[Cite as *State v. Crowley*, 2009-Ohio-6689.]

IN THE COURT OF APPEALS FOR CLARK COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 2009 CA 65
v.	:	T.C. NO. 09 CRB 00642
KERRY J. CROWLEY, SR.	:	(Criminal appeal from Municipal Court)
Defendant-Appellant	:	
	:	

. . . . . .

O P I N I O N

Rendered on the 18th day of December, 2009.

. . . . . .

MICHAEL F. SHEILS, Atty. Reg. No. 0021678, City of Springfield, 50 E. Columbia Street, Springfield, Ohio 45502
Attorney for Plaintiff-Appellee

DAVID SMITH, Atty. Reg. No. 0020413, P. O. Box 791, Springfield, Ohio 45501
Attorney for Defendant-Appellant

. . . . . .

FROELICH, J.

Kerry Juan Crowley, Sr. was convicted after a jury trial in the Municipal Court of Clark County of telecommunications harassment and menacing. The court sentenced him to 180 days in jail for telecommunications harassment and 30 days in jail for menacing, to be served concurrently.

Crowley appeals from his convictions, claiming that the trial court erred in allowing evidence of prior "other acts" to be admitted at trial, that the court erred in allowing hearsay evidence of his (Crowley's) threats to be admitted, that his counsel rendered ineffective assistance, and that he was denied due process because the jury's verdict was based on a misstatement of the law in the jury instructions. For the following reasons, Crowley's conviction for menacing will be affirmed, his conviction for telecommunications harassment will be reversed, and the matter will be remanded for further proceedings.

I

According to the State's evidence at trial, during the evening of January 30, 2009, Christina Hopping argued with Crowley, the father of her three young children, about Crowley's relationship with another woman. The two had a series of conversations over their cell phones, calling each other "back and forth," and Hopping received several text messages from Crowley. Crowley told Hopping that he was going to come over and that she "was making matters worse." One of Crowley's text messages included the single word, "flick." "Flick" was the nickname for Charles Cunningham, who had been charged with the murder of Jessica Serna, the mother of Cunningham's children and a former classmate of Hopping, and of Serna's friend. At approximately 10:30 p.m.,[1] Hopping called the Springfield Police Department and reported that the father of her children was making threatening telephone calls to her. Hopping testified that she called because she "did not want him to come over to my house."

[1]Although the officers testified that they were dispatched at approximately 10:30 p.m., the 911 tape indicates that Hopping called at 2027, or 8:27 p.m. on January 30, 2009, and that an officer was dispatched at that time.

Four officers responded to Hopping's 911 call – Officer Joshua Haytas and his partner, Officer Stephanie Crego, and Officer Gregory Garman and a new officer that he was training, Officer Duwayne Hush. The officers arrived at Hopping's apartment at approximately the same time, and they approached her door together. Hopping informed the officers that she had received harassing phone calls and text messages from Crowley, the father of her children, and that she was afraid that he was going to come over and harm her. Hopping showed several text messages to Hush and Garman, including the text message with the word, "flick." Hopping explained to the officers that "Flick" was the nickname for Cunningham and what Cunningham allegedly had done, and she told them that she was afraid that Crowley was going to kill her. According to Hush, Hopping's hand was shaking while she showed him the text messages. Hopping appeared "scared," "intimidated," and "obviously distressed." Haytas told Hopping to call the police immediately if Crowley came to her apartment. Crowley never came to her home.

In February 2009, Crowley was charged by complaint with telecommunications harassment, in violation of R.C. 2917.21(A)(1), a first degree misdemeanor, and menacing, in violation of R.C. 2903.22(A), a fourth degree misdemeanor. Prior to trial, the telecommunications harassment charge was amended to reflect a charge under R.C. 2917.21(A)(3).

A jury trial on the telecommunications harassment and menacing charges was held on July 2, 2009. Hopping, Haytas, Hush, and Garman testified for the State. Although Hopping testified for the prosecution, she made clear that she did not want to testify against Crowley, and she claimed that she had "misunderstood" the text message about "flick," that

Crowley had not made any threats during their conversations, and that she had not been afraid for her safety. In his case-in-chief, Crowley re-called Hush to ask him a few questions about the inconsistency between Hopping's testimony at trial and her statements to him at the apartment. After deliberations, Crowley was convicted of both offenses. The court sentenced him accordingly. Crowley's motions to stay his sentence pending appeal were denied.

Crowley appeals from his convictions, raising four assignments of error.

II

Crowley's first assignment of error states:

"THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT ADMITTED EVID. R. 404(B) 'OTHER ACTS' EVIDENCE OF APPELLANT'S PRIOR CRIMINAL CONVICTION AND PRISON TERM AS CHARACTER EVIDENCE."

In his first assignment of error, Crowley asserts that the trial court erred in allowing Hopping to testify that he had previously committed domestic violence against her, for which he had served a prison term. He argues that this testimony violated Evid.R. 404(B).

Evid.R. 404(B) provides: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Relevant evidence is admissible unless its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury. Evid.R. 402; Evid.R. 403(A).

The decision whether to admit evidence is left to the sound discretion of the trial court, and a reviewing court will not reverse that decision absent an abuse of discretion. *State v. Sage* (1987), 31 Ohio St.3d 173, paragraph two of the syllabus. An abuse of discretion means more than a mere error of law or an error in judgment. It implies an arbitrary, unreasonable, unconscionable attitude on the part of the trial court. *State v. Adams* (1980), 62 Ohio St.2d 151.

During Hopping's testimony, the prosecutor inquired as to why Hopping had called the police in response to her telephone communications with Crowley. Hopping responded that Crowley "said he was coming over to my house." The prosecutor then asked:

"Q: Well, would you agree with me it's not typical for somebody to call to get the police to come out to their house because someone said they were coming over, unless they might be afraid of them?

"A: Of course you know we have a history, of course.

"Q: Well, I don't think any of the folks sitting in the jury box know about that, so that's what I'm asking you. What, you say you have a history, what history are you referring to?"

At this juncture, defense counsel objected and asked to approach. After a sidebar discussion, which is not part of the record, the court announced that it had overruled the objection. The prosecutor continued, as follows:

"Q: What do you mean by history?

"A: He has had domestic violence charges in the past.

"Q: Were you a party to that?

"A: Yes, I was.

"Q: And –

"A: He has not hit me in the past two years. I mean, we've been doing really well. We have, on that sense.

"Q: OK. Well, when you say domestic violence charges, you said you were, you were a party to that?

"A: Yes. He has done time.

"Q: When you say 'done time'?

"A: In the penitentiary.

"Q: As a result of physically harming you?

"A: Yes.

"Q: When was that, if you, if you know?

"A: '04? '03?

"Q: 2004? Could there have any incidents since then that you recall?

"A: No, not in actually physically hitting me, no."

Upon review of the transcript, the State did not present evidence of Crowley's prior domestic violence to prove that he had bad character and acted in conformity with that character by engaging in telecommunications harassment and menacing. Rather, the State elicited testimony from Hopping about Crowley's prior domestic violence in order to explain why she had contacted the police in response to Crowley's telephone calls and to prove that she had a reasonable basis to fear that Crowley would commit physical harm to her, as he had done in the past. The trial court's admission of evidence regarding Crowley's past

domestic violence against Hopping was not contrary to Evid.R. 404(B). Moreover, the probative value of that testimony was not substantially outweighed by the danger of unfair prejudice.

In his reply brief, Crowley raises that the trial court failed to instruct the jury that it could consider his past domestic violence only for the limited purpose of determining whether Hopping had a reasonable basis to fear his threats. Crowley did not ask for a limiting instruction. Consequently, he has waived all but plain error.

"Plain error exists 'if the trial outcome would clearly have been different, absent the alleged error in the trial court proceedings.' *State v. Rollins*, Clark App. No. 2005-CA-10, 2006-Ohio-5399. '[T]o successfully prevail under plain error the substantial rights of the accused must be so adversely affected that the error undermines the "fairness of the guilt determining process."' *State v. Ohl* (Nov. 27, 1991), Ashland App. No. CA-976." *State v. Bahns*, Montgomery App. No. 22922, 2009-Ohio-5525, at ¶25.

"The courts in Ohio have long recognized that evidence of other crimes, wrongs or bad acts carries the potential for the most virulent kind of prejudice for the accused. *** In cases where evidence has been admitted for a very limited purpose and that evidence tends to show that Defendant has committed other criminal acts, the jury should be instructed that such evidence must not be considered by them as proof that defendant committed the crime charged. The limiting instruction should be given at the time the 'other acts' evidence is received, and it has been held that the failure to give any limiting instruction constitutes plain error." (Internal citations omitted.) *State v. Tisdale*, Montgomery App. No. 19346, 2003-Ohio-4209, at ¶47.

We have noted, however, that a defendant may rationally choose, as a matter of trial strategy, not to avail himself of his right to a limiting instruction because of a concern that the instruction will only emphasize the "other acts" evidence and thereby reinforce the potential prejudice. *Tisdale* at ¶48, citing *State v. McDaniel* (Aug. 19, 1992), Clark App. No. 2853. "Because there may be good reasons for a defendant to elect to waive his right to a limiting instruction, a reviewing court should be reluctant to find plain error where a defendant has not requested a limiting instruction." *McDaniel*, supra.

Crowley's counsel could have reasonably elected not to request a limiting instruction regarding his previous conviction and incarceration for domestic violence in order to avoid having the jury focus on the fact that his past acts of domestic violence might have reasonably caused Hopping to believe that he would, in fact, hurt her. Moreover, the prosecutor emphasized at closing argument that Hopping was afraid based on the nature of the conversations and texts and the history of domestic violence; the prosecutor did not argue that Crowley's "other acts" should be considered for any other purpose. Under these circumstances, we find no plain error in the trial court's failure to give a limiting instruction regarding Crowley's history of domestic violence.

The first assignment of error is overruled.

III

Crowley's second assignment of error states:

"THE TRIAL COURT COMMITTED PLAIN ERROR WHEN IT ADMITTED HEARSAY TESTIMONY OF APPELLANT'S THREATS TO, AND THEIR EFFECT UPON, THE ALLEGED VICTIM."

In his second assignment of error, Crowley contends that the trial court erred in admitting several hearsay statements by Hopping. Specifically, he challenges the admissibility of a redacted tape recording of Hopping's 911 call and the responding officers' testimony regarding statements Hopping made to them about Crowley's calling and threatening her.

We begin with Crowley's complaint that the trial court erred in permitting the State to play Hopping's call to the police dispatcher.

"Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Evid.R. 801(C). In general, hearsay is not admissible. Evid.R. 802. The State asserts that Hopping's statements were not hearsay, arguing that they were offered "to explain why she needed police services." Contrary to the State's assertion, it appears that Hopping's prior out-of-court statements that Crowley had threatened her were offered to establish the truth of those statements, i.e., that Crowley had threatened her. Hopping's statements were hearsay, as defined by Evid.R. 801.

However, there are several exceptions to the hearsay rule. Evid.R. 803(1) permits the admission of a "present sense impression," which is defined as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter unless circumstances indicate lack of trustworthiness. ***"

"There is an assumption that statements or perceptions that describe events uttered during or within a short time from the occurrence of the event are more trustworthy than

statements not uttered at or near the time of the event. Moreover, 'the key to the statement's trustworthiness is the spontaneity of the statement, either contemporaneous with the event or immediately thereafter. By making the statement at the time of the event or shortly thereafter, the minimal lapse of time between the event and statement reflects an insufficient period to reflect on the event perceived – a fact which obviously detracts from the statement's trustworthiness.'" *State v. Travis*, 165 Ohio App.3d 626, 2006-Ohio-787, at ¶35, quoting *State v. Ellington*, Cuyahoga App. No. 84014, 2004-Ohio-5036, at ¶10.

Evid.R. 803(2) excludes an excited utterance from the hearsay rule. An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." See *State v. Helney*, Montgomery App. No. 20789, 2005-Ohio-6142, at ¶23. "For an alleged excited utterance to be admissible, four prerequisites must be satisfied: (1) the occurrence of an event startling enough to produce a nervous excitement in the declarant; (2) a statement made while still under the stress of excitement caused by the event; (3) a statement related to the startling event; and (4) the declarant's personal observation of the startling event." *Travis* at ¶39, citing *State v. Taylor* (1993), 66 Ohio St.3d 295, 300-301. "The controlling factor is whether the declaration was made under such circumstances as would reasonably show that it resulted from impulse rather than reason and reflection." *State v. Humphries* (1992), 79 Ohio App.3d 589, 598.

In short, an excited utterance is spontaneous exclamation made under the stress of a startling event. In contrast, a present sense impression is a statement describing or explaining an event *while or immediately after* the event is perceived. With present sense

impressions, the declarant need not be under "stress of excitement caused by the event or condition," as required for an excited utterance; rather, the primary focus is whether the statement was contemporaneous with the perceived event or condition. With both exceptions, the declarations are admissible unless there is an indication that the statements are not trustworthy.

911 calls are usually admissible under the excited utterance or the present sense impression exception to the hearsay rule. *Ratliff v. Brannum*, Greene App. No. 2008-CA-5, 2008-Ohio-6732, at ¶132 (911 calls are admissible as excited utterances), citing *State v. Williams*, Montgomery App. No. 20368, 2005-Ohio-213, at ¶17; *State v. Jackson*, Champaign App. No. 2004-CA-24, 2005-Ohio-6143, at ¶15 (911 tape was properly admissible as a present sense impression).

During Hopping's testimony, the prosecutor asked her if she remembered the call that she made to the Springfield Police Department for assistance. Hopping stated that she had asked the police "to come out so I could make a report. I didn't want to press charges. I didn't want to take anything this far." Hopping did not recall her exact words to the dispatcher. At that point, Crowley's counsel asked to approach, a conversation occurred which is not part of the record, and a brief recess was taken.

Upon resuming the trial, the State asked to play a redacted portion of the 911 call. The prosecutor reminded the court that the 911 tape had been discussed on the record, and he informed the court that defense counsel had heard the redacted tape and did not object to this portion being played for the jury. The court asked defense counsel if the prosecutor's statements were accurate; defense counsel responded affirmatively.

The State played the redacted 911 call for the jury. On the recording, Hopping told the police dispatcher that she wanted to make a report because the father of her children was calling and making threats to her; Hopping's voice was calm and matter-of-fact. It appears that the State's intent when it played the 911 telephone call was to establish that Hopping had called the police because Crowley had, in truth, threatened her. Hopping subsequently testified that she had made the 911 call from her home, that she was referring to Crowley as the caller, and that she had just received a call from Crowley when she made the call to the police.

The State did not lay a foundation for having the tape admitted as either an excited utterance or a present sense impression. However, Hopping testified following the playing of the tape that she called the police immediately after receiving a communication from Crowley. Her testimony thus supports a conclusion that the 911 tape could have been admissible as a present sense impression.

Even if the 911 call were inadmissible hearsay in this instance, Crowley's challenge to the admission of the 911 tape is barred by the invited error doctrine. "The doctrine of invited error is a corollary of the principle of equitable estoppel. Under the doctrine of invited error, an appellant, in either a civil or a criminal case, cannot attack a judgment for errors committed by himself or herself; for errors that the appellant induced the court to commit; or for errors into which the appellant either intentionally or unintentionally misled the court, and for which the appellant is actively responsible. Under this principle, a party cannot complain of any action taken or ruling made by the court in accordance with that party's own suggestion or request." *Daimler/Chrysler Truck Financial v. Kimball*,

Champaign App. No. 2007-CA-07, 2007-Ohio-6678, at ¶40, citing 5 Ohio Jurisprudence 3d (1999, Supp.2007) 170-71, Appellate Review, Section 448 (internal citations omitted).

Although the discussion between counsel and the court regarding the 911 tape recording was not transcribed, the record reflects that the tape was redacted, that defense counsel did not object to playing the first part of the tape, and that defense counsel affirmatively informed the court that he had no objection to that portion's being played for the jury. Crowley cannot now complain that the first portion of the tape should not have been played as inadmissible hearsay.

Crowley further complains that the officers should not have been allowed to testify that Hopping informed them that she had received threatening phone calls and text messages from Crowley, because Hopping's statements constituted inadmissible hearsay. Crowley did not object to this testimony at trial.

During her testimony, Hopping stated that at the time she made the call to the Springfield Police Department, she had just received a call from Crowley. The police responded to her apartment, and Hopping relayed to them that she had received threatening phone calls and text messages from Crowley. As with the 911 tape, the record thus reflects that Hopping's statements to the responding officers were made shortly after Hopping received threatening calls and text messages from Crowley, supporting their admission as present sense impressions.

Hopping's statements to the officers might also have been admissible as excited utterances. Haytas, Hush, and Garman each testified that Hopping was noticably frightened and distressed when they responded to her 911 call. Hush further testified that her hand was

shaky when she showed him the text messages. We note, however, that Hopping's voice was calm during the 911 call, which makes the question of whether Hopping's statements to the police could also qualify as excited utterances a close call. Nevertheless, absent any objection or even discussion on the record concerning the conversation, we cannot conclude that the trial court committed plain error in allowing the officers to testify that Hopping told them that Crowley had made threatening phone calls and text messages.

Additionally, Hopping's statements to the officers that Crowley had threatened her with telephone calls and text messages were merely cumulative of her statements to the police dispatcher, which had previously been played for the jury. Accordingly, we cannot conclude that the admission of Hopping's statements to the officers would constitute plain error.

Crowley's second assignment of error is overruled.

IV

Crowley's third assignment of error states:

"APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL COUNSEL."

To reverse a conviction based on ineffective assistance of counsel, it must be demonstrated both that trial counsel's conduct fell below an objective standard of reasonableness and that the errors were serious enough to create a reasonable probability that, but for the errors, the result of the trial would have been different. *Strickland v. Washington* (1984), 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674; *State v. Bradley* (1989), 42 Ohio St.3d 136. Trial counsel is entitled to a strong presumption that his or her

conduct falls within the wide range of reasonable assistance. *Strickland*, 466 U.S. at 688. Deficient performance means that claimed errors were so serious that the defense attorney was not functioning as the "counsel" that the Sixth Amendment guarantees. *State v. Cook* (1992), 65 Ohio St.3d 516, 524.

First, Crowley claims that his counsel rendered ineffective assistance by failing to object to Hopping's testimony regarding his prior bad acts, i.e., his history of domestic violence against Hopping. He also asserts that his counsel should have objected to the alleged hearsay testimony of the responding police officers that Crowley had called Hopping and threatened her and to the playing of the redacted recording of the 911 call. Crowley raised the admissibility of this testimony and the 911 tape in his first and second assignments of error.

Crowley's counsel properly objected to Hopping's testimony regarding Crowley's history of domestic violence against her. Although he did not request a limiting instruction when that testimony was introduced, as discussed above, counsel could have reasonably concluded that a limiting instruction would merely emphasize the prejudicial testimony. Counsel's conduct with respect to Crowley's "other acts" was not ineffective.

Counsel's decision not to object to the first portion of the 911 tape could have been a reasonable trial strategy. In the very short portion that was played for the jury, Hopping stated, in a calm and conversational tone, that she wanted to make a report that the father of her children was calling her and threatening her. Counsel could have reasonably believed that the tone of Hopping's voice demonstrated that she was not afraid when she called the police and that the 911 call supported Hopping's testimony that she merely wanted to make a

report. Counsel could have also reasonably believed that the 911 call and Hopping's statements to the officers were admissible under an exception to the hearsay rule. Crowley's counsel did not render ineffective assistance when he failed to object to the entire 911 tape.

Crowley further contends that his counsel presented evidence on his behalf that was actually detrimental to his case.

During counsel's cross-examination of Hopping, counsel elicited testimony from Hopping that, when she called the police, she was "mad enough to get Mr. Crowley into trouble." She further stated that Crowley did not make any threats to her or her children and that she had not been afraid for her safety. In his case-in-chief, Crowley re-called Officer Hush to ask him about the inconsistencies between what Hopping had told the officers and what she had said at trial. Counsel's questioning consisted of the following:

"Q: Officer Hush, you were here when Officer Garman testified, is that correct?

"A: Yes, sir.

"Q: Was he correct in his testimony that he was your field training officer?

"A: Yes, sir.

"Q: And he taught you the proper way to fill out your paperwork?

"A: Yes, sir.

"Q: Was he correct in telling you to be honest with, in your paperwork?

"A: Yes, sir.

"Q: To basically, I don't remember his exact words, to get the most information down as possible?

"A: Yes, sir.

"Q: OK. And do you do that with your reports?

"A: Yes, sir.

"[Objection by the prosecutor to the line of questioning, which was overruled]

"Q: In your report, I believe you mentioned Miss Hopping making several statements to you about [Crowley] threatening her and her children? Was that correct?

"A: Yes, sir.

"Q: Have you had an opportunity to look over your report?

"A: I've looked over it briefly before then.

"Q: OK, but that's a correct statement of that, is it?

"A: Yes, sir.

"Q: You also heard her testify that's incorrect, that she did not make those statements to you? Were you here when she said that?

"A: Yes, sir.

"Q: OK. Was she correct when she stated that?

"A: The state –

"Q: When she stated that she did not make those statements?

"A: I'm stating that the statement that was put in the court documents is correct.

"Q: Interesting. So was she lying today when she stated she did not make those statements?

"A: To my knowledge, that would be yes.

"Q: It's a yes?

"A: Yes, sir."

Counsel explained his reason for calling Hush to testify on Crowley's behalf during his closing argument. Counsel stated, in part:

"The main witness today was Miss Hopping. I believe all the testimony today from the officers were basically just based on Miss Hopping's statements and I didn't want to, you know, like I said, I didn't want – I put the officers back on the stand at the end not to, you know, chastise him, chastise Miss Hopping. I do believe that she made statements. She even made statements here today in front of you that she was lying or she made statements at the time of, she was talking to the officers that she was lying. But at some point, she did make conflicting statements.

"These are things you have to take into consideration when you view her testimony as a whole. She lied at some point. I don't know if she's lying today, lying there, but she lied. There is no debate over that. I mean, I think the prosecutor will bring in, well, if she's lying because of this or that. For whatever reason, she's lying at some point."

The record reflects that Crowley's counsel asked Hush about Hopping's inconsistent statements to emphasize that she has lied and that her statements should not be believed. During his cross-examination of Haytas, counsel had asked if he had ever seen Hopping mad, if witnesses had ever lied to the police, and if he had "ever had people just wanted to get someone in trouble." During his cross-examination of Hush, counsel also asked if he had ever seen Hopping mad or knew how she reacted when she was lying. Hush testified on cross-examination that a person might shake when he or she is lying. Although counsel's questioning of Hush during Crowley's case-in-chief was inartful and its purpose

was not apparent at first blush, it appears to have been part of a reasonable trial strategy to discredit Hopping in the hope that the jury would believe that she had lied to the police on January 30, 2009.

Moreover, viewing the record as a whole, we cannot conclude that Hush's testimony during Crowley's case-in-chief significantly added to the evidence presented at trial. The testimony offered during the State's case-in-chief reflected that Hopping did not want to testify against Crowley. Although she acknowledged having received a text message that said "flick" and having called the police, she denied being threatened by Crowley and stated, instead, that she was angry and called the police merely to make a report. In contrast, the police officers' testimony had shown that Hopping called the police due to threatening calls and texts and that she was scared by those communications. Hush's testimony simply highlighted a discrepancy that was already apparent. We cannot conclude that there was a reasonable probability that the outcome of the case would have been different but for counsel's renewed questioning of Hush.

Finally, Crowley argues that his counsel made statements from which the jury might have reasonably concluded that he had the burden of proving his innocence. In his opening statement, counsel stated:

"Good afternoon. I know it's already been a long day but, I'll try to make this very brief. As the prosecutor has already stated to you, you know, it's his burden to prove guilty beyond a reasonable doubt today. Because I've gone through several different openings this morning, because I really don't know how to express this. I don't know how to express a negative. I mean, Mr. Crowley – Mr. Crowley, I'm sorry, I always get that wrong. Mr.

Crowley didn't do it. How do you prove someone didn't do something? This event supposedly occurred back in January. How do you prove that you didn't do something?

"***

"*** But I believe after you hear all the evidence today, you'll come to the same conclusion I have, that the prosecution has not proved their case beyond a reasonable doubt and you should bring back the correct verdict today of not guilty."

During his closing argument, counsel reiterated that "it's hard to prove a negative" and that "the prosecution did not meets its burden." When the trial court instructed the jury, it instructed that Crowley was "presumed innocent until and unless his guilt is established beyond a reasonable doubt. He must be acquitted unless the State of Ohio has produced evidence which convinces you beyond a reasonable doubt of every essential element of the offenses charged in the complaint."

Although counsel referred to the difficulty of proving that a person did not do something, counsel further stated that the prosecution had the burden of proving Crowley's guilt beyond a reasonable doubt. The trial court properly instructed the jury on the State's burden of proof and Crowley's presumption of innocence, and we presume that the jury followed the court's instruction. We find no basis to conclude that counsel's reference to "proving a negative" during opening and closing arguments prejudiced Crowley.

The third assignment of error is overruled.

V

Crowley's fourth assignment of error states:

"WHEN THE JURY VERDICT IS BASED UPON A MISSTATEMENT OF LAW

AS TO THE ELEMENTS OF TELECOMMUNICATIONS HARASSMENT AND WHERE, FROM THE EVIDENCE PRESENTED, NO REASONABLE FINDER OF FACT COULD HAVE FOUND THOSE ERRONEOUS ELEMENTS PRESENT, APPELLANT WAS DENIED HIS RIGHT TO DUE PROCESS AND A FAIR TRIAL."

In his fourth assignment of error, Crowley claims that his right to due process was violated when the jury convicted him of telecommunications harassment based on an erroneous jury instruction. The State responds that, under Crim.R. 30, Crowley waived any error relating to the jury instructions by failing to object to the instructions that were given. The State further comments that Crowley's argument is directed solely to the telecommunications harassment charge and would not affect his conviction for menacing.

Crowley was charged with telecommunications harassment, in violation of R.C. 2917.21(A)(3). That statute provides: "No person shall knowingly make or cause to be made a telecommunication, or knowingly permit a telecommunication to be made from a telecommunications device under the person's control, to another, if the caller does any of the following: *** During the telecommunication, violates section 2903.21 of the Revised Code." To establish a violation of R.C. 2903.21(A), the aggravated menacing statute, the State was required to prove that a defendant knowingly caused the victim to believe that he would cause her serious physical harm. See *State v. Nelson*, Champaign App. No. 2006-CA-36, 2007-Ohio-3162, at ¶16. Thus, to prove telecommunications harassment under R.C. 2917.21(A)(3), the State was required to prove that Crowley knowingly made a telecommunication and, during that telecommunication, he knowingly caused Hopping to believe that he would cause her serious physical harm.

The trial court failed to properly instruct on aggravated menacing. Rather than stating that the State had to prove that Crowley knowingly *caused Hopping to believe* that he would cause her serious physical harm, the court defined aggravated menacing as "knowingly cause or attempt to cause serious physical harm to another." The court's purported instruction on aggravated menacing was, in fact, an instruction on felonious assault. See R.C. 2903.11(A)(1). Crowley failed to object to the court's instruction at trial and waived all but plain error. Crim.R. 30(A); *State v. Underwood* (1983), 3 Ohio St.3d 12, syllabus.

We agree with Crowley that he was denied due process when he was convicted of telecommunications harassment. We presume that the jury followed the trial court's instructions on telecommunications harassment. *Pang v. Minch* (1990), 53 Ohio St.3d 186, 195; *State v. West*, Montgomery App. No. 22966, 2009-Ohio-6270, at ¶14. Based on those instructions, however, the jury could not have reasonably found Crowley guilty of telecommunications harassment, in violation of R.C. 2917.21(A)(3). There was no evidence to support the jury's apparent conclusion that Crowley had engaged in felonious assault, as it had been instructed to find in order to convict him of telecommunications harassment. Hopping testified that Crowley never came to her apartment, and there was no evidence that Crowley committed any physical harm to Hopping on January 30, 2009, serious or otherwise. Although the State presented sufficient evidence to establish telecommunications harassment, as defined by R.C. 2917.21(A)(3), and the jury might have reached the same result had it been properly instructed, we nevertheless find that the trial court's erroneous jury instruction deprived Crowley of a fair trial on the telecommunications

harassment charge.

The fourth assignment of error is sustained.

VI

The trial court's judgment of conviction for menacing will be affirmed. Crowley's conviction for telecommunications harassment will be reversed, and the matter will be remanded for further proceedings on that charge only.

We note that Crowley has completed his jail sentence for the menacing charge and has completed more than five months of his 180 day sentence for the telecommunications harassment charge. Because Crowley has nearly completed his sentence for the telecommunications harassment conviction, which we will reverse, the trial court should bring him before the court for a bond hearing without delay.

. . . . . .

BROGAN, J. and FAIN, J., concur.

Copies mailed to:

Michael F. Sheils
David Smith
Hon. Denise L. Moody