[Cite as *State v. Morris*, 2009-Ohio-4711.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 92080

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

STEPHEN MORRIS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART, REVERSED
IN PART AND REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-511098

BEFORE: Stewart, P.J., Boyle, J., and Sweeney, J.

RELEASED: September 10, 2009

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

MELODY J. STEWART, P.J.:

{¶ 1} Defendant-appellant, Stephen Morris, appeals from his conviction on one count of menacing by stalking. The charges arose after the victim, a bus driver for the Greater Cleveland Regional Transit Authority ("RTA"), complained that Morris purposely and repeatedly rode on buses that she drove and said unwelcome things to her. Morris complains that (1) the court erred by refusing to allow him to introduce evidence of other complaints made by the victim, (2) the court imposed restitution without first determining whether he had the ability to pay, and (3) the jury's verdict was against the manifest weight of the evidence. We find no basis for the restitution order and reverse it, but affirm the conviction in all other respects.

I

{¶ 2} The state alleged that Morris engaged in a pattern of conduct that knowingly caused the victim to believe that he would cause her physical harm or mental distress to her. See R.C. 2903.211(A)(1)

{¶ 3} The victim testified that Morris would board her bus and sit in the handicapped section. For the first month that he did so, he would stare at her while she drove and said nothing. Unnerved by this conduct, the victim at one point asked her dispatcher to contact the RTA police to meet her at the end of her route. Morris exited the bus before the end of the route, so the police could not investigate.

{¶ 4} Morris began speaking to the victim during the second month that he rode her bus. He commented on the size of her legs and buttocks, and told the victim about the type of woman he liked. Although the victim found these remarks offensive, she did not respond to Morris and chose to ignore him. On a different occasion, the victim said that another rider was being "fresh" with her and Morris threatened the other rider for being disrespectful. The other rider threatened Morris in kind, and as the situation escalated, the victim called for the RTA police. However, both Morris and the other rider exited the bus before the police could arrive.

{¶ 5} The victim testified that on one occasion, her daughter rode along with her during a break from school. When Morris boarded the bus, the victim told him that "I'm not listening to nothing you're saying tonight. I don't want to hear it." Morris replied, "[r]ight," and took a seat behind the victim's daughter. He rode without incident until the victim stood to change the route information sign on the bus. Morris came between the victim and her daughter and told the victim that "[y]ou got lucky this time." The victim asked Morris if he understood that there were video cameras on the bus, and Morris replied that "[t]hey already got my picture. They already know." When the victim told him to "quit playing," Morris replied, "I don't play games. I didn't go to elementary school because I don't like to play." Morris

exited the bus and the victim conceded that Morris did not physically threaten her during this incident.

{¶ 6} After this incident, the victim called off work for two days, hoping that the time off would break up her schedule and confuse Morris as to when she would be driving. Despite this effort, Morris again showed up at the start of her route when she returned to work. The victim called her husband (also an RTA driver) and he drove to the garage. The husband told Morris that he could not board the bus and asked the victim to call the RTA police. During that time, three buses driving the same route as the victim passed by, but Morris did not attempt to board those buses. When the transit police arrived, the victim told them that Morris had been "stalking me and threatening me." She identified Morris to the police, but the police released him after questioning. Calling it the "last straw," the victim decided that she could not drive the bus any more because she was "so stressed." She did not work for two months and received counseling.

{¶ 7} The victim testified that she did not engage in any conversation with Morris, choosing to ignore what he was saying. Morris did all of the talking. She also testified that apart from notifying dispatch (from whom all calls to RTA police were made) she did not notify any of her supervisors about her concerns with Morris. She acknowledged that the time she took off from

work was without RTA's permission and caused her to be suspended from her duties.

II

{¶ 8} Morris first complains that the court abused its discretion by refusing to allow him to cross-examine the victim with evidence that she had filed a number of menacing or domestic violence complaints in the past. Morris wished to cross-examine the victim on this history to show that she was predisposed to making complaints.

{¶ 9} Cross-examination "shall be permitted on all relevant matters and on matters affecting credibility." Evid.R. 611(B). The text of the rule does not limit cross-examination to matters raised during direct examination. *State v. Treesh*, 90 Ohio St.3d 460, 481, 2001-Ohio-4. Nevertheless, "[t]rial judges may impose reasonable limits on cross-examination based on a variety of concerns, such as harassment, prejudice, confusion of the issues, the witness's safety, repetitive testimony, or marginally relevant interrogation." Id., citing *Delaware v. Van Arsdall* (1986), 475 U.S. 673, 679. We review decisions to limit cross-examination for an abuse of discretion based on the particular facts of each case. *State v. Acre* (1983), 6 Ohio St.3d 140, 145.

{¶ 10} During his cross-examination of the victim, Morris asked whether "it's fair to say that in your past, you've had bad experiences, would you say that, with men?" The court sustained the state's objection and then met with

counsel. Morris told the court that he was attempting to elicit the number of criminal complaints that the victim had made in the past. He noted that during discovery, the state provided a "criminal history log" that detailed complaints made by the victim. Morris told the court that it showed that the victim filed "eight to ten" complaints between 1988 and 1996 for menacing, assault, and domestic violence. He maintained that this number of complaints would show that the victim had a predisposition to make complaints.

{¶ 11} The court noted that R.C. 2903.211(A)(1) employed a subjective standard as to what the victim believed – that is, did the victim believe that Morris would cause physical harm to her. Even if the victim were an "eggshell" victim, her having filed a number of previous complaints did not disprove that she subjectively believed that Morris would cause physical harm to her. The court also analogized the offered evidence to the Rape Shield Statute, finding that a victim of past stalking should not have to "relive every one of those incidents every time she has a new incident of stalking" because it "would further compound her mental distress." The court thought that public policy should "restrict[] the kind of questions that you're proposing to be asked * * *."

{¶ 12} Morris did not proffer the log sheet into the record, and the substance of the alleged charges is not apparent from the record, so we have

no way of determining whether there was any basis for allowing cross-examination. See Evid.R. 103(A)(2). He has therefore waived the issue for purposes of appeal. *State v. Brooks* (1989), 44 Ohio St.3d 185, 195.

{¶ 13} Moreover, we find no plain error with the court's refusal to allow Morris to cross-examine the victim about instances of past complaints. Although the broad scope of impeachment permitted on cross-examination might have entitled Morris to impeach the victim by inquiring into prior stalking allegations made by her, it was apparent from the record that defense counsel had not actually investigated the contents of the criminal history log. When asked whether any of the cases cited by defense counsel resulted in a criminal prosecution, defense counsel stated, "[t]hat I don't know." The state told the court that the log did nothing more than indicate that a person's name had been entered into the police computer system – for any reason. The log did not show whether any criminal complaints were actually filed. Given the lack of specificity contained in the logs, as well as counsel's admission that he did not know whether there had been any criminal prosecutions resulting from those log entries, there is no reason to think that the outcome of trial would have been different had the court allowed Morris to cross-examine the victim on the content of the logs.

III

a. Morris next argues that the court erred by ordering him to pay $4,000 in restitution to the victim without first assessing whether he had the ability to pay.

b. Before ordering restitution as a part of a criminal sentence, the court must "consider the offender's present or future ability to pay." R.C. 2929.19(B)(6). The court need not hold a hearing to make this consideration, *State v. Cosme*, Cuyahoga App. No. 90075, 2008-Ohio-2811, at ¶34, nor does it need to make a specific finding in a judgment entry that the offender has the ability to pay. *State v. Lewis*, Cuyahoga App. No. 90413, 2008-Ohio-4101, at ¶12. We review an order of restitution for an abuse of discretion. *State v. Marbury* (1995), 104 Ohio App.3d 179, 181.

c. The court abused its discretion because it made no determination of Morris's ability to pay the restitution. The only information regarding Morris's ability to pay came from defense counsel who told the court that "Mr. Morris is older and with disabilities. He's had substantial leg and back injuries, and from what I understand, he was applying for SSI." Defense counsel also told the court that Morris was "living hand to mouth" and that Morris might have psychological issues. Although a defendant's indigency itself does not bar an order of restitution, *State v. Kelly*

(2001), 145 Ohio App.3d 277, 283-284, it would be an empty gesture for the court to order restitution from an offender who, on the record before us, appears to lack the present and future ability to pay. The court should have determined whether Morris had the ability to make restitution before so ordering.

d. Apart from Morris's ability to make restitution is the question of whether the victim proved her monetary loss. Restitution is limited to the actual loss caused by the defendant's criminal conduct. *State v. Brumback* (1996), 109 Ohio App.3d 65, 82; *State v. Marbury* (1995), 104 Ohio App.3d 179, 181. And there must be competent, credible evidence in the record from which the court can ascertain the amount of restitution to a reasonable degree of certainty. *State v. Warner* (1990), 55 Ohio St.3d 31, 69.

e. During sentencing, the victim gave a statement in which she indicated that the two months of work she missed caused her to lose $4,000 in wages. She did not offer any evidence to support that claim. The court accepted this figure and, without further elaboration, told Morris, "I'm going to order you to pay $4,000 in restitution."

f. The court's exchange with the victim did not prove the victim's actual loss. The victim testified at trial that she took the time off

due to "stress." But she offered no evidence to support her monetary loss. These are matters that the court should have considered before ordering restitution.

g. We sustain this assignment of error and remand to the trial court for a hearing on restitution in conformity with R.C. 2929.19(B)(6).

IV

{¶ 14} Finally, Morris argues that there was insufficient evidence to show that he committed menacing by stalking. He maintains that the state failed to establish evidence that he knowingly caused the victim to believe that he would cause her physical harm.

{¶ 15} When reviewing a claim that there is insufficient evidence to support a conviction, we view the evidence in a light most favorable to the prosecution to determine whether 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 259, paragraph two of the syllabus.

{¶ 16} Menacing by stalking is a violation of R.C. 2903.211(A)(1), which states: "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." A person acts knowingly, regardless of his or her purpose, when that person is aware that his or her conduct will probably cause a certain result or will probably be of a

certain nature. R.C. 2901.22(B). The term "mental distress" is defined as any mental illness or condition that involves some "temporary substantial incapacity" or a mental condition "that would normally require psychiatric or psychological treatment, or other mental health services, whether or not any person requested or received psychiatric treatment, psychological treatment, or other mental health services." R.C. 2903.211(D)(2).

{¶ 17} The state thus has to prove that: (1) Morris engaged in a pattern of conduct; (2) that led the victim to believe that Morris would cause her physical harm or mental distress; and (3) that Morris was aware that his conduct would probably cause the victim to believe that she would be harmed or distressed.

{¶ 18} Evidence that Morris repeatedly rode buses driven by the victim, to the exclusion of other buses, sufficiently established a pattern of conduct. The state also offered evidence to show that the victim believed that Morris would cause her physical harm – the victim said that she considered Morris's statement that "[y]ou got lucky this time" to be a "threat." She also testified that he made her so "nervous" that, combined with RTA's failure to intercede on her behalf, she was forced to take two months off from work and seek counseling for the stress caused by his conduct.

{¶ 19} The more difficult question is whether Morris acted "knowingly" – aware that his conduct would probably cause the victim to believe that she

would be harmed or distressed. There is no evidence to show that the victim communicated to Morris her annoyance with his conduct. She testified that "I never let him know that he was upsetting me because a lot of people say a lot of things * * *." Morris's comments of a sexual nature were unsettling to the victim, but she ignored Morris because she thought that her response might indicate that she found his comments to be acceptable.

{¶ 20} The only evidence showing the victim communicating with Morris occurred on the occasion when the victim's daughter rode the bus. As Morris boarded the bus, the victim told him, "I'm not listening to nothing you're saying tonight. I don't want to hear it." Morris replied, "[r]ight," and sat down. When the bus reached the end of its route, Morris stood between the victim and her daughter, "looked me dead in my face" and said, "You got lucky this time." When the victim told him to "quit playing," Morris replied, "I don't play games." Morris exited the bus. As the bus pulled away on its return route, the victim saw Morris standing by a bus shelter. She told him "You're not getting back on this bus today."

{¶ 21} A rational trier of fact could find that the victim's statement to Morris that "I'm not listening to nothing you're saying tonight. I don't want to hear it" would have caused him to know that his actions were causing her mental distress. This statement clearly communicated to Morris that he had led the victim to believe that he might cause her additional emotional

distress. And a rational trier of fact could infer from Morris's reply that "I don't play games" showed that he knew he had intimidated the victim to the point where she was becoming increasingly threatened by his conduct. His pattern of specifically riding the victim's bus and staring at her or otherwise making rude comments were so pervasive that a rational trier of fact could conclude that he intended to intimidate the victim in a manner that he knew would cause her to believe that he might physically injure her or cause her mental distress.

{¶ 22} Judgment affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion.

It is ordered that the parties bear their own costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MELODY J. STEWART, PRESIDING JUDGE

JAMES J. SWEENEY, J., CONCURS

MARY J. BOYLE, J., CONCURS IN PART AND
DISSENTS IN PART WITH SEPARATE OPINION

MARY J. BOYLE, J., CONCURS IN PART AND DISSENTS IN PART:

{¶ 23} Respectfully, it is my opinion that the trial judge did not abuse his discretion when ordering Morris to pay restitution. Morris was convicted of committing menacing by stalking on an on-duty RTA bus driver. He engaged in a pattern of conduct over a period of time while the victim was driving the bus, causing her mental distress. She stated that the "stress and distress" he caused placed a financial burden upon her and her family. She told the court that she missed two months of work without pay because of Morris's criminal conduct. She stated she earns $15.16 per hour, works forty hours per week, and suffered a $4,000 economic loss. Morris argues that it was improper for the court to impose restitution without first determining whether he had the ability to pay. Since it is my opinion that there is some evidence in the record that the trial court considered Morris's present and future ability to pay restitution and a reasonable basis to support the victim's economic loss, I would respectfully dissent to the majority's resolution of assignment of error II.

{¶ 24} A trial court need not explicitly state that it considered a defendant's ability to pay a financial sanction. Rather, a court looks to the totality of the record to see if this requirement has been satisfied. See *State v. Henderson*, Vinton App. No. 07CA659, 2008-Ohio-2063; *State v. Smith*, Ross App. No. 06CA2893, 2007-Ohio-1884; and *State v. Ray*, Scioto App. No. 04CA2965, 2006-Ohio-853.

Here, the record shows that the trial court considered (1) the evidence presented at the jury trial he presided over, (2) the recommendation made by the victim, and (3) information he received by defense counsel as to Morris's present and future ability to pay. The trial court further gave Morris the opportunity to speak on his own behalf at sentencing, but Morris chose to shake his head no and not address the court.

{¶ 25} R.C. 2929.18(A)(1) authorizes the trial court to impose restitution based upon the victim's economic loss as a financial sanction. The statute further provides, "* * * if the court imposes restitution, the court may base the amount of restitution it orders on an amount recommended by the victim * * *."

{¶ 26} According to *State v. Cosme*, Cuyahoga App. No. 90075, 2008-Ohio-2811, and *State v. Lewis*, Cuyahoga App. No. 90413, 2008-Ohio-4101, the court is not required to determine whether Morris had the ability to make restitution, but only to consider Morris's present and future ability to pay the amount of the sanction or fine. R.C. 2929.19(B)(6).

{¶ 27} At Morris's sentencing hearing, the victim requested restitution, gave her reasons for it, and recommended an amount based upon her lost wages. Defense counsel informed the trial court of Morris's present and future ability to pay restitution when he told the court that "Morris is older with disabilities and has substantial leg and back injuries," "suffers from the demons of alcohol and drug addiction," and "was applying for SSI." As the majority points out, a defendant's indigency itself does not bar an order of restitution. *State v. Kelly*

(2001), 145 Ohio App.3d 277, 283-284. Additionally, no objection was made by defense counsel after restitution was ordered.

{¶ 28} Therefore, in my opinion, the record supports the conclusion that the trial court sufficiently considered Morris's present and future ability to pay restitution, and it was reasonable in this case to base the amount of restitution ordered, as the statute provides that it may be based upon the recommendation of the victim. R.C. 2929.18(A)(1). Thus, I would uphold the trial court's restitution order and overrule the second assignment of error.