

IN THE COURT OF APPEALS OF OHIO  
TENTH APPELLATE DISTRICT

State of Ohio,	:	
	:	
Plaintiff-Appellee,	:	
	:	No. 09AP-1043
v.	:	(M.C. No. 2009 CRB 2626)
	:	
John Clellan,	:	(REGULAR CALENDAR)
	:	
Defendant-Appellant.	:	

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D E C I S I O N

Rendered on August 17, 2010

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*Richard C. Pfeiffer, Jr.*, City Attorney, *Lara N. Baker*, City Prosecutor, *Melanie R. Tobias* and *Orly Ahroni*, for appellee.

*Javier H. Armengau*, for appellant.

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APPEAL from the Franklin County Municipal Court.

BRYANT, J.

{¶1} Defendant-appellant, John Clellan, appeals from a judgment of the Franklin County Municipal Court finding him guilty, pursuant to jury verdict, of aggravated menacing in violation of R.C. 2903.21. Because (1) sufficient evidence supports the jury's verdict, (2) the manifest weight of the evidence supports the jury's verdict, and (3) defendant's counsel was not ineffective, we affirm.

## I. Procedural History

{¶2} On February 4, 2009, an argument arose between defendant and Robert Litchfield on a Grove City street concerning Litchfield's parked car, which partially blocked defendant's path to his driveway. As the argument escalated, defendant pulled a gun on, and threatened to shoot, Litchfield.

{¶3} As a result of the incident, a complaint was filed in the Franklin County Municipal Court on February 5, 2009 charging defendant with aggravated menacing in violation of R.C. 2903.21. The complaint stated that defendant did "[k]nowingly cause another, to wit: Robert L. Litchfield, to believe that John Clellan would cause serious physical harm to said other, to wit: John Clellan pointed a handgun at Mr. Litchfield and stated, "I'll kill your ass."

{¶4} Trial began on October 6, 2009, and the prosecution presented testimony from Litchfield, his brother-in-law's girlfriend, Karen Devine-Riley, and Deputy Brian Felkner. The defense followed with testimony of defendant and his wife, Joan, who was charged separately with the same offense and subsequently was found not guilty. Based on the evidence, the jury found defendant guilty of aggravated menacing, and the trial court sentenced defendant accordingly.

## II. Assignments of Error

{¶5} Defendant appeals, assigning the following errors:

**ASSIGNMENT OF ERROR I:**

The trial court erred by not granting Appellant's Motion for a Rule 29 Dismissal.

**ASSIGNMENT OF ERROR II:**

The convictions in the instant case are not supported by sufficient evidence.

**ASSIGNMENT OF ERROR III:**

The convictions in the instant case are against the manifest weight of the evidence.

**ASSIGNMENT OF ERROR IV:**

Trial counsel was ineffective for failing to make any argument whatsoever for his Rule 29 Motion to Dismiss.

**ASSIGNMENT OF ERROR V:**

Trial counsel was ineffective for failing to make a Motion for a Judgment Notwithstanding the Verdict.

**III. First and Second Assignments of Error — Sufficiency of the Evidence**

{¶6} Defendant's first and second assignments of error contend not only that the state failed to present sufficient evidence to support the charged offense but that the trial court erred in denying defendant's Crim.R. 29 motion for acquittal.

{¶7} Pursuant to Crim.R. 29(A), a court "shall order the entry of a judgment of acquittal of one or more offenses \* \* \* if the evidence is insufficient to sustain a conviction of such offense or offenses." Because analysis of the evidence for purposes of a Crim.R. 29(A) motion looks at the sufficiency of the evidence, a Crim.R. 29(A) motion and a review of the sufficiency of the evidence are subject to the same analysis. *State v. Tenace*, 109 Ohio St.3d 255, 2006-Ohio-2417, ¶37.

{¶8} Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. Sufficiency is a test of adequacy of the evidence. *Id.* We construe the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found the essential elements of the offense proven beyond a reasonable doubt. *State v. Jenks* (1991), 61

Ohio St.3d 259, paragraph two of the syllabus; *State v. Conley* (Dec. 16, 1993), 10th Dist. No. 93AP-387.

{¶9} According to the state's evidence, Robert Litchfield was dropping off his brother-in-law's girlfriend, Karen Devine-Riley, at her home in Grove City on the evening of February 4, 2009. Because of icy conditions in the driveway, Litchfield parked his car partially on the road and partially in the driveway. Earlier plowing left snow banks on the side of the road, making the road narrower than was customary. Devine-Riley exited the car in order to unload firewood from the trunk.

{¶10} Meanwhile, defendant's wife, Joan Clellan, had pulled the Clellans' truck straight into their driveway after returning home. Defendant preferred the truck to be backed into the driveway, so he went outside to turn around the truck. In order to perform the maneuver, defendant pulled the truck past Devine-Riley's driveway, turned the truck around, and then began to back it into his own driveway. In the course of backing, defendant came close to Litchfield's parked car. Defendant stopped his truck so that the front of the truck was almost even with the rear of Litchfield's car, and a verbal altercation ensued.

{¶11} Devine-Riley testified that, upon stopping his truck, defendant began to scream profanities at her, repeatedly stating, "You're not going to assault me." (Tr. 119.) Devine-Riley assured defendant they would be only a minute and intended to move the car shortly. In the course of the escalating exchange, defendant opened the door of his truck, stood on the floor of the truck between the door and the cab, and continued to scream and swear at Devine-Riley.

{¶12} At that point, Litchfield came to the front of the truck, next to Devine-Riley, and asked, "What the fuck is your problem? Why are you screaming at her?" (Tr. 40.) Defendant then pulled a gun, pointed it at Litchfield, and said, "I'll blow your fucking brains out." (Tr. 40.) Litchfield, who was about four feet away from defendant, feared defendant would shoot him; he was afraid he was going to die, because defendant pointed the gun at Litchfield's head. Litchfield called 911 because Devine-Riley was shaking so badly she could not dial the number. Police responded to the call and ultimately charged defendant with aggravated menacing under R.C. 2903.21(A).

{¶13} Under the charged offense, the prosecution had the burden to prove defendant "knowingly cause[d] another to believe that [he would] cause serious physical harm to the person or property of the other person." R.C. 2903.21(A). Litchfield's testimony provides evidence that meets the elements of R.C. 2903.21: Litchfield testified he not only feared defendant would shoot him but was afraid he would die because defendant had the gun pointed at his head. Construed in the light most favorable to the prosecution, the evidence supports the conclusion that defendant knowingly caused Litchfield to believe he would cause serious physical harm to Litchfield. The prosecution thus presented sufficient evidence to defeat defendant's Crim.R. 29(A) motion for acquittal and to sustain a conviction for aggravated menacing under R.C. 2903.21. Defendant's first and second assignments of error are overruled.

#### **IV. Third Assignment of Error — Manifest Weight of the Evidence**

{¶14} Defendant's third assignment of error asserts his conviction is against the manifest weight of the evidence. When presented with a manifest weight argument, we engage in a limited weighing of the evidence to determine whether sufficient competent,

credible evidence supports the jury's verdict to permit reasonable minds to find guilt beyond a reasonable doubt. *Conley*, supra; *Thompkins* at 387 (noting that "[w]hen a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony"). Determinations of credibility and weight of the testimony remain within the province of the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. The jury thus may take note of the inconsistencies and resolve them accordingly, "believ[ing] all, part or none of a witness's testimony." *State v. Raver*, 10th Dist. No. 02AP-604, 2003-Ohio-958, ¶21, citing *State v. Antill* (1964), 176 Ohio St. 61, 67.

{¶15} Defendant's testimony differs significantly from that of Litchfield and Devine-Riley. Defendant testified that as he was backing down the street to enter his driveway, he saw Litchfield's car pull into the middle of the street and stop; the trunk opened. Defendant decided his truck could not pass the car if he remained on the street but believed he could drive his truck over the mound of snow that the earlier plowing created. While backing past Litchfield's car at "less than walking speed," defendant heard Devine-Riley say, "Wait a damn minute." (Tr. 211.) Believing Devine-Riley dropped something that rolled under his truck, defendant stopped. Devine-Riley said she would be out of the way momentarily. Defendant told her she was blocking the street, and he needed to get to his driveway. Devine-Riley said she could not hear him, so he opened the door and repeated himself, eventually standing up to continue the discussion. The exchange became unfriendly. Devine-Riley told defendant she was "sick of you damn people," and

defendant responded that they were "going to settle this in court. I'm not going to argue with you about this anymore." (Tr. 211.)

{¶16} Litchfield at that point exited his car, walked up to the front of defendant's truck and said, "I'm just dropping her off, fuck-face." (Tr. 212.) Defendant advised he did not care what Litchfield was doing, but Litchfield could not block the street. Litchfield then offered to "whoop [defendant's] ass." (Tr. 212.) When defendant retorted that doing so would land Litchfield in jail, Litchfield said, "Come out of there," walked toward the open truck door, and began to shadow box and kick the fender of the truck. (Tr. 212.)

{¶17} Believing Litchfield to be "nuts," defendant grabbed his wife's .45 pistol from the console and held it at his side, though Litchfield had begun to retreat from the truck. (Tr. 212-13.) Seeing the gun, Devine-Riley told Litchfield, "Now, see. Now he's got a gun." (Tr. 213.) Litchfield turned and said, "Oh, you pulled a gun on me? Now I will kill you, mother-fucker." (Tr. 213.) Litchfield charged the window of the truck and reached through the window of the open truck door. In response, defendant brought the gun up and used the door as a shield by placing his foot against it. When Litchfield attempted to walk around the door of the truck to get at defendant, defendant warned Litchfield to "[g]et back. You're going to get shot." (Tr. 213.) Devine-Riley was able to convince Litchfield to retreat, so defendant returned the gun to the console and sat down. Devine-Riley returned to the truck and told defendant they would call the police since he pulled a gun on them. Defendant explained he did so because Litchfield tried to pull him out of his truck; defendant advised they must leave his truck alone.

{¶18} Devine-Riley and Litchfield moved away from the truck, and Litchfield retrieved a cell phone. Defendant shut the door and put the truck in gear and "gassed it"

toward his driveway. (Tr. 214.) Checking his mirrors to see where he was going, defendant looked up to see Devine-Riley and Litchfield chasing after his truck as he backed down the street. Running the truck aground on a pile of rocks and snow with Devine-Riley and Litchfield in pursuit, defendant saw his wife Joan coming out of the house and to the door of his truck. He handed her the gun and said, "If they come down here and try to hurt us, shoot them." (Tr. 215.) Litchfield and Devine-Riley "backed off" to Litchfield's car; defendant parked his truck in the driveway. (Tr. 215.) The Clellans entered their home, slammed the door, and locked it.

{¶19} Neither defendant's evidence nor the state's evidence suggests defendant did not commit the act for which he was charged. Indeed, defendant testified that at one point he "brought the gun up" and said to Litchfield, "Get back. You're going to get shot." (Tr. 213.) Defendant's response to Devine-Riley's accusation that he pulled a gun on someone was, "You're damn right." (Tr. 214.) Instead, defendant's challenge to the manifest weight of the evidence raises issues of self-defense.

{¶20} Defendant initially argues the jury lost its way because the prosecution never rebutted the presumption of self-defense set forth in R.C. 2901.05(B), sometimes referred to as the "Castle Doctrine." Pursuant to the provisions of R.C. 2901.05(B), the court instructed the jury that if it were to find by a preponderance of the evidence (1) "the defendant used defensive force," and (2) "the person against whom the defensive force was used was in the process of unlawfully and without privilege to do so, entering the residence and/or vehicle occupied by the defendant," then the jury must find defendant acted in self-defense and enter a verdict of not guilty. (Tr. 312.) Of the two factors, only the second is disputed. The parties presented conflicting evidence about whether

Litchfield was in the process of unlawfully and without privilege entering defendant's vehicle and whether defendant occupied the vehicle.

{¶21} Supporting his defense under R.C. 2901.05(B) was defendant's testimony that Litchfield, upon learning defendant had a gun, said, "Now I will kill you, mother-fucker." (Tr. 213.) According to defendant, Litchfield then reached through the window of the truck, and, failing that, began to come around the open truck door. Such testimony suggests Litchfield was in the process of unlawfully and without privilege entering defendant's vehicle.

{¶22} The prosecution, however, presented Litchfield's testimony that when defendant brandished the gun, Litchfield was at the front of the truck, four or five feet from defendant. After defendant pulled the gun, Litchfield only backed away. When asked if he ever recalled touching the truck, Litchfield said, "No, never touched it." (Tr. 53.) Deputy Brian Felkner also provided testimony supporting Litchfield's version of the events, testifying defendant changed his story about what occurred. Defendant initially told Felkner that Litchfield tried to pull him out of his vehicle by reaching through the window. When Felkner asked defendant how he could brandish a firearm while being pulled out of the truck, defendant admitted Litchfield was not pulling him from the vehicle, but only reached into the truck's window. Confused about why Litchfield would reach into the vehicle without doing anything else, Felkner inquired further. Defendant then admitted Litchfield did not reach into the vehicle; defendant only thought Litchfield would do so.

{¶23} Faced with such conflicting testimony, the jury had the responsibility to determine witness credibility. Given the discrepancies in testimony Litchfield and defendant offered, the jury could have reasonably found Felkner's testimony supported

Litchfield's version of the events and thus concluded Litchfield was not in the process of unlawfully and without privilege entering defendant's vehicle.

{¶24} Moreover, despite defendant's claim that the uncontroverted evidence demonstrated he was in his vehicle at all times he had the gun, some testimony indicated defendant did not occupy the truck when he possessed the gun. Litchfield testified defendant was standing on the rocker panel between the door and the cab of the truck. When asked what was above defendant's head at that point, Litchfield said, "Nothing." (Tr. 42.) Asked if defendant's head was outside of the truck, Litchfield replied affirmatively. Regarding the location from which defendant yelled profanities at her, Devine-Riley stated defendant first yelled through the window. Devine-Riley then testified she was "not sure if [defendant] was standing on the running board or if he was standing actually on his truck, but he was taller \* \* \* so he was kind of above the truck" when he continued yelling at her. (Tr. 118.) Both Litchfield's and Devine-Riley's testimony thus contradicts defendant's evidence that he was in his vehicle at all times. Indeed, defendant himself testified that once Litchfield and Devine-Riley were far enough away from the truck, he was able to "put the gun down on the console, and sit down." (Tr. 214.) The jury reasonably could conclude defendant was unable to stand while remaining inside the vehicle and thus also conclude defendant did not remain in the vehicle during his encounter with Litchfield and Devine-Riley.

{¶25} Based on its resolution of the conflicting evidence, the jury properly could refuse to apply R.C. 2901.05(B). Defendant nonetheless contends the jury lost its way in failing to conclude that, apart from the "Castle Doctrine," defendant acted in self-defense.

{¶26} Self-defense is an affirmative defense, and the burden of proof rests upon the accused. R.C. 2901.05(A). The accused must show each of three elements in order to establish self-defense: (1) the accused was not at fault in creating the situation; (2) the accused had a bona fide belief that he or she was in imminent danger of death or great bodily harm and that the only means of escape was the use of force; (3) the accused did not violate any duty to retreat or avoid the danger. See *State v. Melchior* (1978), 56 Ohio St.2d 15, 20-21 (involving homicide); *State v. Ward*, 168 Ohio App.3d 701, 2006-Ohio-4847, ¶30 (addressing assault); *State v. Ludt*, 180 Ohio App.3d 672, 2009-Ohio-416, ¶21 (concerning aggravated menacing).

{¶27} Here, the second prong of the self-defense test defeats defendant's challenge to the manifest weight of the evidence as it relates to his contention that he acted in self-defense. Evidence in the record suggests defendant did not have a bona fide belief he was in imminent danger of death or great bodily harm. Defendant testified he could "only assume that when [Litchfield] progressed around the outside of the door, that his intention was, indeed, to come in and get a hold of me." (Tr. 276.) When asked if Litchfield ever climbed in, defendant responded Litchfield did not. Similarly, when asked if Litchfield could have climbed in had he wanted to, defendant replied, "I don't think so." (Tr. 276.) The testimony gave the jury reason to discredit defendant's testimony, allowing the jury reasonably to conclude defendant did not believe himself to be in imminent danger of death or great bodily harm.

{¶28} Because the record presents a basis for the jury to find adversely to defendant on at least one of the three prongs of the self-defense test, the jury's verdict is

not against the manifest weight of the evidence. The jury thus did not lose its way when it did not find defendant acted in self-defense.

{¶29} Defendant's third assignment of error is overruled.

#### **V. Fourth and Fifth Assignments of Error — Ineffective Assistance of Counsel**

{¶30} To prove ineffective assistance of counsel, defendant must establish counsel's performance was deficient. *Strickland v. Washington* (1984), 466 U.S. 668, 687, 104 S.Ct. 2052, 2064. To carry that burden, the defendant must demonstrate counsel made errors so serious that counsel was not functioning as the "counsel" the Sixth Amendment guarantees. *Id.* Secondly, the defendant must demonstrate the deficient performance prejudiced the defense. *Id.* The defense is prejudiced when the record reveals a reasonable probability that the outcome of the proceeding would have been different if not for counsel's errors. *Id.* at 694, 2068. Thus, the defendant must establish counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.* at 687, 2064. Unless a defendant makes both showings, the conviction cannot be said to have resulted from a breakdown in the adversary process that renders the result unreliable. *Id.*

{¶31} Defendant's fourth and fifth assignments of error assert his trial counsel was ineffective in two ways: (1) his attorney failed to argue the merits of defendant's Crim.R. 29 motion, and (2) his attorney failed to move for a judgment notwithstanding the verdict. A judgment notwithstanding the verdict applies in civil cases. See Civ.R. 50(B); it is not a motion found among the criminal rules. The most nearly equivalent rule in criminal procedure is Crim.R. 29(C), which permits a defendant to move for acquittal after verdict or discharge of jury. Defendant's two assignments of error are thus resolved under

Crim.R. 29: the fourth assignment of error under Crim.R. 29(A) and the fifth under Crim.R. 29(C).

{¶32} Trial counsel was not ineffective in failing to argue the merits of defendant's Crim.R. 29(A) motion for acquittal. Because, as noted above, the state presented sufficient evidence to support the charge against defendant, trial counsel's argument would have been unavailing. Trial counsel is not ineffective for not moving for acquittal under Crim.R. 29(A) where sufficient evidence supports a conviction. *State v. Shipley*, 10th Dist. No. 05AP-385, 2006-Ohio-950. Similarly, counsel is not ineffective in moving for acquittal without a supporting argument where, as here, the state presented sufficient evidence to support the charge against defendant. Defendant's fourth assignment of error is overruled.

{¶33} Nor was trial counsel ineffective in failing to file a motion for acquittal under Crim.R. 29(C). The same standard governs motions under both Crim.R. 29(C) and Crim.R. 29(A). *State v. Hill*, 10th Dist. No. 07AP-889, 2008-Ohio-4257, citing *State v. Beehive Ltd. Partnership* (1993), 89 Ohio App.3d 718, 723. Because sufficient evidence supports defendant's conviction, defense counsel's moving for acquittal pursuant to Crim.R. 29(C) again would have been unsuccessful. Defendant's fifth assignment of error is overruled.

{¶34} Having overruled defendant's five assignments of error, we affirm the judgment of the trial court.

*Judgment affirmed.*

KLATT and FRENCH, JJ., concur.

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