[Cite as *State v. Howard*, 2010-Ohio-5158.]

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

STATE OF OHIO :

Plaintiff-Appellee : C.A. CASE NO. 23588

v. : T.C. NO. 09CRB2073

JAMES J. HOWARD : (Criminal appeal from Municipal Court)

Defendant-Appellant :

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O P I N I O N

Rendered on the 22nd day of October, 2010.

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FROELICH, J.

{¶ 1} This matter is before the Court on the direct appeal of Defendant-Appellant James Howard from his conviction and sentence for Menacing. For the following reasons, the judgment of the trial court will be Affirmed.

I

{¶ 2} On the afternoon of February 24, 2009, Ronald and Lynn Shackleford arrived home from the grocery store, parked in the driveway that they shared with their next-door-neighbor, Serena Tisdale, and began unloading their groceries. Howard, whom the Shacklefords had never met before, suddenly appeared on Tisdale's porch and demanded, "You better move that blank blank car because if you don't I will move it for you." At first, Mr. Shackleford ignored Howard, who was slurring his speech and ranting, appearing to be intoxicated. Howard moved down the stairs towards the Shacklefords, yelling at them and calling them names. Twice Howard threatened to blow the Shacklefords's heads off if they did not move their car.

{¶ 3} Mrs. Shackleford went into her house and returned with the phone, calling the police. By the time officers arrived, Howard had stopped threatening the Shacklefords and retreated into Tisdale's home.

{¶ 4} When Officer Evans arrived, she found Mrs. Shackleford upset and shaking. Mrs. Shackleford was on the verge of tears, and she had a hard time talking to the officers. Mr. Shackleford was angry, but calm.

{¶ 5} Officer Evans also spoke with Howard, who appeared to be intoxicated but cooperative. His speech was slurred, and he continued to yell at the Shacklefords while he spoke with Officer Evans. Howard seemed angry and upset, and he kept calling the Shacklefords "crack-heads."

{¶ 6} Howard was charged with one count of Menacing, and the case proceeded to a bench trial. The defense offered the testimony of Tisdale and

Howard. Tisdale agreed that Howard was talking loudly and cussing at the Shacklefords, but she denied hearing him make any threats. Howard admitted yelling, cursing, and calling the Shacklefords names, but he denied ever threatening them. The trial court found Howard guilty and sentenced him accordingly. Howard appeals.

II

{¶ 7} Howard's First Assignment of Error:

{¶ 8} "THE COURT ERRED BY NOT GRANTING APPELLANT'S MOTION FOR ACQUITTAL AT THE CLOSE OF THE STATE'S CASE."

{¶ 9} In his first assignment of error, Howard claims that the trial court should have granted his Crim.R. 29 motion for acquittal. Criminal Rule 29(A) requires a trial court to enter a judgment of acquittal "if the evidence is insufficient to sustain a conviction of such an offense...." A sufficiency of the evidence argument challenges whether the State has presented adequate evidence on each element of the offense to allow the case to go to the jury or to sustain the verdict as a matter of law. *State v. Thompkins,* 78 Ohio St.3d 380, 387, 1997-Ohio-52. The proper test to apply to the inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492: "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."

{¶ 10} Howard was charged with Menacing, in violation of R.C. 2903.22, which states "No person shall knowingly cause another to believe that the offender will cause physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family." He insists that "there was no actual evidence that [he] had the actual ability to cause harm." However, "[m]enacing does not require that the offender be able to carry out a given threat. *State v. Schwartz* (1991), 77 Ohio App.3d 484, 486, * * * Instead, it is sufficient if the offender knowingly causes the victim to believe that the threat will be executed." *City of Niles v. Holloway* (Oct. 3, 1997), Trumbull App. No. 96-T-5533. See, also, *State v. Padgett,* Montgomery App. No. 19590, 2003-Ohio-6242.

{¶ 11} Howard relies on *State v. Harding,* Holmes App. No. 09 CA 007, 2009-Ohio-6882. However, that case is factually distinguishable from the instant case. In *Harding,* the victim consistently denied being afraid of the defendant; he was merely tired of the defendant's constant harassment. Thus, an element of the charge could not be proven. In the instant case, on the other hand, the Shacklefords both feared for their safety, and Mr. Shackleford feared for the safety of their property, as a result of Howard's threats.

{¶ 12} When the State asked Mr. Shackleford if he feared for his safety, he replied, "Yes I did because I didn't know the guy." He also was concerned that Howard might damage his property, which is why Mr. Shackleford remained by his vehicle during the verbal altercation. Mr. Shackleford was glad to see the officers arrive because he was not sure what Howard would do, and he feared that Howard

may have gone inside to retrieve a gun.

{¶ 13} Furthermore, Mrs. Shackleford testified that she was afraid. She feared for the physical safety of both herself and her husband. She did not know if Howard had a gun, but she explained that she thought he might because of the way he approached them. Although by the time the police arrived, Mr. Shackleford appeared to be calm, yet angry, Officer Evans testified that Mrs. Shackleford had difficulty talking with the officers because she was so upset that she was shaking and on the verge of tears.

{¶ 14} Howard insists that the State's evidence was insufficient to support his conviction because both of the Shacklefords were unable to articulate any specific fears, merely repeating that they did not know what he might do. However, a victim need not articulate a precise fear. It is sufficient for the State to establish the victim's general fear for the safety of himself, the members of his immediate family, and/or his property. For example, in *Holloway,* supra, the victim explained that she was scared for her safety because she did not know what the defendant might do after taunting her by saying, "Come here. I'm going to get you." The Shacklefords expressed the same general fear for their safety and that of their property as did the victim in *Holloway.*

{¶ 15} For these reasons, Howard's conviction for menacing was supported by sufficient evidence, and the trial court properly denied his Crim.R. 11 motion for acquittal. His first assignment of error is overruled.

III

{¶ 16} Howard's Second Assignment of Error:

{¶ 17} "THE APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL."

{¶ 18} In his second assignment of error, Howard contends that he was denied his right to the effective assistance of trial counsel because counsel failed to object to the State's manner of eliciting certain testimony. In order to prevail on a claim of ineffective assistance of counsel, the defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052. Trial counsel is entitled to a strong presumption that his conduct falls within the wide range of effective assistance, and to show deficiency the defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. Id. Howard can meet neither prong.

{¶ 19} Howard quotes three somewhat lengthy exchanges, which he concludes are "the most damaging examples" of the State's pattern of asking "leading, speculative and argumentative questions." The following two exchanges took place between the prosecutor and Mr. Shackleford:

{¶ 20} "Q: Did you become concerned for your safety?

{¶ 21} "A: Yes I did because I didn't know the guy.

{¶ 22} "Q: You indicated that he had said he was going to blow your head off. How many times did he say that?

{¶ 23} "A: Well he said it twice.

{¶ 24} "Q: At some point did your wife go into the residence?

{¶ 25} "A: Yeah she did because she was taking like the groceries in. I'm still out there because I didn't know what the guy was going to do.

{¶ 26} "Q: And were you concerned he might damage your property as well as on your –

{¶ 27} "A: Well yes I was. Yes I was.

{¶ 28} "Q: When your wife went inside she called the police?

{¶ 29} "A: Not at first she didn't."

{¶ 30} At this point, the defense objected to the line of questioning as speculative. The trial court sustained the objection. The questions continued as follows:

{¶ 31} "Q: And when she went inside to do that what did Mr. Howard say about calling the police?

{¶ 32} "A: He said you can call the police I don't give – I'm not scared of the police because I've been in jail before and he just kept mouthing off. He just kept hollering and stuff.

{¶ 33} "Q: Is that when he made his second threat to you?"

{¶ 34} "A: Yes he did. * * * He kept saying like that he would blow our heads off if we didn't move the car.

{¶ 35} "Q: Ok. And the police did arrive at some point?

{¶ 36} "A: Yes they did but when they came he was in the house.

{¶ 37} "Q: Ok. Were you concerned as to what he might be doing when he went back inside the house?

{¶ 38} "A: I don't know but I'm glad they came.

{¶ 39} "Q: What did you think he may be doing based on what he said to you?

{¶ 40} "A: Hey like he said he was going to blow our heads off so – I didn't know.

{¶ 41} "Q: Did you have any thoughts to what he might be doing?

{¶ 42} "A: Well I'm concerned that he could have been in there like – I guess he went to get his gun or something ma'am. I didn't know what he was doing.

{¶ 43} "Q: You didn't threaten him at any point during this incident?

{¶ 44} "A: No ma'am.

{¶ 45} "Q: And you indicated he appeared to be intoxicated?

{¶ 46} "A: Yes ma'am."

{¶ 47} Howard maintains that counsel should have objected to this entire line of questioning. He further claims that his attorney should have objected when the State asked Mr. Shackleford on re-direct examination, "You said he kept on threatening you? By threatening you are you referring to his statements about the gun and getting it and blowing your head off?"

{¶ 48} Howard also insists that counsel should have objected to the following series of questions from the prosecutor to Mrs. Shackleford:

{¶ 49} "Q: And there was some time here between when he – when you called the police and the police arrived?

{¶ 50} "A: Ugh huh.

{¶ 51} "Q: About how much time was there?

{¶ 52} "A: I'm not sure. I'm not sure. I was scared.

{¶ 53} "Q: Did everything seem to happen really fast for you?

{¶ 54} "A: Yes it did. Yes it did.

{¶ 55} * *

{¶ 56} "Q: Were you concerned for your physical safety?

{¶ 57} "A: And my husbands (sic)

{¶ 58} "Q: And your husbands (sic)? Ok. When he indicated that he was going to get a gun and blow your head off did you believe him?

{¶ 59} "A: I didn't know if he had one.

{¶ 60} "Q: Did you think he might?

{¶ 61} "A: Yes I did because the way he approached us."

{¶ 62} He gives three further examples of questions by the State to Mrs. Shackleford, which he concludes were leading and calling for speculation. Those examples are: "He was saying other things to you besides that he was going to blow your head off?"; "When the police arrived you were pretty shaken up?"; and "You really felt as though he might?"

{¶ 63} We do not see how any of the contested questions might be considered argumentative, nor does Howard specifically explain this allegation. One or two of the questions might call for speculation, such as when the prosecutor asked Mr. Shackleford why his wife had gone into the house. However, counsel did object to that question. Howard's main argument is that the State's questions were objectionable due to their leading nature. And, we agree that many of these questions were leading. However, that fact alone does not mean that counsel was required to object.

{¶ 64} "'[T]he failure to object to leading questions will almost never rise to the level of ineffective assistance of counsel. There is no reason to object to

leading questions that are intended to elicit routine or undisputed facts. These facts are clearly going to be established in any event, and leading questions simply expedite the proceedings. Even if the testimony elicited involved disputed or controversial facts, experienced trial counsel may reasonably decide not to object.'" *State v. Beverly,* Clark App. No. 2005 CA 85, 2007-Ohio-1028 ¶53, quoting *State v. Howard,* Montgomery App. No. 20575, 2005-Ohio-3702.

{¶ 65} The questions to which Howard insists that his attorney should have objected were mostly eliciting routine or undisputed facts. To the extent that the questions reached into the area of disputed or controversial facts, the information was already before the court. The leading nature of the questions merely served to streamline the questioning and to clarify the witnesses's testimony. Moreover, this was a trial to the court, and the judge was certainly able to distinguish between leading questions and sworn testimony. "[T]here is a presumption that in a bench trial the trial court relies 'only on relevant, material, and competent evidence in arriving at its judgment.'" *State v. Brodie,* Montgomery App. No. 20877, 2006-Ohio-37, ¶41, quoting *State v. Lane* (1995), 108 Ohio App.3d 477, 484.

{¶ 66} We see no reason to doubt that counsel's decisions regarding whether to object to any of these questions was a sound strategy decision. "Unless counsel has reason to believe that the leading nature of the questions is shaping the testimony adversely, it is often unwise to object, because the same testimony, offered without the impetus of leading questions, may be more impressive to the [finder of fact]." *State v. Armstrong,* Montgomery App. No. 19655, 2005-Ohio-432, ¶77.

{¶ 67} Accordingly, we do not find counsel's performance to have been deficient. Moreover, whatever counsel's reasoning for deciding not to object to the State's questioning techniques, there is no reasonable likelihood that the outcome of Howard's trial would have been different if counsel had objected.

{¶ 68} Howard's second assignment of error is overruled.

IV

{¶ 69} Howard's two assignments of error having been overruled, the judgment of the trial court is Affirmed.

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DONOVAN, P.J. and BROGAN, J., concur.

Copies mailed to:

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Hon. John S. Pickrel, Presiding Judge