[Cite as *State v. Plants,* 2010-Ohio-2930.]

COURT OF APPEALS
TUSCARAWAS COUNTY, OHIO
FIFTH APPELLATE DISTRICT

	:	JUDGES:
STATE OF OHIO	:	Julie A. Edwards, P.J.
	:	William B. Hoffman, J.
Plaintiff-Appellee	:	Sheila G. Farmer, J.
	:	
-vs-	:	Case No. 2009 AP 10 0054
	:	
	:	
CHARLES PLANTS	:	O P I N I O N
Defendant-Appellant		

CHARACTER OF PROCEEDING:	Criminal Appeal from Tuscarawas County Court, Southern District, Case No. 2008 CRB 260
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	June 22, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
SHAWN LINDSAY P.O. Box 272 Uhrichsville, Ohio 44683	GERALD A. LATANICH Tuscarawas County Public Defender Office 153 North Broadway New Philadelphia, Ohio 44663

Edwards, P.J.

{¶1} Appellant, Charles Plants, appeals a judgment of the Tuscarawas County Court, Southern District, convicting him of menacing by stalking (R.C. 2903.211(A)(1)). Appellee is the State of Ohio.

STATEMENT OF FACTS AND CASE

{¶2} On April 18, 2008, appellant called the Tuscarawas County Jail and asked to speak to Winona McCoun, a corrections officer at the jail who appellant met during a previous stay at the jail. Deputy Kevin Ornowski answered the call and took a message. The caller told Ornowski his name was Charles France and left a phone number. Ornowski asked the caller for his name two or three times and the caller repeated, "This is Charles France." Tr. 11.

{¶3} McCoun returned the phone call and asked for Charles France. When appellant came on the line, McCoun asked if she was speaking to Charles France. Appellant responded that she was not, but she was close. Recognizing his voice, she then asked if she was speaking to Charles Plants, and appellant responded affirmatively. McCoun asked, "What is your malfunction?" Appellant responded that he just called to say "what's up?" McCoun told him to never call the jail for her again. Appellant said he wanted to apologize for whatever he did to "piss her off." She told appellant, "This is part of it," and told him to "drop it." She repeated her directive to never call her at the jail again and asked if he understood. He said okay, and asked her to calm down. She said goodbye and hung up.

{¶4} On April 21, 2008, a letter from appellant postmarked April 19, 2008, arrived at the jail addressed to McCoun. This letter states:

{¶5} "Dear Miss McCoun,

{¶6} "Hey, I know, I'm writing you now. I'm sorry I have to write you at work, but it's hard to stalk someone when you don't know where they live. Don't be mad. I just want you to know that your (sic) everything I could want in a woman.

{¶7} "I don't know what to say. Your (sic) the woman of my dreams, literally and metaphorically. I want to thank you for being you.

{¶8} "Do you remember when I came to the jail that one weekend last October with my face busted. I was feeling extremely self conscious and you kept reassuring me that it wasn't that bad; 'You can't even see it from here' etc. I will always remember that . You touched me deeply.

{¶9} "Your smart, beatiful (sic), funny, and your (sic) also a strong woman. Every part of you turns me on. I want you more than words can describe. Just being in your presence makes my whole body tingle. You have my phone number, address, and the keys to my heart, use them wisely. Write me back if you would, or call me. I would also like to have your phone number.

{¶10} "With Love, Charles Plants.

{¶11} "P.S. Also don't expect me to say this to you out loud because I'm not an emotional person."

{¶12} After receiving this letter McCoun became concerned for her safety. She worked at the jail from 3:00-11:00 p.m. and worried about leaving work at night, given appellant's declaration that he was stalking her and the sexual connotations of his letter.

{¶13} Deputy Brian Alford was assigned to investigate the case. He met with appellant's parents at their Newcomerstown address and learned that appellant was

staying at the homeless shelter in New Philadelphia. On April 24, 2008, Alford found appellant playing basketball at the homeless shelter. Alford held up the letter McCoun received and asked appellant if the letter was his. Appellant smiled and responded affirmatively. Alford stressed to appellant many times that if he had any further contact with McCoun, charges would be brought. Appellant responded, "I know already, you told me like ten times." Tr. 46.

{¶14} Appellant again called the jail asking for appellant on April 26, 2008. He identified himself only as "Plants." Deputy Allen Rennicker received the call and referred the call to his supervisor, Karen Lindamood. Appellant stated that he just wanted to apologize to McCoun.

{¶15} On April 28, 2008, a complaint was filed in the Tuscarawas County Court charging appellant with menacing by stalking. The case proceeded to bench trial. Following trial, appellant was convicted as charged and sentenced to 90 days incarceration with credit for 30 days served. The remaining 60 days were suspended and appellant was placed on community control for two years. Appellant assigns two errors on appeal:

{¶16} "I. THERE WAS INSUFFICIENT EVIDENCE PRESENTED TO CONVICT THE APPELLANT OF MENACING BY STALKING.

{¶17} "II. THE CONVICTION FOR MENACING BY STALKING VIOLATED THE 1ST AND 14TH AMENDMENTS IN THE FEDERAL CONSTITUTION AND ARTICLE 1, 11, AND 16 OF THE OHIO CONSTITUTION."

I

{¶18} In his first assignment of error, appellant argues the evidence was insufficient to convict him of menacing by stalking.

{¶19} An appellate court's function when reviewing the sufficiency of the evidence is to determine 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. *State v. Jenks* (1991), 61 Ohio St.3d 251, paragraph two of the syllabus.

{¶20} Menacing by stalking is defined by R.C. 2903.211, which provides in pertinent part:

{¶21} "(A)(1) No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person.

{¶22} "(D) As used in this section:

{¶23} "(1) 'Pattern of conduct' means two or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents.

{¶24} "(2) 'Mental distress' means any of the following:

{¶25} "(a) Any mental illness or condition that involves some temporary substantial incapacity;"

{¶26} Appellant first argues that there was no physical harm or intention of causing physical harm communicated to McCoun.

{¶27} During the April 18, 2008, telephone call, McCoun clearly communicated to appellant to stop calling her at the jail. When he asked why she was upset with him, McCoun told him it was because of this behavior. A few days later she received a letter from appellant in which he states that he is contacting her at the jail because it's hard to stalk someone when you don't know where they live. He went on to explain how physically attracted he was to her and believed she was the woman of his dreams.

{¶28} McCoun testified that after receiving the letter she was concerned because he talked about stalking and brought into it "sort of a sexual content which could possibly lead to rape." Tr. 27. She routinely left the jail at 11:00 p.m. after work, and became concerned about leaving at night. She constantly checked perimeters before she left and became more cautious. She testified that even walking her dog, she was concerned about where appellant might be because he threatened to stalk her. She became even more concerned after learning that appellant called the jail on April 26, 2008, because he was previously made aware that he was not supposed to be contacting her at all, and he's not "getting the idea." Tr. 31.

{¶29} While no direct threat was communicated in the letter or the phone call, there was evidence from which a rational trier of fact could conclude that appellant knowingly engaged in a pattern of conduct which caused McCoun mental distress. Appellant recognized during the first phone call that McCoun was upset with him. In the letter appellant acknowledged that he has to contact her at work because he can't stalk her at home without knowing where she lives. He goes on to tell her that she's the woman of his dreams and he wants her more than words can describe. After being warned by Deputy Alford to let McCoun alone, appellant called the jail and asked for

her. McCoun felt fearful in going about her daily activities, particularly leaving work late at night, because of her uncertainty about what appellant would do and where he might be. From all the evidence, a rational trier of fact could conclude that appellant committed the offense of menacing by stalking.

{¶30} Appellant also argues that the evidence is insufficient because the complaint alleged that the offense took place on April 26, 2008, but the entire pattern of conduct did not take place on that date.

{¶31} Appellant did not object to the date in the complaint or move to dismiss the charge on that basis. R.C. 2941.08 provides in pertinent part:

{¶32} "An indictment or information is not made invalid, and the trial, judgment, or other proceedings stayed, arrested, or affected:

{¶33} " (B) For omitting to state the time at which the offense was committed, in a case in which time is not of the essence of the offense;

{¶34} (C) For stating the time imperfectly;"

{¶35} Failure to provide dates in an indictment does not, of itself, provide a basis for dismissal of the charges; rather, securing such details falls more appropriately to the bill of particulars. *State v. Tackett,* Scioto App. No. 06CA3103, 2007-Ohio-6620, ¶22. Ordinarily, precise times and dates are not essential elements of an offense, and the failure to provide dates and times will not alone provide a basis for dismissal of the charges. *State v. Sellards* (1985), 17 Ohio St.3d 169, 171, 478 N.E.2d 781. To determine if a vague description of times violates a defendant's due process rights three prongs must be satisfied: (1) the time and date must be an element of the offense, (2)

the state did not engage in full disclosure of the date and time, and (3) the failure to limit the time frame prejudiced the defendant's ability to defend himself. Id.

{¶36} In the instant case, the precise times and dates are not essential elements of the offense. Nothing in the record suggests that appellant was unaware of the dates of the alleged incidents constituting the pattern of conduct alleged in the offense. The date as stated in the complaint is April 26, 2008, which is the date of the final phone call, and only 8 days after appellant's first attempt to contact McCoun. Further, while no bill of particulars or any discovery was formally requested or filed in the case, it is apparent from the transcript that appellant had been given copies of the police reports.[1] Nothing in the record suggests that appellant was prejudiced in any way in preparing his defense by the failure of the complaint to list all the relevant dates.

{¶37} Finally, appellant argues that the state failed to prove venue. Appellant moved to dismiss the charge at trial on the basis that neither of the two incidents constituting the pattern of conduct occurred in the venue of the County Court for the Southern District. The letter had a return address of Newcomerstown, which is within the venue of the court. However, appellant argues that the letter is postmarked Columbus, and it appeared that appellant was living at the homeless shelter in New Philadelphia within a few days after the letter was written. The only evidence at trial concerning the final phone call was that appellant told his probation officer he made the call from New Philadelphia. The state argued at trial that the first incident was the April 18, 2008, phone call, which the state proved was made from Newcomerstown.

[1] When Deputy Alford testified that after being arrested on the charge, appellant was asking to see McCoun while being booked at the jail, appellant's counsel objected on the basis that the police reports he had been provided did not include any oral statements made by appellant after his arrest. Tr. 49-50.

{¶38} Venue, although not a material element of the offense, must be proven by the state unless it is waived by the defendant. *State v. Headley* (1983), 6 Ohio St.3d 475; *State v. Draggo* (1981), 65 Ohio St.3d 88; and *Willoughby v. Scott* (Dec. 8, 1995), Lake App. No. 94-L-146, unreported.

{¶39} R.C. 2901.12(A) governs venue in criminal cases and states that the trial should be "held in a court having jurisdiction of the subject matter, and in the territory of which the offense or any element thereof was committed." Therefore, venue can exist in any jurisdiction where *any* element of the crime was committed. *State v. Chakirelis* (March 29, 1996), Lake App. No. 95-L-041, unreported.

{¶40} The State proved that the phone call from McCoun to appellant in response to his message on April 18, 2008, was made to a land line in Newcomerstown. Appellant's father testified that his address is 139 Nugent St., Newcomerstown, and his telephone number, which is a land line, is 740-498-4211. McCoun returned the phone call to the number appellant gave Deputy Ornowski, which was 498-4211. Initially she dialed a 330 area code, but after discovering the number was not in service at that area code, tried the number with a 740 area code, where she reached appellant.

{¶41} Further, we find that the phone call from Newcomerstown was the first incident in the pattern of conduct proscribed by R.C. 2903.211. We reject appellant's arguments that McCoun actually called him, and therefore this incident is not a part of the pattern of conduct. She telephoned him because he left a message for her to call him, leaving a false last name. She did not realize she was calling appellant until she asked if he was Charles France. He replied that he was not, but she was "close," and

she then correctly recognized him to be Charles Plants by his voice. Appellant continued to attempt to keep McCoun on the line and talk with her despite her repeatedly telling him to not call her again. Finally, McCoun said goodbye and hung up the telephone. Appellant asked her what he did to "piss her off" and told her she needed to calm down, demonstrating that he knew he was upsetting her and was aware that she was upset by the telephone call.

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

II

{¶43} Appellant argues that the conviction infringed on his First Amendment right to free speech. Appellant concedes that he did not raise this issue in the trial court, but argues plain error. He argues that the letter essentially stated that McCoun is attractive, and the phone call was merely an attempt to apologize for the letter.

{¶44} Appellant relies on *State v. Weiger*, Stark App. No. 2008CA00132, 2009-Ohio-1391, in which this Court stated, in considering a similar claim in a disorderly conduct case:

{¶45} "In light of the First Amendment to the United States Constitution and Section 11, Article I, of the Ohio Constitution, a disorderly conduct statute restricting speech "must be narrowly drawn so as to avoid criminalizing constitutionally protected conduct. *Norwell v. Cincinnati* (1973), 414 U.S. 14." Appellant's Brief at 6.

{¶46} "As appellant acknowledges, although we all hold dear the First Amendment protections, we are all aware that freedom of speech is not absolute. As such, there are classes of unprotected speech i.e., threatening words, obscene speech, fighting words, speech that interferes with the rights of others, speech that creates a

clear and present danger, and defamatory speech. As charged sub judice, R.C. 2917.11(A)(1) is applicable to this case: "Engaging in fighting, in threatening harm to persons or property, or in violent or turbulent behavior." Appellant argues her statements did not rise to this level. We must review appellant's statements in the context of all the surrounding circumstances, and determine if her words were 'threatening words.'" Id. at ¶18-19.

{¶47} We reject appellant's argument. In State *v. Szerlip*, Knox App. No. 01CA05, 2002-Ohio-900, we considered a First Amendment claim in a menacing by stalking appeal. We noted in that case that the appellant's constitutional right to freedom of speech was not at issue; rather, a jury was asked to determine whether appellant's pattern of conduct knowingly caused mental distress as defined under the statute. Id. at page 9. We concluded that the appellant's behavior was not protected by the First Amendment. Id.

{¶48} In the instant case, as in *Szerlip*, the court was asked to determine whether his pattern of conduct knowingly caused McCoun mental distress as defined under the statute. Appellant's right to free speech is not absolute, and he can be punished when his speech is threatening or interferes with the rights of others. *Weiger*, supra.

{¶49} The second assignment of error is overruled.

{¶50} The judgment of the Tuscarawas County Court, Southern District, is affirmed.

By: Edwards, P.J.

Hoffman, J. and

Farmer, J. concur

s/Julie A. Edwards

s/William B. Hoffman

s/Sheila G. Farmer

JUDGES

JAE/r0323

[Cite as *State v. Plants*, 2010-Ohio-2930.]

IN THE COURT OF APPEALS FOR TUSCARAWAS COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
CHARLES PLANTS	:	
Defendant-Appellant	:	CASE NO. 2009 AP 10 0054

For the reasons stated in our accompanying Memorandum-Opinion on file, the judgment of the Tuscarawas County Court, Southern District, is affirmed. Costs assessed to appellant.

s/Julie A. Edwards

s/William B. Hoffman

s/Sheila G. Farmer

JUDGES