[Cite as *State v. Herculson*, 2013-Ohio-1838.]

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

State of Ohio — Court of Appeals No. WD-11-080

Appellee — Trial Court No. 10-CR-469

v.

Richard Herculson — **DECISION AND JUDGMENT**

Appellant — Decided: May 3, 2013

* * * * *

Paul A. Dobson, Wood County Prosecuting Attorney, David E. Romaker, Jr. and Aram M. Ohanian, Assistant Prosecuting Attorneys, for appellee.

Lawrence A. Gold, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Richard Herculson, appeals the judgment of the Wood County Court of Common Pleas, convicting him of one count of extortion in violation of R.C. 2905.11(A)(5), a felony of the third degree. We affirm.

A. Facts and Procedural Background

{¶ 2} Appellant was indicted on one count of extortion based on a crude and vulgar letter that he sent to the victim, threatening to sue her for a list of grievances he had against her from their relationship together. The letter also included several allegations that the victim was involved in various types of fraud, and that appellant was going to report her to Social Security and the IRS. The letter demanded that the victim deposit $2 million in appellant's bank account and give him a black Mercedes S500, among other things. It further stated that if appellant complied, she, her family, her friends, and her attorney would not go to jail.

{¶ 3} Appellant entered a plea of not guilty on July 8, 2011, and the matter was ultimately set for trial on November 1, 2011. Shortly before trial, on October 27, 2011, appellant moved for an appropriation of funds to secure an expert witness. Appellant argued that an expert in civil litigation was necessary to support his defense that the letter was merely a demand for settlement prior to the filing of a civil lawsuit, and thus could not constitute extortion. Appellant renewed this motion on the day of trial. The trial court denied the motion.

{¶ 4} The matter proceeded to a bench trial. The victim testified to her relationship with appellant. The victim also authenticated the letter, which was admitted into evidence. Thereafter, the state rested. Appellant moved for an acquittal pursuant to Crim.R. 29, which the trial court denied. Appellant then proffered testimony in the form of an affidavit from a local civil litigator, and then rested without calling any other

witnesses or submitting any evidence. After a short recess, the trial court found appellant guilty. The matter was continued for sentencing, at which time appellant was ordered to serve 18 months in prison.

B. Assignments of Error

{¶ 5} Appellant has timely appealed, raising three assignments of error:

> 1. The trial court erred in violation of Appellant's right to Due Process under the Fifth and Fourteenth Amendments to the United States Constitution and Section 16, Article 1 of the Ohio Constitution in denying his motion for an expert witness.
>
> 2. The trial court erred to the prejudice of Appellant by denying his Rule 29 Motion upon completion of the State's case in chief.
>
> 3. The trial court's finding of guilty was against the manifest weight of the evidence presented at trial.

II. Analysis

A. Denial of Motion for Expert Witness

{¶ 6} Under his first assignment of error, appellant contests the trial court's denial of his motion for an expert witness. We review the trial court's denial of a motion for funds to obtain an expert witness for an abuse of discretion. *State v. Mason*, 82 Ohio St.3d 144, 150, 694 N.E.2d 932 (1998). An abuse of discretion connotes that the trial court's attitude was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 7} The Ohio Supreme Court has held that

> due process * * * requires that an indigent criminal defendant be provided funds to obtain expert assistance at state expense only where the trial court finds, in the exercise of a sound discretion, that the defendant has made a particularized showing (1) of a reasonable probability that the requested expert would aid in his defense, and (2) that denial of the requested expert assistance would result in an unfair trial. *Mason* at 150.

{¶ 8} "In making this determination, the court must consider '(1) the effect on the defendant's private interest in the accuracy of the trial if the requested service is not provided, (2) the burden on the government's interest if the service is provided, and (3) the probable value of the additional service and the risk of error in the proceeding if the assistance is not provided.'" *State v. Campbell*, 90 Ohio St.3d 320, 327, 738 N.E.2d 1178 (2000), quoting *Mason* at 149.

{¶ 9} In the trial court, appellant argued that a demand for settlement in civil litigation could not constitute extortion. In support, he cited a federal district court case that stated,

> [A] threat to sue does not constitute extortion within the meaning of Ohio Rev.Code § 2905.11(A). The only basis on which to argue the contrary is § 2905.11(A)(5), which defines extortion as exposing or threatening to expose any person to any matter threatening to damage his personal or business repute, for the purpose of obtaining a thing of value. On its face, this section may appear to encompass a threat to bring a lawsuit

made for the purpose of obtaining a thing of value. However, such a reading leads to an entirely absurd result. If a threat to bring a lawsuit constitutes a threat to expose one to matter damaging to one's reputation, then actually bringing a lawsuit must constitute actually exposing one to matter damaging to one's reputation. Since most civil actions have as their aim the receipt of a thing of value, any person who brings a lawsuit is committing an act of extortion in Ohio if the statute has [such a broad meaning]. In the absence of authority compelling such a reading, this Court easily rejects such an absurd interpretation of Ohio's definition of extortion. *Heights Community Congress v. Smythe, Cramer Co.*, 862 F.Supp. 204, 207 (N.D.Ohio 1994)

{¶ 10} Appellant argues that the trial court abused its discretion because the quintessential issue in the criminal case was the wording and intent of the letter, and "[a]n expert in civil litigation would have provided valuable testimony to the trial court regarding the nature of demand letters as related to the contents of Appellant's letter." In particular, the proffered testimony concludes that

> While the letter is replete with ill-advised and ill-conceived vulgarities and evinces a high-degree of animosity towards [the victim] and others, it is by its very nature a demand for something of value in exchange for the refraining of instituting legal proceedings against [the victim] and others.

> * * * Notwithstanding the vulgarities and hyperboles in said letter, it is my opinion, to a reasonable degree of legal certainty, that the letter is merely a demand for something of value in exchange for a promise to not bring legal proceedings in which certain matters of an embarrassing or sensitive nature may or may not be exposed.

{¶ 11} We disagree that a reasonable probability exists that the additional testimony would aid appellant's defense, or that the denial of the expert would result in an unfair trial. Here, the case was tried to the bench, not the jury. The trial court judge was an experienced jurist, and any insight provided by the expert witness into the nuances of demand letters would have been marginal. Therefore, we hold the trial court did not abuse its discretion in denying appellant's motion for funds to obtain an expert witness.

{¶ 12} Accordingly, appellant's first assignment of error is not well-taken.

B. Motion for Acquittal and Manifest Weight

{¶ 13} In his second assignment of error, appellant argues that the trial court erred when it denied his Crim.R. 29 motion for acquittal at the close of the state's evidence. Relatedly, appellant argues in his third assignment of error that his conviction was against the manifest weight of the evidence.

{¶ 14} We review a ruling on a Crim.R. 29(A) motion under the same standard used to determine whether the evidence was sufficient to sustain a conviction. *See State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 39-40. "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.

{¶ 15} In contrast, 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 [trier of fact] 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, quoting *Thompkins* at 387.

{¶ 16} R.C. 2905.11(A)(5) provides, "No person, with purpose to obtain any valuable thing or valuable benefit or to induce another to do an unlawful act, shall * * * [e]xpose or threaten to expose any matter tending to subject any person to hatred, contempt, or ridicule, or to damage any person's personal or business repute, or to impair any person's credit." In support of his assignment of error, appellant does not contest that he had a purpose to obtain a valuable thing, or that the letter threatened to expose

matter that would subject the victim to hatred, contempt, or ridicule, or damage her personal or business repute. Rather, appellant argues that the letter was a demand letter in civil litigation. Thus, the trial court reached an absurd result when it found him guilty of extortion based on the letter. However, the contents of the letter include threats to report the victim to Social Security and the IRS leading to federal jail time,[1] which could lead a rational trier of fact to conclude that it was more than a simple demand letter. *See State v. Davidson*, 7th Dist. No. 84-B-17, 1984 WL 3782 (Nov. 7, 1984) (threat to expose judge to charges which could lead to "fed time" unless judge "takes back" the sentence imposed on the defendant satisfies the elements of extortion under R.C. 2905.11(A)(5)). Therefore, we hold that appellant's conviction is supported by sufficient evidence. Likewise, we cannot conclude that the trier of fact clearly lost his way such that the conviction is against the manifest weight of the evidence.

{¶ 17} Accordingly, appellant's second and third assignments of error are not well-taken.

III. Conclusion

{¶ 18} For the foregoing reasons, the judgment of the Wood County Court of Common Pleas is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment affirmed.

[1] "I will report you to the Social Security for your 'Disability Income' and for your alleged 'MS' – can't work – boy, Big time jail – Federal. I will report you, Dick & Liz for tax fraud to IRS for all the trips, depreciation, etc. for your house in Bainbridge, Seattle, – FRAUD, income tax evasion – BIG TIME JAIL!"

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

Arlene Singer, P.J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE