[Cite as *State v. Ross*, 2010-Ohio-2931.]

COURT OF APPEALS
COSHOCTON COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. W. Scott Gwin, P.J.
	:	Hon. Sheila G. Farmer, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 09-CA-0024
JAMES A. ROSS	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Coshocton County Municipal Court, Case No. CRB900220A-B
JUDGMENT:	Affirmed in part; Vacated in part and Remanded
DATE OF JUDGMENT ENTRY:	June 24, 2010

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
JAMES SKELTON COSHOCTON CITY LAW DIRECTOR 760 Chestnut Street Coshocton, OH 43812	BRIAN W. BENBOW BENBOW LAW OFFICE 605 Market Street Zanesville, OH 43701

Gwin, P.J.

{¶1} Defendant-appellant James A. Ross appeals from his convictions and sentences in the Coshocton County Municipal Court on one count of menacing, a misdemeanor of the fourth degree in violation of R.C. 2903.22(A) and one count of criminal mischief, a misdemeanor of the third degree in violation of R.C. 2909.07(A)(3). Plaintiff-appellee is the State of Ohio.

STATEMENT OF THE CASE AND FACTS

{¶2} This matter involves a property line dispute between appellant and the Briar Hill Stone Company ("Briar Hill") that took place on March 17, 2009.

{¶3} Jerry Parsons, an employee of Briar Hill Stone Company, testified Briar Hill wished to have timber cut on the land that it owned adjacent to land owned by appellant. Mr. Parsons testified that Briar Hill did not order a complete survey of the land; rather the company only requested a survey of the boundary line between its property and that of appellant. An employee of the company that Briar Hill had hired to harvest the timber, Terrance Arnold, testified that the company wanted to get the survey done as quickly as possible. (T. at 42). Mr. Arnold testified that he did not submit a "big work order or anything" to the company that he hired to conduct the survey. (Id). Rather, he assisted the surveyor himself by holding the mirrored instrument. (Id.). The surveyor was able to find the metal pins or rebar with a cap containing the name of the original surveyor. (T. at 31-32; 33-34). Mr. Arnold helped place twelve temporary wooden slat markers with a pink ribbon tied on them with "boundary marker" written in marker to be placed on the line where it intended to harvest trees. (Id. at 19-20). These wooden slats were not intended to be permanent boundary markers. (T. at 38). Trees that the

company intended to harvest were marked with a slash mark in either orange or blue paint. (T. at 21). On March 16, 2009, Mr. Arnold went back to the property and discovered that the wooden laths had been moved. He reported his findings to Mr. Parsons.

{¶4} On March 17, 2009, Mr. Parsons observed that the wooden markers were moved from their original location. (T. at 7). It was at this time that Mr. Parsons called the Sheriff's Department. Deputy Ray Wheeler of the Coshocton County Sheriff Department responded to the scene. Deputy Wheeler went to speak with appellant.

{¶5} The deputy and Appellant were standing approximately 25-30 feet away from Mr. Parsons. Mr. Parsons testified that he heard Appellant state that "bad things will happen and I will hurt someone and I will shoot people." (T. at 10). Appellant was "heated" when he said these things and his voice was getting louder. (T. at 17). Based upon these comments, Mr. Parsons instructed all employees to stay away from the property line because he was concerned for their safety. (T. at 11).

{¶6} Appellant testified that he inadvertently ran over the wooden laths as he was running a disk behind his tractor for removing briar. Appellant could not say whether the stakes were already on the ground or whether he had hit them, because he did not see them until after they were on the ground behind his equipment. (T. at 85-86). He took a picture of the wooden slats lying behind his tractor. Appellant telephoned Mr. Parsons to inquire about the stakes. (Id. at 77). Appellant informed Mr. Parsons that the stakes had been placed on his property. Appellant claims that the line fence is the true property line. Appellant had a survey performed on the area. The surveyor opined in a

letter to appellant dated March 27, 2009, "it may be possible to make an argument that the property line should follow the fence…"

{¶7} Appellant was subsequently charged with violation of R.C. 2909.07(A) (3), criminal mischief, and with a violation of R.C. 2903.22, menacing. The matter proceeded to a bench trial on June 10, 2009 and on July 15, 2009. Appellant was convicted as charged. Appellant was sentenced to $100.00 and $150.00 fine by the Trial Court's September 9, 2009 Judgment Entry.

{¶8} Appellant timely appeals raising as his sole assignment f error:

{¶9} "I. THE TRIAL COURT'S SEPTEMBER 9, 2009 JUDGMENT ENTRY, WHICH INCORPORATED AN AUGUST 5, 2009 FINDING OF GUILT AS TO CRIMINAL MISCHIEF AND MENACING, WAS AGAINST THE MANIFEST WEIGHT AND SUFFICIENCY OF THE EVIDENCE."

I.

{¶10} In his sole assignment of error appellant maintains that his convictions are against the sufficiency and the manifest weight of the evidence. We agree, in part.

{¶11} When reviewing the sufficiency of the evidence, our inquiry focuses primarily upon the adequacy of the evidence; that is, whether the evidence, if believed, reasonably could support a finding of guilt beyond a reasonable doubt. See *State v. Thompkins* (1997), 78 Ohio St. 3d 380, 386, 678 N.E.2d 541, 546 (stating, "sufficiency is the test of adequacy"); *State v. Jenks* (1991), 61 Ohio St.3d 259 at 273, 574 N.E.2d 492 at 503. The standard of review is whether, after viewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the

offense beyond a reasonable doubt. *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781; *Jenks,* 61 Ohio St.3d at 273, 574 N.E.2d at 503.

{¶12} Weight of the evidence addresses the evidence's effect of inducing belief. *State v. Wilson,* 713 Ohio St.3d 382, 387-88, 2007-Ohio-2202 at ¶ 25-26; 865 N.E.2d 1264, 1269-1270. “In other words, a reviewing court asks whose evidence is more persuasive--the State's or the defendant's? Even though there may be sufficient evidence to support a conviction, a reviewing court can still re-weigh the evidence and reverse a lower court's holdings.” *State v. Wilson,* supra. However, an appellate court may not merely substitute its view for that of the jury, but must find that "the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Thompkins*, supra, 78 Ohio St. 3d at 387. (Quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720-721). Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *State v. Thompkins,* supra.

{¶13} Appellant was found guilty of menacing in violation of R.C. 2903.22(A) 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."

{¶14} To find the appellant guilty of menacing as charged, the Trier of fact would have to find that appellant knowingly caused the complaining witness to believe that the appellant will cause physical harm to the complaining witness.

{¶15} R.C. 2901.22 defines "knowingly" as follows:

{¶16} "(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."

{¶17} R.C. 2901.01(A) (3) defines "physical harm" as follows:

{¶18} "(3) 'Physical harm to persons' means any injury, illness, or other physiological impairment, regardless of its gravity or duration."

{¶19} The crime of menacing can encompass a present state of fear of bodily harm and a fear of bodily harm in the future. *Village of W. Lafayette v. Deeds* (Oct. 23, 1996), 5th Dist. No. 96CA3; *State v. Ali* (2003), 154 Ohio App.3d 493, 501-2; 2003-Ohio-5150 at ¶ 26, 797 N.E.2d 1019, 1025-25. "Generally, under the menacing laws, the state does not need to prove the offender's ability to carry out the threat or any movement toward carrying it out. *State v. Schwartz* (1991), 77 Ohio App.3d 484, 602 N.E.2d 671; *State v. Roberts* (Sept. 26, 1990), Hamilton App. No. C-890639, unreported, 1990 WL 410625; Committee Comment to R.C. 2903.22(A)." *State v. Collie* (1996), 108 Ohio App.3d 580, 582, 671 N.E.2d 338; *State v. Lewis* (Aug. 22, 1997), 11th Dist N. 96-P-0272; *State v. Ali,* supra. The sufficiency of the threat is a factual question reserved for the Trier of fact. *Dayton v. Dunnigan* (1995), 103 Ohio App.3d 67, 71, 658 N.E.2d 806.

{¶20} Appellant argues there was no evidence that a threat was "made known" to a potential victim.

{¶21} Mr. Parsons testified that he had had problems with appellant in the past. (T. at 10). He further testified that appellant had called him upset about the placement of

the markers. (T. at 7). Finally, on March 17, 2010, Mr. Parsons and Mr. Arnold both heard appellant state that "bad things will happen and I will hurt someone and I will shoot people." (T. at 10). Mr. Arnold testified that appellant stated that if anyone trespassed on his property, he would shoot them. (T. at 29). Deputy Wheeler asked appellant if he would shoot someone over some trees, to which appellant replied "Yes." (T. at 29). Appellant further stated that he had cancer and only had three years to live and it didn't matter if he spent those three years in his house or in prison. (T. at 29). Mr. Parsons testified that he instructed his workers to stay away from that area out of concern for their safety. (T. at 11). Further, no trees were harvested due to a concern over appellant's reaction. (T. at 10-11).

{¶22} This evidence is sufficient to fulfill the elements of menacing as to potential victims and causing concern with the potential victims. Upon review, we find sufficient evidence to establish that appellant acted knowingly, and to support the trial court's finding of guilty of menacing.

{¶23} Appellant was also convicted of violating R.C. 2909.07(A) (3), criminal mischief, which states as follows:

{¶24} "(A). No person shall:

{¶25} "* * *

{¶26} "(3). Without privilege to do so, knowingly move, deface, damage, destroy, or otherwise improperly tamper with a bench mark, triangulation station, boundary marker, or other survey station, monument, or marker;

{¶27} "* * *"

{¶28} The question appellant pose is whether the twelve temporary wooden slat markers with a pink ribbon tied on them with “boundary marker” written in marker that were placed on the line where Briar Hill intended to harvest trees is a “boundary marker” of “survey marker” as defined by R.C. 2909.07(A)(3).

{¶29} Ohio Admin. Code 4733-37-03 concerning Monumentation provides,

{¶30} “(A) The surveyor shall set boundary monuments so that, upon completion of the survey, each corner of the property and each referenced control station will be physically monumented.

{¶31} “(B) When it is impossible or impracticable to set a boundary monument on a corner, the surveyor shall set a reference monument, similar in character to the boundary monument and preferably along one of the property lines which intersect at that corner. When such a reference monument is used, it shall be clearly identified as a reference monument on the plat of the property and in any new deed description which may be written for the property.

{¶32} “(C) Every boundary monument and/or reference monument set by the surveyor shall, when practicable:

{¶33} “(1) Be composed of a durable material.

{¶34} “(2) Have a minimum length of thirty inches.

{¶35} “(3) Have a minimum cross-section area of material of 0.21 square inches.

{¶36} “(4) Be identified with a durable marker bearing the surveyor's Ohio registration number and/or name or company name.

{¶37} “(5) Be detectable with conventional instruments for finding ferrous or magnetic objects.

{¶38} “(D) When a case arises, due to physical obstructions such as pavements, large rocks, large roots, utility cables, etc., so that neither a boundary monument nor a reference monument can be conveniently or practicably set in accordance with paragraph (C) of this rule, then alternative monumentation, which is essentially as durable and identifiable (e.g., chiseled “X” in concrete, drill hole, etc.) shall be established for the particular situation.”

{¶39} Regarding research and investigation, Ohio Adm. Code 4733-37-02 provides:

{¶40} "(A) When the deed description of the subject property and the deed descriptions of adjoining properties do not resolve the unique locations of the corners and lines of the property being surveyed, the surveyor shall consult other sources of information in order to assemble the best possible set of written evidence of every corner and line of the property being surveyed. These sources include, but are not limited to: records of previous surveys, deed descriptions of adjacent properties, records of adjacent highways, railroads and public utility lines; also include subdivision plats, tax maps, topographic maps, aerial photographs, and other sources as may be appropriate.

{¶41} "(B) After all necessary written documents have been analyzed, the survey shall be based on a field investigation of the property. The surveyor shall make a thorough search for physical monuments, analyze evidence of occupation and confer with the owner(s) of the property being surveyed. In addition, the surveyor shall, when necessary, confer with the owner(s) of the adjoining property and take statements."

{¶42} The law concerning the establishment of property boundaries, the propriety of a conducted survey and what priority that survey must be given in relation to

prior and subsequent surveys has been extensively discussed in *Broadsword v. Kauer*, (1959), 161 Ohio St. 524, 120 N.E.2d 111 and *Sellman v. Schaaf*, (1971), 26 Ohio App.2d 35, 269 N.E.2d 60. In circumstances where a certified surveyor has made a survey of a parcel of land and a plat is made and duly recorded, the monuments placed or ascertained, and boundary lines established by such monuments in the survey, are thereafter controlling. *Sellman v. Schaaf*, supra. In a subsequent survey, the re-surveyor should not run new lines, even where the first are full of errors. *Sanders v. Webb* (1993), 85 Ohio App.3d 674, 680, 621 N.E.2d 420, 424. It is the duty of the second surveyor to find where corners were placed, right or wrong, where they can be found, and then relocate the original lines and corners at the places established. Id. Only when it becomes impossible for a second surveyor to find where the first boundaries were established in the first survey, does the second survey turn to courses, distances, and still existing monuments to determine the boundaries. *Sellman* supra at 41-42, 269 N.E.2d 60.

{¶43} The parties in the case at bar do not dispute that the permanent corner markers were intact and were never moved, altered or interfered with by appellant. We find that temporary wooden stakes placed by a non-registered surveyor who is an employee of a company hired to cut down trees on the property are not the type of boundary or survey markers contemplated within R.C. 2909.07(A)(3).

{¶44} We note however, appellant's conduct may have constituted a criminal act, for example criminal trespass[1] or criminal damaging[2]; however, he was neither charged nor convicted of any other criminal offense[3].

[1] R.C. 2911.21
[2] R.C. 2909.06

{¶45} Under the facts of this case, we find the temporary wooden slates were not intended to be accurate boundary or survey markers. A complete survey was not performed by Briar Hill. Rather, the wooden slates were placed to assist the company in marking trees for harvest.

{¶46} Accordingly, the judgment of the Coshocton County Municipal Court is affirmed, in part and vacated in part. Pursuant to Section 3(B) (2), Article IV of the Ohio Constitution and R.C. 2953.07, the conviction and sentence on criminal mischief is vacated, the conviction for menacing is affirmed, and this case is remanded to the trial court for proceedings in accordance with our opinion and the law.

By Gwin, P.J.,

Farmer, J., and

Wise, J., concur

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. JOHN W. WISE

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[3] We express no opinion of whether appellant would be found guilty of any other offense.

[Cite as *State v. Ross*, 2010-Ohio-2931.]

IN THE COURT OF APPEALS FOR COSHOCTON COUNTY, OHIO

FIFTH APPELLATE DISTRICT

STATE OF OHIO	:	
Plaintiff-Appellee	:	
-vs-	:	JUDGMENT ENTRY
JAMES A. ROSS	:	
Defendant-Appellant	:	CASE NO. 09-CA-0024

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Coshocton County Municipal Court is affirmed, in part and vacated in part. Pursuant to Section 3(B) (2), Article IV of the Ohio Constitution and R.C. 2953.07, the conviction and sentence on criminal mischief is vacated, the conviction for menacing is affirmed, and this case is remanded to the trial court for proceedings in accordance with our opinion and the law. Costs to be divided equally between appellant and appellee.

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HON. W. SCOTT GWIN

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HON. SHEILA G. FARMER

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HON. JOHN W. WISE