[Cite as *State v. Preston-Glenn*, 2009-Ohio-6771.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 09AP-92
v.	:	(M.C. No. 2008 CRB 022999)
Gladys Preston-Glenn,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on December 22, 2009

Richard C. Pfeiffer, City Attorney; *Lara N. Baker*, City Prosecutor*, Melanie R. Tobias* and *Orly Ahroni*, for appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for appellant.

APPEAL from the Franklin County Municipal Court

KLATT, J.

{¶1} Defendant-appellant, Gladys Preston-Glenn, appeals from a judgment of conviction and sentence imposed by the Franklin County Municipal Court. For the following reasons, we affirm that judgment.

{¶2} Appellant and Alice Hartman had been friends for many years. Appellant's daughter, Natalie, initially befriended Hartman's daughter, Lashaunta. Eventually, Natalie and Hartman became friends, as did appellant and Hartman. Natalie had two children:

Mariah and Elijah. Hartman referred to herself as the children's godmother because of all the time she spent with them. Both children consider Hartman their godmother.

{¶3} Natalie passed away in 2006. Shortly after her death, the relationship between Hartman and appellant soured. Although the reasons are not entirely clear, it appears that appellant was upset over money she loaned Hartman, her belief that Hartman was seeing a married man, and her relationship with Natalie's children.

{¶4} Appellant and Hartman both attended the Refugee Baptist Church. On September 14, 2008, a Sunday morning, Hartman went to church with her granddaughter and Mariah and Elijah. The two kids slept at Hartman's house the night before. Appellant appeared at church and asked Mariah and Elijah to sit with her. The two kids went to sit with appellant. Mariah told appellant that she was helping Hartman unpack her house the night before. This upset appellant because she did not want her grandchildren to be with Hartman.

{¶5} After services, everyone exited the church. Hartman and her granddaughter exited the church through a side door and got into a car. They were waiting for Mariah and Elijah, who were both standing outside the church getting ready to leave with Hartman. Appellant walked toward the car and began yelling at Hartman. Hartman heard appellant yell that she would "call your family in Florida and I am going to ship you in a black body bag and it's not going to be from a knife wound." (Tr. at 117.) Hartman drove away from the church and called the Columbus Police Department to report the incident.

{¶6} As a result of this incident, the state filed two complaints against appellant in the Franklin County Municipal Court. One complaint charged her with a count of

menacing in violation of R.C. 2903.22. That complaint alleged appellant knowingly caused Hartman to believe that appellant would cause her physical harm by threatening to send her to her cousin's "in a body bag." The other complaint charged her with a count of disorderly conduct in violation of Columbus City Code 2317.11(A)(1). That complaint alleged appellant recklessly caused Hartman inconvenience, annoyance, or alarm by making the same threat. Both complaints alleged that the incident occurred "on or about the 8 day of September, 2008." Appellant entered not guilty pleas to the charges and proceeded to a jury trial.

{¶7} At trial, appellant denied threatening Hartman. However, Hartman, Mariah, and Elijah each testified that they heard appellant threaten Hartman. The jury found appellant guilty of disorderly conduct but not guilty of menacing. The trial court sentenced appellant to community control and included a condition that appellant stay away from Hartman and her family members.

{¶8} Appellant appeals and assigns the following errors:

> FIRST ASSIGNMENT OF ERROR
>
> THE JURY VERDICTS IN THE PRESENT CASE WERE INCONSISTENT AS THEY WERE BASED ON A SINGLE FACTUAL CLAIM WHICH WAS REJECTED AS TO ONE CHARGE, WAS THE FACTUAL BASIS FOR THE REMAINING CHARGE, AND WAS THE SUBJECT OF A JURY QUESTION AS TO THE REMAINING CHARGE.
>
> SECOND ASSIGNMENT OF ERROR
>
> THE TRIAL COURT ABUSED ITS DISCRETION IN FAILING TO ADDRESS A JURY QUESTION ON AN ISSUE OF LAW.
>
> THIRD ASSIGNMENT OF ERROR
>
> AN ERROR IN THE COMPLAINTS FILED BY THE PROSECUTION LED TO THE IMPROPER ADMISSION OF

OTHER ACTS TESTIMONY IN VIOLATION OF EVID.R. 404(B).

FOURTH ASSIGNMENT OF ERROR

THE TRIAL COURT IMPROPERLY PERMITTED THE PROSECUTION TO AMEND THE COMPLAINTS TO ALLEGE THAT THE OFFENSES WERE COMMITTED ON A DIFFERENT DATE AFTER THE PROSECUTING WITNESS TESTIFIED THAT THERE WERE TWO INCIDENTS AND THAT THE CONDUCT ALLEGED IN THE COMPLAINTS ACTUALLY TOOK PLACE DURING THE SECOND INCIDENT, ON A DIFFERENT DATE. THIS VIOLATED APPELLANT'S DUE PROCESS RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTIONS.

FIFTH ASSIGNMENT OF ERROR

THE TRIAL COURT ERRED IN ORDERING APPELLANT AS A CONDITION OF PROBATION THAT SHE WAS NOT TO HAVE CONTACT WITH FAMILY MEMBERS OF THE ALLEGED VICTIM WHERE THEY WERE NOT IDENTIFIED AS VICTIMS OF THE OFFENSE AND, WITH ONE EXCEPTION, WERE UNNAMED.

SIXTH ASSIGNMENT OF ERROR

THERE WAS INSUFFICIENT COMPETENT, CREDIBLE EVIDENCE TO SUPPORT THE JURY'S VERDICT, THEREBY DENYING APPELLANT DUE PROCESS UNDER THE STATE AND FEDERAL CONSTITUTIONS.

{¶9} For ease of analysis, we address appellant's assignments of error out of order. Appellant contends in her fourth assignment of error that the trial court erred by permitting the state to amend its complaints to change the date of the offenses. We disagree.

{¶10} The incident outside the church was not the first confrontational incident between appellant and Hartman. There were several confrontations between the two women prior to the incident outside the church. The complaints filed against appellant,

however, identified only one specific threat: the threat to send Hartman back to her cousin's in a body bag. The complaints both alleged that this threat occurred "on or about the 8 day of September, 2008."

{¶11} At trial, Hartman first began to testify about an altercation between her and appellant that occurred on September 8, 2008 outside of Hartman's house. Apparently, the prosecutor realized that Hartman was referring to a different incident than that alleged in the complaint because the prosecutor stopped Hartman and questioned her specifically about the "body bag" threat alleged in the complaint. All the parties knew that this threat allegedly occurred on September 14, not September 8.

{¶12} The state originally declined to amend the complaints to change the date of the offenses. By the end of the trial, however, the state requested an amendment. Over appellant's objections, the trial court permitted the state to amend its complaints to allege that the offenses occurred on September 14, 2008.

{¶13} Pursuant to Crim.R. 7(D), a court may, before, during, or after a trial, allow the state to amend an indictment, provided no change is made in the name or identity of the crime charged. An amendment may also not change the penalty or degree of the offenses charged. *State v. Davis,* 121 Ohio St.3d 239, 2008-Ohio-4537, syllabus (amendment that changes the penalty or degree of offense changes the identity of the offense under Crim.R. 7(D) and, therefore, is impermissible). The standards in Crim.R. 7(D) satisfy the notice requirements of the Due Process Clause. *State v. Blauvelt,* 12th Dist. No. CA2007-01-034, 2007-Ohio-5897, ¶20; *State v. Abdullah,* 10th Dist. No. 05AP-1316, 2006-Ohio-5412, ¶24 (noting the "due process protections afforded by Crim.R.

7(D)."). See also *State v. Strozier* (Oct. 5, 1994), 2d Dist. No. 14021 (noting that Crim.R. 7(D) embodies constitutional protections of indictment and notice).

{¶14} If an amendment does not change the name or identity of the crime charged, or the penalty or degree of offense charged, we review the trial court's decision under an abuse of discretion standard. *State v. Kittle,* 4th Dist. No. 04CA41, 2005-Ohio-3198, ¶13; *State v. Beach,* 148 Ohio App.3d 181, 2002-Ohio-2759, ¶23. The term abuse of discretion connotes more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary, or unconscionable. *State v. Adams* (1980), 62 Ohio St.2d 151, 157.

{¶15} The trial court permitted the state to amend its complaints to correct the date of the offenses. These amendments did not change the name or identity of the offenses charged, nor did they change the penalty or degree of the charged offenses. *State v. McFeely*, 11th Dist. No. 2008-A-0067, 2009-Ohio-1436, ¶38 (no abuse of discretion allowing the amendment to date of offense because amendment did not change name or identity of offense, or penalty or degree of offense charged); *State v. Sutton*, 8th Dist. No. 90172, 2008-Ohio-3677, ¶26 (amendment to date of offense does not change name or identity of crime charged); *State v. Martindale* (Apr. 3, 2001), 5th Dist. No. 00CA30 (same). After the amendments, the complaints still charged appellant with menacing and disorderly conduct. The alleged offenses remained misdemeanors of the fourth degree. The amendments simply clarified that the alleged unlawful conduct occurred on September 14, 2008.

{¶16} Appellant asserts that the amendments in this case did not simply change the date of the offenses, because each complaint identified two, separate incidents in

which appellant allegedly threatened Hartman. We disagree. The complaint identified only the specific "body bag" threat that appellant allegedly made on September 14. It included no other threats. Additionally, Hartman did not testify that appellant threatened her on September 8.

{¶17} When an amendment is allowed that does not change the name or identity of the offense charged, the accused is entitled to a discharge of the jury or a continuance, " 'unless it clearly appears from the whole proceedings that the defendant has not been misled or prejudiced by the defect or variance in respect to which the amendment is made.' " *State v. Honeycutt*, 2d Dist. No. 19004, 2002-Ohio-3490, quoting Crim.R. 7(D).

{¶18} Appellant does not argue that she was misled or that the amendments prejudiced her case. In fact, when the trial court offered appellant a continuance after the state requested the amendment, trial counsel declined the offer and told the trial court that he was "not confused about the date of the incident." (Tr. 106.) Trial counsel noted that Hartman's apparent confusion over the dates of the incidents would be a proper basis for impeachment. Absent confusion or prejudice, appellant was not entitled to a continuance or a discharge of the jury. In any event, appellant did not request a discharge of the jury and declined a continuance. Instead, she chose to proceed with the trial. Under these circumstances, the trial court did not abuse its discretion by allowing the amendments to the complaints. Therefore, we overrule appellant's fourth assignment of error.

{¶19} In her third assignment of error, appellant contends the trial court erred by admitting testimony of other bad acts allegedly committed by appellant. The state argues

that appellant's trial counsel invited any such error by questioning Hartman about those bad acts. We agree.

{¶20} This assignment of error relates to Hartman's testimony about events that occurred on September 8, 2008. During the state's questioning, Hartman testified that appellant called her on September 8, 2008. "I didn't answer. She called my cell phone. I didn't answer. And then she called my house phone, and I didn't answer." (Tr. 100.) That was the extent Hartman discussed the September 8 events before the prosecutor redirected Hartman to the events of September 14.

{¶21} However, appellant's trial counsel questioned Hartman extensively about the two different dates and the two incidents in an attempt to discredit Hartman's ability to remember the events. Ultimately, counsel asked Hartman "what happened September the 8th, 2008?" (Tr. 164.) Hartman stated that appellant called her cell phone early in the morning. She did not answer. Shortly thereafter, Hartman heard a big bang at her front door. The noise scared Hartman. She looked out her front door and saw appellant's blue van in her driveway. Appellant then started yelling at Hartman. Hartman testified that appellant spent 15 to 20 minutes yelling outside Hartman's house.

{¶22} Appellant now claims the trial court improperly admitted Hartman's testimony describing appellant's acts on September 8, 2008 in violation of Evid.R. 404(B). Even if the admission of this testimony was error, appellant invited such error by actively questioning Hartman about the events of September 8.

{¶23} Invited error arises when a party tries to take advantage of an error that the party induced the trial court to make. *State v. Smith*, 148 Ohio App.3d 274, 2002-Ohio-3114, ¶30 (citing *State ex rel. The V Cos. v. Marshall* (1998), 81 Ohio St.3d 467, 471).

The invited error doctrine is applied when defense counsel "induced" or was "actively responsible" for the trial court's error. *State v. Campbell*, 90 Ohio St.3d 320, 324, 2000-Ohio-183 (citing *State v. Kollar* (1915), 93 Ohio St. 89, 91).

{¶24} Here, appellant's trial counsel made a strategic decision to attack Hartman's credibility and her ability to accurately and truthfully recall the September 14th incident by questioning her about the September 8th incident. (Tr. 106.) That questioning led to the admission of the testimony appellant now claims was error. Because appellant's trial counsel was actively responsible for any such error, appellant cannot take advantage of that error. *State v. Murphy*, 91 Ohio St.3d 516, 2001-Ohio-112, ¶64. Appellant's third assignment of error is overruled.

{¶25} Appellant contends in her second assignment of error that the trial court's response to a jury question was improper. We disagree.

{¶26} During its deliberations, the jury asked the following question: "Does the statement 'Send you back to your cousins in a body bag' have to be made for the criteria of disorderly conduct to be met?" (Tr. 402.) The trial court answered the question by referring the jury to the instructions previously given that defined the elements of disorderly conduct.

{¶27} Appellant asserts that because the disorderly conduct complaint specifically identified the "body bag" threat as the basis for the charge, the trial court should have responded "yes" to the jury's question. Appellant argues that the state could prove disorderly conduct only by proving that appellant made this specific threat, not by other conduct. However, appellant's second assignment of error challenges only the trial court's response to the jury's question.

{¶28} It is within the sound discretion of the trial court to provide supplemental instructions in response to a question from the jury. *State v. Thompson* (Nov. 10, 1997), 10th Dist. No. 97APA04-489 (citing *State v. Maupin* (1975), 42 Ohio St.2d 473, 486). The trial court's response, when viewed in its entirety, must constitute a correct statement of the law and be consistent with or properly supplement the jury instructions that have already been given. *State v. Hull*, 7th Dist. No. 04 MA 2, 2005-Ohio-1659, ¶45; *Sabina v. Kress,* 12th Dist. No. CA2006-01-001, 2007-Ohio-1224, ¶15; *State v. Letner* (Feb. 23, 2001), 2nd Dist. No. 2000-CA-58. " 'A reversal of a conviction based upon a trial court's response to such a request requires a showing that the trial court abused its discretion.' " *State v. Young,* 10th Dist. No. 04AP-797, 2005-Ohio-5489, ¶35 (quoting *State v. Carter* (1995), 72 Ohio St.3d 545, 553).

{¶29} Here, the trial court did not abuse its discretion when it responded to the jury's question by referring the jury to its previous instructions on disorderly conduct. Therein, the trial court instructed the jury that it could find appellant guilty of disorderly conduct if it found "beyond a reasonable doubt that * * * the defendant recklessly caused inconvenience, annoyance, or alarm to Alice Hartman by engaging in threatening harm to Alice Hartman." (Tr. 387.) This instruction did not require the jury to limit its consideration to only the alleged "body bag" threat. The instruction referred to "engaging in threatening harm to Alice Hartman," which would include conduct beyond the specific "body bag" threat. Appellant did not object to this jury instruction. Therefore, a "yes" response to the jury's question would not have been consistent with the jury instructions. Accordingly, the trial court did not abuse its discretion by instructing the jury to refer to the instruction

previously given that contained the elements of the disorderly conduct offense. Appellant's second assignment of error is overruled.[1]

{¶30} Appellant contends in her first assignment of error that the jury's verdicts were inconsistent. Appellant's argument is premised on her claim that the jury acquitted her of menacing because it did not believe she made the threat to send Hartman back to her cousins in a body bag. Based on that premise, appellant argues that her disorderly conduct conviction is inconsistent with that acquittal because both counts were based on the same alleged threat.

{¶31} "Consistency between verdicts on several counts of an indictment is unnecessary where the defendant is convicted on one or some counts and acquitted on others; the conviction generally will be upheld irrespective of its rational incompatibility with the acquittal." *State v. Trewartha*, 165 Ohio App.3d 91, 2005-Ohio-5697, ¶15 (citing *State v. Adams* (1978), 53 Ohio St.2d 223). See also *State v. Howard*, 10th Dist. No. 06AP-1273, 2007-Ohio-5659, ¶6-7 (distinguishing cases concerning inconsistent verdicts to different counts versus inconsistent verdicts arising from the same count). This is because each count in an indictment charges a distinct offense and is independent of all other counts. *Trewartha* at ¶15; *State v. Washington* (1998), 126 Ohio App.3d 264, 276. Thus, inconsistent verdicts on different counts do not justify overturning a guilty verdict because a jury's decision as to one count is independent and unaffected by the jury's findings on another count.

{¶32} Recognizing that only inconsistencies between verdicts arising from the same count may justify the reversal of a conviction, appellant asserts that the two charges

[1] We note that appellant has not assigned as error the trial court's jury instruction on disorderly conduct.

were essentially the same count. We disagree. The counts were filed in two separate complaints, contained different mens rea requirements, and were not lesser included offenses. The two offenses in this case are clearly separate counts.

{¶33} Thus, even if we assume that the jury's verdicts are inconsistent in this case,[2] such inconsistency would not justify overturning appellant's conviction because the disorderly conduct and menacing counts were distinct and independent of each other. *Trewartha* at ¶16. Accordingly, we overrule appellant's first assignment of error.

{¶34} Appellant contends in her sixth assignment of error that her disorderly conduct conviction was not supported by sufficient evidence. We disagree.

{¶35} In *State v. Jenks* (1991), 61 Ohio St.3d 259, the Supreme Court of Ohio described the role of an appellate court presented with a challenge to the sufficiency of the evidence:

> 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.

Id. at paragraph two of the syllabus.

{¶36} Whether the evidence is legally sufficient is a question of law, not fact. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Indeed, in determining the

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[2] Appellate courts are not permitted to speculate about the reason for inconsistent verdicts. *Trewartha* at ¶16. However, notwithstanding the jury's question regarding whether or not appellant threatened Hartman, the jury could have believed that appellant acted recklessly, in order to convict her of disorderly conduct, but not knowingly, in order to acquit her of menacing. The jury's verdicts would not be inconsistent under that rationale.

sufficiency of the evidence, an appellate court must "give[ ] full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789. Consequently, the weight of the evidence and the credibility of the witnesses are issues primarily determined by the trier of fact. *State v. Yarbrough,* 95 Ohio St.3d 227, 240; *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. A jury verdict will not be disturbed unless, after viewing the evidence in the light most favorable to the prosecution, it is apparent that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Treesh* (2001), 90 Ohio St.3d 460, 484; *Jenks* at 273.

{¶37} In order to find appellant guilty of disorderly conduct in this case, the state had to prove beyond a reasonable doubt that she recklessly caused inconvenience, annoyance, or alarm to Hartman by threatening harm to her. Columbus City Code 2317.11(A)(1). Appellant contends the state presented insufficient evidence to prove that she threatened Hartman. Appellant denied threatening Hartman, and two witnesses to the incident also denied hearing her make a threat. However, appellant's grandchildren heard her threaten Hartman. Elijah testified that appellant said "she was going to put her in a body bag and send her to her cousin." (Tr. 185.) Mariah testified that appellant said that "she would send my godmom in a body bag to her cousin in Florida." (Tr. 196.) Additionally, Hartman herself testified that appellant threatened to "ship you in a black body bag and it's not going to be from a knife wound." (Tr. 117.) This testimony is sufficient to prove that appellant threatened Hartman.

{¶38} Appellant argues that her grandchildren's testimony was not credible. Such an argument, however, is misplaced in a sufficiency analysis. *State v. Wilkins*, 2d Dist. No. 22834, 2009-Ohio-4575, ¶61 (questions of witness credibility are irrelevant in sufficiency analysis); *State v. Baer*, 7th Dist. No. 07 HA 8, 2009-Ohio-3248, ¶46 (appellate court does not examine credibility of witnesses in sufficiency analysis). In this analysis, we must view the evidence presented in a light most favorable to the prosecution. *State v. Powell*, 11th Dist. No. 2007-L-187, 2009-Ohio-2822, ¶39 (reviewing court does not weigh credibility but looks at evidence in light most favorable to the prosecution).[3] Further, appellant's argument ignores Hartman's testimony, which alone is sufficient to prove that appellant threatened Hartman. Appellant's conviction was supported by sufficient evidence. Accordingly, her sixth assignment of error is overruled.

{¶39} Lastly, appellant contends in her fifth assignment of error that the trial court imposed an improper condition of community control. We disagree.

{¶40} Appellant's disorderly conduct conviction is a misdemeanor of the fourth degree. When sentencing an offender to community control sanctions following a misdemeanor conviction, the trial court may impose community residential sanctions, nonresidential sanctions, financial sanctions, and "any other conditions" that it considers appropriate. R.C. 2929.25(A)(1)(a). The trial court has broad discretion to impose "other conditions" on an offender as part of his community control sanctions, and its decision to impose such conditions will not be reversed absent an abuse of discretion. *State v.*

[3] Although this argument would be appropriate in a manifest weight of the evidence analysis, appellant does not allege that her conviction is against the manifest weight of the evidence.

Hause, 12th Dist. No. CA2008-05-063, 2009-Ohio-548, ¶7; *State v. Talty,* 103 Ohio St.3d 177, 2004-Ohio-4888, ¶10.

{¶41} Although a trial court has broad discretion to impose community control conditions, that discretion is not unlimited. *State v. Stewart*, 10th Dist. No. 04AP-761, 2005-Ohio-987, ¶7. The conditions imposed must not be so overbroad as to impinge upon the offender's liberty, and must reasonably relate to the goals of community control; namely, rehabilitation, administering justice, and ensuring good behavior. *Talty* at ¶13; *State v. Jones* (1990), 49 Ohio St.3d 51, 52. In determining whether a condition advances these goals, courts should consider whether the condition (1) reasonably relates to rehabilitating the offender, (2) has some relationship to the offense, and (3) relates to future criminality and serves the ends of community control. Id. at 53.

{¶42} The trial court ordered appellant to stay away from Hartman as well as her family members. Appellant contends the condition is unlawfully vague and overbroad because it does not identify all the persons she must stay away from and applies to people who were not victims of her crime. We disagree.

{¶43} As the Supreme Court of Ohio noted in *Jones*:

> Courts imposing conditions on probation are not expected to define with specificity the probationer's behavior in all possible circumstances. Rather, the conditions must be clear enough to notify the probationer of the conduct expected of him, with the understanding that the court will act reasonably at a revocation hearing, aware of the practicalities and fundamental goals of probation.

Id. at 55.

{¶44} Here, the trial court did not need to specifically identify all of Hartman's family members. Moreover, the trial court noted at appellant's sentencing hearing that its

condition applied to family members that were with appellant. (Sentencing Tr. 11.) See *State v. Pessefall* (1993), 87 Ohio App.3d 222, 227 (trial court could delineate scope of probation condition or give guidance to offender to determine when condition violated). Interpreting the community control condition in the manner articulated by the trial court, we find no abuse of discretion. The condition is not unlawfully vague and is clear enough to notify appellant of what she must refrain from doing. *Jones* at 54 (reasonably interpreting condition, and noting that a "commonsense" reading of condition provides defendant with notice of prohibited conduct). Further, the condition is not overbroad simply because it applies to people who were not victims of her crime. Id.

{¶45} The trial court did not abuse its discretion by imposing the "stay-away" condition in this case. Appellant's fifth assignment of error is overruled.

{¶46} In conclusion, we overrule appellant's six assignments of error and affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

FRENCH, P.J., and SADLER, J., concur.