[Cite as *State v. Armstrong*, 2009-Ohio-5941.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO Appellee v. NYLE A. ARMSTRONG Appellant	C.A. No. 24479 APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CR 08 06 2045

DECISION AND JOURNAL ENTRY

Dated: November 10, 2009

BELFANCE, Judge.

{¶1} Defendant-Appellant Nyle A. Armstrong appeals the decision of the Summit County Court of Common Pleas. For reasons set forth below, we affirm in part and reverse in part.

I.

{¶2} In early 2008, Armstrong and Marissa Covington began a relationship. Covington resides in an apartment complex and claims that Armstrong never lived with her, nor did he have a key to her apartment. Armstrong alleges that he lived with Covington from late February up until June 10, 2008. In April 2008, Covington alleges that Armstrong began stalking and harassing her, and she therefore told him that she wanted to end the relationship. This upset Armstrong. Armstrong allegedly threatened to throw Covington off a balcony and called her saying he was going to kick in her door. When Covington returned home from work, her door was kicked in.

{¶3} On June 10, 2008, Covington came home from work and began to cook dinner. Her door was unlocked and at some point, Armstrong came in, allegedly held a gun to her head and threatened to kill her. Covington fled the apartment, called the police, and subsequently Armstrong left the apartment as well. Upon returning to her apartment, Covington discovered her purse was missing. Armstrong called Covington while the police were at the apartment and allegedly asked Covington why she called the police on him. Covington denied calling the police so that Armstrong would leave her alone. A complaint was filed against Armstrong that night.

{¶4} On June 20, 2008, Armstrong called Covington around two in the morning and told her that he was coming over and if she did not open the door, it would not be a "pretty nice sight." Armstrong arrived at the apartment and began knocking on the door. Covington called 911 and reported that Armstrong had a gun with him. Officers investigating the incident came across Armstrong in the vicinity of the apartments. Armstrong gave officers a false name.

{¶5} Armstrong was initially charged with aggravated burglary with a firearm specification related to the June 10th incident, having weapons while under disability, also related to the June 10th incident, aggravated menacing concerning the June 10th incident, and falsification concerning the June 20th incident. Subsequently, a supplement to the indictment was filed and attempted burglary and intimidation of a crime victim or witness charges were added concerning the events of June 20th. A jury found Armstrong guilty of aggravated burglary with the firearm specification, having weapons while under disability, aggravated menacing, falsification, and intimidation of a crime victim or witness and not guilty of attempted burglary.

{¶6} Armstrong has appealed, raising three assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

> "THE TRIAL COURT ERRED AS A MATTER OF LAW AND PREJUDICED THE JURY IN ITS INSTRUCTION TO THE JURY ON AGGRAVATED ROBBERY [SIC], AND THE ISSUE OF PRIVILEGE AND TRESPASS RELATING TO AGGRAVATED ROBBERY [SIC]."

{¶7} Armstrong takes issue with the following portion of the aggravated burglary instruction:

> "Now, folks, heads up here. Even if you assume that the defendant's initial entry into the apartment in question was lawful, you may infer that the privilege to remain in the home terminated if the defendant threatened Marissa Covington resulting in a trespass."

Armstrong argues that the instruction requires the jury to improperly conclude that a trespass immediately resulted if it found that Armstrong threatened Covington, especially given the conflicting nature of the testimony concerning whether Armstrong was living with Covington at the time of the incident. Armstrong also argues that the trial court erred by placing undue emphasis on this paragraph with the statement "Now, folks, heads up here." Armstrong argues that the paragraph negates the presumption of innocence. Finally, Armstrong argues that the trial court failed elsewhere in the instructions to specify what criminal offense was the basis for the aggravated burglary charge.

{¶8} While Armstrong did object to the aggravated burglary instruction, his objection in the trial court only concerned the issues of trespass and privilege. With respect to jury instructions, we have stated that "forfeiture is a failure to preserve an objection * * * [and] does not extinguish a claim of plain error under Crim.R. 52(B). [Nonetheless,] this Court will not construct a claim of plain error on a defendant's behalf if the defendant fails to argue plain error on appeal." (Internal quotations and citations omitted.) *State v. Arnold*, 9th Dist. No. 24400,

2009-Ohio-2108, at ¶8. As Armstrong has not argued plain error on appeal, all of Armstrong's arguments except for the one concerning privilege and trespass are overruled.

{¶9} "A trial court must charge a jury with instructions that are a correct and complete statement of the law." *State v. Kewer*, 9th Dist. No. 07CA009128, 2007-Ohio-7047, at ¶5, citing *Marshall v. Gibson* (1985), 19 Ohio St.3d 10, 12.

> "'[A]n appellate court reviews the instructions as a whole. If, taken in their entirety, the instructions fairly and correctly state the law applicable to the evidence presented at trial, reversible error will not be found merely on the possibility that the jury may have been misled. Moreover, misstatements and ambiguity in a portion of the instructions will not constitute reversible error unless the instructions are so misleading that they prejudicially affect a substantial right of the complaining party.'" (Internal citations omitted.) *Kewer* at ¶5, quoting *Wozniak v. Wozniak* (1993), 90 Ohio App.3d 400, 410.

Thus, we will affirm the trial court's instructions absent an abuse of discretion, which implies that the trial court's attitude was arbitrary, unreasonable, or unconscionable. *Kewer* at ¶5, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219.

{¶10} The court's aggravated burglary instruction provides:

> "Before you can find the defendant, Nyle Armstrong, guilty of this offense you must find beyond a reasonable doubt that on or about the 10th day of June, 2008, and in Summit County, Ohio, the defendant did commit the crime of aggravated burglary in that he did, by force, stealth, or deception, trespass in an occupied structure * * * when another person was present, with purpose to commit in said structure a criminal offense, and the defendant recklessly inflicted, threatened, or attempted to inflict physical harm on Marissa Covington, or the defendant had a deadly weapon or dangerous ordnance; to-wit: a gun, on or about his person or under his control.
>
> "*Now, folks, heads up here. Even if you assume that the defendant's initial entry into the apartment in question was lawful, you may infer that the privilege to remain in the home terminated if the defendant threatened Marissa Covington resulting in a trespass.*"
>
> "Further, the defendant may form the purpose to commit a criminal offense, as required for a finding of guilty on the charge of aggravated burglary, at any point during the trespass."

The court then defined, force, stealth, deception, trespass, knowingly, occupied structure, purposely, recklessly, attempt, physical harm, and deadly weapon. The court concluded the instruction with "If, on the other hand, you find the State failed to prove any one of the essential elements of the offense of aggravated burglary, then you will find the defendant not guilty."

{¶11} As noted above, Armstrong takes issue with the italicized paragraph. The basis for this type of jury instruction originates from the case *State v. Steffen* (1987), 31 Ohio St.3d 111. *Steffen* involved the rape and murder of a nineteen year-old woman who was living in her parents' home. Id. at 112. The defendant, a door-to-door salesman, came to the victim's parents' home to sell cleaning supplies. Id. The victim allegedly allowed the defendant to enter the home and was subsequently raped and murdered. Id. As the victim was killed during the attack, there was no evidence indicating whether or not the defendant's entry was or was not initially privileged. The defendant argued that "the trial court erred in instructing the jury that one who lawfully enters premises becomes a trespasser subject to conviction for burglary by virtue of the commission of a felony on the premises." Id. at 114. The Court found the trial court's instruction proper and noted that "the jury was justified in inferring from the evidence that appellant's privilege to remain in [the victim's] parents' home terminated the moment he commenced his assault on her." Id. at 115.

{¶12} Here, on June 10, 2008, Covington stated that Armstrong entered her apartment, walked up to her, put a gun to her head, and threatened to kill her. Covington also testified that Armstrong did not live there, did not have a key, and was not allowed to be there when Covington was not present. Armstrong alleged that he was living with Covington, that he followed her into the apartment, and that he only threatened to kill her after she pulled a knife on him. Armstrong denied having a weapon.

{¶13} One of the fundamental flaws with the portion of the instruction at issue is that it extends the holding of *Steffen* beyond its facts and beyond the language of the Ohio Jury Instructions. While the instructions found in the Ohio Jury Instructions are not mandatory, they "are recommended instructions based primarily upon case law and statutes[.]" *Buehler v. Falor* (Jan. 30, 2002), 9th Dist. No. 20673, at *1, quoting *State v. Martens* (1993), 90 Ohio App.3d 338, 343. One of the comments to the Ohio Jury Instructions instruction on aggravated burglary provides appropriate language if it is determined that a *Steffen* instruction is warranted; it states: "Where a defendant lawfully entered a residential premises, the privilege to be in or upon those premises can be inferred to have been revoked where the defendant thereafter committed a *violent felony* directed against another person in the premises who had the ability and authority to revoke the privilege." (Emphasis added.) 4 Ohio Jury Instructions (2004), Section 511.11, at 386. The instruction in the instant case is not even a close approximation of the Ohio Jury Instructions' proposed language. As the instruction at issue indicates that any sort of threat made against Covington is sufficient to transform a privileged entry into a trespass, we cannot conclude that such is a proper extension of *Steffen*. Unlike *Steffen*, here there was no allegation that Armstrong committed a violent felony upon Covington. Thus, it is highly questionable whether any *Steffen*-type instruction was appropriate at all.

{¶14} We presume the jury followed the instruction at issue, see, e.g, *Pang v. Minch* (1990), 53 Ohio St.3d 186, paragraph four of the syllabus, and thus because the court's instruction was inaccurate, misleading and prejudicial, we sustain Armstrong's assignment of error. See, e.g., *State v. Kincaid*, 9th Dist. No. 01CA007947, 2002-Ohio-6116, at ¶33.

III.

ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED AS A MATTER OF LAW AND ABUSED ITS DISCRETION TO THE PREJUDICE OF APPELLANT BY DENYING HIM THE OPPORTUNITY TO IMPEACH THE ALLEGED VICTIM BY PRIOR INCONSISTENT STATEMENTS."

{¶15} Our resolution of Armstrong's first assignment of error renders this assignment of error moot.

IV.

ASSIGNMENT OF ERROR III

"ARMSTRONG'S CONVICTION FOR INTIMIDATION OF A CRIME VICTIM OR WITNESS WAS BASED UPON INSUFFICIENT EVIDENCE AS A MATTER OF LAW."

{¶16} When assessing the sufficiency of the evidence, this Court examines the evidence "'to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt.'" *State v. Flynn*, 9th Dist. No. 06CA0096-M, 2007-Ohio-6210, at ¶8, quoting *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus. In reviewing challenges to sufficiency, we must view the evidence in a light most favorable to the prosecution. *State v. Cepec*, 9th Dist. No. 04CA0075-M, 2005-Ohio-2395, at ¶5, citing *Jenks*, 61 Ohio St.3d at 279.

{¶17} Armstrong was convicted of intimidation of a crime victim under R.C. 2921.04(B), a felony of the third degree. R.C. 2921.04(B) provides that "[n]o person, knowingly and by force or by unlawful threat of harm to any person or property, shall attempt to influence, intimidate, or hinder the victim of a crime in the filing or prosecution of criminal charges or an attorney or witness involved in a criminal action or proceeding in the discharge of the duties of

the attorney or witness." Armstrong argues that the State failed to prove the element of unlawful threat of harm found in the statute.

{¶18} The intimidation of a crime victim charge arose from the events of June 20th. In the early morning hours, Armstrong called Covington and told her that "he was going to come by [Covington's] apartment and if [she] didn't open the door it wasn't going to be a pretty nice sight." Armstrong then came to Covington's apartment and began knocking loudly on the door. Covington called 911 and informed the operator that Armstrong had a gun, which she saw him place in his back pocket as he was walking away.

{¶19} The Supreme Court of Ohio analyzed the meaning of "unlawful threat of harm" in R.C. 2921.04(B) in *State v. Cress*, 112 Ohio St.3d 72, 2006-Ohio-6501. The Court began by comparing the language of R.C. 2921.04(A) with that of R.C. 2921.04(B) and noted that "the statute distinguishes between felony witness intimidation and misdemeanor witness intimidation by the presence of an unlawful threat of harm." Id. at ¶35. The Court went on to recognize that "[b]oth R.C. 2921.04(A) and (B) prohibit knowing attempts to intimidate a witness[,]" id. at ¶39, and concluded that there was no meaningful difference between threatening a witness and intimidating a witness. Id. at ¶40. Therefore, the Court reasoned that "[a]n *unlawful* threat must accordingly connote more than just a threat, i.e., more than just a communication to a person that particular negative consequences will follow should the person not act as the communicator demands." (Emphasis in original.) Id. at ¶41. The Court held that "the statutory language in R.C. 2921.04(B), proscribing intimidation by an 'unlawful threat of harm,' is satisfied only when the very making of the threat is itself unlawful because it violates established criminal or civil law." Id. at ¶42. In order to meet its burden in a R.C. 2921.04(B) prosecution, the State must

introduce evidence that the unlawful threat of harm also constituted a predicate offense, such as coercion. See id. at ¶¶42-43.

{¶20} Armstrong argues that the State failed to prove that the unlawful threat also constituted a predicate offense as required by *Cress*. We disagree.

{¶21} Viewing the evidence in a light most favorable to the State, Armstrong called Covington and told her that "he was going to come to [her] apartment and if [she] didn't open the door it wasn't going to be a pretty nice sight." Within hours, Armstrong was loudly knocking on Covington's door with a gun visibly in his possession. This testimony could clearly be viewed as evidence of a threat of harm by Armstrong against Covington. Further, R.C. 2903.21(A), the aggravated menacing statute provides that "[n]o person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of the other person * * * ." A violation of R.C. 2903.21(A) is generally a first-degree misdemeanor. R.C.2903.21(B). We believe that the threat could also be found by the jury to constitute a violation of R.C. 2903.21(A) and as such the State met its burden in proving the element of unlawful threat of harm. As noted by the Eleventh District, "the [C]ourt [in *Cress*] did not hold that the 'predicate offense' must be identified in the indictment or otherwise specified by the [S]tate." *State v. Ott*, 11th Dist. No. 2007-P-0093, 2008-Ohio-4049, at ¶26. As Armstrong has only challenged the element of unlawful threat of harm on appeal, we determine Armstrong's assignment of error is without merit.

V.

{¶22} In light of the foregoing, we affirm in part and reverse in part the judgment of the Summit County Court of Common Pleas and remand the matter for proceedings consistent with this opinion.

Judgment affirmed in part,
reversed in part,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed equally to both parties.

EVE V. BELFANCE
FOR THE COURT

MOORE, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

NICHOLAS SWYRYDENKO, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.