[Cite as *State v. Russell*, 2012-Ohio-1127.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NOS. CA2011-06-058 CA2011-09-097
- vs -	:	O P I N I O N
	:	3/19/2012
JOHN RUSSELL,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT
Case No. 2010CRB00739

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POWELL, P.J.

{¶ 1} A landowner found guilty of aggravated menacing for firing his handgun to evict three trespassers from his property seeks to overturn his conviction and vacate an order that bars him from keeping firearms in his residence as a condition of community control. We affirm the landowner's conviction as the finding of guilt was supported by the manifest weight of the evidence, but modify the community control sanction to prohibit the possession of firearms outside of his residence.

{¶ 2} John Russell was charged in Warren County Court with two counts of aggravated menacing, in violation of R.C. 2903.21, for allegedly firing his handgun three times in front of three teenaged trespassers who refused to leave the creek running through his property. Although there were three teenagers involved in the incident, only two complaints were filed by the parent or guardian of J.H. and J.F., respectively.

{¶ 3} In a bench trial, the court heard testimony from the three teenagers, two police officers, and Russell. The trial court found Russell guilty of both counts and sentenced him to two years of non-reporting "probation" or community control, and 20 hours of community service. Russell was also ordered not to possess a firearm or have a firearm in his residence during his period of community control.

{¶ 4} Russell appeals his conviction, raising two assignments of error for our review.

{¶ 5} Assignment of Error No. 1:

{¶ 6} THE TRIAL COURT ERRED IN CONVICTING MR. RUSSELL OF AGGRAVATED MENACING UNDER ORC §2903.21.

{¶ 7} Russell argues that his convictions were against the manifest weight of the evidence and not supported by sufficient evidence. He specifically argues there was no finding that he shot at the trespassers and, assuming he didn't shoot at them, there was no evidence the trespassers were afraid and his response was a "reasonable expression of his intent to defend his person or property."

{¶ 8} R.C. 2903.21(A), the aggravated menacing statute, states that "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."

{¶ 9} Under R.C 2901.22(B), a person acts "knowingly," regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a

certain nature; a person has knowledge of circumstances when he is aware that such circumstances probably exist.

{¶ 10} "Serious physical harm to persons" means, as applicable here, any physical harm that carries a substantial risk of death; any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity; or any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain. R.C. 2901.01(A)(5).

{¶ 11} "Serious physical harm to property" means any physical harm to property that either results in substantial loss to the value of the property or requires a substantial amount of time, effort, or money to repair or replace, or temporarily prevents the use or enjoyment of the property or substantially interferes with its use or enjoyment for an extended period of time. R.C. 2901.01(A)(6).

{¶ 12} The menacing crimes can involve a present state of fear of bodily harm and a fear of bodily harm in the future. *State v. Ali*, 154 Ohio App.3d 493, 2003-Ohio-5150, ¶ 26. Aggravated menacing does not require the state to prove that the offender is able to carry out the threat or even that the offender intended to carry out the threat. *Id*. at ¶ 27; *Dayton v. Dunnigan*, 103 Ohio App.3d 67, 70 (1995).

{¶ 13} In discussing R.C. 2903.21, the *Ali* court observed that the 1973 Legislative Service Commission Note for the aggravated menacing statute indicated that an offender merely must have a purpose to intimidate or know that his conduct would probably intimidate. *Id.* at 27. The sufficiency of the threat is a factual question reserved for the trier of fact. *Id*. at ¶ 28; *Dunnigan* at 71.

{¶ 14} The record at trial indicates M.L., one of the three teenagers involved in the

incident, lives on a property that adjoins the creek in question. On July 16, 2010, M.L., J.H., and J.F. entered the creek and moved past a bridge to an area of the creek they found more favorable for swimming.

{¶ 15} J.H. testified that two of them were on a tree that had fallen across the creek and the third teenager was in the water when Russell appeared on one side of the creek bank and asked them if they had permission to be on the property. J.H. said they told Russell they did not need permission to be on the property; they believed the state, not Russell, owned the creek. When Russell told them they were trespassing on his property and must leave, they did not leave. J.H. said he didn't see any "no trespassing" signs.

{¶ 16} Russell told the teenagers he would call the police and did call the police. When questioned about comments that were allegedly made, J.H. said he believed M.L. said something to the effect that they "don't care if the fucking police are coming." When asked if anyone said to Russell something to the effect of "fuck yourself," J.H. said he "[n]ever heard that."

{¶ 17} J.H. testified Russell was about 25 feet away from them when Russell fired about four shots, which he estimated landed in the water ten to 15 feet from them. J.H. said after the shots were fired, he thought it was time to go, that Russell "was serious." J.H. said he was scared he was going to get hurt. He later indicated he believed the shots were warning shots and the shots were not fired at them, but he was concerned about bullets ricocheting off of rocks. He said he was scared because he had never had a gun fired that close to him. J.H. said they gathered their belongings and walked back to M.L.'s property, when a police officer stopped them.

{¶ 18} J.F. also testified the shots Russell fired hit about ten to 15 feet from them. He said he could not see Russell from where he was standing during the encounter. He did not

recall anyone using profanity in reference to the police or Russell, but said they might have been cussing at him. He said Russell called them a "smart ass."

{¶ 19} J.F. admitted on cross examination that he completed a written statement to police in which he stated that he was not afraid, was used to "being around gunfire," and "figured they were warning shots and we left." J.F. indicated that he was afraid when the shots were fired and when he told the police officer otherwise, "[y]es, I lied to the officer, I guess, yeah."

{¶ 20} M.L., whose parent or guardian did not file a complaint against Russell, testified that Russell shot his pistol into the water toward them. M.L. indicated it was possible he used profanity, but he could not remember. M.L. said they ran after the shots were fired, but he called out his address because Russell said he was calling the police. In his written statement to police, M.L. said, "no, not really," when asked if he was afraid.

{¶ 21} A sergeant with the Clearcreek Township Police Department testified he responded to Russell's property on the trespassing call and talked with Russell. However, he was not aware that shots had been fired during the incident until a parent of one of the teenagers called him that evening. The sergeant testified that he talked with the three teenagers and again talked with Russell later that evening. At that time, Russell told him he fired three 9-millimeter rounds into the creek bed about 60 feet from the teenagers. According to the police sergeant, Russell said he fired the shots because the teenagers were yelling at him.

{¶ 22} Russell testified in his own behalf that on the afternoon in question, he planned to walk his dog on his 60-acre property when he heard a commotion and went to investigate. He said he took his cell phone and gun, as usual. Russell said he has discovered numerous trespassers on the property over the years and some of them were armed. Russell indicated

he had posted "no trespassing" signs on the property.

{¶ 23} Russell said he encountered the teenagers at the creek, but from where he was standing, he could only see one or two of them at any given time because of the terrain and foliage; he could only hear the other person or persons. When he asked whether they had permission to be there, Russell said the trespassers said the state owned the creek and they did not need Russell's permission to be there. He said he informed them that he owned the creek bed, the creek bank, and "the tree you're standing on, smart ass."

{¶ 24} Russell told them they were trespassing and needed to leave immediately and stay off the property. The trespassers refused. Russell told them he would call the police, and when he said the police were on their way, Russell testified that one of them said, "Let the fucking police come." Russell said shortly thereafter, one of the teenagers said "go fuck yourself." Russell said he felt "offended, disrespected, and quite threatened."

{¶ 25} Russell testified that he fired three rounds "straight down" into the water at the creek bed and the rounds entered the clay creek bottom. He said he was located an estimated 120 feet from the tree where the teenagers were standing at the time. Russell testified that he wanted to evict them from the property and thought firing the rounds was the "least physical response." Russell said, "My intent was to motivate them to leave." He said he had no intention of shooting or harming anyone.

{¶ 26} Russell indicated the trespassers gathered their things and walked down the creek. One of the trespassers called out an address and another comment was made that he could not understand.

{¶ 27} When reviewing a challenge to the sufficiency of the evidence to support a criminal conviction, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶ 34; *State v. Blanton*, 12th Dist. No. CA2005-04-016, 2006-Ohio-1785, ¶ 6.

{¶ 28} A court considering whether a conviction was against the manifest weight of the evidence must review the entire record, weigh the evidence and all reasonable inferences, and consider the credibility of witnesses. *Hancock* at ¶ 39. The question is 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. *Id*.

{¶ 29} As this court has previously stated, a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency. *State v. Wilson*, 12th Dist. CA2006-01-007, 2007-Ohio-2298, ¶ 35. As a result, a determination that a conviction is supported by the manifest weight of the evidence will also be dispositive of the issue of sufficiency. *State v. Bates*, 12th Dist. No. CA2009-06-174, 2010-Ohio-1723, ¶ 7.

{¶ 30} Based on Russell's testimony, he asserted both that he felt "quite threatened" by the trespassers' statements and he was attempting to eject them from his property after they refused to leave.

{¶ 31} Self defense and defense of property against trespassers are two defenses applicable to a charge of aggravating menacing. *State v. Ludt*, 180 Ohio App.3d 672, 2009-Ohio-416, ¶ 21 (7th Dist.).

{¶ 32} With the defense of self-defense, a person is privileged to use only that force that is reasonably necessary to repel the attack. *State v. Williford*, 49 Ohio St.3d 247, 249-250 (1990). The law of self-defense distinguishes between the use of deadly force and non-deadly force. *State v. Miller*, 149 Ohio App.3d 782, 2002-Ohio-5812, ¶ 6 (1st Dist.).

{¶ 33} To establish self-defense against nondeadly force, the defendant must establish (1) that the defendant was not at fault in creating the situation giving rise to the

altercation and (2) that he had reasonable grounds to believe and an honest belief, even though mistaken, that he was in imminent danger of bodily harm and his only means to protect himself from the danger was by the use of force not likely to cause death or great bodily harm. *State v. D.H.*, 169 Ohio App.3d 798, 809, 2006-Ohio-6953 (10th Dist.).

{¶ 34} In order to prove self-defense by means of deadly force, a defendant has to prove that "(1) he was not at fault in creating the situation (2) he had reasonable grounds to believe and an honest belief that he was in immediate danger of death or great bodily harm and that his only means of escape from such danger was by the use of deadly force, and (3) he had not violated any duty to escape to avoid the danger." *Ludt*, 180 Ohio App.3d 672, 2009-Ohio-416, at ¶ 21; *Williford* at 250 (no duty to retreat from one's home). A defendant's fear of immediate death or great bodily harm must be objectively reasonable; there must be both reasonable objective grounds to believe that harm is imminent, and there must be an honest subjective belief that harm is imminent. *Ludt* at ¶ 22.

{¶ 35} "Deadly force" is defined as "any force that carries a substantial risk that it will proximately result in the death of any person." *Id.*, *citing* R.C. 2901.01(A)(2); R.C. 2923.11(A) ("deadly weapon" means any instrument, device, or thing capable of inflicting death, and designed or specially adapted for use as a weapon, or possessed, carried, or used as a weapon).

{¶ 36} The defense of ejectment of trespassers is also referred to as the defense of property. *Ludt* at ¶ 24. "While a person has a right to protect his property from a trespass, and, after warning or notice to the trespasser, use such force as is reasonably necessary so to do, he cannot unlawfully use firearms to expel the intruder where he has no reasonable ground to fear the trespasser will do him great bodily harm." *State v. Childers*, 133 Ohio St. 508, 516 (1938) (child injured when farmer placed shotguns activated by trip wire to stop

trespassers on his property).

{¶ 37} In determining whether there are reasonable grounds to believe there was an imminent threat of great bodily harm, the court can consider whether the defendant received prior threats or encountered prior trespassers. *See State v. Fields*, 84 Ohio App.3d 423, 428 (12th Dist.1992) (where off-duty officer carried handgun with her when she "carefully" ejected trespassers, 12th District also considered fact that other trespassers had been on property, the uninhabited house was previously broken into, and the property previously vandalized).

{¶ 38} The burden is on the defendant to prove the elements of an affirmative defense by a preponderance of the evidence. *State v. Martin*, 21 Ohio St.3d 91 (1986); *Miller*, 149 Ohio App.3d 782, 2002-Ohio-5812, at ¶ 7.

{¶ 39} The trial court in the case at bar found the teenagers were trespassing on Russell's property, but noted Russell was not in his residence, his business, or his vehicle during the incident. The trial court found that neither Russell nor his property was in imminent danger of harm.

{¶ 40} The trial court found Russell exercised poor judgment when the trespassers said some things that were "probably very offensive," that offended you, and "you fired these shots." "I don't know how I am to draw any other conclusion * * * that your intent was to lead these young men to believe if they did not leave, you would shoot them." The trial court said it did not believe Russell would have shot the trespassers, "[b]ut what's important is what was in their mind at the time that this was happening. And I do believe that you caused these two gentlem[e]n to believe that you would cause them serious physical harm, and I find you guilty * * *."

{¶ 41} As we previously noted, aggravated menacing may be found when an offender merely had a purpose to intimidate or knows that his conduct would probably intimidate. *Ali*

at ¶ 27; R.C. 2903.21; R.C. 2901.22 (person acts "knowingly," regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature).

{¶ 42} Russell said he was trying to "motivate" the trespassers to leave; J.H. said when Russell fired the shots, he thought it was time to go, that Russell was serious. It is sufficient to prove that the victims, in the moment, believed the defendant to be in earnest and capable of acting. *State v. Marcum*, 7th Dist. No. 10 CO 17, 2011-Ohio-6140, ¶ 37.

{¶ 43} The trial court found the two victims were intimidated by Russell's action and rejected Russell's argument that his conduct was excused because he was defending himself or his property at the creek bank. Witness credibility is generally the province of the trier of fact, who sits in the best position to assess the weight of the evidence and credibility of the witnesses, whose gestures, voice inflections, and demeanor the trier of fact can personally observe. *State v. DeHass*, 10 Ohio St.2d 230, 231 (1967).

{¶ 44} We find the trial court did not lose its way and create such a manifest miscarriage of justice that the conviction must be reversed. Russell's conviction was supported by the manifest weight of the evidence. Accordingly, we also find sufficient evidence to support the conviction. Russell's first assignment of error is overruled.

{¶ 45} Assignment of Error No. 2:

{¶ 46} THE TRIAL COURT ERRED IN ORDERING THAT NO FIREARMS BE STORED AT THE RESIDENCE OF MR. RUSSELL AS A CONDITION OF COMMUNITY CONTROL.

{¶ 47} Russell claims the portion of the community control sanction that prohibited him from having firearms in his residence for the two-year community-control term was unreasonable and overbroad. Russell argues that he, as well as his wife, need to possess

firearms for protection, given the size of his property, "the cover" provided "to intruders" from vegetation and terrain, the history of trespassing on the property, the fact that some trespassers are armed and others display a lack of respect for authority. We note that Russell did not object when this community control sanction was imposed by the trial court at sentencing.

{¶ 48} The misdemeanor community control sanctions statute, R.C. 2929.25, states, in pertinent part, that in the "interests of doing justice, rehabilitating the offender, and ensuring the offender's good behavior, the court may impose additional requirements on the offender" and the "offender's compliance with the additional requirements also shall be a condition of the community control sanction imposed upon the offender."

{¶ 49} Seeing no "meaningful distinction between community control and probation for purposes of reviewing the reasonableness of their conditions," the Ohio Supreme Court in *State v. Talty*, 103 Ohio St.3d 177, 2004-Ohio-4888, reiterated a test it previously presented to determine whether a probation condition reasonably related to probation interests.

{¶ 50} Under the test, courts should consider whether the condition "(1) is reasonably related to rehabilitating the offender, (2) has some relationship to the crime of which the offender was convicted, and (3) relates to conduct which is criminal or reasonably related to future criminality and serves the statutory ends of probation." *Id*. at ¶ 12. However, the community control conditions cannot be overly broad so as to unnecessarily impinge upon the probationer's liberty. *Id*. at ¶ 13.

{¶ 51} The General Assembly has granted broad discretion to trial courts in imposing community-control sanctions, and appellate courts review the trial court's imposition of community-control sanctions under an abuse-of-discretion standard. *Id*. at ¶ 10. We find under the specific facts of this case, the trial court abused its discretion when it prohibited

Russell from having firearms in his residence for the period of community control. We modify the order to reflect that Russell is not permitted to possess firearms outside of his residence for the remaining period of his community control.

{¶ 52} Russell's second assignment of error is sustained to the extent indicated.

{¶ 53} Judgment affirmed as modified.

RINGLAND and PIPER, JJ., concur.