[Cite as *State v. Simmons*, 2023-Ohio-2957.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 112179
v.	:	
SAUL SIMMONS,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: DISMISSED
RELEASED AND JOURNALIZED: August 24, 2023

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-22-666873-A

Appearances:

Mary Elaine Hall, *for appellant*.

MICHAEL JOHN RYAN, J.:

{¶ 1} Defendant-appellant Saul Simmons appeals from his judgment of conviction, which was rendered after a jury trial. On appeal, counsel for Simmons filed a motion to withdraw pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), asserting that following an examination of the record there are no meritorious grounds for appeal. This court held the motion in abeyance to give Simmons an opportunity to file a pro se brief. He did not do so. After

conducting our own independent review, we grant counsel's motion to withdraw and dismiss the appeal.

Facts and Procedural History

{¶ 2} The culminating incident giving rise to the charges in this case occurred on January 9, 2022, when Simmons was arrested by the Brook Park police on the property of the victim, who is the mother of his minor daughter. At the time of the incident, Simmons had previously been convicted of domestic violence and attempted domestic violence against the victim. He had also violated previous temporary protection orders issued in favor of the victim and against him.

{¶ 3} On January 26, 2022, a Cuyahoga County Grand Jury indicted Simmons on the following charges: Count 1, menacing by stalking with a furthermore clause, a felony of the fourth degree in violation of R.C. 2903.211(A)(1); Count 2, menacing by stalking with a furthermore clause, a felony of the fourth degree in violation of R.C. 2903.211(A)(1); and Count 3, criminal damaging or endangering, a misdemeanor of the second degree in violation of R.C. 2909.06(A)(1). The indictment alleged that the menacing by stalking occurred "on or about October 1, 2019 to January 9, 2022," and the criminal damaging or endangering occurred "on or about January 9, 2022." The furthermore clause attendant to Count 1 alleged that Simmons "has a history of violence toward the victim or any other person or a history of other violent acts toward the victim or any other person." The furthermore clause attendant to Count 2 alleged that Simmons "trespassed on the land or premises where the victim lives, is employed, or attends

school." A bill of particulars reiterated the dates in the indictment and specified the address where the crimes were committed.

{¶ 4} After negotiations, the state offered Simmons to plead to an amended Count 1, attempted menacing by stalking, a felony of the fifth degree in violation of R.C. 2923.02 and 2903.211(A)(1), and Count 3 as indicted, criminal damaging or endangering, a misdemeanor of the second degree, with conditions of no-contact with the victim and a restitution order. Under the state's offer, Count 2 would be dismissed. Simmons rejected the offer, and the matter proceeded to a jury trial.

{¶ 5} Prior to trial, the defense stipulated to prior felony convictions Simmons had, those being domestic violence and criminal damaging (Cuyahoga C.P. No. CR-16-609601), and attempted domestic violence (Cuyahoga C.P. No. CR-19-645449). The defense also stipulated to the furthermore clause attendant to Count 1.

{¶ 6} The state informed the court that it was "clear with the victim that she is not going to mention the Defendant's prior incarceration, and we will not in any way try to elicit that testimony." The state clarified what testimony as to the victim's prior history with Simmons it anticipated eliciting from her:

> The only testimony that we anticipate eliciting from her is about the history between them. That history is relevant to the element of menacing by stalking, which includes the history of a violent period towards the victim, and we are restricting that to the victim herself. We're not going to try to talk about anything involving anybody else.

(Tr. 369-370.)

{¶ 7} The state explained that although the defense stipulated to the two prior felony convictions, "there are two misdemeanor cases that are part of the history here." The state contended that it was seeking testimony about the pattern of conduct, not that the conduct resulted in misdemeanor charges. The state further informed the court that the testimony was necessary to establish that Simmons acted knowingly to cause the victim to believe that he would cause her physical harm or mental distress.

{¶ 8} The defense objected and made a motion in limine to prevent any additional evidence (besides the two prior convictions the defense stipulated to) outside of the dates in the indictment (October 1, 2019-January 9, 2022) relative to the history between the victim and Simmons. After considering the parties' arguments and reviewing pertinent case law, the trial court overruled the defense's motion in limine.

{¶ 9} The victim testified that she and Simmons had been dating and she became pregnant with their child, who was born in 2016. When she was approximately seven months pregnant, Simmons became irate with the victim, smashed the baby's crib, and knocked the victim through a door. The victim and Simmons stayed together until approximately two months after their baby was born, at which time they separated. The victim testified that they separated because they needed time apart given their tumultuous history. She also sought a protection order at that time. The victim testified that she sought protection orders "pretty

much yearly, ongoing after that." According to the victim, in addition to being physically violent, Simmons was also verbally and psychologically abusive.

{¶ 10} The victim testified that although she was not sure of their future as a couple, she wanted Simmons and their child to have a relationship so she kept in touch with him. For the next two years, the victim and Simmons had a turbulent on-again-off-again relationship, until 2018, when the victim decided that she and Simmons should solely co-parent and not be romantically involved. According to the victim, Simmons would not engage in activities with their child on his own — he would only engage with the child if the victim participated in the activities.

{¶ 11} The victim further testified that incidents with Simmons continued after their break-up in 2018. She described an incident that occurred in 2019 while she and her child were on vacation and Simmons texted her from inside her house. Upon arriving back in the city from the vacation, the victim immediately went to the police who provided her an escort to her home. Once at the home, the police approached it, knocked on the door, and Simmons answered. Simmons told the police that he resided at the home with his wife; the police took him into custody. A search of the home revealed that it was "pretty much trashed." Additionally, there were coverings on windows that had not previously been there and bullet fragments were found in the basement near items belonging to Simmons.

{¶ 12} The victim testified that she no longer felt safe being around Simmons because she felt his anger toward her was escalating and she was worried that he would go to the "next level"; she specifically testified that she was scared of

Simmons. By way of example, she testified about a time they were planning to go to Edgewater Park and Simmons packed duct tape, plastic garbage bags, and rope to bring along with them. The victim called the outing off because she feared what he had planned, and her doing so caused Simmons to become upset.

{¶ 13} The victim also testified that, on the recommendation of her child's pediatrician, she sought counseling for her child because of the situation involving the parties' relationship.

{¶ 14} As to the January 9, 2022 incident giving rise to this indictment, the victim testified that at approximately 8:45 a.m. she heard a loud bang at the back of her house and initially thought a tree had fallen on it. However, when she looked out her front door she saw Simmons walking away. According to the victim, Simmons was not welcome at her house at that time. The victim testified that she was "nervous": "I sat there and thought about how long he could have been there. Was he watching.[?] It's just a lot of uncertainties." She called the police, who responded and found Simmons in the vicinity; he refused to identify himself. The police transported Simmons back to the victim's house, and the victim positively identified him as the man she saw on her property.

{¶ 15} The victim testified that that morning, she turned on her cell phone, which she had off overnight, and discovered Simmons had sent her a number of menacing-type text messages as well as indecent photographs of himself in the early morning hours prior to damaging her window. Some of the messages implied that Simmons had been at the victim's house for a period of time. For example, one of

the text messages, sent at 2:26 a.m., asked the victim "Can I come in?" According to the victim, Simmons's overnight texting was a frequent occurrence.

{¶ 16} One of the responding officers photographed the broken window. The officer testified that although the photograph did not capture the damage to the window because of the lighting, the window was indeed broken. The victim had to have the window boarded up until it could be replaced.

{¶ 17} Another responding Brook Park police officer described the victim as "very emotional" and "upset." The officer further testified that during his investigation of the case, he learned that from 2019 through the time of the culminating incident in January 2022, the police had responded "several" times to the victim's residence for incidents involving Simmons.

{¶ 18} At the conclusion of the state's case, the defense made a Crim.R. 29 motion for judgment of acquittal, which the trial court denied. The trial court instructed the jury, which included the following instruction regarding the testimony of prior acts not subject to the present indictment:

> Evidence of prior incidents were offered for a limited purpose.
>
> First, this evidence was not received, and you may not consider it to prove the character of the defendant or in order to show that he [has] acted in conformity or accordance with that character.
>
> Specifically, you may not infer that because a person committed an act in the past that they committed another act at a later time. Each act or incident must stand on its own.
>
> To form a pattern of conduct alleged in Counts 1 and 2, you must find beyond a reasonable doubt the Defendant committed two or more acts closely related in time to each other, and occurring within the broader

> range of October 1st, 2019 to January 9th, 2022.
>
> Prior incidents outside of the dates listed in the indictment are not part of the specific pattern of conduct alleged in the indictment and do not show their pattern of conduct occurred at a later time.
>
> You may not consider evidence of prior incidents in determining whether a pattern of conduct occurred.
>
> Incidents occurring outside the limited time interval that constitute a pattern of conduct may be considered for the limited purpose of your evaluation of the history between the Defendant and [the victim].
>
> They may also be considered by you in evaluating how [the victim] perceived and was affected by any subsequent actions of the defendant that you may find occurred.

(Tr. 591-593.)

{¶ 19} After its deliberations, the jury returned guilty verdicts on all three counts. The parties agreed that Counts 1 and 2 merged for the purpose of sentencing, and the state elected to proceed on Count 1. The trial court imposed a prison sentence of one year on Count 1 and 90 days of jail time on Count 3, and ordered the sentences to be served concurrently.

Law and Analysis

{¶ 20} In *Anders*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493, the United States Supreme Court held that if appointed counsel, after a conscientious examination of the case, determines the appeal to be wholly frivolous, he or she should advise the court of that fact and request permission to withdraw. *Id.* at 744. This request, however, must be accompanied by a brief identifying anything in the record that could arguably support the appeal. *Id.* Further, counsel must also

furnish the client with a copy of the brief and allow the client sufficient time to file his or her own brief. *Id.*

{¶ 21} Once the appellant's counsel satisfies these requirements, this court must fully examine the proceedings below to determine if any arguably meritorious issues exist. *Id.* If we determine that the appeal is wholly frivolous, we may grant counsel's request to withdraw and dismiss the appeal without violating constitutional requirements or we may proceed to a decision on the merits if state law so requires. *Id.*

{¶ 22} Appointed counsel here proposed the following potential assignment of error:

> I. The trial court committed plain error when she overruled the Defense's Motion in Limine * * * during the course of the trial and overruled the Defense's Rule 29 Motion at the conclusion of the State's case * * *.

{¶ 23} At the start of trial, the defense sought a motion in limine to limit testimony regarding any prior acts of violence or abusive behavior between Simmons and the victim. According to the defense, the state should have filed a motion under Evid.R. 404(B) so that the defense would have had notice and an opportunity to prepare for the testimony.

{¶ 24} "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Evid.R. 404(B). However, this evidence may be admissible for other purposes, such as to

prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*; *see also* R.C. 2945.59.

{¶ 25} A trial court has broad discretion in deciding whether to admit or exclude other-acts evidence. *State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 67. Thus, ordinarily we defer to a trial court's evidentiary ruling unless the court "has clearly abused its discretion and the defendant has been materially prejudiced thereby." *State v. Hymore*, 9 Ohio St.2d 122, 128, 224 N.E.2d 126 (1967).

{¶ 26} Simmons was charged with menacing by stalking under R.C. 2903.211(A)(1). Under that section, the state had to establish that Simmons "engag[ed] in a pattern of conduct" that "knowingly cause[d]" the victim to believe that he would cause her physical harm or mental distress. "'Other acts evidence can be particularly useful in prosecutions for menacing by stalking because it can assist the jury in understanding that a defendant's otherwise innocent appearing acts, when put into the context of previous contacts he has had with the victim, may be knowing attempts to cause mental distress.'" *State v. Spaulding*, 151 Ohio St.3d 378, 2016-Ohio-8126, 89 N.E3d 554, ¶ 114, quoting *State v. Bilder*, 99 Ohio App.3d 653, 658, 651 N.E.2d 502 (9th Dist.1994); and citing *State v. Hart*, 12th Dist. Warren No. CA2008-06-079, 2009-Ohio-997, ¶ 12 ("In prosecutions for menacing by stalking, the victim's belief that the defendant will cause physical harm is an element of the offense which is often intertwined with their past interactions.").

{¶ 27} The state introduced the other acts evidence in this case to demonstrate why, based on the victim's history with Simmons, she believed he would cause her physical harm or mental distress. And the court specifically instructed the jury that the evidence was to be considered for that limited purpose.

{¶ 28} In regard to Simmons's due process contention, we note this court's decision in *State v. Benitez*, 8th Dist. Cuyahoga No. 98930, 2013-Ohio-2334. In *Benitez*, the charges against the defendant included menacing by stalking, whereby it was alleged that the defendant, "by engaging in a pattern of conduct, did knowingly cause [the victim] to believe that [the defendant] will cause physical harm to [the victim] * * * or cause mental distress to [the victim]." *Id.* at ¶ 15. This court found that the defendant had notice of the other acts and distinguished it from *State v. Muniz,* 8th Dist. Cuyahoga No. 93528, 2010-Ohio-3720, which the *Benitez* defendant contended was similar to his case.

{¶ 29} In *Muniz*, the defendant was convicted of intimidation of a crime victim. The defendant contended that the indictment did not provide notice of the charge against her because it did not list the elements of the predicate offense or the date and location of the alleged crime constituting the predicate offense. This court agreed, finding that "where a defendant is charged with intimidation of a 'victim of a crime,' an essential element of the charge is that the underlying crime occurred and thus created a victim." *Id.* at ¶ 20. The court reasoned that because

> [t]he charge of intimidation of a crime victim presupposes an earlier crime has been committed[,] [t]he state has the burden of proof on all essential elements of the crime as charged; therefore, it must prove the

> underlying acts occurred for there to be a crime victim, regardless of whether a complaint has been filed or a charge brought for that underlying crime.

Id.

{¶ 30} *Muniz* was considered in the en banc opinion *State v. Sanders*, 2019-Ohio-2566, 140 N.E.3d 128 (8th Dist.), "regarding what must be proven to support a conviction for intimidation." *Sanders* at ¶ 1. The en banc court held that "the occurrence of the underlying criminal or delinquent act is not an essential element of the offense of intimidation that must be proven beyond a reasonable doubt. To the extent that our decision in *Muniz*, 8th Dist. Cuyahoga No. 93528, 2010-Ohio-3720, is inconsistent with this holding, it is overruled." *Sanders* at ¶ 10.

{¶ 31} In this case, as in *Benitez*, 8th Dist. Cuyahoga No. 98930, 2013-Ohio-2334, the testimony at issue was not required as proof of an essential element of the menacing counts (the defense stipulated to two of Simmons's prior convictions, which were not relative to the testimony at issue). Rather, the state offered testimony (which was the subject of misdemeanor charges) to aid the jury in understanding the history between Simmons and the victim and to provide context to the victim's belief that Simmons would cause her physical harm or mental distress. To that end, the victim did not testify about the resultant convictions that arose from those incidents. Indeed, the victim did not testify about any of Simmons's convictions. Further, the trial court instructed the jury on how it was to consider the evidence. Additionally, Simmons was on notice from the indictment (i.e., the furthermore clause attendant to Count 1) that his "history of violence

toward the victim" was a subject of the within prosecution. *See State v. Andrus*, 11th Dist. Ashtabula No. 2019-A-0082, 2020-Ohio-6810, ¶ 34 ("Appellant was on notice from the [i]ndictment and the Bill of Particulars that the state was required to prove he had a history of violence or violent acts."). On this record, the trial court did not abuse its discretion by allowing the victim's testimony as to the history between her and Simmons.

{¶ 32} We next consider counsel's proposed contention that the trial court erred in denying Simmons's Crim.R. 29 motion for a judgment of acquittal. Crim.R. 29(A) provides for an acquittal "if the evidence is insufficient to sustain a conviction of such offense or offenses." A sufficiency challenge essentially argues that the evidence presented was inadequate to support the jury verdict as a matter of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). "'The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (Emphasis deleted.) *State v. Getsy*, 84 Ohio St.3d 180, 193, 702 N.E.2d 866 (1998), quoting *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). "[A] conviction based on legally insufficient evidence constitutes a denial of due process." *Thompkins* at *id.*, citing *Tibbs v. Florida*, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). When reviewing a sufficiency of the evidence claim, we review the evidence in a light most favorable to the prosecution. *State v. Hill*, 75 Ohio St.3d 195, 205, 661 N.E.2d 1068 (1996).

{¶ 33} Simmons was charged in Counts 1 and 2 with menacing by stalking in violation of R.C. 2903.211(A)(1), which states, "[n]o person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person * * * or cause mental distress to the other person[.]"

> A person acts knowingly, regardless of his or her purpose, when he or she is aware that his or her 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.

R.C. 2901.22(B).

{¶ 34} Therefore, in this case, it does not matter whether Simmons "intended that his actions cause fear of physical harm or mental distress[;] instead[,] what is important is [whether] he knew his actions would probably result in such fear and mental distress." *Vega v. Tomas*, 8th Dist. Cuyahoga No. 104647, 2017-Ohio-298, ¶ 15, citing R.C. 2901.22(B).

{¶ 35} A pattern of conduct is defined as two or more actions or incidents closely related in time. R.C. 2903.211(D)(1). "The incidents need not occur within any specific temporal period." *Rufener v. Hutson*, 8th Dist. Cuyahoga No. 97635, 2012-Ohio-5061, ¶ 16, citing *Jenkins v. Jenkins*, 10th Dist. Franklin No. 06AP-652, 2007-Ohio-422. Further, two incidents are enough to establish a pattern of conduct for purposes of R.C. 2903.211(A)(1). *State v. O'Reilly*, 8th Dist. Cuyahoga No. 92210, 2009-Ohio-6099, ¶ 34, citing *State v. Rucker*, 12th Dist. Butler No. CA2001-04-076, 2002 Ohio App. LEXIS 234 (Jan. 22, 2002).

{¶ 36} Mental distress refers to "any mental illness or condition that involves some temporary substantial incapacity or mental illness or condition that would normally require psychiatric treatment." R.C. 2903.211(D)(2). "Mental distress need not be incapacitating or debilitating * * * [and] expert testimony is not required to find mental distress." *Perry v. Joseph*, 10th Dist. Franklin Nos. 07AP-359, 07AP-360, and 07AP-361, 2008-Ohio-1107, ¶ 8. Instead, "[l]ay testimony may be sufficient" to establish mental distress. *Rufener* at ¶ 17. The parties' history is also relevant to establishing the elements of menacing by stalking. *Spaulding*, 151 Ohio St.3d 378, 2016-Ohio-8126, 89 N.E.3d 554, at ¶ 114, citing *Bilder*, 99 Ohio App.3d at 658, 651 N.E.2d 502, and citing *Hart*, 12th Dist. Warren No. CA2008-06-079, 2009-Ohio-997, at ¶ 12.

{¶ 37} The state presented sufficient evidence to support the menacing charges. The evidence demonstrated more than two incidents, closely related in time, and within the timeframe set forth in the indictment, involving Simmons and the victim whereby a jury could find that he engaged in a pattern of conduct knowing it would cause the victim fear of physical harm or mental distress.

{¶ 38} We note that the state relied on the home invasion incident as one of the incidents demonstrating a pattern of conduct. While the assistant prosecuting attorney and defense counsel referred to the incident occurring in January 2019, there was no testimony to that effect. The victim, the only witness to testify about the incident, merely stated that it happened in 2019, without any indication as to what month. *See* Tr. 434, 436. The state also relied on the canceled Edgewater

outing as another incident establishing a pattern of conduct. But again, the victim, who was the sole witness about the incident, did not provide the date that the incident occurred. *See* tr. 442.

{¶ 39} Nonetheless, other testimony was sufficient evidence that Simmons engaged in a pattern of conduct during the relevant timeframe. For example, the victim testified that she sought protection orders against Simmons "pretty much yearly" after the 2016 violent incident with Simmons when she was pregnant, and one of the police officers testified that the Brook Park police were called to the victim's house during the years 2019 through 2022 for incidents involving Simmons. The officer specified that for each year in that timeframe, the police responded to the home. According to the officer, the victim called the police because of complaints regarding telecommunications harassment, domestic violence, protection order violations, and menacing. Moreover, on the date of the culminating incident, Simmons sent the victim numerous menacing type text messages, as well as indecent pictures of himself. This evidence was sufficient to demonstrate a pattern of conduct within the required timeframe.

{¶ 40} Further, the other acts evidence presented by the state was sufficient to demonstrate that Simmons's conduct would knowingly cause the victim to believe that he would cause physical harm or mental distress to her. Specifically, the victim's testimony about the incident in 2016 when she was pregnant was sufficient to demonstrate that, because of the couple's prior history, Simmons's conduct would knowingly cause her to believe that he would cause physical harm or mental distress

to her as it related to the within menacing by stalking offenses. Indeed, the victim testified that she was scared and worried about Simmons's escalating behavior toward her.

{¶ 41} In regard to the criminal damaging count, Simmons was charged under R.C. 2909.06(A)(1), which provides that "[n]o person shall cause, or create a substantial risk of physical harm to any property of another without the other person's consent: (1) Knowingly, by any means[.]" The state presented sufficient evidence that Simmons was at the victim's residence on January 9, 2022, without her consent, and threw something at her window, causing damage to it. The evidence was sufficient to support criminal damaging.

{¶ 42} Based on our review of the entire record, we find there are no meritorious, nonfrivolous issues for our review with respect to Simmons's conviction. Accordingly, we conclude that this appeal is wholly frivolous and grant counsel's motion to withdraw.

{¶ 43} Appeal dismissed.

It is ordered that appellee recover from appellant costs herein taxed.

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

MICHAEL JOHN RYAN, JUDGE

MICHELLE J. SHEEHAN, P.J., and
LISA B. FORBES, J., CONCUR