[Cite as *State v. Rowbotham*, 2022-Ohio-926.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

DAVID ROWBOTHAM,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0066

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 19 CR 0154

BEFORE:
Cheryl L. Waite, Carol Ann Robb, Judges and Cynthia Westcott Rice,
Judge of the Eleventh District Court of Appeals, Sitting by Assignment.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor and *Atty. Ralph M. Rivera*, Assistant Chief Prosecuting Attorney, Criminal Division, *Atty. Edward A. Czopur*, Assistant Mahoning County Prosecutor, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee

Atty. John B. Juhasz, 7081 West Boulevard, Suite No. 4, Youngstown, Ohio 44512-4362, for Defendant-Appellant.

Dated: February 15, 2022

WAITE, J.

{¶1} Appellant David P. Rowbotham appeals a May 24, 2019 Mahoning County Court of Common Pleas judgment entry convicting him on two counts of menacing by stalking. Appellant argues that the menacing by stalking statute is unconstitutionally vague and overly broad as applied to this case. For those reasons, Appellant argues that his convictions violate the First Amendment. He additionally argues that his trial counsel was ineffective for failing to file a motion to dismiss his indictment on First Amendment grounds. In the event that this Court disagrees, Appellant argues that his convictions are not supported by sufficient evidence and are against the manifest weight of the evidence. Appellant argues that if his convictions are vacated for either reason, they cannot serve as the basis for his probation violation in an unrelated case. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Factual and Procedural History

{¶2} Appellant is the father of B.R. ("Son.") At the time of the incident, Son was a senior at Lowellville High School. M.B. is a math tutor at the elementary school ("Tutor.") The elementary school and the high school are in separate wings of the same building. E.T. is the superintendent of Lowellville Schools ("Superintendent.")

{¶3} Just before winter break, Tutor was asked to substitute for a high school study hall. During the study hall, a male student asked Tutor if she "made out" with girls.

Tutor testified that she did not know which boy asked the question, however, all parties now agree that it was not Son. Tutor testified that she laughed in response and asked a group of three male students, including Son, if they had girlfriends. Son replied that he did not. Another boy stated that he had a girlfriend who lived in Aurora. Tutor responded "it's a far way away. Do you really trust that?" (Trial Tr., p. 311.) The third boy responded that he had a girlfriend who was twenty years old and Tutor responded that the girl must be a loser. All parties seem to agree that this exchange did, in fact, take place.

{¶4} Tutor apparently told a colleague about the conversation and was advised to inform the principal. Tutor testified that she did not believe that she said or did anything wrong when engaging in this conversation with the boys. Tutor was not formally disciplined for this incident, but was advised to be careful conversing with students because certain conversations can be interpreted in several ways by students. However, for initiating this communication with their provocative question, Son and the other boys each received a four-hour detention to be served on a Saturday.

{¶5} Son informed Appellant of his detention and explained how the incident occurred. Appellant contacted the school and had an in-person meeting with the principal. During the meeting, Appellant contends he requested a "stay" of Son's detention to allow him to investigate the situation. Appellant's stance was that Tutor's participation in the conversation was inappropriate, and he was concerned that she was "grooming" the boys. According to Appellant, the stay was originally granted, but revoked when officials at the school learned that he planned to discuss the incident and Tutor's involvement with law enforcement. Superintendent disagrees a "stay" was granted but acknowledges that the boys thought that their punishment was undeserved. School

officials allowed Son to apologize and his detention was reduced to two hours, which he apparently served.

{¶6} On January 9, 2019, Appellant filed a police report with the Lowellville Police Department. Appellant alleged that school officials abused their authority and forced Son to delete content from his cellphone. In this complaint, Appellant included the (unlisted) address of Superintendent. A separate page of the report addresses the incident involving Tutor. Appellant accused Tutor of several improprieties. He alleged that she called Son "crocs with socks" in front of a group of students, subjecting him to ridicule. He alleged that she ridiculed other students in front of their peers. Appellant also alleged that Tutor's interactions with Son and the other boys during their study hall should be investigated for possible criminal charges. Appellant complained that Tutor inappropriately asked the boys if they had girlfriends and commented on those relationships. Although it was unclear who originally asked Tutor whether she "made out" with girls, each of the three boys were given detention. Appellant complained that Son should not have been punished, as he claimed it was Tutor who initiated the personal questions. Appellant included the name of fifteen students he alleges overheard the conversation between the boys and Tutor

{¶7} Because Appellant was dissatisfied with the outcome of his meeting with school officials, and likewise dissatisfied with the failure of the police to investigate his claims, he began to use social media in an attempt to force some investigation of Tutor. At the outset, we note that the only social media posts in this record are the exhibits provided by the state. These exhibits include several videos of Appellant's Facebook and YouTube posts. While it is clear the trial court viewed these videos during the bench trial

in this matter, on review either these videos are corrupted and cannot be played or play only intermittently and only certain portions. As Appellant was self-represented in the trial court, it is not entirely clear either from direct or cross-examination of any witness, including Appellant himself, as to the full content of these videos. Hence, we are somewhat hampered on review of this matter. It is clear that Appellant does not dispute the content of the videos or that he posted them to his social media accounts.

{¶8} Appellant's first social media posts pertaining to the incident occurred on January 9, 2019. On that date, Appellant posted at least four times on his Facebook account. The first post occurred at 7:33 a.m. Appellant complained that the principal had taken Son's phone and "forced" him to delete content from the phone. (Exh. 1.) Approximately an hour and a half later, Appellant went "live" on Facebook. The full content of this activity is unknown, however, we can glean that Appellant was complaining about Tutor and her behavior and a photo of her and her fiancé was contained within the "live" post. (Exh. 2.)

{¶9} About twenty minutes later, Appellant again went "live" on Facebook. It is unclear exactly what Appellant discussed in his live stream, however, a news article is posted with the stream that has the headline "Former teacher gets 3 years for having sex with 14-year-old student." (Exh. 3.) According to the state, the article regards a separate incident that occurred at Mathews High School, which is part of a different school system in the general area. Appellant was apparently using this incident and comparing it to Tutor's behavior. Appellant's next post corrected the name of the officer who allegedly required that Son remove content from his phone. (Exh. 4.) Appellant's final post of the day is somewhat confusing, as it shows a google search of "[Tutor] YSU." (Exh. 5.) The

caption on the photograph questions why a public page was deleted from the site, however, it is unclear to what site he is referring. In this post Appellant again takes issue that no criminal charges were filed over the study hall incident, as "almost a hundred people" had contacted him regarding the situation and were allegedly outraged by Tutor's conversation with the boys.

{¶10} The next morning, Appellant again went "live" on Facebook. There is a caption stating "[t]he intelligence of this man. Lol. We need to get in touch with the village idiot. Would have a more intelligent conversation." (Exh. 6.) It is unclear to whom Appellant is referring, however, Lowellville Police Chief Alli believed it was him. Appellant had recorded telephone conversations with the Chief and posted them to his various social media accounts, angry that the police had not investigated Tutor. The video appears to have been viewed 209 times at the time the screenshot was taken. The next exhibit shows a comment on an apparently "live" post where Appellant contends that a teacher used inappropriate language and discussed personal matters with high school students and should be criminally investigated. Appellant claimed that an investigation of the incident involving his son's cell phone had begun as well. (Exh. 7.)

{¶11} The next social media activity involved two Facebook posts on the morning of January 14, 2019. The first post is another "live" stream. (Exh. 8.) Again, it is unclear what Appellant actually said on the stream but a caption indicates that it is a recording of a phone call. In the caption, Appellant again takes issue with the lack of criminal investigation, presumably as to the incident involving Tutor and the study hall. The second post, about an hour later, is the only post where Appellant "tags" another page. (Exh. 9.) Here, he "tagged" Lowellville Schools. He stated that he would not "unfriend"

the page despite its failure to discipline Tutor for her "misconduct." In his lengthy post, Appellant provides his version of the study hall incident and complains that the boys were forced to attend school on a Saturday as punishment while Tutor was merely "spoken to" about the incident. Appellant also complains that the school failed to contact him and inform him of the incident, which he says happened in front of students ranging from twelve to seventeen-years-old.

{¶12} The next day, January 15, 2019, Appellant posted three times on Facebook. The first post included a photograph of Mathews High School with a caption stating "[w]e will be at a meeting tomorrow with BCI [Ohio Bureau of Criminal Investigations] to give them all I have on Lowellville School Teacher [Tutor] and Lowellville police officer that siezed (sic) a students (sic) phone without Judges (sic) warrant." (Exh. 10.) Three minutes later, Appellant posted the same photograph of Mathews High School with a caption questioning why Superintendent did not want to investigate Tutor, implying misconduct on his part. Appellant said that this is why "we have higher ups." (Exh. 11.) About two and a half hours later, Appellant posted a meme depicting a skeleton with the words "If I fuck with you, anything I do for you isn't a favor, it's out of love. Just look out for me when it's time." (Exh. 12.) Appellant did not "tag" anyone in the post and did not include a caption. There is nothing specifically linking this meme to any specific person, however, Chief Alli and Superintendent both testified they were concerned that this post was an indication Appellant was "ramping up" his vendetta.

{¶13} On that same date, Holmes Legal Services, LLC, counsel for the school, sent Appellant a cease and desist letter. In relevant part, the letter accused Appellant and his fiancée (who is not involved in this appeal) of behavior that "harassed and

intimidated various District employees in response to the disciplinary action that the District imposed against your son. You have also posted various false and defamatory statements about the District and its employees on Facebook." (Exh. 17.) In the letter the school demanded that Appellant stop posting defamatory statements on Facebook, "cease and desist from threatening, intimidating, and harassing District employees," and prohibited him from contacting any employee without the prior and written consent of Superintendent. (Exh. 17.) The letter also informed Appellant and his fiancée they were prohibited from entering school grounds or attending school events without the prior written consent of Superintendent, and that failure to abide by the terms of the letter would result in a civil action for defamation and possible pursuit of criminal menacing and stalking charges. Although it appears that the letter contains multiple pages, only the first page is included in the record. The letter was sent to Appellant by both certified mail and email.

{¶14} On the same day, Appellant responded to the letter by email, denying that he had intimidated any employee or posted any false or defamatory statements. Appellant sought clarification as to which posts were problematic and agreed to take down these posts until his attorney could review them. Instead of directly responding to Appellant's request, the attorney for the school asked Appellant for his attorney's contact information. Appellant responded that while he had forwarded all relevant information to his attorney, he personally requested specific information as to which posts were problematic. Appellant also complained that it appeared someone at the school was being paid to, essentially, monitor his social media all day.

{¶15} The next exhibit is a screenshot of a text message that appears to have been sent by Superintendent to Chief Alli. The text is dated January 16, 2019 and forwards a thumbnail of a YouTube video titled "Lowellville High School teacher trying to have sex with students." (Exh. 13.) Although it is not clear where the video was posted to YouTube, the thumbnail appears to portray Appellant speaking on his cell phone and again making insinuations about Tutor.

{¶16} On the same date of this text message, January 16, 2019, Appellant posted three times on Facebook. Each post regards the attorney who sent him the cease and desist letter. The first post showed a screenshot of a search of the attorney's name on the Ohio Supreme Court attorney database. (Exh. 22.) Although the photograph is of poor quality, it appears to show an address for that attorney. In Appellant's caption he mocks the attorney, saying that the attorney claims his address has a suite number when he merely has a box at a UPS store. The next post takes issue with either the Chief's or Superintendent's use of a cell phone to conduct official business, and again complains that the school's attorney would not inform him which posts were deemed to be harassment, stalking, or defamatory. The final post again involved the attorney's address.

{¶17} Approximately two days later, Son asked a school official for permission to retrieve money from his car, parked in the school lot. Instead, Son was seen driving out of the school's parking lot. Around this time, Superintendent was viewing Appellant's Facebook "live" stream. In the live stream, Appellant was driving or standing near a box truck and Appellant was announcing in the video that Son was meeting him outside of Lowellville. Testimony reflects that Superintendent became concerned about Son's duplicity, that he left school grounds, and that Appellant was live streaming this on

Facebook, so Superintendent placed the school on a soft lockdown. Apparently, normal day-to-day functions could occur, but no one was permitted to leave school grounds. Superintendent drove his car off school grounds in an attempt to locate Son, himself. Moments after he left, he saw Son return to the parking lot, so Superintendent turned his car around and met Son in the parking lot and instructed him to remain inside his vehicle. At some point during this encounter, Chief Alli was alerted to the incident. Chief Alli observed Son as he exited his car and did not believe, based on the tightness of his clothing, that he was carrying a gun. However, Son was suspended as a result and sat in a conference room the remainder of the school day. The school did not immediately notify Appellant that his son had been suspended.

{¶18} In a later Facebook live video, Appellant's explanation as to why Son left the school was that Son found no money in his car and called Appellant, asking to pick some up from him. Because Appellant was not allowed on school grounds, he instructed Son to meet him so he could give him money. Son did not inform the school he was leaving school grounds to meet his father, presumably out of fear that he would not be permitted.

{¶19} When Tutor was informed the school had been placed on a soft lockdown, she assumed Appellant and his son were somehow involved because Superintendent had kept her informed about all of Appellant's earlier Facebook posts. Thus, she was very alarmed. She had also been told by third parties that Appellant had a criminal record and that he had a poor reputation in the community. She was concerned that Appellant was bent on vigilante action intended to punish her because the school officials had not.

{¶20} Later that evening, Appellant engaged in a series of Facebook posts. The first addressed the lockdown. (Exh. 14.) He alleged that his son's car had been surrounded by men asking Son if he had weapons or a recording device on his person. Appellant contended that after being "interrogated" for two hours, the school refused to allow him to attend class. Appellant claimed this was all in retaliation for Appellant's insistence that Tutor be investigated. Appellant also alleged that Tutor had previously been reported to the school for saying that some of the male students were "cute" and asking them if she looked good. A second post again complained that the school refused to investigate Tutor even though they knew of prior incidents of her impropriety with minor students. The third complained that Son had been blamed for the lockdown. In all the posts, Appellant states: "Lowellville residents are aware of this misconduct of staff and filed complaints on ME for addressing this." (Exh. 16.)

{¶21} On the same date, Appellant posted a vague reference to sharing an address of a school official he obtained from the Ohio voter website. (Exh. 24 A.) This appears to refer to the fact that he included Superintendent's unlisted home address on the police report he filed, even though he did not post the address publicly on social media. He also claimed the school's attorney who sent the cease and desist letter was fired from his previous firm for violating attorney client privilege, and he complained his own attorney still had not heard from the school's lawyer as to exactly which of his posts the school deemed threatening.

{¶22} Superintendent testified that Appellant posted to Facebook "it's personal now, just how I like it." (Trial Tr., p. 316.) This post was described in testimony but is not part of the state's physical exhibits. In addition, there was testimony regarding a meme

of a skeleton designed to look like "death" holding a staff. The meme contains the phrase "hurt my daughter or my son not even God can save you from my wrath." (Exh. 24 B.) A screen shot showing the meme and the name "David Rowbotham" in the search bar was offered into evidence. At trial, Appellant admitted that he posted this, but claimed that this posting was completely unrelated to his problems with Lowellville school officials and/or law enforcement.

{¶23} At some point, Appellant made all of his postings regarding the school private, before eventually deactivating his Facebook account. He testified that he did so because he never intended to harm anyone and had learned that both Tutor and Superintendent felt threatened by his posts.

{¶24} Sometime thereafter, Appellant was in Cleveland on business and received a call from his son that black sport utility vehicles had surrounded their house. Son left the house and was immediately stopped by three vehicles that surrounded him from the front, back, and side. A video Son took of the incident shows an officer approach him and remark "that was a nice trick your dad played." (Exh. 38.) When Son responded that he did not understand the comment, the officer did not elaborate further. The officer instead told him that he stopped Son for failure to display a front license plate. Appellant subsequently called the police department and learned that there was an outstanding warrant for his arrest. He agreed to turn himself in on his return from Cleveland. On January 25, 2019, Appellant was arrested.

{¶25} Since the start of this incident, when Appellant's son was given detention for the study hall encounter with Tutor, Appellant contacted the Attorney General's Office, the prosecutor's office, and the local newspaper in an attempt to have his allegations of

impropriety addressed. There is evidence that he also attempted to contact the Ohio Department of Education. As acknowledged by the trial court, Appellant became increasingly frustrated because no entity believed the incident was as serious as Appellant framed it, and no entity would investigate his allegations.

{¶26} On March 14, 2019, Appellant was indicted on two counts of menacing by stalking, a violation of R.C. 2903.211(A)(2), (B)(2)(a), felonies of the fourth degree. The first count pertained to Tutor while the second count involved Superintendent.

{¶27} Again, Appellant chose to defend himself pro se at a bench trial. We note that standby counsel was present. On May 7, 2019, the trial court found Appellant guilty of both offenses. Because Appellant was indicted for menacing by stalking with an enhancement, a judgment entry of Appellant's previous conviction for menacing by stalking in case number 17CR563 was admitted into evidence.

{¶28} On May 24, 2019, the trial court sentenced Appellant to eighteen months of incarceration on each count. The sentences were ordered to run concurrently, but consecutive to Appellant's sentence in case number 17 CR 563, which is the basis for the probation violation. The transcripts reveal that Appellant had been sentenced to eighteen months in case number 17 CR 563. Thus, his aggregate sentence is three years. On July 2, 2019, the court sustained Appellant's motion for jail time credit and awarded him 119 days of credit. It is from the trial court's sentencing entry that Appellant timely appeals.

ASSIGNMENT OF ERROR NO. 1

Appellant's Convictions Violate Freedoms Guaranteed by U.S. CONST., amend. I and XIV and OHIO CONST., art. I, §11, and must be vacated.

ASSIGNMENT OF ERROR NO. 3

Appellant's Convictions and Sentences Are in Violation of the State and Federal Constitutions Because Appellant Was Denied the Effective Assistance of Counsel When Counsel Failed to File a Pretrial Motion to Dismiss the Indictment on Constitutional Grounds, in Violation of U.S. CONST., amend. VI and XIV; OHIO CONST., art. I, §§1, 10 and 16.

{¶29} Appellant argues that criminal punishment for merely expressing his displeasure with the school's lack of investigation into the study hall incident with Tutor constitutes a violation of his First Amendment rights. While conceding that the government may regulate certain speech, Appellant argues that his words did not fall into these limited categories. Appellant asserts that he did not directly communicate any of the alleged threats to either victim. Further, he did not "tag" either of the victims in any of his social media posts; in fact, neither victim had a Facebook account. To the extent that either of the victims were upset by his words, Appellant argues that the standard is not whether words actually frightened Tutor or Superintendent. Instead, the standard is objective: whether a reasonable person would have been distressed. Appellant contends that the standard used by the trial court renders the law vague, overly broad, and prohibits constitutionally protected speech. Appellant also argues that he received ineffective assistance, as counsel failed to file a motion to dismiss the indictment based on the First Amendment issues in this case.

{¶30} The state responds by first noting that a statute is presumed to be constitutional. To rebut this presumption, a defendant must establish beyond a

reasonable doubt that a person of ordinary intelligence would not be able to predict or understand what conduct constitutes the criminal behavior. The state urges that this Court and several other Ohio districts have held that the menacing by stalking statute is not unconstitutionally vague, as it does not suppress constitutionally protected speech. Rather, it prohibits behavior that causes another to fear physical harm or causes mental distress.

{¶31} The right to freedom of speech is governed by the First Amendment to the United States Constitution and applies to the states through the Fourteenth Amendment. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Constitution, Amendment I. In addition, the Ohio Constitution affords freedom of speech:

> Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. In all criminal prosecutions for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury, that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted.

Ohio Constitution, Article 1, Section 11.

{¶32} The Ohio Supreme Court has held that "the free speech guarantees accorded by the Ohio Constitution are no broader than the First Amendment, and that the First Amendment is the proper basis for interpretation of Section 11, Article I of the Ohio Constitution." *State v. Adams*, 7th Dist. Mahoning No. 02CA171, 2004-Ohio-3199, ¶ 15, citing *Eastwood Mall, Inc. v. Slanco*, 68 Ohio St.3d 221, 222, 626 N.E.2d 59 (1994), citing *State ex rel. Rear Door Bookstore v. Tenth Dist. Court of Appeals*, 63 Ohio St.3d 354, 362-363, 588 N.E.2d 116 (1992).

{¶33} However, as Appellant concedes, the First Amendment is not absolute. Some forms of speech may be regulated, "i.e., threatening words, obscene speech, fighting words, speech that interferes with the rights of others, speech that creates a clear and present danger, and defamatory speech." *State v. Plants*, 5th Dist. Tuscarawas No. 2009 AP 10 0054, 2010-Ohio-2930, ¶ 46.

{¶34} Appellant argues that the menacing by stalking statute is vague and overly broad. The overbreadth doctrine is reserved for cases involving alleged violations of First Amendment rights, such as freedom of the press, speech or assembly: "generalized overbreadth challenges are recognized only in First Amendment issues * * * ." *State v. Bielski*, 7th Dist. Mahoning No. 12 MA 217, 2013-Ohio-5771, 5 N.E.3d 1037, ¶ 8, *State v. Vrabel*, 99 Ohio St.3d 184, 2003-Ohio-3193, 790 N.E.2d 303, ¶ 64 citing *New York v. Ferber*, 458 U.S. 747, 768, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982).

{¶35} The interpretation of a statute presents a question of law and is reviewed *de novo*. *Bielski* at ¶ 9. Statutes are presumed constitutional. *Sorrell v. Thevenir*, 69 Ohio St.3d 415 at 418-419, 633 N.E.2d 504 (1994). In order to overcome this presumption, the challenger must "meet the burden of establishing beyond a reasonable

doubt that the statute is unconstitutional." *Bielski* at ¶ 9, citing *State v. Tooley*, 114 Ohio St.3d 366, 2007-Ohio-3698, 872 N.E.2d 894, ¶ 29.

{¶36} There are two types of First Amendment challenges: a challenge to the statute on its face and a challenge as applied to a specific circumstance. In the event of a facial challenge, "the challenging party [must] show that the statute is vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.' " *State v. Anderson*, 57 Ohio St.3d 168, 171, 566 N.E.2d 1224 (1991), quoting *Coates v. Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971). If the challenge is as applied, the challenger must demonstrate that the "application of the statute in the particular context in which he has acted, or in which he proposes to act, [is] unconstitutional." *State v. Lowe*, 112 Ohio St.3d 507, 2007-Ohio-606, 861 N.E.2d 512, ¶ 17. Here, Appellant presents an as applied challenge.

Menacing By Stalking Statute – R.C. 2903.211

{¶37} Appellant contests R.C. 2903.211 which states:

> (A)(1) 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 a family or household member of the other person or cause mental distress to the other person or a family or household member of the other person. In addition to any other basis for the other person's belief that the offender will cause physical harm to the other person or the other person's family or household member or mental distress to the other person or the other person's family or household member, the other person's belief

or mental distress may be based on words or conduct of the offender that are directed at or identify a corporation, association, or other organization that employs the other person or to which the other person belongs.

(2) No person, through the use of any form of written communication or any electronic method of remotely transferring information, including, but not limited to, any computer, computer network, computer program, computer system, or telecommunication device shall post a message or use any intentionally written or verbal graphic gesture with purpose to do either of the following:

(a) Violate division (A)(1) of this section;

(b) Urge or incite another to commit a violation of division (A)(1) of this section.

{¶38} The definition of the "knowing" requirement is found within R.C. 2901.22(B), which provides that:

(B) A person acts knowingly, regardless of purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist. When knowledge of the existence of a particular fact is an element of an offense, such knowledge is established if a person subjectively believes that there is

a high probability of its existence and fails to make inquiry or acts with a conscious purpose to avoid learning the fact.

Mental distress is defined within R.C. 2903.211(D)(2) and describes mental distress as any of the following:

(a) Any mental illness or condition that involves some temporary substantial incapacity;

(b) Any mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services, whether or not any person requested or received psychiatric treatment, psychological treatment, or other mental health services.

Vagueness Doctrine

{¶39} The vagueness doctrine is a product of the Fourteenth Amendment, and "bars enforcement of 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.' " *Bielski* at ¶ 10, citing *State v. Bennett*, 150 Ohio App.3d 450, 458, 2002-Ohio-6651, 782 N.E.2d 101 (1st Dist.2002); *United States v. Lanier*, 520 U.S. 259, 266, 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997); *Connally v. General Construction Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). "When [a] resolution is challenged as unconstitutionally vague, the reviewing court must determine whether the statute provides sufficient notice of its proscriptions and contains reasonably clear guidelines to

prevent official arbitrariness or discrimination in its enforcement." *State v. Brundage*, 7th Dist. Mahoning No. 01 CA 07, 2002-Ohio-1541, ¶ 7.

{¶40} Where the issue arises in a criminal matter, more precision is required than in other legal matters, such as regulatory matters. *Id.* at ¶ 11. To survive a constitutional challenge, "a criminal statute must clearly define its prohibitions so that persons of ordinary intelligence may comprehend the statute to fairly inform themselves of the generally proscribed behavior and so that the statute does not encourage arbitrary or discriminatory enforcement." *Bielski* at ¶ 12, citing *Bennett, supra*, at ¶ 19, citing *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983); *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Thus, a statute "must be sufficiently definite to provide a person of ordinary intelligence with adequate notice of the conduct that the statute proscribes [and] * * * must provide sufficiently definite guidelines for law enforcement officials in order to prevent arbitrary and discriminatory enforcement." *Bielski* at ¶ 12, citing *Bennett* at ¶ 19; *State v. Dorso*, 4 Ohio St.3d 60, 446 N.E.2d 449 (1983).

{¶41} We note that Appellant dedicated much of his time at oral argument to a discussion of *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942). *Chaplinsky* stands for the proposition that a person cannot be punished for merely speaking rude or insulting words, unless those words are likely to provoke the average person into immediate retaliation. *Id.* at 573.

{¶42} The essence of Appellant's argument is based on the theory that he did not intend to place Tutor or Superintendent in fear and had no way of knowing that his words and actions would cause those individuals to be distressed. While his words may have

been rude or insulting, he does not believe they were threatening or intimidating. Essentially, the question is whether Appellant would understand, as a man of ordinary intelligence, that his conduct would cause mental distress to the victims.

{¶43} While Appellant raises an "as applied" challenge, most of the caselaw provided by the state applies to facial challenges of R.C. 2903.211. We have previously addressed an as applied challenge to R.C. 2903.211 in *State v. Smith,* 126 Ohio App.3d 193, 211, 709 N.E.2d 1245 (7th Dist.1998). In *Smith,* the appellant followed the victim on multiple occasions from his place of work to a women's center. The appellant pulled his vehicle next to the victim's vehicle and stared at him. On multiple occasions, the appellant called the victim by name, shouted expletives, threatened to "teach" him, and inquired about the location of his wife. *Id.* at 197-198. We determined that the statute was not unconstitutional on its face, because a person of ordinary intelligence would understand what type of conduct is prohibited and the statute is narrow in its scope. As to the as applied challenge, we held that the appellant was not punished for a simple "protest," but for knowingly placing another person in fear for their physical and mental well-being.

{¶44} The issue was also before the Ninth District, both facially and as applied, in *State v. Barnhardt,* 9th Dist. Lorain No. 05CA008706, 2006-Ohio-4531. In *Barnhardt*, the appellant argued in part that whether a person violates the statute depends on the victim's reaction to conduct, which may cause distress to one person but not to another. *Id.* at ¶ 9. The *Barnhardt* court rejected that argument and held that the statute requires an offender to act knowingly, meaning that "regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances

probably exist." *Id.* at ¶ 10, citing R.C. 2901.22(B). Thus, the statute penalizes only conduct that the offender knows will cause the victim to suffer mental distress. Because the offender must have knowledge of those circumstances, the court held that "a defendant cannot be convicted based on the subjective beliefs of a particular complainant." *Id.* at ¶ 11. In other words, "[i]f a defendant knows his behavior will cause the complainant distress, the defendant is not at the whim of the complainant to determine what behavior is prohibited." *Id.* Even so, the court noted that the level of intent required by the statute can mitigate any perceived vagueness. *Id.* citing *State v. Werfel,* 11th Dist. Lake Nos. 2002-L-101, 2002-L-102, 2003-Ohio-6958.

{¶45} As to Tutor, Appellant's pattern of behavior included the following events: a series of Facebook posts questioning whether she was "grooming" minor students and a Facebook post that included a photograph of her and her fiancé obtained by Appellant through a Google search, and innuendo that Tutor was or desired to be sexually involved with students. In addition, it appears that almost all of Appellant's social media presence was aimed at ensuring Tutor be disciplined in her workplace and/or criminally investigated. It was apparent Appellant was angry his son was punished while she was not. Admittedly, Tutor did not have a Facebook presence. Instead, she learned of Appellant's posts through Superintendent and others. However, a reasonable person would likely know that a series of public Facebook posts accusing a teacher at a local school of having improper relationships with minor students would be brought to that teacher's attention. While Appellant complains that Tutor only learned of Appellant's criminal record through third parties, there are sufficient facts in the record to otherwise support a finding of mental distress.

{¶46} This record establishes that Tutor's fear was not so much the result of Appellant's individual social media posts or his criminal record, although those factors did contribute to her distress. Rather it was that these posts represented Appellant's unpredictable behavior and escalation in behavior and his apparent obsession with his belief that she had evaded punishment for what he perceived to be inappropriate behavior towards his minor son. While on their face Appellant's individual posts may not be directly threatening, taken together they present what may be viewed as a pattern of malicious, obsessive, unrelenting, vigilante behavior. A reasonable finder of fact could certainly view Appellant's behavior as intimidating.

{¶47} As to Superintendent, the evidence of Appellant's pattern of conduct and Superintendent's resulting mental distress is less direct. While he is mentioned in some of the Facebook live videos and one Facebook post, he was not the direct focus of Appellant's malicious efforts. In one video, Appellant appears to have been alerted to the fact that Superintendent was upset that his unlisted home address was included in Appellant's police report, which is a public record. In the video, Appellant tries to explain that he obtained the address through another public record for the sole purpose of ensuring the police located the correct person, as Appellant learned that multiple people share Superintendent's same name. It does not appear that this home address was placed into any social media post.

{¶48} Regardless, the menacing by stalking statute provides that "the other person's belief or mental distress may be based on words or conduct of the offender that are directed at or identify a corporation, association, or other organization that employs the other person or to which the other person belongs." R.C. 2903.211(A)(1). A valid

basis for Superintendent's distress is the threat he believed Appellant posed to the school and/or its employees. Appellant's behavior caused a lockdown. A reasonable person could see Appellant's pattern of behavior as a threat to the school.

{¶49} We again note that this argument is reviewed for plain error. A person of ordinary intelligence could believe that this particular conduct, which was repeated over the course of about a month, would likely cause another person to suffer mental distress. Furthermore, as the *Barnhardt* court acknowledged, the level of intent required by the statute can mitigate any perceived vagueness. As such, Appellant has not plainly demonstrated error that the law is unconstitutionally vague.

Overbreadth

{¶50} "When a court applies the overbreadth doctrine, the statute or ordinance in question is declared to be facially invalid. For this reason, it has been said that the overbreadth doctrine is 'manifestly strong medicine' that is employed sparingly, and only as a last resort." (Internal citations omitted.) *Adams, supra*, at ¶ 13, citing *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

{¶51} A party asserting a First Amendment overbreadth challenge must show that "a substantial number of [the law's] applications are unconstitutional, judged in relation to [the law's] plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010). "The first step in overbreadth analysis is to construe the challenged [law]; it is impossible to determine whether a [law] reaches too far without first knowing what the [law] covers." *United States v. Williams*, 553 U.S. 285, 293, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008).

{¶52} We previously addressed an overbreadth challenge to the menacing by stalking statute. The *Smith* court held that:

> R.C. 2903.211 is not unconstitutionally overbroad, as the First Amendment does not protect the type of activity prohibited, nor does the statute criminalize a substantial amount of constitutionally protected activity. See *Dario, supra*. R.C. 2903.211 is not aimed at the expression of ideas or beliefs but rather at oppressing behavior that invades another person's privacy interests. *Id*. Therefore, R.C. 2903.211 does not attempt to punish both illegal and legal activity.

Smith, 126 Ohio App.3d at 210. The *Smith* court rationalized that the appellant's conduct did not constitute a mere protest. Rather, he repeatedly followed the victim and shouted threatening statements at him, causing him to fear for his physical and mental well-being. As such, the law punished threatening behavior, which is not constitutionally protected.

{¶53} Here, if believed, the victims' testimony established that Appellant's relentless and obsessive behavior constituted harassment that caused them mental distress. Thus, the law punished, not Appellant's stated displeasure with the school's actions or inactions, but his constant harassment of Tutor and Superintendent. As such, the statute is not overly broad so as to punish constitutionally protected behavior.

Ineffective Assistance

{¶54} Appellant next argues that his counsel was ineffective for failing to raise these issues at trial through a motion to dismiss the indictment. The test for an ineffective assistance of counsel claim is two-part: whether trial counsel's performance was deficient

and, if so, whether the deficiency resulted in prejudice. *State v. White*, 7th Dist. Jefferson No. 13 JE 33, 2014-Ohio-4153, ¶ 18, citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Williams*, 99 Ohio St.3d 493, 2003-Ohio-4396, 794 N.E.2d 27, ¶ 107. In order to prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Lyons*, 7th Dist. Belmont No. 14 BE 28, 2015-Ohio-3325, ¶ 11, citing *Strickland* at 694. The appellant must affirmatively prove the alleged prejudice occurred. *Id*. at 693.

{¶55} As both prongs are necessary, if one prong of the *Strickland* test is not met, an appellate court need not address the remaining prong. *Id.* at 697. The appellant bears the burden of proof on the issue of counsel's effectiveness, and in Ohio, a licensed attorney is presumed competent. *State v. Carter*, 7th Dist. Columbiana No. 2000-CO-32, 2001 WL 741571 (June 29, 2001), citing *State v. Calhoun*, 86 Ohio St.3d 279, 289, 714 N.E.2d 905 (1999).

{¶56} "When a claim for ineffective assistance of counsel is made based on failure to file an objection or a motion, the appellant must demonstrate that the objection or motion had a reasonable probability of success." *State v. Saffell*, 7th Dist. Jefferson No. 19 JE 0021, 2020-Ohio-7022, ¶ 51. "If the objection or motion would not have been successful, then the appellant cannot prevail on the ineffective assistance of counsel claim." *Id*., citing *State v. Adkins*, 161 Ohio App.3d 114, 2005-Ohio-2577, ¶ 14 (4th Dist.).

{¶57} Based on our above analysis, a motion to dismiss the indictment based on First Amendment grounds would not have been successful. Thus, trial counsel was not

ineffective for failing to file such motion. As such, Appellant's first and third assignments of error are without merit and are overruled.

ASSIGNMENT OF ERROR NO. 2

> The Trial Court Erred in Convictin [sic] Appellant, as Appellant's Convictions violate U.S. CONST., amend. XIV and OHIO CONST., art. I, §16 Because the Evidence of a Crime Was Not Established, and Convictions Based Upon Insufficient Evidence Violate the Aforesaid Provisions.

ASSIGNMENT OF ERROR NO. 4

> Convictions and a Prison Sentence violate U.S. CONST., amend. VIII and XIV and OHIO CONST., art. I, §§1, 2, 9, and 16 When the Convictions are Against the Manifest Weight of the Evidence.

{¶58} Appellant argues that his conviction is supported by insufficient evidence and is against the manifest weight of the evidence. He first argues that his speech is protected by the First Amendment, and cannot constitute a criminal offense. Second, he argues that the trial court applied a subjective test, creating a scenario where a defendant cannot know in advance whether his words amount to a crime. In addition, he argues that mental stress or annoyance is insufficient to amount to mental distress for purposes of the menacing by stalking statute.

{¶59} The state responds that the record is replete with evidence establishing a pattern of conduct. The state cites to Appellant's emails and phone calls, along with his Facebook and YouTube posts. The state highlights two memes Appellant posted on

Facebook depicting photographs of skulls and bones with threatening words. The state also describes a post where Appellant stated "[y]ou made it personal now, didn't you? Just the way I like it." (Trial Tr., p. 316.) The state urges that there was substantial testimony detailing the mental distress suffered by each victim.

{¶60} Pursuant to R.C. 2903.211(A)(1)-(2):

> (A)(1) 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 a family or household member of the other person or cause mental distress to the other person or a family or household member of the other person. In addition to any other basis for the other person's belief that the offender will cause physical harm to the other person or the other person's family or household member or mental distress to the other person or the other person's family or household member, the other person's belief or mental distress may be based on words or conduct of the offender that are directed at or identify a corporation, association, or other organization that employs the other person or to which the other person belongs.
>
> (2) No person, through the use of any form of written communication or any electronic method of remotely transferring information, including, but not limited to, any computer, computer network, computer program, computer system, or telecommunication device shall post a message or use any intentionally written or verbal graphic gesture with purpose to do either of the following:

(a) Violate division (A)(1) of this section;

(b) Urge or incite another to commit a violation of division (A)(1) of this section.

{¶61} Appellant was convicted of R.C. 2903.211(A)(2)(a), thus the state was required to prove that Appellant violated section (A)(1) through the use of written or electronic communication. R.C. 2903.211(D)(1) defines "pattern of conduct" as:

> [T]wo or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents, or two or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents, directed at one or more persons employed by or belonging to the same corporation, association, or other organization * * * or the posting of messages, use of intentionally written or verbal graphic gestures, or receipt of information or data through the use of any form of written communication or an electronic method of remotely transferring information, including, but not limited to, a computer, computer network, computer program, computer system, or telecommunications device, may constitute a "pattern of conduct."

{¶62} After Appellant's unsuccessful efforts to seek an internal school investigation of Tutor, he turned to social media in an apparent attempt to force the school into an investigation. Again, we note that our review is somewhat hampered by our own

inability to view the video evidence. While we have only the limited testimony about this evidence to review, Appellant does not contest that he posted the material and merely responds that it is protected by the First Amendment. Hence, the evidence is unrebutted.

{¶63} Unsuccessful in his attempts to get the school to take his desired action, Appellant shifted his attention from the school to law enforcement on January 9, 2019. On that date, Appellant filed a police report with the Lowellville Police Department. He raised two complaints. In the first he alleged that the school, specifically a D.A.R.E. resource officer, abused its authority in "forcing" Son to provide his phone to the officer and then "forcing" him to delete content from the phone.

{¶64} The complaint was based on the following: In a tape recorded phone conversation that was admitted into evidence, Chief Alli could be heard suggesting that Appellant obtain the names of students who may have overheard the study hall conversation between Tutor and the boys. Appellant responded that Son would obtain the names. Apparently, Son then asked students if anyone overheard the conversation. Son wrote down the names of fifteen students who responded that they heard the conversation, took a photo of the list with his cellphone, and texted it to Appellant. Appellant contends that officials at the school learned of the text and Son was called to the principal's office. Son was forced to unlock his phone and show the principal and the D.A.R.E. officer the photo and text. He was then "forced" to delete both from his phone.

{¶65} The position of the school district and Superintendent is that Son was observed violating the rules regarding a student's use of a cellphone. He was investigated for this rule violation. When a photo and text were discovered which proved Son did violate the school's rule, he was required to delete them.

{¶66} Appellant claims he was also ordered by school officials to delete the text from his phone, but he declined. He included the fifteen names in his police report. Apparently, a school official called Chief Alli to complain about Appellant's text. In a phone call recorded by Appellant, Chief Alli complained to Appellant that the text had caused him problems with the school. Chief Alli said he had told Appellant that Son would need to obtain the students' names from his own memory instead of approaching students directly. This statement is inconsistent with the prior recorded phone call which was admitted into evidence.

{¶67} Appellant's second complaint contained in his police report addressed issues involving Tutor directly. Appellant accused Tutor of two improper actions. First, he asserted that Tutor subjected Son to peer ridicule by allegedly calling him a silly name in front of a group of other students, and that Tutor ridiculed other students in front of their peers.

{¶68} Next, Appellant addressed the study hall incident. Appellant claimed that Tutor inappropriately asked three minor boys, including his son, if they had girlfriends and provided inappropriate commentary on those relationships. It does not appear that the person who asked Tutor if she "made out" with girls was ever identified, however, all parties agreed that it was not Son. Regardless, all three boys were given a four-hour detention. Sometime after the initial meeting with the principal, the boys returned and requested a reduction of their detention because it was their contention Tutor had initiated the conversation. The principal ultimately reduced the boys' detention to two hours and required apologies. Appellant complained that Tutor was not disciplined for her role, which Appellant perceives as the instigator.

{¶69} Appellant's first social media posts about the incident occurred on the same date he filed his police report. On that date, Appellant posted at least four times on his Facebook account. The first post occurred at 7:33 a.m. (Exh. 1.) Approximately an hour and a half later, Appellant went "live" on Facebook. Appellant accompanied his stream with a photo of Tutor and her fiancé. (Exh. 2.)

{¶70} About twenty minutes later, Appellant again went "live" on Facebook and posted as a part of this "live" feed a headline "Former teacher gets 3 years for having sex with 14-year-old student." (Exh. 3.) In Appellant's next post he named the officer who required Son to remove content from his phone. (Exh. 4.)

{¶71} Appellant's final post of the day occurred later in the evening. The post shows a google search of the terms "[Tutor] YSU." (Exh. 5.) The caption for the photograph makes vague reference to an improperly deleted page, but the real thrust of the post is to attack Tutor's study hall conversation and complain that no charges were filed even though "almost a hundred people" allegedly had expressed outrage.

{¶72} The next morning, Appellant again went "live" on Facebook. Unlike the prior two "live" feeds, there is no photograph associated with the post. However, there is a caption that states "[t]he intelligence of this man. Lol. We need to get in touch with the village idiot. Would have a more intelligent conversation." (Exh. 6.) Chief Alli testified that this was a reference to him, and was viewed hundreds of times.

{¶73} The next exhibit shows a comment to one of Appellant's "live" posts. In the comment, Appellant once again complains that a teacher used inappropriate language and discussed personal matters with high school students, although he does not

specifically name Tutor in this post. He also claimed in his comment that law enforcement was investigating part of his police complaint. (Exh. 7.)

{¶74} On the morning of January 14, 2019, Appellant posted another "live" stream. (Exh. 8.) A caption indicates that it is a recording of a phone call. In the caption, Appellant generally rants about the lack of investigation of any of his complaints. A second post appeared about an hour later. This post is the only instance where Appellant "tags" another page in one of his posts. (Exh. 9.) Here, he "tagged" Lowellville Schools and in his lengthy post he described the incident in the study hall involving Tutor. Appellant is clearly very upset she was not disciplined for her "misconduct" and complains that the boys were forced to attend school on a Saturday as punishment while Tutor was merely "spoken to" about the incident. The post contains allegations that the school should have called him about the incident, which he claims happened in front of students ranging from twelve to seventeen-years-old.

{¶75} The next day, January 15, 2019, Appellant posted three times on Facebook. The first featured a photograph of Mathews High School with a caption stating "[w]e will be at a meeting tomorrow with BCI [Ohio Bureau of Criminal Investigations] to give them all I have on Lowellville School Teacher [Tutor] and Lowellville police officer that siezed (sic) a students (sic) phone without Judges (sic) warrant." (Exh. 10.) Three minutes later, Appellant posted the same photograph of Mathews High School with a caption questioning why Superintendent did not investigate Tutor and makes vague innuendos about a cover-up. Appellant said this is why "we have higher ups." (Exh. 11.)

{¶76} About two and a half hours later, Appellant posted a meme depicting a skeleton with the words "If I fuck with you, anything I do for you isn't a favor, it's out of

love. Just look out for me when it's time." (Exh. 12.) While Appellant did not direct this post to any particular person or event, Chief Alli and Superintendent testified that this post concerned them, as they believed it represented an escalation in Appellant's vengeful behavior.

{¶77} On that same date, counsel for the school sent Appellant a cease and desist letter. In it, Appellant was informed his behavior: "harassed and intimidated various District employees in response to the disciplinary action that the District imposed against your son. You have also posted various false and defamatory statements about the District and its employees on Facebook." (Exh. 17.) Appellant was told to: "cease and desist from threatening, intimidating, and harassing District employees," and prohibited him from contacting any district employee without the prior and written consent of Superintendent. (Exh. 17.)

{¶78} The letter also prohibited Appellant from entering school property or attending school events without the prior written consent of Superintendent. The letter also stated that failure to abide by these terms would result in a civil action for defamation and pursuit of criminal menacing and stalking charges. Hence, Appellant was clearly placed on notice as to how school officials viewed his behavior.

{¶79} Appellant's response was to deny that he had taken any action to intimidate any employee or posted false or defamatory statements, but agreed that he would remove any posts that the school officials specifically told him were problematic pending review by his attorney.

{¶80} At some point after this, Superintendent texted Chief Alli with a thumbnail of a YouTube video titled "Lowellville High School teacher trying to have sex with

students." (Exh. 13.) The thumbnail appears to show Appellant speaking on a cell phone and the thrust of the video's content was, again, accusations about Tutor's behavior.

{¶81} On the same date, Appellant posted three times on Facebook, each post related to the cease and desist letter. The first included a screenshot of a search of the attorney's name on the Ohio Supreme Court attorney database, and mocks him by alleging his address is a UPS store. (Exh. 22.) The next post contains vague mention of use of a personal cell phone for official business and complains that the school's attorney would not specify which of his posts were considered harassing, stalking or defamatory. The final post on the matter again questioned the attorney's address.

{¶82} Appellant's strange and malignant behavior lead to a school lockdown when Son requested permission to go to the parking lot, but instead, left school grounds to meet Appellant. Appellant was live streaming their meeting. Because Son lied about his whereabouts, Appellant was live streaming a meeting with his son on social media, and due to concern caused by Appellant's previous behavior, Superintendent became so concerned about the possibility of violence he placed the school on what he termed a "soft lockdown." He also alerted police officials. When Son returned to the school parking lot, he was asked to stay in his car pending the arrival of police. He was not searched, because on exiting his car the Chief did not believe he had a weapon. He was, however, suspended. Appellant addressed the incident in a separate Facebook live video. Appellant's explanation for this incident was that Son needed money and left the school to meet his father to get the money. He lied about his whereabouts because he feared he would not be allowed, due to the fact that his father was prohibited from entering school

grounds without permission. There was no explanation of Appellant's odd decision to live stream his meeting with his son.

{¶83} Superintendent had kept Tutor informed about Appellant's Facebook posts before the lockdown incident occurred. She was also informed by third parties that Appellant had a criminal record. Hence, when the lockdown occurred she became concerned that it not only involved Appellant, but may also involve her. She was concerned that Appellant intended to punish her himself since she had not been disciplined by school officials and no criminal charges had been filed, and that the lockdown was caused by Appellant's attempts to reach those ends.

{¶84} Later that evening, Appellant posted a series of Facebook posts, all directed towards the school's handling of the lockdown. (Exh. 14.) The first post claimed, among other things, that Son was "interrogated" for two hours, and then the school refused to allow him to attend class. Appellant opined that this was in retaliation for his repeated attempts to get the school or police to investigate Tutor. He also alleged that Tutor had previously been reported to the school for saying that some of the male high school students were attractive and asking students if she looked good.

{¶85} A second post questioned why the school refused to investigate Tutor even though they "knew" of prior incidents of Tutor's improper behavior. The third post questioned why Son had been blamed for the lockdown. All of the posts stated: "Lowellville residents are aware of this misconduct of staff and filed complaints on ME for addressing this." (Exh. 16.)

{¶86} Two days later, on January 18, 2019, Appellant posted about his use of an address that he obtained from the Ohio voter website. (Exh. 24 A.) While he does not

specifically name Superintendent or post the address, this is in reference to his inclusion of Superintendent's home address in the police report Appellant filed. Apparently, he had been alerted that Superintendent thought this was a threat to his person or his home. In this post, Appellant also claimed that the attorney who sent the cease and desist letter had been fired from his previous firm for violating attorney client privilege and again complains that he was not told which specific posts the school officials found threatening.

{¶87} Finally, Appellant posted a meme of a skeleton designed to look like "death" and holding a staff. The meme contains the phrase "hurt my daughter or my son not even God can save you from my wrath." (Exh. 24 B.) Appellant admits he posted this depiction, but claims that it was not directed towards any of his ongoing problems with the school, its employees, or law enforcement.

{¶88} We note that there is no evidence Appellant made direct threats to physically harm any person. While there was limited testimony that Appellant had a criminal record, Chief Alli refused to provide any details as to that record. It is likely that specific details would have been inadmissible as prior bad acts evidence. In any event, because there are no direct physical threats, we presume that the trial court as the trier of fact found that Appellant caused the victims mental distress.

{¶89} R.C. 2903.211(D)(2) defines mental distress as:

> (a) Any mental illness or condition that involves some temporary substantial incapacity;
>
> (b) Any mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services,

> whether or not any person requested or received psychiatric treatment, psychological treatment, or other mental health services.

R.C. 2903.211(D)(2)(a)-(b).

{¶90} We have previously addressed whether an offender must, in fact, cause mental distress or merely cause the victim to believe they will suffer mental distress. *Caban v. Ransome,* 7th Dist. Mahoning No. 08 MA 36, 2009-Ohio-1034. In *Caban,* we recognized a disagreement among districts on this issue and joined several other Ohio districts in holding that the offender must actually cause mental distress. *Id.* at ¶ 24. This issue is not contested, here, as both victims testified that they actually suffered mental distress as a result of Appellant's behavior.

{¶91} Relevant to the instant matter, we reiterated that in order to constitute mental distress, the victim must either develop a mental illness, a mental condition that involves a temporary substantial incapacitation, or a condition that would normally require mental health services. *Id.* ¶ at 28. Mere annoyance or mental stress is insufficient to constitute mental distress for purposes of menacing by stalking. *Id.* at ¶ 29.

{¶92} We also addressed the mental distress aspect of menacing by stalking in *Morton v. Pyles,* 7th Dist. Mahoning No. 11 MA 124, 2012-Ohio-5343. We explained that the statute does not require proof that the victim sought treatment for their distress. *Id.* at ¶ 15, citing *Retterer v. Little,* 3d Dist. Marion No. 9-11-23, 2012-Ohio-131. In addition, the distress need not be totally or permanently incapacitating, it need only be substantial. *Morton* at ¶ 15. Incapacitation has been deemed substantial "if it has a significant impact upon the victim's daily life." *Id.* "[T]estimony that the offender's conduct caused the victim

considerable fear and anxiety can also support a finding of mental distress under R.C. 2903.211." *Id.,* citing *Retterer, supra.*

{¶93} "[T]he trier of fact can refer to its own experiences to determine whether the defendant's conduct caused the emotional distress." *State v. Beckwith*, 8th Dist. Cuyahoga No. 104683, 2017-Ohio-4298, 82 N.E.3d 1198, ¶ 14, *State v. Bilder*, 99 Ohio App.3d 653, 665, 651 N.E.2d 502 (9th Dist.1994).

{¶94} Preliminarily, we note that neither victim maintained a Facebook account. However, Appellant's posts were designated as "public," meaning those posts could be viewed by anyone if they viewed his page. Superintendent testified that he used the school's Facebook page to continually monitor Appellant's posts and also relayed the content of the posts to Tutor

{¶95} The trial court's judgment entry noted that it considered Superintendent's testimony that he learned of Appellant's criminal past which made him fearful. However, the statute clearly provides that it must be the offender who knowingly causes distress, not a third party. Because a defendant cannot control what third parties communicate to victims, this information does not provide evidence as to acts knowingly committed by the defendant, required by the statute. Thus, the fact that the victims were made aware of Appellant's prior criminal record by third parties is not evidence that is relevant to the elements of menacing by stalking. This evidence could only be relevant if the defendant was somehow responsible for such third party communication, which is not the case, here.

{¶96} The record, however, does contain evidence of mental distress. Beginning with Tutor, she testified that she believed Appellant was determined to mete out the

punishment he believed she deserved and that the school declined to impose on her. Due to this belief, she changed the locks at her residence and was ultimately diagnosed with PTSD. She was particularly distressed that Appellant had accused her publicly of "grooming" high school students and had posted a photograph of her and her fiancé, which he apparently obtained in a Google search of her name.

{¶97} As previously discussed, it appears that Tutor's fear stemmed from Appellant's obsession with ensuring she received discipline as a result of her conversation with his son. She believed he intended to "punish" her, himself, if the school or legal system would not. A finder of fact could view Appellant's relentless behavior as a vigilante effort to ruin Tutor's life and career. Based on the numerous posts accusing Tutor of grooming minors and his obsession with pursuing discipline for her, Appellant should have known that his behavior would likely cause Tutor mental distress. While Appellant claims he did not know the victims felt threatened, he was certainly placed on notice in the January 15, 2019 cease and desist letter that these school employees felt threatened by his posts. Admittedly, the letter did not specify which employees. However, Appellant was well aware of the content of his posts and would most certainly know which employees the letter involved. While he disagreed that any of his posts could be viewed as threatening in his response to that letter, he was certainly placed on notice that employees were, in fact, threatened. Despite receiving this notice, or perhaps because of it, Appellant posted similar content at least eight more times over the course of the next two days.

{¶98} As previously discussed, the evidence is less direct as to Superintendent. As to mental distress, he claimed that he purchased a gun which he keeps in his room at

night. He testified that his fear escalated after seeing the two skeleton memes Appellant posted. Although there is no direct evidence that either of those memes were related to the incident, "courts must take every action into consideration even if * * * some of the person's actions may not, in isolation, seem particularly threatening." *Collins v. Vulic*, 10th Dist. Franklin No. 20AP-528, 2021-Ohio-3343, ¶ 16, citing *J.W. v. D.W.*, 10th Dist. Franklin No. 19AP-52, 2019-Ohio-4018, ¶ 47; *Olson v. Olson*, 6th Dist. Wood No. WD-15-002, 2016-Ohio-149, ¶ 14.

{¶99} Appellant did obtain Superintendent's unlisted home address. This concerned Superintendent, because he assumed that Appellant had followed him home. In addition to the fact that Appellant made it clear that he had obtained the address through a voter registration search, it is questionable whether Appellant knew that his action of obtaining the address and listing it in a police report would cause Superintendent emotional distress. This is particularly true as Appellant used the address only in the police report, and did not post it.

{¶100} The court relied on testimony from Superintendent that he feared he would be "blackballed" if he ever attempted to gain new employment, as Appellant's posts may come up in a Google search. No caselaw can be found as to whether reputational damage is sufficient to constitute emotional distress. Again, the definition of emotional distress looks to whether the victim experiences some mental illness or condition that ordinarily would require some sort of treatment or temporary incapacity. It is unclear whether reputational damage would have that effect on a person, particularly as any future employment would be merely speculative: Superintendent did not suggest an intention to leave the school's employment anytime soon. While Superintendent testified

that future employment was a concern, he did not testify that he experienced any specific emotional distress arising from that concern.

{¶101} Because the majority of Appellant's escalating behavior did not pertain directly to Superintendent, there is no such a clear link to a pattern of conduct as the evidence tied to Tutor. However, the menacing by stalking statute provides that "the other person's belief or mental distress may be based on words or conduct of the offender that are directed at or identify a corporation, association, or other organization that employs the other person or to which the other person belongs." R.C. 2903.211(A). Thus, a legitimate basis for Superintendent's distress is the threat he believed Appellant posed to the school. In fact, it was significant enough to cause a lockdown requiring police assistance. This record does reflect that a reasonable trier of fact could see Appellant's behavior posed a real threat to the school, its employees and students. Superintendent is directly charged with their welfare, thus, with their concern.

{¶102} While we may not have reached the same verdict as the trial court, the record contains sufficient evidence to support Appellant's convictions. Accordingly, Appellant's second and fourth assignments of error are without merit and are overruled.

ASSIGNMENT OF ERROR NO. 5

A Conviction and Sentence for Violating Community Control Must be Vacated When Premised Entirely on Invalid Underlying Felony Convictions. U.S. CONST., amend. XIV, OHIO CONST., art. I, §16. (T.d., 34, 39.)

{¶103} Appellant argues that since his convictions should be vacated, they cannot form the basis for his probation violation in case number 17 CR 536. Appellant urges that

he did not stipulate to a probation violation by merely agreeing to waive a hearing on the matter.

{¶104} The state responds by arguing that vacating his conviction would not necessarily require vacating the associated probation violation, as the latter is subject to a lesser preponderance of the evidence standard.

{¶105} Because both of Appellant's convictions are affirmed, Appellant's fifth assignment of error is moot.

Conclusion

{¶106} Appellant argues that the menacing by stalking statute is unconstitutionally vague and overly broad as applied to this case. For those reasons, Appellant argues that his convictions violate the First Amendment. He additionally argues that his trial counsel was ineffective for failing to raise the issue. In the event that this Court disagrees, Appellant argues that his convictions are not supported by sufficient evidence and are against the manifest weight of the evidence. Finally, Appellant argues that if his conviction is vacated, it cannot serve as the basis for a probation violation in an unrelated case. For the reasons provided, Appellant's arguments are without merit and the judgment of the trial court is affirmed.

Robb, J., concurs.

Rice, J., concurs.

For the reasons stated in the Opinion rendered herein, Appellant's first, second, third and fourth assignments of error are overruled and his fifth assignment is moot. It is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.