[Cite as *State v. Zientek*, 2013-Ohio-4836.]

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

State of Ohio — Court of Appeals No. S-12-032

Appellee — Trial Court No. CRB 1200403 A

v.

James J. Zientek, Jr. — **DECISION AND JUDGMENT**

Appellant — Decided: November 1, 2013

* * * * *

Diana Bittner, for appellant.

* * * * *

OSOWIK, J.

{¶1} This is an appeal from a judgment of the Fremont Municipal Court, Sandusky County, Ohio, which found appellant guilty of one count of aggravated menacing, in violation of R.C. 2903.21(A), a misdemeanor of the first degree. Appellant was sentenced to serve a three-day period of incarceration, along with non-reporting probation, an anger management assessment, a fine and court costs. The record reflects

that the incident underlying this matter occurred in connection to a protracted family feud between appellant and several family members. For the reasons set forth below, this court affirms the judgment of the trial court.

{¶2} Appellant, James J. Zientek Jr., sets forth the following four assignments of error:

> 1. APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.
>
> 2. THE TRIAL COURT ERRED IN PERMITTING THE VICTIMS TO REMAIN IN THE COURTROOM DURING THE TESTIMONY OF OTHER WITNESSES, IN VIOLATION OF THE ORDER FOR SEPARATION OF WITNESSES MADE AT THE OUTSET OF THE TRIAL.
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> 3. THE TRIAL COURT ERRED WHEN IT DENIED APPELLANT'S MOTION FOR MISTRIAL AFTER THE COURT'S BAILIFF IMPROPERLY PRESENTED INFORMATION TO THE COURT IN THE PRESENCE OF THE JURY.
>
> 4. THE TRIAL COURT ERRED IN RELYING AT SENTENCING ON STATEMENTS MADE BY THE VICTIM BEYOND THE SCOPE OF A PERMISSIBLE VICTIM IMPACT STATEMENT.

{¶3} The following undisputed facts are relevant to this appeal. On April 13, 2012, appellant made multiple threats of serious physical harm to his nephew in connection to a pending family divorce and appellant's unsuccessful attempts to pressure his nephew, Adam Morgan ("Morgan"), regarding alliances in connection to the divorce. The threats were immediately reported by witnesses including Morgan, Morgan's girlfriend, and Morgan's stepmother.

{¶4} The trio collaboratively decided to promptly go to the Sandusky County Sheriff's Department and file a police report. The parties reported that appellant had threatened to, "bash" Morgan's head in and further stated that appellant threatened to, "beat the fuck out of the three individuals." The investigating deputy determined the parties to be credible. An investigation commenced. Appellant was subsequently contacted by the deputy. Appellant acknowledged the essence of what had occurred. Upon being confronted with his actions by the deputy, appellant made an unsupported claim that his nephew had threatened appellant back in response to the threatening statements made by appellant. Charges were initiated against appellant.

{¶5} On April 16, 2012, appellant was charged with three counts of aggravated menacing, in violation of R.C. 2903.21 (A), all misdemeanors of the first degree. On August 30, 2012, the matter proceeded to a jury trial in the Fremont Municipal Court. Ultimately, the state dismissed the two charges against appellant connected to Morgan's

girlfriend and stepmother due to the unavailability of those victims to testify. The case proceeded with respect to the count pertaining to Morgan.

{¶6} The state's first witness was the sheriff's deputy who investigated the matter and interviewed all the relevant parties shortly after the events underlying this case. The deputy furnished detailed, compelling testimony articulating why he found the three victims in this matter to be credible and compelling. The ten-year deputy explained that he observed the demeanor of the victims found that they exhibited indicia consistent with legitimate claims.

{¶7} Significantly, the deputy also testified that when he contacted appellant, appellant did not deny threatening physical harm against the victims. On the contrary, the deputy's testimony reflected that appellant made disclosures that were, "essentially saying that he made threats." The deputy noted that appellant then made unsubstantiated allegations that Morgan had responded to appellant's threats by issuing threats in return against appellant. The record reflects several witnesses to the threats issued against Morgan, but no witnesses to the alleged counter-threat. The deputy summarized victim Morgan's statement to him by testifying, "Adam's statement to me was that Uncle Jim had threatened to beat the fuck out of the three individuals."

{¶8} After several attempts at trial, the victim's girlfriend determined that she was unable to testify, and therefore she unexpectedly became unavailable as a witness. The trial court denied a motion for a mistrial prefaced upon the bailiff stating in the presence

of the jury that the witness was having an anxiety attack. The trial court promptly, plainly instructed the jury to disregard the bailiff's statement. The trial court then permitted the calling of Morgan himself to testify as an alternative witness.

{¶9} Morgan testified in detail regarding a lengthy and ongoing history of conflict and issues between appellant and several family members. Suffice it to say, the record reflects an extensive history of conflict in this family. The record further reflects a history of conflict instigation by appellant. Appellant's own admissions in the course of this matter likewise reflect that he has difficulty with anger and that his statements fuel the situation.

{¶10} The conflict underlying this case stems from a pending family divorce and perceptions regarding various people taking sides and not taking sides in the divorce. Given this context and background, it is important to note that the entirety of the record reflects efforts by Morgan to stay out of the fray as contrasted to reflecting efforts by appellant to ensnare Morgan into the matter.

{¶11} The record reflects that after Morgan accidentally overheard appellant telling Morgan's grandfather that he would, "beat the fuck out of me and Amy and Danielle," Morgan contacted his grandfather. Morgan's grandfather had Morgan speak directly to appellant. Appellant responded by directing vulgarities and specific threats of serious physical harm to Morgan. Appellant's volatile temperament and inappropriate conduct is conceded throughout appellant's own lengthy statement at trial. Appellant

stated in relevant part, "I know I should have held my temper * * * I shouldn't have said everything that I said, told him to stay away from me on the phone I guess. I wasn't just acting irrational."

{¶12} The jury deliberated and found appellant guilty of the sole remaining count of misdemeanor aggravated menacing count based upon the the threats of serious physical harm directed by appellant to his nephew. As referenced above, appellant spoke at length in mitigation regarding his actions. The trial court's imposition of a minimal sentence within the range of potential sentences clearly reflects consideration of appellant's statement in mitigation. Appellant was sentenced to 90 days of incarceration, with 87 of the 90 days suspended, non-reporting probation, anger management, and a fine and court costs. This appeal ensued.

{¶13} In the first assignment of error, appellant delineates numerous decisions of trial counsel in support of his claim of ineffective assistance of counsel. Upon our review of appellant's contentions, it is clear that appellant's challenges are based on legitimate, tactical decisions of counsel. For example, appellant unilaterally claims that, "counsel was ineffective in failing to present evidence and witnesses that Appellant had informed counsel of prior to trial." In addition, appellant alleges that trial counsel erred in failing to make a motion for a directed verdict, failing to object to the victim impact statement, and several other claims rooted in routine trial decisions.

{¶14} To prevail on a claim of ineffective assistance of trial counsel, appellant must establish that trial counsel's conduct so undermined the proper functioning of the adversarial process that the trial court cannot be relied upon as having produced a just result. Appellant must show that counsel's representation fell below an objective standard of reasonableness to such an extent that, but for counsel's perceived errors, the results of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.E.2d 674 (1984). *State v. Plassman*, 6th Dist. Fulton No. F-07-036, 2008-Ohio-3842.

{¶15} We have carefully reviewed and considered appellant's allegations in support of his claim of ineffective assistance of trial counsel. We are not persuaded. We find that the matters complained constituted standard tactical decisions of trial counsel. We further find that appellant has failed to establish that, but for the claimed errors, the result of the matter would have been different. Wherefore, we find appellant's first assignment of error not well-taken.

{¶16} In appellant's second assignment of error, he claims that the trial court erred in allowing Morgan to testify after permitting him to be present in the courtroom from the outset of the trial. We note that appellant concedes that R.C. 2930.09 permits a victim to the present at any stage of a criminal proceeding unless doing so fatally prejudiced the fairness of the trial.

{¶17} Upon our review of the transcript of proceedings and the entire record, we find no objective, persuasive evidence in the record in support of appellant's contention that he was denied an unfair trial despite his allegation that, "Mr. Morgan was able to present his testimony both to fall in line with that of the deputy and to compensate for the lack of testimony by Ms. Wiley." The record is devoid of any objective or relevant indicia of any kind that Morgan's testimony was unfairly influenced by the deputy's testimony and that appellant was unfairly prejudiced. On the contrary, the record reflects that both the deputy and Morgan conducted themselves in a wholly appropriate manner. There simply was no concerning or unusual correlation between the testimony of the deputy and the later testimony of Morgan. Wherefore, we find appellant's second assignment of error not well-taken.

{¶18} In the third assignment of error, appellant contends that the trial court erred in denying his motion for a mistrial. Appellant's motion for a mistrial was prefaced upon the bailiff stating in the presence of the jury that the first witness was unable to testify due to experiencing an anxiety attack.

{¶19} On appeal, the trial court's decision to grant or deny a motion for a mistrial will not be overturned absent an abuse of discretion. *State v. Goerndt*, 8th Dist. Cuyahoga No. 88892, 2007-Ohio-4067, ¶ 20. An abuse of discretion connotes more than a mere error of law or judgment, instead requiring a finding that the trial court's decision was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d

217, 219, 450 N.E.2d 276 (1983). Generally, the granting of a mistrial is proper only in cases where a fair trial has become impossible. *Goerndt*, at ¶ 21.

{¶20} The record in this matter reflects that the trial court promptly and properly furnished a curative instruction to the jury to disregard the bailiff's single sentence statement in the presence of the jury that, "Judge, I've been informed by the witness that she's unable to testify due to anxiety attacks that she's currently having." After denying the motion for a mistrial on the basis of that sentence, the trial court instructed the jury to disregard the bailiff's brief statement. We find that the trial court adequately addressed the matter. There is no evidence that the fairness of the proceedings was compromised. Conversely, the record reflects that appellant received a proper, fair trial. Wherefore, we find appellant's third assignment error not well-taken.

{¶21} In appellant's fourth assignment of error, he alleges that the trial court fatally prejudiced the trial by the scope of the victim's statement at sentencing. We are not convinced. The record reflects an exhaustive history of tension and hostilities on the part of appellant towards certain people connected to his family and his nephew in particular.

{¶22} The record reflects that appellant fueled various family conflicts. By contrast, the record reflects that the victim in this matter attempted to diffuse the situation. Similarly, the record reflects that the victim voluntarily and immediately undertook every effort to avoid future contact and conflict with appellant following this

incident. The victim immediately met with personnel at a school where both parties are taking coursework and changed instructors in a course where both parties initially shared the same instructor. In addition, the victim modified his work schedule in multiple respects in order to minimize the risk of encountering appellant in the workplace.

{¶23} The record shows that the victim acted well within his rights in responding to inquiries posed by the trial court at sentencing in the trial court's effort to gain a fuller understanding of the ongoing, volatile family conflict. Appellant's minimal sentence ordering him to serve three days of incarceration out of a possible 90 days of incarceration belies his claims that he was unfairly prejudiced and harmed by the victim's statement to the court prior to the imposition of sentence. Wherefore, we find appellant's fourth assignment of error not well-taken.

{¶24} We find that substantial justice has been done in this matter. The judgment of the Fremont Municipal Court is hereby affirmed. Appellant is ordered to pay the cost of this appeal pursuant to App.R. 24.

Judgment affirmed.

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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