**[Cite as *Lyndhurst v. Smith*, 2015-Ohio-2512.]**

# Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
**No. 101019**

## CITY OF LYNDHURST

PLAINTIFF-APPELLEE

vs.

## GREGORY M. SMITH

DEFENDANT-APPELLANT

**JUDGMENT:**
AFFIRMED

Criminal Appeal from the
Lyndhurst Municipal Court
Case No. 09 CRB 00420

**BEFORE:** Boyle, J., Keough, P.J., and E.A. Gallagher, J.

**RELEASED AND JOURNALIZED:** June 25, 2015

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MARY J. BOYLE, J.:

**{¶1}** Defendant-appellant, Gregory M. Smith, appeals his disorderly conduct convictions. He raises the following assignments of error for our review:

> 1. The trial court abused its discretion when it refused to bifurcate the trials.
>
> 2. The trial court abused its discretion in permitting impermissible [Evid.R.] 404(B) evidence.
>
> 3. The guilty verdicts concerning disorderly conduct were inconsistent and not based upon sufficient evidence.
>
> 4. The guilty verdicts are against the manifest weight of the evidence.

**{¶2}** Finding no merit to his appeal, we affirm.

Procedural History and Factual Background

**{¶3}** On June 1, 2009, in Lyndhurst M.C. No. 09 CRB 00420, Smith was charged with three counts of aggravated menacing against three victims (Latoyia and Terence Delaine and Kevin Michaels), in violation of Lyndhurst Codified Ordinance ("L.C.O.") 636.04(a). The offenses allegedly occurred on May 17, 2009.

**{¶4}** On April 23, 2010, in Lyndhurst M.C. No. 10 CRB 00271, Smith was charged with one count of violating a protection order against Michaels, which allegedly occurred on April 22, 2010.

**{¶5}** On May 26, 2010, the city moved to consolidate the two cases, which the trial court granted.

**{¶6}** A jury trial took place in April 2011. The jury found Smith not guilty of aggravated menacing against all three victims, but guilty of the lesser included offense of disorderly conduct, in violation of L.C.O. 648.04(a)(1). The jury also found Smith guilty of violating the protection order involving Michaels. Smith appealed. *See Lyndhurst v. Smith*, 8th Dist. Cuyahoga No. 97045, 2012-Ohio-2920. On June 28, 2012, this court reversed his convictions, finding that Smith did not receive a fair trial due to the cumulative error of "copious amounts of other acts testimony" being admitted and improper prosecutorial comments in opening statements and closing arguments. *Id.* at ¶ 35. The case was remanded to the trial court.

**{¶7}** Before the two cases proceeded to a second jury trial on the three counts of disorderly conduct and one count of violating a protection order, Smith moved to sever the two cases from each other, as well as from five new cases that Smith was charged with subsequent to this court releasing *Smith*.[1] The trial court granted his motion to sever in part and denied it in part. It severed the five cases that occurred in 2012 and 2013 from the two cases that occurred in 2009 and 2010, but it refused to sever the 2009 case from the 2010 case, namely, the cases at issue here. The 2009 and 2010 cases proceeded to a second jury trial on October 30, 2013, where the following facts were presented.

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[1] After this court released *Smith*, Lyndhurst charged Smith with five new cases involving only the Delaines for alleged events that took place on September 17, 2012, April 16, 2013, April 17, 2013, April 18, 2013, and August 15, 2013. These charges included one count of disorderly conduct and four counts of violating a protection order. For details about these cases see *Lyndhurst v. Smith*, 8th Dist. Cuyahoga No. 101134, 2015-Ohio-303.

**{¶8}** Latoyia Delaine testified that she and her husband, Terence Delaine, lived on Fairlawn Road in Lyndhurst, Ohio. Smith was her next-door neighbor. Kevin Michaels lived on the other side of Smith. Latoyia testified that on May 17, 2009, she and her husband and their oldest daughter, who was four years old at the time, had just gotten home from church and the grocery store. They pulled their car into their driveway and began getting groceries out of their car when they heard Smith "shouting" at them. Smith was in his front yard, near the Delaines' driveway. Latoyia testified that Smith said, "you're going to get yours soon." Smith then said, "you f******* pussy. I see you calling the police." Latoyia testified that Smith's wife also stated, "oh shut up and f*** off" as well.

**{¶9}** Latoyia said that she became "frightened" for herself and her daughter, so she took her daughter inside their house. Latoyia described Smith's tone as "very forceful" and "like rage."

**{¶10}** Latoyia further stated that she was frightened during the May 17, 2009 incident because of another incident that had occurred in 2008 when Terence and Smith had gotten into an altercation. Latoyia explained that in 2008, Terence came home from work and saw that Smith had raked his leaves onto the Delaines' driveway. Terence knocked on Smith's door, and asked him to stop raking leaves into their yard. Terence began walking home, and Smith followed him outside. Eventually, Latoyia saw Smith spit on Terence. Terence reacted by punching Smith in the eye.

**{¶11}** Terence Delaine testified that on May 17, 2009, he and his wife had just gotten home from the grocery store. They got out of their car and were taking the groceries out of the car when Smith "came out, looked over there, and called me a f****** pussy, you're a coward, I'll kick your a**, and just kept going on and on." Smith further "told us we had it coming, he was gonna kick our a**, and just kept going from there."

**{¶12}** Terence stated that Kevin Michaels, who lived on the other side of Smith, was across the street helping a neighbor put a roof on his home, heard the commotion and came over. Terence said that Smith began yelling at Michaels. Terence heard Smith tell Michaels "to mind his f****** business, he'll kick his a**, he had it coming, and it just went from there to the police [being] called."

**{¶13}** Terence said that the incident made him upset because Smith threatened his wife and he had a prior altercation with Smith in 2008. Terence explained that in 2008, he arrived home and saw a pile of leaves in his driveway. Terence said this was not the first time that it had happened. Terence walked over to Smith's house, knocked on his door, and talked to Smith about the leaves. Terence stated that he smelled alcohol on Smith's breath. Terence further testified that Smith was "real belligerent and aggressive." Terence left Smith's house and walked home. Smith followed Terrence, and the two exchanged words. Terence testified that he called Smith a bum and a loser because Smith did not have a job. Smith's wife, Kathy, got involved, telling Terence to stop saying "that stuff" to her husband. Terence stated that at some point, Smith

grabbed his shirt and spit at him. Terence "reacted back and punched" Smith in the face. Smith fell to the ground. Terence testified that he later learned that he broke Smith's bone in his orbital socket. Terence stated that Smith's wife, Kathy, fell to the ground too, but Terence said he never touched her.

**{¶14}** Terence and Latoyia signed written complaints against Smith regarding the May 2009 incident and obtained temporary protection orders ("TPO") against Smith as part of the criminal case.

**{¶15}** Kevin Michaels testified that he lived on the opposite side of Smith from where the Delaines lived. Michaels testified that on May 17, 2009, he was helping a neighbor put a roof on his shed. Michaels said that he was on the roof when he heard "high screaming and swearing." He jumped off the roof and ran to the front yard. Michaels saw Smith "screaming at the Delaines." Michaels heard Smith say that he was "going to kick their a****."

**{¶16}** Michaels testified that Smith turned and noticed that Michaels was standing there. Smith then began yelling at Michaels. Michaels testified that Smith said that "he was going to kick my a**, my wife's, and my pussy son's a**." Michaels said he felt threatened and angry. Michaels testified that Smith's wife was holding Smith back when Smith was saying these things to him. Michaels's wife called the police. Michaels signed a complaint against Smith and obtained a TPO against him as part of the criminal case. The TPO was marked as an exhibit.

**{¶17}** The TPO stated that Smith "shall not enter the residence, school, business, place of employment, or child care providers of the protected persons named in this order, including the buildings, grounds, and parking lots at those locations." The protection order further prohibited Smith from initiating contact or having any contact with the protected persons.

**{¶18}** Michaels explained that under the TPO, Smith was not supposed to come onto his property or communicate with him in any way. Michaels testified that on April 22, 2010, he was inside his house watching television. Michaels stated that his son's girlfriend parked her car in his driveway such that the end of her car was partially blocking the sidewalk. The police came to his house and told him that he needed to move the car. Michaels called his son and told him to tell his girlfriend that she needed to move her car off the sidewalk.

**{¶19}** After the police left, Michaels heard a "rapping on the window," and his dogs "went ballistic." Michaels stated that the knocking came from his "front left picture window." Michaels said that he "ran out the front door." Michaels saw Smith "[r]ight in the middle of my yard coming out from between the two trees" and he was "running out towards his yard." When Smith reached his own yard, he turned around and said, "Hey, a**hole." Michaels called police.

**{¶20}** Officer James Johnson of the Lyndhurst Police Department testified that he went to the Michaels' house two times on April 22, 2010. The first time, he told Michaels that he needed to move the car that was partially blocking the sidewalk. The

second time, Officer Johnson went when Michaels called about Smith knocking on his window. Officer Johnson said that when he knocked on Smith's door, Smith smelled of alcohol. Officer Johnson stated that Smith kept putting his hands in his pockets, so for officer safety, they patted him down. When police were patting Smith down, they found a box cutter in his right rear pocket. Smith told the officers that he used it to cut carpet. Officer Johnson testified that Smith's speech was slurred and he had bloodshot eyes. They arrested Smith and took Smith to the police station. Per police protocol, they administered a portable breath alcohol test; Smith tested .08.

**{¶21}** At the close of the city's case, Smith moved for a Crim.R. 29 acquittal, which the trial court denied.

**{¶22}** Smith presented two witnesses on his behalf: his wife, Kathy Burrows Smith, and his mother-in-law, Marianne Burrows. Kathy testified as to the November 2008 incident. She said that her husband was mowing grass, but could not finish it because Kathy needed to make a phone call and, therefore, Smith had to be with their kids. Kathy said that Terence was mad that there were grass clippings in his driveway. Smith tried to explain to Terence that he planned to finish the lawn, but did not have time at that moment. Kathy said that Terence was making "some really nasty comments to my husband about how he doesn't have a job and he doesn't own the house, and he was mooching off of me." Kathy said that Terence got very mad and she tried to step in between the two men and "the next thing [she] knew, [Terence's] arm hits [her]," and she went "flying to the ground."

**{¶23}** Regarding the 2009 incident, Kathy said that she and her husband were in their driveway when the Delaines pulled in their driveway. Kathy testified that Terence just stared at them, which made her really uncomfortable. Smith looked over at Terence and said, "stop staring at us." Smith also said to Terence, "if you have something to say, say something to me." Terence continued to stare at the Smiths. After that, Smith and Terence began to exchange words. At some point, Michaels showed up. Smith told him to mind his own business. Kathy further testified to an incident that occurred in April 2010. She stated that she was in Chicago for work at the time of the incident. She received a call from her mother that her husband had been arrested. She got in her car and drove home from Chicago at 10:30 p.m.

**{¶24}** Marianne Burrows testified that she watched the children on the evening of April 22, 2010, after Smith was arrested by police.

**{¶25}** At the close of all of the evidence, Smith moved for a Crim.R. 29 acquittal, which the trial court denied. Smith also moved for a mistrial based on other acts evidence that was admitted regarding the 2008 incident. The trial court denied Smith's motion for a mistrial.

**{¶26}** The jury found Smith guilty of disorderly conduct as to Terence and Michaels, but not guilty of disorderly conduct as to Latoyia. The jury also found Smith not guilty of violating the TPO.

**{¶27}** The trial court sentenced Smith to a fine of $250 for disorderly conduct against Terence Delaine, as well as 30 days in jail, suspended. The trial court also

sentenced Smith to a $250 fine, with $150 suspended, for the disorderly conduct against Michaels, as well as 30 days in jail, suspended. It is from this judgment that Smith appeals.

Bifurcation

**{¶28}** In his first assignment of error, Smith maintains that the trial court erred when it denied his motion to bifurcate the 2009 case involving the disorderly conduct charges from the 2010 case involving the violation of the TPO. He argues that the two cases occurred at different times, involved different charges, and the 2010 case did not involve the Delaines at all. Because of this, Smith maintains that the cases did not have a common scheme or plan, nor were they part of a course of criminal conduct, and therefore, the trial court should have bifurcated the cases.

**{¶29}** Crim.R. 8(A) permits the joinder of multiple charges against a defendant if the charges "are of the same or similar character, or are based on the same act or transaction, or are based on two or more acts or transactions connected together or constituting parts of a common scheme or plan, or are part of a course of criminal conduct." "It is well settled that the law favors joinder * * *." *State v. Waddy*, 63 Ohio St.3d 424, 429, 588 N.E.2d 819 (1992). Joinder is liberally permitted to conserve judicial resources, reduce the chance of incongruous results in successive trials, and diminish inconvenience to the witnesses. *State v. Schaim*, 65 Ohio St.3d 51, 58, 600 N.E.2d 661 (1992). Joinder of offenses solely because they are of the same or similar character creates a greater risk of prejudice to the defendant, while the benefits from

consolidation are reduced because "unrelated offenses normally involve different times, separate locations, and distinct sets of witnesses and victims." *Id*.

**{¶30}** "'A defendant claiming prejudice by the joinder of offenses may move for severance under Crim.R. 14.'" *State v. Bennett*, 9th Dist. Lorain No. 12CA010286, 2014-Ohio-160, ¶ 9, quoting *State v. Merriweather*, 9th Dist. Lorain No. 97CA006693, 1998 Ohio App. LEXIS 2021 (May 6, 1998). The defendant "'has the burden of making an affirmative showing that his rights will be prejudiced'" by joinder. *State v. Davis*, 9th Dist. Summit No. 26660, 2013-Ohio-5226, ¶ 40, quoting *State v. Roberts*, 62 Ohio St.2d 170, 175, 405 N.E.2d 247 (1980).

**{¶31}** When a defendant claims that he was prejudiced by the joinder of multiple offenses, a court must determine: (1) whether evidence of the other crimes would be admissible even if the counts were severed; and (2) if not, whether the evidence of each crime is simple and distinct. *Schaim* at 59, citing *State v. Hamblin*, 37 Ohio St.3d 153, 158-159, 524 N.E.2d 476 (1988).

> "If the evidence of other crimes would be admissible at separate trials, any 'prejudice that might result from the jury's hearing the evidence of the other crime in a joint trial would be no different from that possible in separate trials,' and a court need not inquire further."

*Id*., quoting *Drew v. United States*, 331 F.2d 85, 90 (D.C.Cir.1964).

**{¶32}** "'[A] defendant's failure to renew his or her Crim.R. 14 motion for severance at the close of the state's case or at the close of all evidence waives all but plain error on appeal.'" *State v. Howard*, 3d Dist. Marion No. 9-10-50, 2011-Ohio-3524, ¶ 82, citing *State v. Miller*, 105 Ohio App.3d 679, 691, 664 N.E.2d 1309 (4th Dist.1995).

"To demonstrate plain error, the defendant must demonstrate that the trial court deviated from a legal rule, the error was an obvious defect in the proceeding, and the error affected a substantial right." *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002). "The defendant must also demonstrate that the outcome of his trial would clearly have been different but for the trial court's errors." *State v. Waddell*, 75 Ohio St.3d 163, 166, 661 N.E.2d 1043 (1996). We recognize plain error "with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." *State v. Landrum*, 53 Ohio St.3d 107, 110, 559 N.E.2d 710 (1990). Smith did not renew his Crim.R. 14 motion at the close of the city's case. Accordingly, we review for plain error.

**{¶33}** In reviewing the evidence in this case, we find no prejudice to Smith. Even if the evidence of the other crimes would not have been admissible if the cases had been severed, we find that the evidence of each crime was simple and distinct. Each victim testified as to what occurred in 2009, and Michaels testified as to what occurred in 2010. The testimony of each victim was straight forward regarding the events. Indeed, the jury found Smith guilty of two of the 2009 disorderly conduct charges (against Terence and Michaels), but not guilty of one of the 2009 disorderly conduct charges (against Latoyia), and not guilty of the 2010 TPO violation involving Michaels. The jury's verdict demonstrates that they were able to separate the evidence of each crime and make a determination as to Smith's guilt regarding each crime. Thus, we find no error, plain or otherwise.

**{¶34}** Accordingly, Smith's first assignment of error has no merit and is overruled.

Evid.R. 404(B)

**{¶35}** In his second assignment of error, Smith argues that the trial court abused its discretion when it permitted the witnesses to discuss the 2008 incident that occurred between Smith and Terence. The witnesses testified that in 2008, Terence got angry with Smith because he believed that Smith raked leaves onto the Delaines' driveway. Terence and Smith exchanged words. The argument resulted in Smith spitting on Terence, and in return, Terence punched Smith in the face, breaking Smith's orbital socket. Smith claims that this evidence unduly prejudiced him.

**{¶36}** "'The admission of [other-acts] evidence lies within the broad discretion of the trial court, and a reviewing court should not disturb evidentiary decisions in the absence of an abuse of discretion that created material prejudice.'" *State v. Morris*, 132 Ohio St.3d 337, 2012-Ohio-2407, 972 N.E.2d 528, quoting *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 66.

**{¶37}** "'Evidence that an accused committed a crime other than the one for which he is on trial is not admissible when its sole purpose is to show the accused's propensity or inclination to commit crime or that he acted in conformity with bad character.'" *State v. Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, ¶ 15, citing *State v. Curry*, 43 Ohio St.2d 66, 68, 330 N.E.2d 720 (1975).

**{¶38}** Evid.R. 404(B) provides that

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It

> may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. In criminal cases, the proponent of evidence to be offered under this rule shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

**{¶39}** Evid.R. 404(B) "affords the trial court discretion to admit evidence of other crimes, wrongs, or acts for 'other purposes,' including, but not limited to, those set forth in the rule. Hence, the rule affords broad discretion to the trial judge regarding the admission of other acts evidence." *Williams* at ¶ 17.

**{¶40}** In determining whether to permit other-acts evidence to be admitted, trial courts should conduct a three-step analysis set forth in *Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, at ¶ 20: (1) determine if the other-acts evidence "is relevant to making any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence" under Evid.R. 401; (2) determine if the other acts "is presented to prove the character of the accused in order to show activity in conformity therewith or whether the other acts evidence is presented for a legitimate purpose, such as those stated in Evid.R. 404(B)"; and (3) consider "whether the probative value of the other acts evidence is substantially outweighed by the danger of unfair prejudice."

**{¶41}** To prove disorderly conduct, the city had to establish that Smith recklessly caused inconvenience, annoyance, or alarm to the alleged victims by "engaging in fighting, in threatening harm to persons or property, or in violent or turbulent behavior." At least with regard to the Delaines, it is more probable that because of the events of

2008, the Delaines were — at a minimum — alarmed by Smith's threats on May 17, 2009, that "you're going to get yours soon" and that he would kick Terence's "a**." Thus, the first step of the *Williams* test is satisfied.

**{¶42}** Under the second part of the *Williams* test, we agree with the city that evidence of the past incident was relevant to establishing that Smith had motive to act as he did toward the Delaines because Terence had previously punched him in the face, breaking his orbital bone. Accordingly, the second prong of the *Williams* test is met.

**{¶43}** Moreover, in *Smith*, 8th Dist. Cuyahoga No. 97045, 2012-Ohio-2920, involving the first trial on these issues, the trial court permitted evidence to be admitted that Smith had reportedly beat up a man in Lakewood. The city argued in *Smith* that "the Delaines and [Michaels] could properly testify that defendant 'got away with it before,' in order to establish their reasonable fear that he would cause them physical harm." *Id.* at 33. This court disagreed, stating "[s]uch evidence may be relevant where it involves that victim," but where "the evidence does not involve the same individuals," the evidence "reaches the essence of the Evid.R. 404(B) prohibition because it relies on the very inferential pattern that 'he did it before, so he must have done it again.'" *Id.* In the present case, however, the past incident in 2008 involved the same individuals —Terence, Latoyia, and Smith. This evidence was relevant to establishing that Terence and Latoyia were inconvenienced, annoyed, or alarmed by Smith threatening harm to them.

**{¶44}** Regarding the third prong of the *Williams* test, we do not find that "the probative value of the other acts evidence" was "substantially outweighed by the danger of unfair prejudice." *Williams*, 134 Ohio St.3d 521, 2012-Ohio-5695, 983 N.E.2d 1278, at ¶ 20. Indeed, in the 2008 incident, one could argue that Terence looked just as "bad" as Smith. Terence is the one who marched over to Smith's house, and accused him of raking leaves onto his driveway, and ultimately punched Smith in the face and broke his orbital socket. Accordingly, we do not find Smith's act of spitting on Terence so prejudicial to Smith that without that evidence, the outcome of his trial would have been different.

**{¶45}** Further, the other-acts evidence admitted in this trial was not like the first trial, which this court reversed because of the "copious amounts of other-acts testimony." *Smith* at ¶ 29. In the first trial, the trial court permitted other-acts evidence of Smith allegedly beating up a man in Lakewood, having a "tendency" to be a child molester, putting dead animals in the Delaines' yard, the Delaines' daughter coming home screaming and crying from Smith's house because something "was not right," and Terence consuming a lot of drugs and alcohol. *Id.* at ¶ 29 - 30. We concluded on appeal that "the record display[ed] an overwhelming amount of other-acts evidence" that portrayed Smith as "a bad man who deserves to be punished." *Id.* at ¶ 32. That is simply not the case here.

**{¶46}** Smith's second assignment of error is overruled.

Inconsistent Verdicts

**{¶47}** In his third assignment of error, Smith argues in part that because the jury found him not guilty of disorderly conduct against Latoyia, but guilty of disorderly conduct against Terence and Michaels for the exact same conduct, that the verdicts were inconsistent and should be set aside.

**{¶48}** Courts have held that consistency between verdicts on separate counts of an indictment is unnecessary. *State v. Thomas*, 9th Dist. Summit Nos. 22990 and 22991, 2006-Ohio-4241, ¶ 15. In *United States v. Powell*, 469 U.S. 57, 65, 105 S.Ct. 471, 83 L.Ed.2d 461 (1984), the United States Supreme Court explained that:

> [I]nconsistent verdicts — even verdicts that acquit on a predicate offense while convicting on the compound offense — should not necessarily be interpreted as a windfall to the government at the defendant's expense. It is equally possible that the jury, convinced of guilt, properly reached its conclusion on the compound offense, and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense.

**{¶49}** The Ohio Supreme Court has reiterated this principle, explaining that "a verdict that convicts a defendant of one crime and acquits him of another, when the first crime requires proof of the second, may not be disturbed merely because the two findings are irreconcilable." *State v. Gardner*, 118 Ohio St.3d 420, 2008-Ohio-2787, 889 N.E.2d 995, ¶ 81. Therefore, a "conviction will generally be upheld irrespective of its rational incompatibility with [an] acquittal [on a separate count]." *State v. Whitlock*, 9th Dist. Summit No. 16997, 1995 Ohio App. LEXIS 3820, *2 (Aug. 30, 1995); *see also Dunn v. United States*, 284 U.S. 390, 393, 52 S.Ct. 189, 76 L.Ed. 356 (1932); *Powell* at 65.

**{¶50}** After reviewing the law on inconsistent verdicts, it is clear that there is no "cognizable error," as Smith contends. Smith was convicted of two counts of disorderly

conduct against two separate victims, but not against a third victim. These were separate charges in the complaint against Smith. As we stated, consistency between verdicts on separate counts is unnecessary.

**{¶51}** Thus, Smith's third assignment of error regarding inconsistent verdicts is without merit and overruled.

Sufficiency of the Evidence

**{¶52}** Also in his third assignment of error, Smith asserts that the city failed to present sufficient evidence that he committed disorderly conduct against Terence and Michaels.

**{¶53}** "'[S]ufficiency' is a term of art meaning that legal standard which is applied to determine whether the case may go to the jury or whether the evidence is legally sufficient to support the jury verdict as a matter of law." *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997), citing *Black's Law Dictionary* 1433 (6th Ed.1990). When an appellate court reviews a record upon a sufficiency challenge, "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.

**{¶54}** Again, to prove disorderly conduct, the city had to establish that Smith recklessly caused inconvenience, annoyance, or alarm to Terence and Michaels by

"engaging in fighting, in threatening harm to persons or property, or in violent or turbulent behavior." L.C.O. 648.04(a)(1).

**{¶55}** R.C. 2901.22(C) defines the culpable mental states of recklessly, and provides that "[a] person acts recklessly when, with heedless indifference to the consequences, he perversely disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature."

**{¶56}** The Ohio Supreme Court has determined that disorderly conduct under R.C. 2917.11(A)(1) (which is identical to the disorderly conduct at issue here) contains a component that does not concern the prohibition of speech or expression. *State v. Reeder*, 18 Ohio St. 3d 25, 26, 479 N.E.2d 280 (1985). Rather, this section of disorderly conduct contains elements prohibiting behavior. *Id.*

**{¶57}** Terence testified that Smith called him "a f****** pussy" and a "coward" and threatened Terence that he would "kick [his] a**." Terence further testified that Smith "told us we had it coming." Terence said that the incident made him upset.

**{¶58}** Michaels testified that Smith said that "he was going to kick my a**, my wife's, and my pussy son's a**." Michaels said he felt threatened and angry.

**{¶59}** Smith argues that this evidence, which only established that a verbal argument occurred, does not rise to the level of criminal conduct. We disagree. The elements of disorderly conduct under L.C.O. 648.04(a)(1) can be established from verbal threats of harm to persons, which is what occurred here. The basis for the charge against appellant went well beyond his profane language. After review, we find that

Terence's and Michaels's testimonies were sufficient, if believed, to establish the elements of disorderly conduct.

**{¶60}** Accordingly, Smith's third assignment of error is overruled in its entirety.

Manifest Weight of the Evidence

**{¶61}** In his fourth assignment of error, Smith argues that his convictions were against the manifest weight of the evidence.

**{¶62}** Unlike sufficiency of the evidence, a challenge to the manifest weight of the evidence attacks the credibility of the evidence presented. *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541. Because it is a broader review, a reviewing court may determine that a judgment of a trial court is sustained by sufficient evidence, but nevertheless conclude that the judgment is against the weight of the evidence. *Id*., citing *State v. Robinson*, 162 Ohio St. 486, 487, 124 N.E.2d 148 (1955).

**{¶63}** In determining whether a conviction is against the manifest weight of the evidence, the court of appeals functions as a "thirteenth juror." *Id.* In doing so, it must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "'whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.'" *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). Reversing a conviction as being against the manifest weight of the evidence and ordering a new trial

should be reserved for only in the '"exceptional case in which the evidence weighs heavily against the conviction."' *Id.*

**{¶64}** After review, it is clear that the jury believed the testimony of Terence and Michaels over that of Smith's witnesses, as it was free to do. Although an appellate court must act as a "thirteenth juror" when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the factfinder's determination of the witnesses' credibility. *In re S.H.*, 8th Dist. Cuyahoga No. 100529, 2014-Ohio-2770, ¶ 27, citing *State v. Chandler*, 10th Dist. Franklin No. 05AP-415, 2006-Ohio-2070, ¶ 9. Further, the trier of fact is free to believe or disbelieve all or any of a witness's testimony. *State v. Montgomery*, 8th Dist. Cuyahoga No. 95700, 2011-Ohio-3259, ¶ 10.

**{¶65}** Accordingly, we cannot say that the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.

**{¶66}** The fourth assignment of error is overruled.

**{¶67}** Judgment affirmed.

It is ordered that appellee recover from appellant the 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 Lyndhurst Municipal Court to carry this judgment into execution. The defendant's convictions

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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MARY J. BOYLE, JUDGE

KATHLEEN ANN KEOUGH, P.J., and
EILEEN A. GALLAGHER, J., CONCUR