[Cite as *State v. Tackett*, 2004-Ohio-6705.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

ASHTABULA COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2003-A-0091**
- vs -	:	
RANDY L. TACKETT,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Ashtabula Municipal Court, Case No. 02 CRB 0153.

Judgment: Affirmed.

Thomas J. Simon, Ashtabula City Solicitor, *Margaret A. Draper*, Assistant Ashtabula City Solicitor, 110 West 44th Street, Ashtabula, OH 44004 (For Plaintiff-Appellee).

Hobart M. Shiflet, 217 Park Avenue, P.O. Box 1442, Ashtabula, OH 44005-1442 (For Defendant-Appellant).

JUDITH A. CHRISTLEY, J.

{¶1} The following is an accelerated calendar appeal, submitted on the briefs of the parties. Appellant, Randy L. Tackett, appeals from a conviction issued by the Ashtabula Municipal Court for menacing, a fourth degree misdemeanor, under R.C. 2903.22(A). For the reasons that follow, we affirm.

{¶2} On February 2, 2002, a complaint was filed in the Ashtabula Municipal Court, charging appellant with menacing, in violation of R.C. 2903.22(A). The complaint alleged that appellant knowingly caused Billie Gochneaur ("Mrs. Gochneaur") to believe that he would cause physical harm to her person. During his arraignment, appellant pleaded not guilty to the menacing charge.

{¶3} This matter proceed to a trial before the municipal court on April 22, 2003. At trial, the state called Mrs. Gochneaur and her husband, Richard Gochneaur ("Mr. Gochneaur"), as witnesses. The testimony of both Mrs. Gochneaur and Mr. Gochneaur (collectively "the Gochneaurs") provided the following factual events relating to the menacing charge.

{¶4} The Gochneaurs and appellant resided in the city of Ashtabula, Ohio, and had been neighbors during the five years prior to trial. On the morning of February 2, 2002, at approximately 9:45 a.m., Mrs. Gochneaur walked to the end of her driveway with her dog, while Mr. Gochneaur was scraping snow off his vehicle about forty-five feet away. As Mrs. Gochneaur approached her mailbox, appellant's dog began barking at Mrs. Gochneaur and her dog. Mrs. Gochneaur testified that appellant then came out of his house and called her a "fucking bitch" and stated that he was going to kill her. Mr. Gochneaur also testified that he heard appellant make the aforementioned remark and threat.

{¶5} The Gochneaurs then proceeded to enter their home and contact the police. Mr. Gochneaur testified that Mrs. Gochneaur was visibly shaken by appellant's threat and that he dialed the phone number of the police department for his wife because her hands were trembling.

{¶6} Further testimony by the Gochneaurs revealed an ongoing acrimonious relationship with appellant. The hostility between the Gochneaurs and appellant originated from disputes regarding the location of the Gochneaurs' property line and appellant's dog barking incessantly at the Gochneaurs whenever they were outside.

{¶7} Appellant and his fifteen-year old daughter, Crystal Tackett ("Crystal"), were called as witnesses on behalf of the defense. Crystal's testimony expressed some uncertainty as to the date and time of the events in question. Nevertheless, Crystal ultimately testified that, on the morning of the alleged menacing, she had put their dog out at approximately 6:30 a.m. She further testified that she heard their dog barking at the Gochneaurs, but stated that appellant was still asleep and he never exited the house or threatened Mrs. Gochneaur.

{¶8} Likewise, appellant testified that he never yelled at or threatened Mrs. Gochneaur on the morning of February 2, 2002. Instead, appellant stated that he was asleep the entire morning and was first awakened by the police responding to Mrs. Gochneaur's phone call. Appellant's testimony also maintained that the Gochneaurs constantly "teased" his dog, thereby precluding him from letting his dog outside.

{¶9} Following trial, on April 22, 2003, the municipal court issued a judgment entry finding appellant guilty of menacing, pursuant to R.C. 2903.22(A). On June 24, 2003, the court sentenced appellant to thirty days in jail and fined him $250. However, the court suspended the thirty-day jail term and $150 of the fine, provided that appellant did not commit a similar or related offense within the next year.

{¶10} From this judgment, appellant filed a timely notice of appeal and now sets forth the following three assignments of error for our consideration:

{¶11} "[1.] Whether appellant was deprived of due process of law, because he was denied the effective assistance of counsel.

{¶12} "[2.] Whether appellant was deprived of a fair trial by the trial court's cutting short the testimony of the state's witness regarding possible motives as to testimony.

{¶13} "[3.] Whether the weight of the evidence was sufficient to sustain a verdict of guilty by the trier of fact."

{¶14} Under his first assignment of error, appellant argues that he was denied due process of law by virtue of ineffective assistance of counsel. Appellant maintains that he provided his trial counsel with names and addresses of witnesses prior to trial, but his trial counsel failed to subpoena these witnesses. Appellant's first assignment of error further maintains that his trial counsel informed his appellate counsel that appellant failed to provide her with full information regarding the menacing charge.

{¶15} Appellant contends that if his assertions are true, then trial counsel's failure to subpoena these witnesses was conduct which fell below the standard required of an attorney. Appellant further argues that even if his trial counsel's allegations are true, "her trial conduct was still below the standard as the record indicates she did not even request a continuance from the Court upon finding out that [appellant] desired to have his witnesses there."

{¶16} Both the Supreme Court of Ohio and this court have adopted the following two-pronged test articulated in *Strickland v. Washington* (1984), 466 U.S. 668, to determine whether an accused has received ineffective assistance of counsel:

{¶17} "First, a defendant must be able to show that his trial counsel was deficient in some aspect of his representation. *** This requires a showing that trial counsel made errors so serious that, in effect, the attorney was not functioning as the 'counsel' guaranteed by both the United States and Ohio Constitutions. ***

{¶18} "Second, a defendant must show that the deficient performance prejudiced his defense. *** This requires a showing that there is 'a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different.' *** 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' ***" (Citations omitted.) *State v. Swick* (Dec. 21, 2001), 11th Dist. No. 97-L-254, 2001-Ohio-8831, 2001 Ohio App. LEXIS 5857, at 4-5. See, also, *State v. Bradley* (1989), 42 Ohio St.3d 136.

{¶19} We first note that appellant's claim of ineffective assistance of counsel relies exclusively upon evidence outside of the record. This court has held on numerous occasions that when a defendant makes a claim of ineffective assistance of counsel based upon facts outside the record, the appropriate remedy is a petition for postconviction relief. *State v. Thomas*, 11th Dist. No. 2001-L-185, 2003-Ohio-1584, at ¶12, citing *State v. Songer* (Dec. 10, 1999), 11th Dist. No. 98-T-0100, 1999 Ohio App. LEXIS 5939, at 17. Stated differently, a postconviction relief petition is the only mechanism whereby a defendant can present evidence outside the original trial record. *State v. Robinson* (Aug. 4, 2000), 11th Dist. No. 98-L-164, 2000 Ohio App. LEXIS 3538, at 5.

{¶20} Because appellant's instant appeal is not a petition for postconviction relief, we are prohibited from considering evidence outside the record. As a result, it is

impossible for this court to determine whether trial counsel's conduct fell below an acceptable standard. Thus, appellant's first assignment of error is without merit.

{¶21} Moreover, the record before us fails to demonstrate that there were any additional witnesses who could have provided supplementary testimony to assist in appellant's defense. At no time during trial did appellant testify that he was aware of any individual, other than Crystal, that may have overheard or witnessed the events of February 2, 2002. To the contrary, appellant testified that he was asleep until the police arrived at his residence.

{¶22} It appears that trial counsel called the only relevant witnesses who could provide testimony germane to appellant's defense. Thus, the record before us fails to establish that trial counsel's representation of appellant at trial was deficient. For this additional reason, appellant's first assignment of error is without merit.

{¶23} Appellant's second assignment of error contends that the municipal court committed plain error in sustaining the state's objection during appellant's cross-examination of Mrs. Gochneaur. The state's objection occurred when appellant was attempting to establish a possible motive for Mrs. Gochneaur to fabricate the factual events of the menacing charge, to wit:

{¶24} "Q: Ma'am, is there a property line dispute between you and [appellant]?

{¶25} "Ms. Vandevender: Objection.

{¶26} "Court: Overruled.

{¶27} "***

{¶28} "A: Yes.

{¶29} "***

{¶30} "Q: And [appellant] basically, claims that you, your fence encroaches onto his property line, correct?

{¶31} "A: Wrong.

{¶32} "Q: But that's what [appellant's] saying?

{¶33} "A: Yes.

{¶34} "***

{¶35} Q: And what happened then?

{¶36} A: Well, there was a confrontation of him of that.

{¶37} "***

{¶38} "Q: What happened during this confrontation that you spoke of?

{¶39} "Ms. Vandevender: Your Honor, I have to object. We don't have a time frame.

{¶40} "***

{¶41} "Court: Sustained. Find out the date.

{¶42} "Q: Do you remember the date the property was surveyed?

{¶43} "A: No, I don't remember the day.

{¶44} "***

{¶45} "Q: Was it in the last year or so?

{¶46} "A: It's been almost three years, I think.

{¶47} "***

{¶48} "Ms. Vandevender: Your Honor, I have to object to any continuing line of questioning regarding an incident that happened over three years ago.

{¶49} "Court: Sustained."

{¶50} Based upon the foregoing, appellant argues that he was denied "his opportunity to convince the Court that the State's evidence lacked credibility because the State's witnesses had a motive to lie."

{¶51} Although appellant's second assignment of error states a general contention, he has failed to present this court with any legal analysis or citations to legal authority that would support this assignment of error. App.R. 16(A)(7) provides that appellant shall include in his brief "[a]n argument containing the contentions of the appellant with respect to each assignment of error presented for review *and the reasons in support of the contentions, with citations to the authorities, statutes, and parts of the record on which appellant relies.*" (Emphasis added.) See, also, Loc.R. 12(C)(4).

{¶52} This court "may disregard an assignment of error presented for review" if the party raising it fails to comply with the above requirements. App.R. 12(A)(2). Thus, despite appellant's contention, his failure to support this contention with any substantive legal analysis results in a waiver of his second assignment of error.

{¶53} Nevertheless, in the interest of justice, we will review the record for a possible error on the part of the municipal court. After reviewing the record, it is evident that any potential error regarding the court sustaining the state's objection would be harmless. Specifically, we note that the aforementioned testimony demonstrates that appellant accomplished his goal of introducing testimonial evidence regarding a property line dispute between appellant and the Gochneaurs. Such evidence was before the court and adequate to introduce a possible motive for the Gochneaurs to fabricate the factual events that resulted in the menacing charge.

{¶54} Furthermore, appellant, on direct examination, provided unchallenged testimony that there was a property line dispute. Likewise, Mr. Gochneaur's direct examination testimony gave a detailed explanation of the circumstances surrounding the property line dispute. Therefore, any possible error on the part of the court in sustaining the state's objection was harmless. Appellant's second assignment of error is without merit.

{¶55} Under his third assignment of error, appellant contends that the weight of the evidence is insufficient to sustain his conviction. Specifically, appellant argues that the testimony presented by the Gochneaurs was unreasonable and biased.

{¶56} When reviewing a claim that a judgment was against the manifest weight of the evidence, an appellate court must review the entire record, weigh both the evidence and all reasonable inferences, consider the credibility of witnesses, and determine whether in resolving conflicts, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that a new trial must be ordered. *State v. Martin* (1983), 20 Ohio App.3d 172, 175. See, also, *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52.

{¶57} "The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Martin* at 175. The role of the appellate court is to engage in a limited weighing of the evidence introduced at trial in order to determine whether the state appropriately carried its burden of persuasion. *Thompkins* at 390 (Cook, J., concurring). The reviewing court must defer to the factual findings of the trier of fact as to the weight to be given the

evidence and the credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph two of the syllabus.

{¶58} When assessing witness credibility, "[t]he choice between credible witnesses and their conflicting testimony rests solely with the finder of fact and an appellate court may not substitute its own judgment for that of the finder of fact." *State v. Awan* (1986), 22 Ohio St.3d 120, 123. "Indeed, the factfinder is free to believe all, part, or none of the testimony of each witness appearing before it." *Warren v. Simpson* (Mar. 17, 2000), 11th Dist. No. 98-T-0183, 2000 WL 286594, at 3. Furthermore, if the evidence is susceptible to more than one interpretation, a reviewing court must interpret it in a manner consistent with the verdict. Id.

{¶59} In the instant case, the Gochneaurs' testimony of the events of February 2, 2002, conflicts with the testimony of appellant and Crystal. To resolve this conflicting testimony, the court was required to evaluate the credibility of each witness. As noted by the court at the conclusion of trial, the Gochneaurs' testimony was identical with respect to the circumstances which led to the menacing charge. There is nothing to suggest that the Gochneaurs' testimony was incredible or absurd as it adequately described appellant's actions on the morning in question.

{¶60} The court further stated that Crystal expressed uncertainty as to the date and time of the events and appellant "adjusted his testimony to purport with" Crystal's testimony. Obviously, the court did not find appellant or Crystal's testimony to be more credible than the Gochneaurs' testimony. Accordingly, this court will not disturb the municipal court's credibility findings on appeal, as the credibility of each witness was a

critical issue for the trier of fact to determine. *State v. Ready* (2001), 143 Ohio App.3d 748. Appellant's third assignment of error is without merit.

{¶61} Based upon the foregoing analysis, appellant's three assignments of error are without merit. We hereby affirm the judgment of the municipal court.

WILLIAM M. O'NEILL, J.,

DIANE V. GRENDELL, J.,

concur.