**[Cite as *State v. McGrath*, 2010-Ohio-4477.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
**No. 93445**

## STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

## JOSEPH McGRATH

DEFENDANT-APPELLANT

**JUDGMENT:**
AFFIRMED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case Nos. CR-516312 and CR-524159

**BEFORE:** Sweeney, J., McMonagle, P.J., and Blackmon, J.

**RELEASED AND JOURNALIZED:** September 23, 2010

**FOR APPELLANT**

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JAMES J. SWEENEY, J.:

**{¶ 1}** Defendant-appellant, Joseph McGrath ("defendant"), appeals pro se following his convictions for three counts of menacing by stalking, two counts of violating a protection order, and resisting arrest. The convictions arise from separate criminal cases that were consolidated for trial. For the reasons that follow, we affirm.

**{¶ 2}** In Case No. CR-516312, defendant was charged with three counts of menacing by stalking in violation of R.C. 2903.211(A)(1)[1] and three counts of

[1]Counts 1-3. The indictment identified the following dates of offense: Count 1 occurred between March 12, 2007 – December 28, 2007; Count 2 occurred between December 31, 2007 – January 18, 2008; and Count 3 occurred between January 19,

violation of a temporary protection order in violation of R.C. 2919.27(A)(2).[2] In Case No. CR-524159, defendant was charged with two additional counts, menacing by stalking and resisting arrest.[3] The victim involved in each count was defendant's ex-girlfriend ("Michelle").

**{¶ 3}** The matter proceeded to trial. Michelle testified that she met defendant in 2005 and they began dating in April of that year. Although defendant would spend periods of time at her home in Cleveland, he would leave for several days. Michelle insisted that defendant did not reside with her as he maintained a separate residence elsewhere. During this time period, Michelle lived with her daughter, Jennifer, as well as Jennifer's fiancé Jim, and their child. Michelle indicated that after defendant was arrested in January 2008, she returned his belongings to his brother, including his birth certificate and social security card.

**{¶ 4}** Michelle said she broke off her relationship with defendant sometime in 2006. He began calling her frequently and she did not answer her phone. Michelle worked at a grocery store in Parma. It was her testimony that she saw defendant in the parking lot of her job slashing her car tires. This caused her to

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2008 – September 10, 2008. Each count contained a furthermore clause alleging a prior conviction for menacing by stalking and a history of violence toward the victim.

[2]These were Counts 4 – 6, and also were alleged to have occurred between March 12, 2007 – December 28, 2007 (Count 4); between December 31, 2007 – January 18, 2008 (Count 5); and between January 19, 2008 – September 10, 2008 (Count 6).

[3]Both of these offenses were alleged to have occurred on September 26, 2008.

make a police report.[4] She also made a separate police report against defendant for harassment. On January 15, 2007, Michelle reported being trapped by defendant at a gas station, where police responded and arrested him. Defendant was charged with felony menacing by stalking.

**{¶ 5}** On January 18, 2007, the Parma Municipal Court held a hearing and a witness, Det. Michael Klein, testified that defendant was in attendance by video camera. On that date, defendant was arraigned and Det. Klein requested a temporary protection order,[5] which the court issued that day ("TPO"). (Joint ex. 9.) It was not an ex parte order as reflected on the face of the document.[6] Det. Klein testified that there was a hearing on the TPO, "they have the arraignment and TPO hearing." On the TPO form, the line provided to set a date for hearing was not filled in and was not signed by defendant. However, Det. Klein was present at the hearing, which he said took place the same day the TPO was issued. Det. Klein presented evidence at the hearing in support of the request for the TPO.

**{¶ 6}** The Deputy Clerk of Parma Municipal Court testified that she took a copy of the TPO to the court's bailiff for delivery to defendant. A corrections

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[4] The tire slashing occurred December 19, 2006 according to Det. Klein's testimony. Those misdemeanor charges were dismissed at Det. Klein's direction.

[5]Det. Klein testified that he requested the TPO, not Michelle. Michelle was in fear of defendant and seeing "how scared she was," Det. Klein "took it upon [himself] to apply for the TPO."

[6]See joint ex. J and tr. at page 631, "the ex parte TPO granted, and it's all blank, correct?/A. Yes, it is./Q. It's the one afterwards, that TPO granted, and there's a stamp

officer for the Parma Police Department testified that he served defendant with a copy of the TPO at "10:05 hours" on January 19, 2007.

**{¶ 7}** State's ex. 10 is a docket from Parma Municipal Court concerning the charge against defendant for the January 15, 2007 incident. It reflects the issuance of the TPO and indicates that the matter was bound over to the common pleas court following a preliminary hearing on January 24, 2007. Defendant was indicted in CR-439644 and on March 21, 2007, the Cuyahoga County Common Pleas Court continued the TPO. That case was dismissed without prejudice on October 14, 2009.

**{¶ 8}** Sergeant Timothy Smith of the Cuyahoga County Sheriff's Department testified that jail records reflect numerous telephone calls from the jail to Michelle's cellular and home phones for the time periods between March 12, 2007 – December 28, 2007, and January 18, 2007 – February 1, 2008. In total, 9,578 calls were placed to those numbers from the jail during those time periods. Sgt. Smith initially testified that none of the calls were accepted, but subsequently acknowledged that about 50 calls were taken around the time period of May 18, 2007.

**{¶ 9}** Michelle testified that defendant would call incessantly each night. She said she did not answer most of the calls; however, she did speak with defendant around the May 18, 2007 time period. Michelle's daughter, Jennifer,

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there?/A. Correct. Correct."

confirmed that the phone would ring constantly in the evenings. Jennifer admitted to answering the phone to try to get defendant to stop calling.

**{¶ 10}** Michelle said she had loved the defendant but then only helped him because she felt sorry for him. According to Michelle, around May 2007, she paid $800 to an attorney for defendant. She also made at least one deposit into defendant's commissary account of $100. Michelle could not recall if she had made another deposit, but denied making any more than two deposits for defendant.

**{¶ 11}** On September 26, 2008, Michelle received a message from defendant informing her that he was being released from jail and was on his way to her home. She locked the doors, closed the windows, and told her daughter and Jim about defendant's impending arrival. When defendant arrived at the back door, he was told to leave and advised that the police had been called. Jim confronted defendant in the front of the home. Defendant left and Jennifer followed him in her car to ensure police could locate defendant. Jennifer said she did this because she did not want defendant around her mother.

**{¶ 12}** Jennifer informed police by phone of defendant's presence at a junkyard. Cleveland Police Officer Daugenti responded to the location, where a foot chase began. Officer Daugenti announced his status as a police officer and commanded defendant to stop, but defendant did not comply. Officer Daugenti drew his Taser weapon, being in fear for his own safety. Defendant continued to refuse Officer Daugenti's orders and then began reaching behind his back. At

that point, Officer Daugenti "tased" defendant. This did not subdue defendant, who was "tased" again after which a struggle ensued until Officer Daugenti was able to finally place defendant in handcuffs.

**{¶ 13}** The police contacted EMS and defendant was taken to the hospital. Officer Daugenti's partner recalled defendant complaining that one of Michelle's neighbors hit him with a baseball bat. Jennifer denied that there was any intervention or assault on defendant by any neighbors.

**{¶ 14}** While CR-439644 was pending, Det. Klein was contacted about defendant's violations of the TPO, including the numerous phone calls to Michelle. He was also advised that defendant went to Michelle's house on December 31, 2007, upon his release from jail. Det. Klein was preparing charges in connection with the alleged violations when he received notice of the September 26, 2008 incident. Det. Klein acknowledged that Michelle, against his advice, initiated some contact with defendant. He confirmed that it is permissible for the victim of the TPO to initiate contact with the defendant but not vice versa. Det. Klein said defendant violated the TPO by making phone and letter contact with Michelle.

**{¶ 15}** At the conclusion of the State's case-in-chief, the defense moved for acquittal, which the trial court denied.

**{¶ 16}** The defense presented three witnesses: William Godale, Neal Watters, and defendant. Godale testified that he has known defendant since approximately 2004. Godale said that he sold defendant a Cadillac that was

later allegedly damaged by Michelle's daughter's fiancé; however, Godale did not witness the incident. Godale took photographs of the damaged vehicle and said that Michelle paid for repairs to the car. Godale also testified about his observations and interactions with defendant and Michelle. According to Godale, he had "never seen [defendant be] anything but polite and attentive to Michelle * * * go out of his way to try to appease Michelle. * * * [defendant] has been nothing but a gentlemen when he has been out with friends * * * He never used swear words * * * he comes off as a nice person and he was nice to be around."

**{¶ 17}** During cross-examination of Godale, the State played a DVD audio (State's ex. 15), which consisted of several voicemail messages defendant had left for Michelle. In them, defendant accuses Michelle of damaging his car and owing him money. However, they also contain several threats of violence and are laced with profanity. On one occasion, defendant informs Michelle that he was walking down her street with an eight-pound sledgehammer to smash her car into "a million * * * pieces." Godale recognized defendant's voice on the recordings, but denied ever hearing anything that was played on the message system. On re-direct, Godale denied ever hearing defendant talk to Michelle like he did on the voicemail messages.

**{¶ 18}** Neal Watters was a part-time parochial vicar at the Cuyahoga County jail. According to Watters, defendant attended his religious services at the jail

and he spoke with defendant on occasion. Watters confirmed that defendant would speak to him about Michelle.

**{¶ 19}** Defendant was the last witness to testify. Defendant testified that he maintained his own residence throughout the duration of his relationship with Michelle. He met Michelle in 2004. They began dating in early 2005.

**{¶ 20}** According to defendant, he installed a "junk tire" on Michelle's car that flattened during her shift at Giant Eagle. When he went to change the tire for her, she called the police and made a report. The charges against defendant that stemmed from that incident were dismissed.

**{¶ 21}** Defendant denied harassing Michelle by telephone on or about January 15, 2007. He did admit to meeting her at a Parma Speedway gas station. According to defendant, Michelle told him to meet her there, where she was to pay him $500 for damaging his car. But, when he arrived, Michelle was "stalling him" and asking if they could work something out. He allegedly said she could pay him later and they went to their respective vehicles. At that point, Parma police arrived, having been contacted by Michelle's daughter's boyfriend, and defendant was arrested.

**{¶ 22}** Defendant testified that Michelle broke the windows on his car because she was mad at him for watching a television commercial featuring women's underwear. Defendant said Michelle was jumping up and down on the windshield of his Cadillac with a fence post in her hand, beating every window out of it. This allegedly caused $22,000 worth of damage to the car. Defendant

believed this incident occurred in 2006, possibly 2007. Michelle purchased a windshield for the car. Defendant said the basis of this whole case is over his attempts to obtain repayment from Michelle for the damage done to this vehicle. According to defendant, "all this stuff happened in Cleveland."

**{¶ 23}** Defendant admitted calling Michelle repeatedly demanding his money back and threatening to prosecute her. He went to the Speedway gas station in Parma to obtain money and was arrested by Parma police. Defendant admitted Michelle filed police reports in Parma, although he maintained her accusations were "bogus." According to defendant, Michelle and her daughter's boyfriend "set him up."

**{¶ 24}** Defendant testified that he eventually got "out of jail with the stalking case from 2007," but was rearrested "for that" on March 12. Defendant then said "that is what we're in court for here today, from jail I stalked my girlfriend from jail."

**{¶ 25}** While incarcerated in Parma, defendant attended a preliminary hearing, where he "grilled" Det. Klein for approximately 20 minutes. Defendant recalled that he was "jumping up and down screaming at the judge." Defendant acknowledged that the court docket reflects that he waived the preliminary hearing, which he contends is a falsification. The case was bound over after which defendant posted his bond.

**{¶ 26}** Defendant was re-arrested on March 12, 2007, and remained in Cuyahoga County jail until December 27, 2007, when allegedly Michelle posted

his bond. Almost immediately after departing the jail, defendant says Michelle "flipped her wig" because he asked a group of women for a cigarette. She allegedly stormed away and left him downtown without a ride. Then, Michelle had his bond revoked and he was incarcerated again on January 25, 2008. However, defendant's later testimony is that he was arrested on January 18, 2008 for the "Speedway incident."

**{¶ 27}** Defendant was released from jail again on September 26, 2008 and took a bus to Michelle's house to obtain his belongings. Prior to doing so, defendant notified Michelle he was coming over and, according to him, she said "come on over." Defendant maintains Michelle welcomed his arrival but her daughter's boyfriend started a commotion and called the police. Defendant says he simply left. But, the daughter's boyfriend rallied the neighbors to surround him and hit him. According to defendant, he lost a tooth. At this point, defendant ran away to McMahon's junkyard. Thinking he was being chased and in fear for his life, he was then approached by "the little cop," who told him to freeze and get on the ground. Defendant said he did not comply because he did not want to get dirty, which resulted in him being tasered. Defendant attempted to get up, denied resisting arrest, and stated he was handcuffed. Defendant alleged the police were civilly liable to him for assaulting and tasering him, but also testified that they were "really nice people" and he understood them "tasing" him.

**{¶ 28}** Defendant identified joint ex. J as a certified copy of the protection order issued by the Parma Municipal Court judge. According to defendant, this protection order was from an "old stalking case" he "beat." Defendant denied ever being in court for a hearing on this order, and denied ever being subject to any prior protection order. He denied ever seeing the protection order prior to his indictment in this case, and denied that anyone ever told him about the protection order.

**{¶ 29}** Under cross-examination, defendant stated the Parma Municipal judge gave him a "verbal no-contact-with-the-victim" order but denied receiving the protection order. At this point, the State presented audio tape conversations of defendant's phone conversations from Parma jail (State's ex. 16), wherein he acknowledged a restraining order. Defendant insisted he was referring to the verbal no-contact order. Prior to his case being transferred to the common pleas court, defendant recalls a hearing at which he cross-examined Det. Klein. Defendant stated his belief that the protection order was void because he did not sign it.

**{¶ 30}** Defendant recalled his arraignment in county court, but claimed he did not hear anything beyond the amount of the bond because the public defender shut off the microphone. Nonetheless, the judgment entry reflects not only the bond, but also indicates "no contact with victim, temp protection order is continued." (State's ex. 12.) Defendant again denied being advised of the protection order.

**{¶ 31}** When asked if he ever "enter[ed] the business, the residence, school, business, or place of employment of Michelle * * * after the date of th[e] protective order, which was January 13, 2007?" defendant responded, "Yeah."

**{¶ 32}** When asked if he surrendered "all keys and garage doors to [Michelle's residence]," he said "No. Why would I?" Defendant admitted he had contact with Michelle but denied intimidating her.

**{¶ 33}** Defendant continued to adamantly maintain he had not seen the protective order prior to his incarceration in the County jail. According to defendant, the witnesses who testified otherwise were all lying. Defendant testified that the jail guards simply come to work, write their name in the logbook, proceed to fall asleep, and then fill out the logbook ten minutes before they go home.

**{¶ 34}** According to defendant, Michelle sent him greeting cards and typed letters and placed money in his account.

**{¶ 35}** Defendant admitted contacting Michelle by phone from jail, estimating that he called maybe once or twice a day for approximately nine months. According to defendant, this was "mutual, consensual contact." He also said he had permission to go to Michelle's residence.

**{¶ 36}** Defendant acknowledged having prior convictions for domestic violence, aggravated assault, and felonious assault.

**{¶ 37}** Defendant suggested on re-direct that the reason there were 9,000 phone calls listed to Michelle's number was because he could "dial a phone

number a hundred times and never get through once. Every time it goes on the list." According to him, he spoke with Michelle once or twice a day. When asked about his repeated calls to Michelle's voicemail as exemplified by State's ex. 15, defendant responded, "[t]hat's how we communicate. Actually she was calling me back on many of those."

**{¶ 38}** The defense rested and renewed its motion for acquittal, which the trial court again denied.

**{¶ 39}** In CR-516312, the jury found defendant guilty of menacing by stalking in violation of R.C. 2903.211(A)(1) under Count 1, along with a history of violence specification. The jury also found defendant was the subject of a protection order issued under R.C. 2903.213 or 2903.214 at the time of the commission of the offense in violation of R.C. 2903.211. The jury found defendant guilty of violating a temporary protection order in violation of R.C. 2919.27(A)(2) as charged in Count 4 and that the violation occurred during the commission of a felony, i.e., menacing by stalking. The jury found defendant guilty of violating a temporary protection order in violation of R.C. 2919.27(A)(2) as charged in Count 6; however, the jury found that this violation did not occur during the commission of a felony offense. The jury found defendant not guilty of the remaining counts of the indictment in CR-516312; specifically, Counts 2, 3, and 5.

**{¶ 40}** In CR-524159, the jury found defendant guilty on all three counts, along with findings that defendant had a history of violence.

**{¶ 41}** Defendant received the following sentence: in CR-516312, a 12-month prison term on Count 1; a five-year consecutive prison term on Count 4; and a six-month concurrent jail term on Count 6. In CR-524159, a 12-month concurrent prison term on Counts 1 and 2 to be served consecutive to the sentence imposed in CR-516312; and 90-day concurrent jail term on Count 3. The total aggregate sentence for both cases is seven years.

**{¶ 42}** Defendant now appeals raising 17 assignments of error for our review.

**{¶ 43}** "I. The trial court abused its discretion and committed reversible and/or plain error and violated the appellant's Ohio and United States Constitutional rights by permitting the city of Parma to prosecute a criminal offense in the Court of Common Pleas, when no criminal offense was committed in the city of Parma's political subdivision and/or territorial jurisdiction."

**{¶ 44}** Although defendant complains that the city of Parma lacked jurisdiction to prosecute him in these matters, he was being prosecuted by the state of Ohio in the Cuyahoga County Court of Common Pleas. "The court of common pleas has original jurisdiction of all crimes and offenses except in cases of minor offenses the exclusive jurisdiction of which is vested in courts inferior to the court of common pleas." R.C. 2931.03. Defendant was indicted by the grand jury for multiple felony offenses, which the State established all occurred in Cuyahoga County. This assignment lacks merit and is overruled.

**{¶ 45}** "II. The appellant's conviction [is] against the [manifest] weight of the evidence, in violation of the Ohio and United States Constitutions."

**{¶ 46}** To warrant reversal of a verdict under a manifest weight of the evidence claim, this Court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether, in resolving conflicts in evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541.

**{¶ 47}** Here, defendant challenges his convictions for violating the protection order and menacing by stalking.

**{¶ 48}** Defendant was convicted of two counts of violating a protection order in violation of R.C. 2919.27(A)(2), which provides:

**{¶ 49}** "(A) No person shall recklessly violate the terms of any of the following:

**{¶ 50}** "* * *

**{¶ 51}** "(2) A protection order issued pursuant to section 2151.34, 2903.213, or 2903.214 of the Revised Code;"

**{¶ 52}** The protection order contained in this record as joint ex. 9, was explicitly issued "per R.C. 2903.213."

**{¶ 53}** R.C. 2903.213 provides in relevant part:

**{¶ 54}** "(A) Except when a complaint involves a person who is a family or household member * * * upon the filing of a complaint that alleges a violation of section * * * 2903.211 [menacing by stalking] * * * of the Revised Code, a violation of a municipal ordinance substantially similar to section * * * 2903.211 * * * of the Revised Code, * * * the complainant * * * may file a motion that requests the issuance of a protection order as a pretrial condition of release of the alleged offender * * *."

**{¶ 55}** R.C. 2903.211(C)(1) requires the court to hold a hearing on the request for a protection order "as soon as possible" and "not later than the next day that the court is in session * * * to determine whether to issue the order. The person who requested the order shall appear before the court and provide the court with the information that it requests concerning the basis of the motion. If the court finds that the safety and protection of the complainant or the alleged victim may be impaired by the continued presence of the alleged offender, the court may issue a protection order under this section, as a pretrial condition of release, that contains terms designed to ensure the safety and protection of the complainant or the alleged victim, including a requirement that the alleged offender refrain from entering the residence, school, business, or place of employment of the complainant or the alleged victim."

**{¶ 56}** R.C. 2903.213(C)(2)(a) provides that the protected person cannot waive or nullify the terms of the order by granting permission or extending an invitation to the alleged offender. The court is required to direct that "a copy of

the order be delivered to the defendant on the same day that the order is entered." R.C. 2903.213(G). If the matter is bound over to the common pleas court, the order remains in effect "until the disposition * * * of the criminal proceedings arising out of the complaint upon which the order is based * * * or until the issuance under section R.C. 2903.214 of the Revised Code of a protection order arising out of the same activities as those that were the basis of the complaint filed under this section." R.C. 2903.213(G)(3) and (E)(2).

**{¶ 57}** Defendant attacks his convictions for violation of a protection order on the following grounds: (1) there was allegedly no hearing held concerning the order of protection; (2) the absence of his signature on the order allegedly proves he did not receive it; and (3) the order, if valid, terminated upon the trial court's acceptance of his guilty plea in CR-493644. Defendant's arguments are not supported by the record or applicable law.

**{¶ 58}** The Order of Protection was entered by the Parma Municipal Court on January 18, 2007. The State presented testimony that a complaint for menacing by stalking was initiated in Parma Municipal Court by the Parma police relating to the January 15, 2007 Speedway incident. An order of protection was requested by the complainant for Michelle. Det. Klein, who was an arresting officer at the Speedway scene, testified that he appeared for defendant's arraignment, where a hearing was held on the motion for protective order. Based on Det. Klein's testimony, the Parma Municipal Court issued joint ex. 9.

**{¶ 59}** Defendant insists that there was no hearing concerning the order of protection, but during his trial testimony, he clearly recollected discharging his assigned counsel and personally cross-examining Det. Klein.[7] It is true that defendant did not acknowledge receipt of the protection order by signature and, in fact, adamantly maintains he did not know about it until his trial. However, the State presented the testimony of various witnesses, who described the process that was employed to serve defendant with a copy of the protection order in jail. The record also contains recorded conversations that took place during defendant's incarceration in the Parma jail between defendant and Godale, where the existence of a protection order is discussed. (State's ex. 16.)

**{¶ 60}** To the extent the evidence does contain some instances of consensual contact between defendant and Michelle around May 2007, joint ex. J clearly advises in bold print that:

> **"THE PERSONS PROTECTED BY THIS ORDER CANNOT GIVE YOU LEGAL PERMISSION TO CHANGE OR VIOLATE THIS ORDER. IF YOU VIOLATE ANY TERMS OF THIS ORDER, EVEN WITH THE PROTECTED PERSON'S PERMISSION, YOU MAY BE ARRESTED. * * * YOU ACT AT YOUR OWN RISK IF YOU DISREGARD THIS WARNING."**

[7] Defendant believes this was a preliminary hearing, but the court's docket reflects that the preliminary hearing set for January 24, 2007 was waived and the matter was bound over to common pleas court. Conversely, the docket reflects, consistent with Det. Klein's testimony, that proceedings were held on January 18, 2007 and that a protection order was issued on that date. It is noted that defendant maintains that the court records were falsified.

**{¶ 61}** Additionally, the jury found defendant not guilty of violating the order of protection that involved this time period (Count 5 alleged violations occurring between December 31, 2007 and January 18, 2008).

**{¶ 62}** The menacing by stalking charges in Parma were bound over to the common pleas court on January 24, 2007, where the order of protection was continued in CR-493644. Defendant maintains the protection order expired when he entered his guilty plea in that case. However, defendant pursued an appeal in that case and, among other things, successfully challenged the trial court's acceptance of his guilty plea. The criminal proceedings in CR-493644 therefore continued until October 14, 2009, when that case was dismissed by the common pleas court without prejudice.[8] Finally, the defense stipulated that CR-493644 was pending during the dates covered by the indictment being tried in this case. Defendant acknowledged that he understood this stipulation.

**{¶ 63}** Defendant does not contest that he tried to contact Michelle by phone and went to her house at times between January 18, 2007 and September 2008. This conduct violated the terms of joint ex. 9. Accordingly, his

[8]The cases upon which defendant relies in suggesting the criminal proceedings were disposed of upon the trial court's acceptance of his plea have no relevance to this issue. These cases involve whether a court's acceptance of a guilty plea on a lesser offense bar prosecution of other charges on the basis of double jeopardy. See *State ex rel. Leis v. Gusweiler* (1981), 65 Ohio St.2d 60, 418 N.E.2d 397; *State ex rel. Sawyer v. O'Connor* (1978), 54 Ohio St.2d 380, 377 N.E.2d 494; *State v. Knaff* (1998), 128 Ohio App.3d 90, 713 N.E.2d 1112. None of them involve a situation where a plea is vacated on appeal and remanded to the trial court for further proceedings on the criminal charges.

convictions of Counts 4 and 6 in CR-516312 were not against the manifest weight of the evidence.

**{¶ 64}** Defendant contends his convictions for menacing by stalking are against the manifest weight of the evidence because there was no evidence that he threatened Michelle or caused her mental distress.

**{¶ 65}** R.C. 2903.211(A)(1) provides:

**{¶ 66}** "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."

**{¶ 67}** There is ample evidence in the record from which a rationale trier of fact could conclude that defendant engaged in a pattern of conduct that knowingly caused Michelle mental distress. The record establishes a tumultuous relationship between Michelle and defendant beginning in early 2005. Ultimately, Michelle filed numerous police reports relating to defendant. Among other things, she accused defendant of slashing her car tires while she was at work.

**{¶ 68}** Many witnesses described Michelle as being afraid of defendant. She did not want to come to court to see him. The voicemail messages that defendant left for Michelle, which were played in court, included threats of bringing a sledge hammer to her house in order to smash her car. Defendant made over 9,000 phone calls to Michelle's telephone number. Michelle testified that there is something about defendant that "fears" her and said "one minute he

is a very nice person and the next minute he can kill you." Michelle's daughter testified that her mother has changed as a result of her relationship with defendant. She keeps the doors and windows locked in fear. There is no dispute that defendant called Michelle on September 26, 2008, and advised her he would be coming to her house. This was the same day he was released from jail. On that day, Michelle said she locked the doors and windows. She and her daughter testified that they called the police when defendant arrived. Michelle's daughter followed defendant because she did not want him around her mother.

**{¶ 69}** Defendant also stipulated to his prior convictions for felonious assault, aggravated assault, and domestic violence, which would support a finding as to his history of violence.

**{¶ 70}** The jury did not clearly lose its way in finding defendant guilty of menacing by stalking under Count 1 of CR-516312 and Counts 1 and 2 under CR-524159. Assignment of Error II is overruled.

**{¶ 71}** "III. The sufficiency of the evidence does not support the appellant's convictions, in violation [of] the Ohio and United States Constitutions."

**{¶ 72}** Under this assignment of error, defendant asserts that his convictions for violating the protection order and menacing by stalking were not supported by sufficient evidence. In support, defendant maintains that his contact with Michelle was mutual and consensual, that other people in the County jail were calling Michelle's telephone numbers, and that Michelle was not credible.

**{¶ 73}** An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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. Thompkins* (1997), 78 Ohio St.3d 380, 386, 678 N.E.2d 541.

**{¶ 74}** As detailed previously in this opinion, there was evidence, if believed, that would convince an average mind of defendant's guilt beyond a reasonable doubt concerning both the violations of the protective order and the counts of menacing by stalking. This assignment of error is overruled.

**{¶ 75}** "IV. The trial court abused its discretion and committed reversible and/or plain error and violated the appellant's Ohio and United States Constitutional rights by forcing the appellant to go through a jury trial wearing county orange clothing over the appellant's objections."

**{¶ 76}** We recently addressed this issue in *State v. Foster*, Cuyahoga App. No. 93391, 2010-Ohio-3186. The relevant inquiry is "whether the accused's appearance before the jury in jail clothes was compelled. 'The reason for this judicial focus upon compulsion is simple; instances frequently arise where a defendant prefers to stand trial before his peers in prison garments. The cases show, for example, that it is not an uncommon defense tactic to produce the

defendant in jail clothes in the hope of eliciting sympathy from the jury.'" Id. at ¶24, quoting *Estelle v. Williams*, 425 U.S. 501, 508, 96 S.Ct. 1691, 48 L.Ed.2d 126.

**{¶ 77}** The trial court did not compel defendant to stand trial in his jail garb. When the court asked defendant why he was "wearing orange," defendant maintained that Michelle had all of his clothes. When defendant confirmed that his brother was there, the court asked if he could obtain clothing for the defendant. The defendant continued to insist that Michelle had everything he owned. The judge again asked, "Is it possible that your brother could bring you some additional clothing?" and defendant kept saying everything he owned was at Michelle's house.

**{¶ 78}** The issue of defendant's trial attire was later raised again by the judge, who offered to retrieve the clothes defendant was wearing at the time of his arrest. Defendant refused on the basis that the clothing was dirty. The judge noted that defendant had civilian clothing available and that the defense would likely be using defendant's jail attire as part of its defense. The judge reached an agreement with the parties that the jury would be told that defendant was unable to secure new clothing for trial.

**{¶ 79}** Because the trial court did not compel defendant to stand trial in jail garb, this assignment of error is overruled.

**{¶ 80}** "V. The trial court abused its discretion and committed reversible and/or plain error and violated the appellant's Ohio and United States Constitutional rights by denying the appellant any discovery."

**{¶ 81}** Defendant makes a generalized complaint that he was not provided "discovery." His only specific complaint is that he has "never heard State's ex. 16[9] CD, in its entirety, he has never read all of the letters the State refused to provide during trial, and he was only permitted to see evidence once it was presented to the jury." The State responds that it provided written discovery in both cases on multiple occasions, which is supported by the dockets. E.g., R. 9, 39, and 40. The State identified, among other things, "phone records — jail, house," which the State indicated was available for copying and inspection at defense counsel's convenience. Discovery was discussed prior to trial, where the State indicated it had produced materials to defendant including documentation of jail calls and court documents. The judge assured defendant that if the State had not produced evidence to him, it would not be admitted at trial. Defense counsel further confirmed receipt of requested police reports. Although counsel objected to the admission of the voicemail messages, it was on grounds other than a discovery violation. We can find no basis in the record to support defendant's contention that the State withheld any discovery. This assignment of error is overruled.

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[9]See, also, Assignment of Error VIII.

**{¶ 82}** "VI. The trial court abused its discretion and committed reversible and/or plain error and violated the appellant's Ohio and United States Constitutional rights by denying the appellant's motion to dismiss for failure to provide a speedy trial."

**{¶ 83}** Defendant maintains the trial court erred by failing to dismiss the misdemeanor counts for want of speedy trial under R.C. 2945.71, 2945.72, 2945.73, and the Ohio and United States Constitutions. Specifically, defendant believes the charge of resisting arrest should have been dismissed after 90 days. This charge arose out of the same facts and circumstances that gave rise to the felony charges in CR-524159, which occurred on September 26, 2008.

**{¶ 84}** Defendant mistakenly premises his argument upon *State v. Hughes* (1999), 86 Ohio St.3d 424, 715 N.E.2d 540. Subsequent to the Ohio Supreme Court's decision in *Hughes*, the Ohio General Assembly amended R.C. 2945.71 "to provide that, where multiple offenses arising from the same conduct are pending, the State must bring the accused to trial on all of the charges within the statutory time period required for the highest degree of offense. S.B. No. 49." *State v. Smith* (Jan. 12, 2000), Athens App. No. 99CA31, fn.1.

**{¶ 85}** R.C. 2945.71(D) explicitly provides:

**{¶ 86}** "A person against whom one or more charges of different degrees, whether felonies, misdemeanors, or combinations of felonies and misdemeanors, all of which arose out of the same act or transaction, are pending shall be brought to trial on all of the charges within the time period required for the highest degree

of offense charged, as determined under divisions (A), (B), and (C) of this section."

**{¶ 87}** The statutory speedy trial time can be extended by circumstances set forth in R.C. 2945.72, including, but not limited to, any period the accused is incompetent to stand trial, any period of delay due to accused's lack of counsel, any period of delay necessitated by defense motion, any period occasioned by continuance at defense request, and "any period of any reasonable continuance granted other than upon the accused's own motion."

**{¶ 88}** In CR-524159, the State had 270 days to bring defendant to trial. Defendant was incarcerated under two separate case numbers from at least October 7, 2008, when he was indicted in CR-516312.[10] Therefore, even assuming defendant was entitled to receive the three-for-one count of R.C. 2945.71(E) between September 26, 2008 to October 7, 2008, the three-for-one calculations would not apply after October 7, 2008. Case No. CR-524159 proceeded to trial on March 31, 2009. Accordingly, defendant was brought to trial on the resisting arrest charge well within the applicable 270 statutory speedy trial time without even considering the multiple tolling events contained on the docket. This assignment of error is overruled.

**{¶ 89}** "VII. The trial court abused its discretion and committed reversible and/or plain error and violated the appellant's Ohio and United States

[10]This is without considering the implications of CR-493644.

Constitutional rights by [incorrect] jury instructions and by leaving out one critical word 'only' in the jury instructions."

**{¶ 90}** We note that defendant did not object to the court's jury instructions relating to this assignment of error; therefore, we review this issue for plain error. See *State v. Wamsley*, 117 Ohio St.3d 388, 2008-Ohio-1195, 884 N.E.2d 45, at ¶25. See, also, Crim.R. 30(A). An erroneous jury instruction does not amount to plain error unless, but for the error, the result of the trial clearly would have been different. *State v. Long* (1978), 53 Ohio St.2d 91, 372 N.E.2d 804.

**{¶ 91}** Defendant complains that the trial court instructed the jury that "an order of protection issued under 2903.213 is effective until the disposition, by the court that issued the order * * * of the criminal proceedings arising out of the complaint upon which the order is based * * *." Defendant contends it was plain error not to insert the word "only" as follows: "an order of protection issued under 2903.213 is ***only*** effective * * *." Defendant contends that the omission of the word "only" implied that the protection order was effective "forever." No reasonable person would have construed the subject instruction to mean that the protective order remains in effect indefinitely. To the contrary, the only reasonable understanding of the instructions given is that the protective order was only valid until the disposition of the criminal charges from which it arose or upon the issuance of an order of protection under R.C. 2903.214. In any case, the omission of the term "only" was not outcome determinative of defendant's

convictions for violating the protection order and, therefore, could not constitute plain error. This assignment of error is overruled.

**{¶ 92}** "VIII. The trial court abused its discretion and committed reversible and/or plain error and violated the appellant's Ohio and United States Constitutional rights by permitting the State to ambush the appellant on the stand with a CD the appellant only heard for the first time [once] he was testifying on the stand."

**{¶ 93}** The State utilized State's ex. 16, a CD of defendant's telephone conversations from jail, to cross-examine witnesses during defendant's case-in-chief. Defendant complained that he was ambushed by the CD, which consisted exclusively of his own conversations. The State informed the court that there was nothing exculpatory to the defendant on the CD and that the State had only received the recorded conversations during trial. Although defendant alleged he had not heard the CD, defense counsel confirmed that he had heard the entire CD.

**{¶ 94}** "Crim.R. 16(E)(3) vests in the trial court the discretion to determine the appropriate response for failure of a party to disclose material subject to a valid discovery request." *State v. Wiles* (1991), 59 Ohio St.3d 71, 79, 571 N.E.2d 97.

**{¶ 95}** There is no evidence of a willful violation of Crim.R. 16 and the State represented it was not aware of the CD until trial, at which point it was disclosed to defense counsel. The CD was used to cross-examine appellant, who was a

participant in the conversations on the CD, and the CD itself was not admitted into evidence. Defendant has not advanced any arguments of how the State's use of the CD (containing his own conversations) to cross-examine him amounted to plain error in this case. This assignment of error is overruled.

**{¶ 96}** "IX. The trial court abused its discretion and committed reversible and/or plain error and violated the appellant's Ohio and United States Constitutional rights by permitting the State over the appellant's objection to use 'void prior criminal cases to enhance a pending criminal case.'"

**{¶ 97}** In this assignment of error, defendant vaguely contends that the trial court erred by introducing "void prior criminal cases to enhance this case on appeal, with prior cases that were void for either no PRC, R.C. §2967.28, and/or improper notification of PRC." Defendant contends that his convictions for Case Nos. CR-388833, CR-352526, and CR-449129 were "void prior criminal cases." Defendant cites to no place in the record, nor can we find one, that would support his allegation that these cases were "void" for any reason. Conversely, we note that some of the charges against defendant required proof of a history of violence and that the defense stipulated to various of defendant's prior convictions. This assignment of error is overruled.

**{¶ 98}** "X. The trial court abused its discretion and committed reversible and/or plain error and violated the appellant's Ohio and United States Constitutional rights by denying the appellant's use of civil discovery of production

of documents, requests for admissions, interrogatories, as a means to gather discovery in his criminal case."

**{¶ 99}** Crim.R. 16 governs the discovery process in criminal cases and therefore, this assignment of error that relies upon Ohio Rules that pertain to civil procedure is without merit and overruled.

**{¶ 100}** "XI. The trial court abused its discretion and committed reversible and/or plain error and violated the appellant's Ohio and United States Constitutional rights by not giving an anti-jury nullification jury instruction as the appellant requested."

**{¶ 101}** Prior to trial, defendant specifically asked the judge, "I would like to ask you not to give — not to give an anti-jury nullification * * *." In response, the judge informed defendant that standard jury instructions would be provided to each party, to which he would have an opportunity to object. Defendant now argues that the trial court erred by allegedly failing to give an anti-jury nullification instruction.

**{¶ 102}** Jury nullification occurs when the jurors disregard the instructions and arrive at a verdict based upon their collective conscience. See *Clev. Constr., Inc. v. Ohio Public Emps. Ret. Sys.*, Franklin App. No. 07AP-574, 2008-Ohio-1630, ¶38. An anti-jury nullification instruction would obviously provide for the opposite.

**{¶ 103}** The jury instructions given by the trial court in this case included the jury's "sworn duty to accept these instructions and apply the laws as I give it to

you. * * * [Y]ou are not permitted to change the law or to apply your own ideas of what you think the law ought to be." The trial court further instructed, "you must not be influenced * * * by any consideration of sympathy or prejudice. It is your duty to * * * apply the instructions of the court to your findings, and give your verdict accordingly * * *." This assignment of error is without merit and overruled.

**{¶ 104}** "XII. The trial court Judge Deena R. [Calabrese] abused her discretion and committed reversible and/or plain error and violated the appellant's Ohio and United States Constitutional rights and was [biased] and prejudiced and penalized the appellant for having [two] related criminal cases pending before the court and denied him bail and penalized the appellant with a [seven-year] sentence stating, 'I'm afraid of you [and] I am afraid of what you might do to me after what you did to the [two] judges, Judge Gaul and Judge Villanueva,' [based] on the [appellant] exposing these [two] other judges for fixing criminal cases and falsifying [court] records as a means to secure convictions [] of the [appellants] in a prior case, and in the criminal case of Jeffrey C. Keith, Esq., all subject to the county corruption probe [requiring] her to recuse [herself]."

**{¶ 105}** This assignment of error is without merit. A review of the sentencing transcript reflects an adequate consideration of the relevant law and supports the sentence imposed by the trial court. See R.C. 2929.11; *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470. Accordingly, this assignment of error is overruled.

**{¶ 106}** "XIII. The trial court abused its discretion and committed reversible and/or plain error and violated the appellant's Ohio and United States Constitutional rights [] in violation of [Evid.R. 404(B) and 403(A)] by not suppressing a [severely] prejudicial 'CD' from a case that was dismissed, a 'CD' that the trial court stated I never heard anything like that in my life, [except] in a movie."

**{¶ 107}** Defendant maintains that the trial court erred to his prejudice and in violation of Evid.R. 403(A) and 404(B) by admitting State's ex. 16 at trial. State's ex. 16 was used during cross-examination of defendant during defense counsel's case-in-chief and was not admitted into evidence. Defendant did not object under either provision at trial and we have already determined that the court did not err by permitting the State to cross-examine defendant with his prior statements. This assignment of error is overruled.

**{¶ 108}** "XIV. The appellant was denied the effective assistance of trial counsel in violation of the Ohio and United States Constitutions, [based] on [counsel's] failure to investigate, failure to object, failure to file motions to suppress."

**{¶ 109}** The substance of defendant's entire argument under this assignment of error is contained in a single sentence whereby defendant contends his counsel was ineffective for "failure to object, failure to investigate, failure to file motions, failure to procure discovery." Defendant's nebulous generalizations fail to establish a claim for ineffective assistance of counsel and

are generally contradicted by the record. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674. This assignment of error is overruled.

**{¶ 110}** "XV. The appellant is entitled to a new trial and/or reversal based on the cumulative effects of all issues [combined]."

**{¶ 111}** The Ohio Supreme Court defined the cumulative-error doctrine in *State v. Garner* (1995), 74 Ohio St.3d 49, 64, 656 N.E.2d 623. "Pursuant to this doctrine, a conviction will be reversed where the cumulative effect of errors in a trial deprives a defendant of the constitutional right to a fair trial even though each of numerous instances of trial court error does not individually constitute cause for reversal." See, also, *State v. DeMarco* (1987), 31 Ohio St.3d 191, 509 N.E.2d 1256. The cumulative-error doctrine does not apply in this case and therefore this assignment of error is overruled.

**{¶ 112}** "XVI. The trial court abused its discretion and committed reversible and/or plain error and violated the appellant's Ohio and United States Constitutional rights [when the] appellant was sentenced to allied offenses of [similar] import."

**{¶ 113}** Defendant has failed to identify, argue, or present any facts or law as to which of his convictions he believes constitute allied offenses of similar import. In any case, each of defendant's convictions are supported by evidence that would support a finding that defendant acted with a separate animus in committing each offense of conviction. This assignment of error is overruled.

**{¶ 114}** "XVII. The trial court abused its discretion and committed reversible and/or plain error and violated the appellant's Ohio and United States Constitutional rights by [trying] the defendant prior to him ever being judicially declared competent to stand trial."

**{¶ 115}** Defendant never raised the issue of his competency in this case. Rather, the trial court sua sponte addressed the issue of defendant's competence prior to commencing trial. In an unrelated proceeding, defendant was declared incompetent and later restored to competency, but this finding was not made part of the record in that case before the trial court accepted defendant's guilty plea. See *State v. McGrath*,Cuyahoga App. No. 91261, 2009-Ohio-1361. For that reason, McGrath's plea was vacated and the matter was remanded for further proceedings. Defendant now relies upon our decision in *McGrath* to support his argument under this assignment of error.

**{¶ 116}** Notably, when the trial court inquired of defendant whether he was taking his medication, he said, "I don't take medication. The whole thing was a ruse. * * * [T]here was no mental health issues. I just wouldn't talk." The trial court proceeded to question defendant to assess his understanding of the proceedings. The court reviewed various competency evaluations of defendant conducted on April 16, 2007 and September 18, 2007. The court noted the doctor's opinion in the later report that "defendant was suffering from no psychiatric disorders and he demonstrated no sign of a mental illness, he had an excellent understanding of the adversarial legal process * * *." The trial court

stated that following her conversation with defendant, she felt the same way. Defense counsel also indicated on the record that he had not had any difficulties communicating with defendant and that he had been very helpful as far as the defense. Defense counsel believed defendant was competent to stand trial, to which the trial court agreed. Defendant was never found incompetent to stand trial in this case, he never raised the issue, there is no evidence in this record that he was incompetent, and therefore, this assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellant its 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 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.

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JAMES J. SWEENEY, JUDGE

PATRICIA A. BLACKMON, J., CONCURS;
CHRISTINE T. McMONAGLE, P.J., CONCURS
IN JUDGMENT ONLY