[Cite as *State v. Pariscoff*, 2010-Ohio-2070.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 09AP-848
v.	:	(M.C. No. 2008 CR B 022358)
Mark Pariscoff,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on May 11, 2010

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

Richard Cline & Co., *LLC*, and *Richard A. Cline*, for appellant.

APPEAL from the Franklin County Municipal Court.

SADLER, J.

{¶1} Defendant-appellant, Mark Pariscoff, appeals from a judgment of the Franklin County Municipal Court finding him guilty, pursuant to a jury trial, of telecommunications harassment, a violation of R.C. 2917.21(B) and a first-degree misdemeanor. For the following reasons, we affirm the judgment of the trial court.

{¶2} By complaints filed September 9, 2008, appellant was charged with menacing, a violation of R.C. 2903.22, and telecommunications harassment, a violation of R.C. 2917.21(B). The matter was tried to a jury in June 2009.

{¶3} The following facts were adduced at trial. The victim in this case, Michele Williams ("Williams"), met appellant through a social networking website. The two were romantically involved for approximately six months. The relationship began to sour in July 2008 and, by September 2008, had officially ended. Williams testified that sometime in September 2008, appellant called her employer and attempted to get her fired. In response, she contacted appellant's employer and reported that appellant was using his cell phone to call her while he was at work.

{¶4} According to Williams, appellant called her at work on September 8, 2008 and told her "[y]ou better hide, I'm on my way to come and get you, you bitch." (Tr. 94.) He also left a voicemail message on her cell phone, averring that "[y]ou better hide real well, bitch, because I'm coming after you. They just fired me and I'm on my way." (Tr. 102.) The prosecution played the voicemail message for the jury. Williams identified the voicemail as one saved on her cell phone; she also identified the number from which the call was made, and the voice on the voicemail as that of appellant. Williams testified that she was "scared" when she heard the message; accordingly, she reported the incidents to the police. (Tr. 103.)

{¶5} Williams admitted on cross-examination that the demise of her relationship with appellant was extremely acrimonious. Indeed, she testified that "[w]e were both trying to destroy each other for some reason. He was calling me and threatening me, and I was trying to get him put in jail." (Tr. 158.) After initially testifying that she had never

threatened appellant over the phone, Williams conceded that she left voicemail messages on appellant's phone, one of which stated that, "I will fuck with you. If you keep fucking with me, I'll have your ass killed. Do you understand me?" (Tr. 166.) The defense played this message for the jury, and Williams admitted that the voice on the message was hers.

{¶6} Appellant testified on his own behalf. According to appellant, during August and September 2008, Williams repeatedly called and threatened him; she also called his employer several times in an attempt to have him fired. In describing their breakup, appellant stated that he and Williams engaged in numerous abusive verbal exchanges; however, he insisted that he never physically threatened or abused Williams.

{¶7} According to appellant, on September 8, 2008, Williams left several messages on appellant's employer's phone, which ultimately resulted in appellant being fired. Appellant admitted that he called Williams and left a voicemail the day he was terminated. He averred, however, that he told her, "[y]ou better hide, B, I'm coming up there to talk to you. You just got me fired." (Tr. 178.) Appellant stated that he made the call because he was "upset" and "mad" when he lost his job. (Tr. 185.) When questioned about the content of the voicemail message, particularly his use of the phrase "coming after" Williams, appellant explained that he meant only that he wanted to speak with Williams and find out why she had him fired. He denied that he intended to physically harm her.

{¶8} Two additional witnesses, Eric Brumm, appellant's long-time friend, and Bonnie Parsicoff, appellant's sister-in-law, testified on appellant's behalf. Brumm testified that he had observed Williams verbally abuse and act aggressively toward appellant; he

maintained, however, that he had never observed appellant threaten or act abusively toward Williams. Parsicoff opined that appellant was incapable of acting violently toward another person.

{¶9} Upon this evidence, the jury found appellant not guilty of menacing, but guilty of telecommunications harassment. Upon hearing the verdicts, appellant immediately moved to vacate the guilty verdict on the telecommunications harassment charge on grounds that it was inconsistent with the not guilty verdict on the menacing charge. The court requested that appellant submit his motion in writing. Appellant did not comply with the court's request; however, the state filed a memorandum contra appellant's oral motion to vacate. In an "entry and order" dated August 14, 2009, the trial court denied appellant's motion upon a finding that the verdicts were not inconsistent. Following a hearing, the court sentenced appellant in accordance with law. On appeal, appellant advances two assignments of error for our review:

> [1.] THE COURT BELOW ERRED WHEN IT FAILED TO GRANT THE RULE 29 MOTION FOR JUDGMENT OF ACQUITTAL ON THE TELEPHONE HARASSMENT CASE AS THERE WAS NO EVIDENCE OF A PURPOSE TO ABUSE, THREATEN OR HARASS. IN THE ALTERNATIVE, THE CONVICTION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.
>
> [2.] THE DEFENDANT WAS DENIED A FAIR TRIAL AND DUE PROCESS OF LAW BECAUSE OF THE INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

{¶10} Appellant asserts by his first assignment of error that the trial court erred in denying his Crim.R. 29 motion for judgment of acquittal on the charge of telecommunications harassment and that his conviction for that crime is against the manifest weight of the evidence. We note that the defense made Crim.R. 29 motions at

the close of the state's case and at the close of the evidence. The trial court overruled both motions.

{¶11} We first address appellant's Crim.R. 29 argument. Crim.R. 29(A) provides, in pertinent part, as follows:

> The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses.

{¶12} When reviewing a trial court's denial of a Crim.R. 29 motion for judgment of acquittal, appellate courts apply the same standard as that applied to claims regarding sufficiency of the evidence. *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52. "A conviction based on insufficient evidence constitutes a denial of due process." *State v. Rawls,* 10th Dist. No. 03AP-41, 2004-Ohio-836, ¶25, citing *Thompkins* at 386. As set forth in *State v. Jenks* (1991), 61 Ohio St.3d 259, when reviewing the sufficiency of the evidence supporting a criminal conviction, an appellate court must examine the evidence submitted at trial to determine whether such evidence, if believed, would convince an average person 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. See also *Jackson v. Virginia* (1979), 443 U.S. 307, 319, 99 S.Ct. 2781, 2789.

{¶13} This test raises a question of law and does not allow the court to weigh the evidence. *State v. Martin* (1983), 20 Ohio App.3d 172, 175. Rather, the sufficiency of the evidence test "gives 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*, 443 U.S. at 319, 99 S.Ct. at 2789. Accordingly, the weight given to the evidence and the credibility of witnesses are issues primarily for the trier of fact. *State v. Thomas* (1982), 70 Ohio St.2d 79, 80. The reviewing court does not substitute its judgment for that of the fact finder. *Jenks* at 279.

{¶14} As noted, appellant was convicted of telecommunications harassment in violation of R.C. 2917.21(B). That section provides that "[n]o person shall make or cause to be made a telecommunication, or permit a telecommunication to be made from a telecommunications device under the person's control, with purpose to abuse, threaten, or harass another person." The state claimed at trial that the purpose of appellant's voicemail message was to threaten Williams. Appellant contends the state failed to prove this element of the offense.

{¶15} We note initially that this court has stated that "R.C. 2917.21(B) does not require more than a single phone call in order to constitute telephone harassment." *State v. Stanley,* 10th Dist. No. 06AP-65, 2006-Ohio-4632, ¶13, citing *State v. Shaver* (July 28, 1997), 12th Dist. No. CA96-09-094. Further, the gravamen of the offense of telecommunications harassment is not whether the person who received the call was in fact threatened, harassed or annoyed by the call, but rather whether the purpose of the person who made the call was to abuse, threaten or harass the person called. *State v. Bonifas* (1993), 91 Ohio App.3d 208, 211-12. If an accused's purpose or intent in making the call cannot be proved by direct evidence, it may be established by circumstantial evidence, that is, the facts and circumstances surrounding the call. *State v. Lucas,* 7th

Dist. No. 05 BE 10, 2005-Ohio-6786, ¶15. Direct and circumstantial evidence have equal probative value. *Jenks* at paragraph one of the syllabus.

{¶16} R.C. 2917.21(B) does not define the term "threaten." However, this court has stated that "[t]he fact that [R.C. 2917.21(B)] does not place legal definitions on each of [the] terms [in the statute] demonstrates that the General Assembly intended to prohibit conduct that is easily definable by the common everyday meaning of [those terms]." *Stanley* at ¶14, citing *State v. Dennis* (Oct. 30, 1997), 3d Dist. No. 1-97-42. Webster's Dictionary defines "threaten" as "to utter a threat against." Webster's Encyclopedic Unabridged Dictionary of the English Language (Portland House 1996). In turn, Webster's defines "threat" as "a declaration of an intention or determination to inflict punishment, injury, death, or loss on someone in retaliation for, or conditionally upon, some action or course." Webster's Encyclopedic Unabridged Dictionary of the English Language (Portland House 1996).

{¶17} We find sufficient evidence in the record which, if believed, would convince a rational trier of fact that appellant was guilty of telecommunications harassment. The voicemail message, which the jury heard, establishes that appellant told Williams that she "better hide real well" because "they just fired [him]" and he was "coming after [her]." Appellant admitted that he left the voicemail message and that he was "mad" and "upset" when he did so because he had just lost his job and blamed Williams for his being fired. From this evidence, a reasonable trier of fact could have determined that the purpose of appellant's call was to declare his intention to inflict some type of punishment or injury on Williams in retaliation for his being fired. Therefore, any rational trier of fact could have found the "threaten" element of the crime of telecommunications harassment proven

beyond a reasonable doubt. While appellant did present an explanation for the voicemail message, principally that he wished only to speak with Williams about why she had him fired, his explanation does not comport with the language he actually utilized in the voicemail. His testimony does not affect our conclusion as to the adequacy of the state's evidence to support the conviction. Appellant's testimony is relevant to the weight of the evidence, which we will now address.

{¶18} In determining whether a verdict is against the manifest weight of the evidence, the appellate court acts as a "thirteenth juror." Under this standard of review, the appellate court weighs the evidence in order to determine whether the trier of fact "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Thompkins* at 387. The appellate court, however, must bear in mind the fact finder's superior, first-hand perspective in judging the demeanor and credibility of witnesses. See *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The power to reverse on "manifest weight" grounds should only be used in exceptional circumstances, when "the evidence weighs heavily against the conviction." *Thompkins* at 387.

{¶19} As previously noted, the state played the voicemail message for the jury. Williams identified the message as having been saved on her cell phone; she further identified appellant as the person speaking on the voicemail. Appellant presented evidence that he and Williams exchanged hostile voicemail messages during the course of their breakup. He testified that he never physically threatened or abused Williams during the course of their relationship. He further testified that his statements in the

voicemail were intended only for the legitimate purpose of communicating to Williams that he wanted to talk to her about her role in getting him terminated from his employment.

{¶20} After thoroughly reviewing the evidence in the record, we do not find that appellant's conviction for telecommunications harassment was against the manifest weight of the evidence. Appellant contends the jury could not find him guilty because he presented evidence that Williams was an active participant in their antagonistic verbal exchanges, that is, that the two routinely threatened one another, and because he testified that his only purpose in leaving the voicemail message was to let Williams know he wanted to talk to her. However, the jury was in the best position to determine the credibility of both appellant and Williams after hearing their testimony and observing their demeanor on the witness stand. *State v. Crisp,* 10th Dist. No. 06AP-146, 2006-Ohio-5041, ¶13. As the state notes, the fact that the jury acquitted appellant of the menacing charge supports the conclusion that the jury did not focus on Williams' reaction to appellant's phone call when it determined his purpose in making the call. The volatile, mutually abusive nature of the relationship between appellant and Williams supports a conclusion by the jury that Williams was not actually in fear for her safety when appellant called her on September 8, 2008. However, while this fact was relevant to the charge of menacing, of which appellant was acquitted, it was not an essential element of the offense of telecommunications harassment.

{¶21} To prove the telecommunications harassment charge, the state was required to prove that the purpose of appellant's voicemail message to Williams was to threaten her. The substantial weight of the evidence supports a finding that appellant, who was angry and upset that he had been fired from his job and blamed Williams for his

firing, called her with the purpose to threaten her. The verbal content of the voicemail message, when viewed within the context of appellant's acrimonious relationship with Williams and against the backdrop of appellant's firing, supports a finding that appellant's purpose in making the call was to threaten Williams. After a thorough review of the record, including the voicemail message, Williams' testimony, and appellant's explanations, we do not find that the jury clearly lost its way in convicting appellant of telecommunications harassment in violation of R.C. 2917.21(B). Accordingly, appellant's conviction was not against the manifest weight of the evidence.

{¶22} Although not specifically set forth in the captioned portion of appellant's first assignment of error, appellant incorporates as a sub-issue under the first assignment of error that the trial court improperly instructed the jury regarding the definition of the term "purpose" with respect to the charge of telecommunications harassment. Because this issue has been fully briefed by the parties, we will address whether the jury was properly instructed with regard to the term "purpose."

{¶23} We note initially that appellant did not raise any general objection to the jury instructions at trial, nor did appellant make any specific request for an instruction on the definition of purposely. Generally, the failure to object at trial or to request a specific instruction waives all but plain error with respect to the jury instructions given. *State v. Johnson,* 10th Dist. No. 08AP-652, 2009-Ohio-3383, ¶37, citing *State v. Hartman,* 93 Ohio St.3d 274, 289, 2001-Ohio-1580.

{¶24} In order to constitute plain error, the error must be an obvious defect in the trial proceedings, and the error must have affected substantial rights. *State v. Barnes,* 94

Ohio St.3d 21, 27, 2002-Ohio-68. Plain error exists only when it can be said that the trial court's error affected the outcome of the trial. Id.

{¶25} The jury was instructed on the charge of telecommunications harassment, in pertinent part, as follows:

> The defendant is charged with telecommunications harassment. Before you can find the defendant guilty, you must find beyond a reasonable doubt that on or about the 8th day of September, 2008, in Franklin County, Ohio, the defendant knowingly made or caused to be made a telecommunication with purpose to abuse, threaten, or harass another person.
>
> A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result. A person has knowledge of circumstances when he is aware that such circumstances probably exist.
>
> Purpose to abuse, threaten or harass is an essential element of the crime of telecommunication harassment.
>
> A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the mind of the defendant a specific intention to abuse, threaten or harass.
>
> When the essence of the offense is a prohibition against conduct of a certain nature, a person acts purposely if his specific intention was to engage in conduct of that nature, regardless of what he may have intended to accomplish by his conduct.

{¶26} Appellant challenges the last paragraph of the instruction, specifically the "essence of the offense" portion of the charge. Appellant maintains that, based upon the instruction given, the "purpose" element of the offense was met if the jury concluded that appellant intended to make a telephone call to Williams and Williams felt threatened by the telephone call.

{¶27} Appellant contends the outcome of the trial would have been different had the jury been properly instructed. According to appellant, such conclusion is demonstrated by the fact that the jury posed the following question: "Is threatening a face-to-face confrontation a telephone harassment?" (Tr. 242.) Appellant avers that a properly instructed jury would have known that the answer to that question is "no" because communicating an intention to meet face-to-face is not a "threat" contemplated by the statute. However, appellant argues that, under the "essence of the offense" instruction as provided by the trial court, the jury could reasonably conclude that since appellant intended to make a telephone call and that call contained information Williams construed as a threat, the purpose element had been met.

{¶28} Initially, we note that we do not construe the jury question in the manner suggested by appellant. Contrary to appellant's averment, the jury question does not imply that the jury was improperly contemplating Williams' reaction to the voicemail message; rather, it suggests that the jury was properly considering appellant's intention or purpose in leaving the voicemail message.

{¶29} Moreover, the jury instruction provided by the trial court mirrors the instruction provided by the Ohio Jury Instructions ("OJI"). 2-CR 417 OJI CR 417.01 sets forth the definition of purposely as follows:

> 1. PURPOSE TO _____ is an essential element of the crime of _____.
>
> 2. RESULT. A person acts purposely when it is his/her specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the mind of the defendant a specific intention to (*describe result*).

> 3. CONDUCT. When the (central idea) (essence) (gist) of the offense is a (prohibition against) (forbidding of) conduct of a certain nature, a person acts purposely if his/her specific intention was to engage in conduct of that nature, regardless of what he/she may have intended to accomplish by his/her conduct.

{¶30} The trial court's instruction regarding the definition of "purposely" comports entirely with the definition provided in OJI. Further, the instruction comports with the definition of "purposely" as provided in R.C. 2901.22(A). Pursuant to that section, "[a] person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature."

{¶31} Contrary to appellant's assertion, the "essence of the offense" definition of "purposely" does not imply that the "purpose" element of the offense is met if appellant intended to make a telephone call to Williams and Williams felt threatened by the telephone call. The "essence of the offense" definition of "purposely" contemplates the conduct of the accused, not the perception of the victim.

{¶32} Because the trial court's instruction regarding the definition of "purposely" accurately informed the jury of the law, it was proper. Accordingly, we find no plain error.

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

{¶34} Appellant's second assignment of error contends that defense counsel was deficient in failing to challenge the allegedly improper jury instruction on the definition of "purpose." We disagree.

{¶35} The standard for determining whether a defendant has been deprived of the effective assistance of counsel is essentially the same under Section 10, Article I of the Ohio Constitution and the Sixth Amendment to the United States Constitution. *State v. Bradley* (1989), 42 Ohio St.3d 136, 142. In order to succeed on his claim of ineffective assistance of counsel, appellant must satisfy a two-prong test. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064. Initially, appellant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Id. However, an error by counsel, even if unreasonable under prevailing professional standards, does not warrant setting aside a judgment unless the error affected the outcome of the trial. *Strickland*, 466 U.S. at 691, 104 S.Ct. at 2066.

{¶36} Thus, under the second prong of *Strickland,* appellant must show that counsel's deficient performance prejudiced the defense. Id. This factor requires showing that, but for counsel's unprofessional errors, a reasonable probability existed that the result of the trial would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. at 2068.

{¶37} For the reasons set forth in our previous discussion of the jury instruction regarding the definition of the term "purpose," appellant's ineffective assistance of counsel argument must fail, as the trial court's instruction on the definition of "purposely" was proper and thus did not merit an objection. Accordingly, defense counsel's decision not to object to the jury instruction regarding the definition of "purposely" does not constitute deficient performance. "[C]ounsel will not be deemed ineffective for failing to make a

meritless objection." *State v. Copley,* 10th Dist. No. 04AP-1128, 2006-Ohio-2737, ¶48, citing *State v. Shahan,* 4th Dist. No. 02CA63, 2003-Ohio-6495, ¶38. Accordingly, appellant's second assignment of error is overruled.

{¶38} Finally, we address appellant's pro se March 12, 2010 pleading, which requests that this court "look over that fact's I have added and to hear the tape." We construe appellant's pleading as a motion requesting that this court add the information set forth in the motion to the record and consider it in deciding the appeal. As this evidence was not part of the trial record, we may not consider it on appeal.

{¶39} For the foregoing reasons, appellant's first and second assignments of error are overruled, and his March 12, 2010 pro se motion is denied. Accordingly, the judgment of the Franklin County Municipal Court is hereby affirmed.

Motion denied;
judgment affirmed.

FRENCH and CONNOR, JJ., concur.

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