R.C. 2921.04(A) but appellee dismissed that count prior to trial.

{¶16} "III. THE MANIFEST WEIGHT OF THE EVIDENCE WEIGHED HEAVILY AGAINST CONVICTION AND THE JURY FUNDAMENTALLY LOST ITS WAY WHEN IT SUBMITTED A VERDICT OF GUILTY ON THE COUNT OF AGGRAVATED MENACING."

ANALYSIS

I.

{¶17} In his first assignment of error, appellant argues he was prejudiced when the trial court interjected with comments favorable to appellee. We disagree.

{¶18} Upon cross-examination of Ptl. Lott, defense trial counsel asked why Lott didn't obtain a search warrant for the downstairs neighbor's apartment if he believed appellant disposed of the knife in the apartment. Lott responded that it was theoretically possible that a supervisor might have sought a search warrant, but he has never done so himself. During this exchange, the following statements were made:

> * * * *.
>
> [DEFENSE TRIAL COUNSEL]: And as far as the search warrant goes, I understand, sir, that you were on the scene, you could have called your supervisor and asked him to obtain a search warrant for you, correct?
>
> [PTL. LOTT]: Correct.
>
> [DEFENSE TRIAL COUNSEL]: And the supervisor--
>
> THE COURT: Well, stop a minute. A search warrant, just so the jury is clear, it's not like going to Taco Bell, you would have to go

to a Judge and show probable cause, and then it would be up to the Judge to determine whether the search warrant was valid or not.

Go ahead, counsel.

[DEFENSE TRIAL COUNSEL]: But the supervisor would know the necessary steps to take in order to obtain the search warrant?

[PTL. LOTT]: Correct.

* * * *.

T. 123-124.

{¶19} We examined a similar argument in *State v. James*, 5th Dist. Stark No. 2016CA00144, 2017-Ohio-7861, ¶ 34. During a jury trial, the comments and manner of the trial court may have a strong impact on the jury. *Id*. If the trial court's comments rise to the level of prejudicing the jury, the defendant is denied a fair trial. *Id.* The conduct of the trial court may affect the impartiality of the jury. *Id*. The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires that a criminal defendant shall be tried before a panel of fair and impartial jurors. *State v. Stevens*, 5th Dist. Morgan No. 14 AP 0005, 2015–Ohio–307, ¶ 14, appeal not allowed, 142 Ohio St.3d 1519, 2015–Ohio–2341, 33 N.E.3d 66, citing *State v. Johnson,* 5th Dist. Stark No. 2011–CA–237, 2012–Ohio–3227, ¶ 24.

{¶20} The trial court's control of a trial is circumscribed by statutes and the Rules of Evidence. R.C. 2945.03 states, "[t]he judge of the trial court shall control all proceedings during a criminal trial, and shall limit the introduction of evidence and the argument of counsel to relevant and material matters with a view to expeditious and

effective ascertainment of the truth regarding the matters in issue." In addition, Evid.R. 611(A) provides that "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." Evid.R. 614 further permits the court to "interrogate witnesses, in an impartial manner, whether called by itself or by a party."

{¶21} In exercising the duty to control a criminal trial, the trial judge is to remain impartial and refrain from making comments which may influence a jury. *State v. Boyd,* 63 Ohio App.3d 790, 794, 580 N.E.2d 443 (8th Dist.1989). "[T]he judge must be cognizant of the effect of [ ] comments upon the jury [.]" *State v. Wade,* 53 Ohio St.2d 182, 187, 373 N.E.2d 1244 (1978), vacated and remanded on other grounds. "[T]he Court's participation by questioning or comment must be scrupulously limited, lest the court, consciously or unconsciously, indicate to the jury its opinion on the evidence or on the credibility of a witness." *State ex rel. Wise v. Chand,* 21 Ohio St.2d 113, 256 N.E.2d 613 (1970), at paragraph three of the syllabus. Furthermore, "juries are highly sensitive to every utterance by the trial judge." *Wade* at 188.

{¶22} In the instant case, appellant argues the statements of the trial court cited above went beyond the trial court's power to control the trial and were inappropriate, to the extent that the comments prejudiced the jury. In deciding whether a trial judge's comments were appropriate, we must determine whether the comments were prejudicial to the defendant's right to a fair trial. *Wade,* 53 Ohio St.2d at 188. "Where a jury might infer the court's opinion of a witness through the persistence, tenor, range, or

intensity of its questions, the interrogation is prejudicially erroneous. While the court can ask neutrally phrased questions, its questions should not suggest disbelief in a witness's testimony." *State v. Prokos,* 91 Ohio App.3d 39, 44, 631 N.E.2d 684 (4th Dist.1993), citing *Chand,* supra, 21 Ohio St.2d 113 at paragraph four of the syllabus.

{¶23} Generally, in determining whether a trial judge's remarks were prejudicial: (1)the burden of proof is placed upon the defendant to demonstrate prejudice, (2) it is presumed that the trial judge is in the best position to decide when a breach is committed and what corrective measures are called for, (3) the remarks are to be considered in light of the circumstances under which they are made, (4) consideration is to be given to their possible effect upon the jury, and (5) to their possible impairment of the effectiveness of counsel. *State v. Petrone*, 5th Dist. Stark No. 2011CA00067, 2012–Ohio–911, ¶ 40, appeal not allowed, 132 Ohio St.3d 1463, 2012–Ohio–3054, 969 N.E.2d 1231, citing *Wade*, supra, 53 Ohio St.2d at 188.

{¶24} An appellate court reviewing a trial court's interrogation of witnesses and comments must determine whether the trial court abused its discretion. *State v. Davis,* 79 Ohio App.3d 450, 454, 607 N.E.2d 543 (4th Dist.1992).

{¶25} As in *James*, supra, 2017-Ohio-7861 at ¶ 40, appellant did not object to the statement at trial. The failure to object to the content of the judicial statements as being prejudicial to the appellant's rights has been held to constitute a waiver of the error and arguably precludes consideration of the issue upon appeal, for, absent an objection, the trial judge is denied an opportunity to give corrective instructions as to the error. *Wade,* 53 Ohio St.2d at 188, citing *State v. Williams,* 39 Ohio St.2d 20, 313 N.E.2d 859 (1974). Accordingly, any errors not brought to the attention of the trial court by objection or

otherwise are waived and may not be raised on appeal unless they rise to the level of plain error. *Petrone*, supra, 2012–Ohio–911 at ¶ 41; *Hamilton v. Clemans,* 121 Ohio App.3d 337, 339, 700 N.E.2d 33 (12th Dist.1997), citing *State v. Williford,* 49 Ohio St.3d 247, 251, 551 N.E.2d 1279 (1990). To constitute plain error, it must appear from the record that an error occurred and that except for that error the outcome of the trial would have been different. *Clemans* at 339, citing *State v. Long,* 53 Ohio St .2d 91, 97, 372 N.E.2d 804 (1978).

{¶26} The trial court did not question a witness in the instant case, but offered a statement regarding the relative ease or lack thereof of obtaining a search warrant. Appellant argues the statement implied defense trial counsel's line of questioning was dishonest; indicated the officers could not have obtained a search warrant; and "aborted an attack on Lott's credibility" because he didn't know how to obtain a search warrant. We have reviewed the statement in the context of Lott's testimony and the entire trial. We disagree that the statement led the jury to infer that police could not have obtained a search warrant; the comment was fleeting and didn't offer a legal analysis of the existence of probable cause. Nor do we agree that the statement prevented an attack on Lott's credibility; the officer testified that although he has never personally obtained a search warrant, he could have referred the matter to his supervisor to do so.

{¶27} More troubling is appellant's assertion that the trial court's comment indirectly cast aspersions upon defense trial counsel, implying the line of questioning was misleading, requiring the court to intervene so that the jury would not be led astray. The statement served no legitimate evidentiary purpose; appellee could have further addressed the search-warrant issue upon redirect. We are unable to find, as we did in

James, that the trial court's statement "reveals that [it is] limited to keeping witnesses and counsel on track with relevant issues in the case, preventing mischaracterization of witnesses' testimony, and keeping heated exchanges from getting out of control, 'all fairly common ground in any criminal trial and within the trial court's discretion to control.'" *James*, supra, at ¶ 42, citing *State v. Spencer*, 3rd Dist. Marion No. 9–13–50, 2015–Ohio–52, ¶ 76, appeal not allowed, 143 Ohio St.3d 1479, 2015–Ohio–3958, 38 N.E.3d 900. The focus of the re-cross-examination was why Lott didn't pursue a search warrant if he thought appellant disposed of the knife in the downstairs apartment. The statement by the trial court did cut short counsel's line of inquiry regarding the procedure of obtaining a search warrant in the course of an investigation, and further implied counsel's implication that a search warrant would be easy to obtain was misleading.

{¶28} The ultimate issue before us, though, is whether the statement changed the outcome of the trial, and we find that it did not. Despite our concerns about the propriety of the statement, we cannot conclude that the outcome of the trial clearly would have been different but for the comment. *See, James*, 5th Dist. Stark No. 2016CA00144, 2017-Ohio-7861, ¶ 97-98, Hoffman, J., concurring.

{¶29} In context, the search-warrant issue raised by the defense was an attack on the thoroughness of the investigation, but the jury observed the testimony of the witnesses and appellee's exhibits. In light of the evidence presented, the issue of whether Lott should have sought a search warrant was not determinative of the outcome. Taken in context, "we cannot say in this case that [the interjection] * * * went so far beyond the legitimate scope of the discretion and prerogative of a trial court in conducting a jury trial,

so as to constitute prejudicial error and thereby deprive the defendant of a fair trial under the standards of review set forth earlier." *Spencer*, supra, 2015–Ohio–52 at ¶ 81.

{¶30} We further note the trial court gave a general curative instruction that the jury was to disregard anything the court said or did which they might consider an indication of the court's view of the facts. T. 209. The effect of the jury instruction is to minimize any prejudicial effect the court's comments may have had upon the jurors. *State v. Scott*, 26 Ohio St.3d 92, 96, 497 N.E.2d 55 (1986) (per curiam); *State v. Lucky*, 5th Dist. Delaware No. 07CAA040018, 2008–Ohio–331, ¶ 50. The jury is presumed to follow the instructions of the trial court. *Pang v. Minch*, 53 Ohio St.3d 186, 187, 559 N.E.2d 1313 (1990), paragraph four of the syllabus. Appellant has not pointed to any evidence in the record that the jury failed to do so in this case.

{¶31} Upon review of the judge's comments in light of the evidence presented to the jury in this matter, we are not persuaded that the outcome of the trial clearly would have gone the other way but for the alleged error. *James*, supra, 2017-Ohio-7861, at ¶ 46, citing *State v. Turner*, 5th Dist. Richland No. 2010–CA–0016, 2010–Ohio–5420, ¶ 35.

{¶32} Under the circumstances of this case, we find that no plain error was committed.

{¶33} Appellant's first assignment of error is overruled.

II., III.

{¶34} Appellant's second and third assignments of error are related and will be considered together. Appellant argues his conviction upon one count of aggravated menacing is not supported by sufficient evidence and is against the manifest weight of the evidence. We disagree.

{¶35} The legal concepts of sufficiency of the evidence and weight of the evidence are both quantitatively and qualitatively different. *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52, 678 N.E.2d 541, paragraph two of the syllabus. The standard of review for a challenge to the sufficiency of the evidence is set forth in *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991) at paragraph two of the syllabus, in which the Ohio Supreme Court held, "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 the 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."

{¶36} In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as the "thirteenth juror," and after "reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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 overturned and a new trial ordered." *State v. Thompkins*, supra, 78 Ohio St.3d at 387. Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial should be reserved for only the "exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶37} Appellant was convicted upon one count of aggravated menacing pursuant to R.C. 2903.21(A), which states in pertinent part, "No person shall knowingly cause

another to believe that the offender will cause serious physical harm to the person or property of the other person * * *."

{¶38} Appellant's arguments are addressed solely to the credibility of appellee's evidence. He points to the discrepancy that Doe told police appellant put a knife to her throat, but testified at trial he merely waved the knife around and pointed it at her. 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. We note the jury convicted appellant of threatening Doe with physical harm but acquitted him of causing it, which indicates the jury was able to independently weigh the evidence.

{¶39} Doe's testimony at trial may have differed from what she told police the night of the incident, and Patrick Williams recanted his statements altogether. Any inconsistencies in the witnesses' accounts, though, were for the trial court to resolve. *State v. Dotson*, 5th Dist. Stark No. 2016CA00199, 2017-Ohio-5565, ¶ 49. "The weight of the evidence concerns the inclination of the greater amount of credible evidence offered in a trial to support one side of the issue rather than the other." *State v. Brindley,* 10th Dist. Franklin No. 01AP–926, 2002–Ohio–2425, ¶ 16.

{¶40} We defer to the trier of fact as to the weight to be given the evidence and the credibility of the witnesses. *State v. DeHass,* 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), at paragraph one of the syllabus. When assessing witness credibility, "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan,* 22 Ohio St.3d 120, 123, 489 N.E.2d 277 (1986). "Indeed, the

factfinder is free to believe all, part, or none of the testimony of each witness appearing before it." *State v. Pizzulo,* 11th Dist. Trumbull No. 2009–T–0105, 2010–Ohio–2048, ¶ 11. Furthermore, if the evidence is susceptible to more than one interpretation, a reviewing court must interpret it in a manner consistent with the verdict. *Id.*

{¶41} Upon our review of the entire record, we conclude appellant's conviction upon one count of aggravated menacing is supported by sufficient evidence and is not against the manifest weight of the evidence. Appellant's second and third assignments of error are overruled.

CONCLUSION

{¶42} Appellant's three assignments of error are overruled and the judgment of the Stark County Court of Common Pleas is affirmed.

By: Delaney, J.,

Wise, John, P.J. and

Hoffman, J., concur.