[Cite as *State v. Baughman*, 2012-Ohio-5327.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

State of Ohio — Court of Appeals No. L-11-1045

Appellee — Trial Court No. CR0201002206

v.

Mark Baughman — **DECISION AND JUDGMENT**

Appellant — Decided: November 16, 2012

* * * * *

Julia R. Bates, Lucas County Prosecuting Attorney, and
Jeffrey D. Lingo, Assistant Prosecuting Attorney, for appellee.

Mark Baughman, pro se.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Defendant-appellant, Mark Baughman, appeals from a judgment of the Lucas County Court of Common Pleas, following a bench trial, which convicted him of two counts of making terroristic threats in violation of R.C. 2909.23(A), felonies of the third degree. We affirm.

A. Facts and Procedural Background

{¶ 2} On July 12, 2010, Mark Baughman was indicted by the Lucas County Grand Jury on two counts of making terroristic threats, in violation of R.C. 2909.23(A), which provides:

> (A) No person shall threaten to commit or threaten to cause to be committed a specified offense when both of the following apply:
>
> (1) The person makes the threat with purpose to do any of the following:
>
> (a) Intimidate or coerce a civilian population;
>
> (b) Influence the policy of any government by intimidation or coercion;
>
> (c) Affect the conduct of any government by the threat or by the specified offense.
>
> (2) As a result of the threat, the person causes a reasonable expectation or fear of the imminent commission of the specified offense.

{¶ 3} Baughman pleaded not guilty to both counts. Prior to trial, Baughman was determined to be indigent and counsel was appointed for him. Thereafter, Baughman filed a motion in limine requesting the court to bar admission of testimony and evidence proposed by the state pursuant to Evid.R. 404(B) and R.C. 2945.59. The court denied the motion, and a bench trial proceeded on January 11, 2011. The court found Baughman guilty of both counts.

{¶ 4} At trial, the state established that Baughman, while incarcerated for two prior felony convictions, wrote several letters to an ex-girlfriend named Mary Cole. Baughman was involved in a tumultuous relationship with Ms. Cole that started in 1971 while the two were in high school. Ms. Cole testified that her relationship with Baughman was marred by several instances where Baughman physically abused her. After having a daughter together, the couple ended their romantic relationship but remained friends for the sake of their daughter.

{¶ 5} In the letters Baughman wrote to Ms. Cole, he made numerous threats directed at Ms. Cole, as well as other individuals. Additionally, Baughman threatened to commit acts of violence against the general public and, more specifically, the criminal justice system toward which he was extremely resentful.

{¶ 6} Regarding threats aimed at the public, Baughman threatened the "pig[s] of the system" and stated that "[t]here's gonna be at least one victim of mine." Baughman also wrote: "Slaughtering some maggot bitches is my ultimate dream & plans anyways. It'll be fun for me! I'm done 'talking!'" In another letter, Baughman wrote: "All I really wanna do is kill, kill, kill, kill, kill, kill, kill, pigs & maggots!" Ms. Cole testified that, when Baughman used the word "pigs" or "maggots," he was referring to "policemen, judges, lawyers, anybody in the court system, government, any government official and people, anybody that gets in his way."

{¶ 7} After presenting the testimony of Ms. Cole and fourteen exhibits consisting of correspondence written by Baughman, the state rested. Baughman's defense counsel

offered no further evidence and called no witnesses. After consideration of the evidence, the trial judge found Baughman guilty on both counts of making terroristic threats pursuant to R.C. 2909.23. The trial court sentenced Baughman to five years in prison for each count, to be served concurrently. Additionally, Baughman was ordered to pay restitution to the state for the expenses associated with his prosecution.

B. Assignments of Error

{¶ 8} Baughman now timely appeals, asserting five assignments of error:

1. THE EVIDENCE AT APPELLANT'S TRIAL WAS INSUFFICIENT TO SUPPORT THE CONVICTIONS.

2. THE TRIAL COURT ERRED WHEN IT ALLOWED, OVER OBJECTION, THE ADMISSION OF CHARACTER EVIDENCE IN VIOLATION OF EVIDENCE RULES 404(B) AND 403.

3. APPELLANT'S CONVICTIONS ARE AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

4. THE APPELLANT WAS NOT AFFORDED EFFECTIVE ASSISTANCE OF COUNSEL AS REQUIRED BY THE UNITED STATES AND OHIO CONSTITUTIONS.

5. THE TRIAL COURT'S ORDER REQUIRING APPELLANT TO PAY ALL APPLICABLE COSTS OF SUPERVISION, CONFINEMENT, ASSIGNED COUNSEL AND PROSECUTION COSTS, ETC. CONSTITUTED AN ABUSE OF DISCRETION.

{¶ 9} For ease of discussion, we address Baughman's assignments out of order.

II. Analysis

A. The Trial Court's Evidentiary Rulings Were Not an Abuse of Discretion

{¶ 10} In his second assignment, Baughman argues that the trial court erred when it allowed, over objection, the admission of character evidence concerning Baughman's prior criminal activity.

{¶ 11} "The admission or exclusion of relevant evidence rests within the sound discretion of the trial court." *State v. Sage*, 31 Ohio St.3d 173, 180, 510 N.E.2d 343 (1987). Thus, we apply an abuse of discretion standard. *Id.* A trial court abuses its discretion when its attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). "A review under the abuse-of-discretion standard is a deferential review. It is not sufficient for an appellate court to determine that a trial court abused its discretion simply because the appellate court might not have reached the same conclusion or is, itself, less persuaded by the trial court's reasoning process than by the countervailing arguments." *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, ¶ 14.

{¶ 12} Here, the trial court admitted character evidence concerning several of Baughman's alleged bad acts. Ms. Cole was permitted to testify concerning prior acts of domestic violence toward herself and Baughman's daughter. In addition, the trial court allowed the state to offer letters written to Ms. Cole and others prior to the indictment

period.[1] Baughman argues that the trial court improperly applied Evid.R. 404(B) when it admitted the evidence of Baughman's other acts.

{¶ 13} Evid.R. 404(B) states in relevant part:

> (B) Other crimes, wrongs or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action 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.

{¶ 14} Other acts evidence is admissible if "(1) there is substantial proof that the alleged other acts were committed by the defendant, and (2) the evidence tends to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *State v. Lowe*, 69 Ohio St.3d 527, 530, 634 N.E.2d 616 (1994). That there is substantial proof that Baughman engaged in the alleged acts is not disputed. The issue is whether those acts were offered to prove action in conformity therewith or for "other purposes."

{¶ 15} With respect to Baughman's prior acts of domestic violence against Ms. Cole and his daughter, Baughman argues that the evidence is irrelevant as to whether Baughman engaged in making terroristic threats. In response, the state claims that it did not offer the evidence for that purpose. Rather, the state argues that it offered the evidence in order to provide a foundation for Ms. Cole's "expectation or fear" that

[1] The indictment covers the period of time from February 6, 2010 through July 10, 2010.

Baughman would actually carry out his threats. Essentially, the state claims that the evidence was offered for "other purposes." We agree with the state.

{¶ 16} We have stated that evidence of an accused's other acts is admissible "when it 'tends to show' one of the material elements in the charged offense." *State v. Wright*, 6th Dist. No. E-03-054, 2004-Ohio-5228; *see also State v. Tarver*, 11th Dist. No. 2011-P-0073, 2012-Ohio-4335 (affirming trial court's admission of a civil protection order into evidence over defendant's objection, since the state was required to show the existence of the order). Under R.C. 2909.23(A)(2), the state had to prove that Baughman's threat caused a reasonable expectation or fear that Baughman would actually commit the specified offense. The fact that Baughman actually carried out abusive threats in the past is probative as to the issue of whether Ms. Cole's fears were reasonable. Therefore, Baughman's prior violent acts toward Ms. Cole and his daughter were admissible for the purpose of proving a necessary element in this case.

{¶ 17} However, our analysis does not stop there, for even when the evidence meets the two-pronged standard outlined in *Lowe*, its probative value must still be balanced against its prejudicial effect. Evid.R. 403(A) states: "Although relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues, or of misleading the jury." Here, the prejudicial effect of the evidence concerning prior acts of violence against Ms. Cole and Baughman's daughter does not substantially outweigh its probative value. Even assuming, arguendo, that the evidence has some prejudicial effect, it is highly relevant

because it shows why Ms. Cole was fearful that Baughman would actually carry out his threats. The state needed to prove that Ms. Cole's fear was reasonable in order to satisfy the second element of the charged offense. Accordingly, the trial court did not abuse its discretion by admitting evidence of Baughman's prior violent conduct.

{¶ 18} Alternatively, even if Evid.R. 404 was violated, we determine that the error was harmless. Crim.R. 52(A) instructs us to disregard errors that do not affect substantial rights. Notwithstanding the evidence concerning prior acts of violence toward Ms. Cole and Baughman's daughter, there was ample evidence contained in the uncontested evidence to prove, beyond a reasonable doubt, that Baughman violated R.C. 2909.23. Therefore, Baughman's first argument is without merit.

{¶ 19} Baughman also argues that the trial court erred when it allowed the state to introduce letters written by Baughman prior to the indictment period. The state argues that it offered the evidence for reasons permitted under Evid.R. 404(B). Upon thorough review of the record, we agree with the state and conclude these letters were offered for the purpose of showing Baughman's motive. Although the letters were written prior to the indictment period, they contain information concerning Baughman's dissatisfaction with the justice system and his prior convictions. For example, exhibit No. 9 contains a letter written by Baughman in which he expresses his desire for a terrorist attack one thousand times greater than the September 11, 2001 attacks. This desire is expressed in the context of frustration over his treatment by prison officials. Rather than attempting to show action in conformity therewith, the state offered these letters to provide necessary

background information to the trier-of-fact as to why Baughman made the threats he made. We believe that purpose fits squarely within the motive exception under Evid.R. 404(B).

{¶ 20} Based on the foregoing, we conclude that the trial court did not abuse its discretion when it permitted Ms. Cole to testify about prior incidences of Baughman's violence and accepted into evidence letters written by Baughman prior to the indictment period. Accordingly, Baughman's second assignment of error is not well-taken.

B. The Evidence was Sufficient to Support Baughman's Conviction

{¶ 21} In his first assignment of error, Baughman argues that the evidence at trial was insufficient to support his conviction. He argues that the state failed to present sufficient evidence to conclude that he committed a "specified offense" as required under R.C. 2909.23. Alternatively, he argues that the state presented insufficient evidence to allow a trier-of-fact to conclude that Baughman made the threats with the purpose of intimidating or coercing a civilian population or affecting the conduct of any government.

{¶ 22} "In essence, sufficiency is a test of adequacy. Whether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "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." *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶ 23} The specified offense which the state alleged Baughman threatened to commit was felonious assault under R.C. 2903.11.[2] Felonious assault, in this context, means to cause serious physical harm to another. Baughman's words unquestionably threaten serious physical harm to another.

{¶ 24} In Baughman's letter dated February 18, 2010, and marked as exhibit No. 5B, he clearly threatens serious physical harm to another. In the letter, Baughman writes: "Slaughtering some maggot bitches is my ultimate dream & plans anyways. It'll be fun for me! I'm done 'talking!'" In another letter dated March 21, 2010, and marked as exhibit No. 6C, Baughman writes: "I hate people! I'd like to kill everybody! Don't be stupid & think I'm just blowing off steam because I'm in here. That's so not the case. I have an insatiable desire & thirst for revenge & killing." Baughman argues in his brief that these words are merely "angry, rambling language." However, based on Baughman's own words, we believe a rational trier of fact could have concluded beyond

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[2] R.C. 2903.11 provides, in relevant part:

> (A) No person shall knowingly do either of the following:
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> (1) Cause serious physical harm to another or to another's unborn;
>
> (2) Cause or attempt to cause physical harm to another or to another's unborn by means of a deadly weapon or dangerous ordnance.
>
> * * *
>
> (D)(1)(a) Whoever violates this section is guilty of felonious assault.

a reasonable doubt that Baughman threatened to commit a specified offense, namely felonious assault.

{¶ 25} Alternatively, Baughman argues that the state presented insufficient evidence to allow a trier of fact to conclude that Baughman made the threats with the purpose necessary for conviction under R.C. 2909.23. In Count 1, Baughman was charged with making threats to commit felonious assault with the purpose of intimidating or coercing a civilian population. In Count 2, he was charged with making threats to commit felonious assault with the purpose of affecting the conduct of any government by the threat or by the specified offense.

{¶ 26} Baughman argues that the word population in the statute requires that the threats be communicated to more than one person. Here, the threats were communicated through letters addressed primarily to Ms. Cole. However, as the state pointed out in its brief, the language of the statute dispels Baughman's argument. R.C. 2909.23(B) provides: "It is not a defense to a charge of a violation of this section that * * * *the threat was not made to a person who was a subject of the threatened specified offense*." (Emphasis added.) When addressing the issue of whether the state has met its burden under R.C. 2909.23(A), the question is not whether the threat is communicated to its subject. Rather, the question is whether the defendant uttered the threat for the purpose of, in this case, intimidating or coercing a civilian population or affecting the conduct of any government.

{¶ 27} Here, Baughman uses phrases such as "pigs of the system" and "maggots" in connection with his threats. Ms. Cole's testimony establishes that these phrases refer to the government and, more specifically, the criminal justice system. Additionally, the letters contain numerous threats toward Ms. Cole and society in general. In fact, Baughman refers to himself in the letters as a serial killer and a mass killer. Accordingly, we determine a rational trier of fact could have concluded that Baughman's threats were made in order to intimidate or coerce a civilian population and affect the conduct of any government. Based on the foregoing, we find Baughman's first assignment of error not well-taken.

C. Baughman's Convictions are not Against the Manifest Weight of the Evidence

{¶ 28} In Baughman's third assignment of error, he argues that his convictions are against the manifest weight of the evidence.

{¶ 29} When reviewing a manifest weight claim,

> The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines 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 and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *State v. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220.

{¶ 30} Baughman's argument essentially rests on an assertion that the trier-of-fact lost its way when it considered the character evidence Baughman challenged in his second assignment of error. Since we have already determined that the character evidence was properly admitted, it logically follows that the trier-of-fact could not be said to have lost its way by virtue of considering it. Additionally, we have examined the entire record and found abundant evidence that would support the conclusions reached by the trier-of-fact in this case. Therefore, Baughman's third assignment of error is not well-taken.

D. Baughman Received Effective Assistance of Counsel

{¶ 31} In his fourth assignment of error, Baughman argues that he was deprived of effective assistance of counsel as required by the United States Constitution and the Ohio Constitution.

{¶ 32} To support a claim for ineffective assistance of counsel, appellant must satisfy the two-prong test developed in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That is, appellant must show counsel's performance fell below an objective standard of reasonableness, and a reasonable probability exists that but for counsel's error, the result of the proceedings would have been different. *Id.* at 687-688, 694. In *Strickland*, the United States Supreme Court opined,

> [A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is

> not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. *Id.* at 697.

{¶ 33} Baughman argues that he was denied effective counsel because he was not permitted to testify on his own behalf. Had he been able to testify, Baughman argues that he would have been able to dispute the factual allegations and provide a more complete picture for the trier-of-fact. Baughman also argues that he was denied effective assistance of counsel because his attorney failed to request a competency examination to determine whether Baughman was competent to stand trial.

{¶ 34} As to Baughman's argument concerning his right to testify on his own behalf, another Ohio court has stated that "[t]he decision whether to call a defendant as a witness falls within the purview of trial tactics." *State v. Adkins*, 144 Ohio App.3d 633, 646, 761 N.E.2d 94 (12th Dist.2001). "Debatable trial tactics generally do not constitute a deprivation of effective counsel." *State v. Phillips*, 74 Ohio St.3d 72, 85, 656 N.E.2d 643 (1995). Indeed, although Baughman was encouraged by counsel not to take the stand, there is no evidence that his counsel actually prevented him from exercising that right. *See State v. Turner*, 6th Dist. No. WD-11-025, 2012-Ohio-3863 (noting that the decision to testify is ultimately one for the defendant to make). Thus, Baughman's argument concerning his right to testify does not support a finding of ineffective assistance of counsel.

{¶ 35} Next, Baughman argues that his attorney's failure to request a competency exam prejudiced his defense. As with decisions whether to call a defendant as a witness, the decision not to challenge a defendant's competency is a tactical one. *State v. Wilkins*, 5th Dist. No. 95-CA-74, 1996 WL 488280, *4 (Aug. 5, 1996). Further, "a trial counsel's failure to seek a competency evaluation or to pursue an insanity defense is not, per se, ineffective assistance of counsel." *Id.* at *3.

{¶ 36} Here, Baughman offers little in the way of reasons that would justify a determination that he was incompetent to stand trial. Baughman points to the fact that he has previously been diagnosed as bipolar in support of his argument. However, a defendant is not incompetent to stand trial merely because he is diagnosed with a bipolar disorder. Thus, we conclude that Baughman was not prejudiced by trial counsel's failure to request the competency examination.

{¶ 37} Because we determine that counsel's performance was reasonable and did not prejudice the outcome of this case, Baughman's fourth assignment of error is not well-taken.

E. The Trial Court did not Abuse its Discretion by Ordering Baughman to Pay Costs of Supervision, Assigned Counsel, and Prosecution Costs

{¶ 38} In Baughman's fifth assignment of error, he argues that the trial court abused its discretion in ordering him to pay the costs incurred by the state in connection with Baughman's prosecution. Baughman asserts that it was improper for the court to find that he has, or reasonably may be expected to have, "the means to pay all or part of

the applicable costs of supervision, confinement, assigned counsel, and prosecution as authorized by law." We cannot agree with Baughman.

{¶ 39} Several statutes provide the trial court ample authority to impose the above-referenced costs. For example, R.C. 2929.18, cited by the trial court in its judgment entry, provides authority to the court to order Baughman to reimburse the state for its costs of confinement and supervision. In addition, R.C. 2941.51(D) authorizes the trial court to order the defendant to pay "an amount that the [defendant] reasonably can be expected to pay" for his assigned counsel fees. Finally, R.C. 2947.23 authorizes the imposition of costs to pay for prosecution expenses.

{¶ 40} Although there is clear authority to impose the costs at issue here, Baughman argues that the trial court abused its discretion by ordering him to pay these costs since his financial status does not, and will not in the future, allow him to pay the costs. Baughman's argument is misplaced.

{¶ 41} In regard to the costs of prosecution imposed pursuant to R.C. 2947.23, the Ohio Supreme Court has held that a defendant's financial status is irrelevant. *State v. Clevenger*, 114 Ohio St.3d 258, 2007-Ohio-4006, 871 N.E.2d 589, ¶ 3. In fact, R.C. 2947.23 requires a court to impose those costs without inquiry into whether the defendant has the financial wherewithal to pay. *Id.*

{¶ 42} In addition to prosecution costs, the trial court imposed costs for supervision. R.C. 2929.18(A)(5)(a)(i) authorizes the trial court to order the defendant to reimburse the state for "[a]ll or part of the costs of implementing any community control

sanction, including a supervision fee." Notably, the statute does not require the trial court to determine whether the defendant is financially capable of paying the supervision costs before imposing them.

{¶ 43} Next, Baughman challenges the imposition of costs for assigned counsel and confinement. Both R.C. 2929.18(A)(5)(a)(ii) and 2941.51(D) require the trial court, prior to imposing such costs, to determine whether the defendant is able to pay the costs. We have previously recognized that trial courts need not hold a separate hearing to determine the defendant's ability to pay. *State v. Maloy*, 6th Dist. No. L-10-1350, 2011-Ohio-6919, ¶ 13. However, "the record must contain some evidence that the court considered the offender's present and future ability to pay." *Id.*

{¶ 44} Here, the trial court included the following language in its judgment entry: "Defendant [is] found to have, or reasonably may be expected to have, the means to pay all or part of the applicable costs of supervision, confinement, assigned counsel, and prosecution as authorized by law." This finding was supported by evidence presented at trial.

{¶ 45} Baughman argues that his affidavit of indigency demonstrates that he has no assets and, since he has been incarcerated for 20 years, will be unemployable after his release from prison. However, Baughman's own letters contain numerous references to the fact that he had approximately $5,600 in cash being held by Ms. Cole. Ms. Cole's testimony further establishes that she transferred control of the remainder of that money to the courts in 2007 for Baughman's benefit. Baughman provides no support for his

assertion that he will be unemployable except to say that he has been incarcerated for the last 20 years. Upon review of the record, we find there is sufficient evidence from which the trial court could conclude that Baughman was able to pay the imposed costs. Accordingly, Baughman's fifth assignment of error is not well-taken.

III. Conclusion

{¶ 46} Based on the foregoing, the judgment of the Lucas County Court of Common Pleas is hereby affirmed. Costs are hereby assessed to the appellant in accordance with App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE