[Cite as *State v. Dengg*, 2009-Ohio-4101.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

STATE OF OHIO,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2008-P-0063**
- vs -	:	
FRANK DENGG, JR.,	:	
Defendant-Appellant.	:	

Criminal Appeal from the Portage County Municipal Court, Kent Division, Case No. 2008 CRB 01114K.

Judgment: Reversed and remanded.

Victor V. Vigluicci, Portage County Prosecutor, and *Pamela J. Holder*, Assistant Prosecutor, 241 South Chestnut Street, Ravenna, OH 44266 (For Plaintiff-Appellee).

Patricia J. Smith, 114 Barrington Town Square, Suite 188, Aurora, OH 44202 (For Defendant-Appellant).

TIMOTHY P. CANNON, J.

{¶1} This matter is submitted to this court on the record and the briefs of the parties. Appellant, Frank Dengg, Jr. ("Dengg"), appeals the judgment entered by the Kent Division of the Portage County Municipal Court. Following a bench trial, Dengg was convicted of one count of menacing.

{¶2} The purported victim, Ms. Marble, lives in an apartment in Kent, Ohio with her three children. Dengg is the father of her youngest child and "like a father" to the

other two. At the end of 2007, Dengg and Marble ended their relationship. Dengg moved to a residence in Akron, Ohio. Although there was no court-ordered visitation schedule, all three children would visit Dengg.

{¶3} On May 10, 2008, the children were visiting Dengg at his residence in Akron, Ohio. Marble arrived to pick up the children. At that time, Marble was upset because there was another woman at Dengg's residence. After Marble left Dengg's residence, Dengg and Marble spoke several times on the telephone, with Marble using her cellular telephone for these calls.

{¶4} At 1:50 p.m. on May 10, 2008, Marble arrived at the Kent Police Station and filled out a menacing report. Officer Samuel Todd of the Kent Police Department took Marble's statement. Marble's police statement, in its entirety, states:

{¶5} "I picked my kids up at Frank Dengg's house today. Kids told me he pulled Wendy to the road by the hair. He is telling me he going to put a bulet in me head. [sic] He told me this over the phone. The kids seen him do that to Wendy. [sic]"

{¶6} As a result of Marble's report, Dengg was charged with one count of menacing, in violation of R.C. 2903.22 and a fourth-degree misdemeanor.

{¶7} On May 29, 2008, Dengg filed a written request for a jury trial.

{¶8} On July 7, 2008, the matter proceeded to a bench trial. At the beginning of the trial, the state advised the trial court it was not prepared to proceed. The assistant prosecutor informed the court that Marble "indicates she does not recall this event." In addition, the assistant prosecutor told the court that Officer Todd was present, "however he states that he does not have enough evidence to proceed." After briefly questioning Marble, the trial court determined it would proceed with the trial.

{¶9} Marble testified for the state. Her testimony generally indicated that she did not remember the alleged incident. In addition, she testified that the police statement she had given was false. Next, the state called Officer Todd, who testified that Marble told him she was threatened by Dengg and that she was in Kent, Ohio when she received the threat.

{¶10} After the conclusion of the state's case-in-chief, Dengg made an informal motion for acquittal pursuant to Crim.R. 29. The basis of this motion was that the state had not presented sufficient evidence that the alleged crime occurred in Portage County. The trial court overruled Dengg's motion for acquittal.

{¶11} Dengg testified on his own behalf. He testified that the children were at his house on the day in question. He stated that Marble was upset because there was another woman at his residence. Dengg admitted that he had a telephone conversation with Marble after she left his residence, but he denied making any threats to her. He said the phone calls occurred within 30 seconds of Marble leaving his residence.

{¶12} After the defense rested, the assistant prosecutor informed the trial court that the state had new evidence. The state recalled Marble. Marble identified state's exhibit one as a copy of the police statement she made. She testified she remembered making the statement. On cross-examination, Marble testified that the statement was not accurate.

{¶13} At the conclusion of all the evidence, Dengg renewed his Crim.R. 29 motion for acquittal. The trial court denied his renewed motion. Thereafter, the trial court found Dengg guilty of menacing. The trial court sentenced Dengg to 30 days in jail, with 27 days suspended. In addition, Dengg was placed on probation, ordered to

perform 48 hours of community service, and ordered to attend an anger management course.

{¶14} Dengg moved the trial court to stay imposition of his sentence pending appeal. The trial court denied Dengg's request for a stay.

{¶15} Dengg timely appealed the trial court's judgment to this court. Dengg filed a motion to stay the execution of his sentence with this court. This court initially stayed the execution of his jail term, but did not stay the remainder of Dengg's sentence.

{¶16} In February 2009, a request to revoke Dengg's probation was filed in the trial court. Dengg filed a motion with this court to modify the conditions of this court's stay. On February 19, 2009, this court issued a temporary order and held that Dengg was still required to comply with the conditions of his probation. However, this court held that the trial court was not to hold any new hearings or render any new judgments in this matter. Then, on March 6, 2009, this court issued a judgment entry granting Dengg's request to stay the trial court's sentence in its entirety.

{¶17} Dengg raises four assignments of error. We will address these assigned errors out of numerical order. Dengg's fourth assignment of error is:

{¶18} "The trial court erred when a bench trial ensued after the appellant had timely filed a jury trial demand, no jury waiver was signed or journalized by the clerk of courts."

{¶19} Dengg claims the trial court violated his right to a jury trial.

{¶20} Crim.R. 23(A) provides, in part:

{¶21} "In serious offense cases the defendant before commencement of the trial may knowingly, intelligently and voluntarily waive in writing his right to trial by jury. Such

waiver may also be made during trial with the approval of the court and the consent of the prosecuting attorney. In petty offense cases, where there is a right of jury trial, the defendant shall be tried by the court unless he demands a jury trial. Such demand must be in writing and filed with the clerk of court not less than ten days prior to the date set for trial, or on or before the third day following receipt of notice of the date set for trial, whichever is later."

{¶22} In addition, R.C. 2945.05 requires a waiver of a jury trial to be written, signed by the defendant, and filed in the record. The Supreme Court of Ohio has held:

{¶23} "Where a defendant in a petty offense case has a right to trial by jury and pleads not guilty and demands a jury trial in the matter provided by Crim.R. 23(A), it must appear of record that such defendant waived this right in writing in the manner provided by R.C. 2945.05, in order for the trial court to have jurisdiction to try the defendant without a jury." *State v. Tate* (1979), 59 Ohio St.2d 50, syllabus.

{¶24} In this matter, Dengg was charged with menacing, a fourth-degree misdemeanor. R.C. 2903.22(B). If convicted, he faced up to 30 days in jail. R.C. 2929.24(A)(4). Accordingly, Dengg had a right to a jury trial. See *State v. Taylor* (May 11, 2001), 11th Dist. No. 98-P-0022, 2001 Ohio App. LEXIS 2146, at *2-3, citing R.C. 2945.17 and *State v. Ferguson* (1955), 100 Ohio App. 191, 198.

{¶25} Once a defendant in a petty case requests a jury trial, the trial court may not conduct a bench trial "unless the defendant makes a knowing, voluntary, and intelligent waiver of his right to a jury trial, and that waiver is made part of the record pursuant to R.C. 2945.05." *State v. Pflanz* (1999), 135 Ohio App.3d 338, 339. (Citations omitted.) See, also, *State v. Taylor*, 2001 Ohio App. LEXIS 2146, at *3, and

State v. Tate, supra. Moreover, "[t]he fact that appellant did not object to the trial court proceeding with a bench trial is of no matter. Silent acquiescence to a bench trial is not sufficient to constitute a waiver of a defendant's right to a jury trial." *State v. Taylor*, 2001 Ohio App. LEXIS 2146, at *3, citing *State v. Tate*, 59 Ohio St.2d at 53. See, also, *State v. Cheadle* (1986), 30 Ohio App.3d 253, 254.

{¶26} Dengg filed a timely, written demand for a jury trial pursuant to Crim.R. 23. The record contains no written waiver of his right to a jury trial. Accordingly, the trial court erred in conducting a bench trial.

{¶27} Dengg's fourth assignment of error has merit.

{¶28} Dengg's first and second assignments of error are:

{¶29} "[1.] The trial court violated the appellant's constitutional right pursuant to Ohio Constitution Article 1, Section 10 and as codified in Ohio Rev. Code Ann. § 2901.12, to a jury trial in the county in which the offense is alleged to have been committed.

{¶30} "[2.] The evidence was insufficient to establish beyond a reasonable doubt that the appellant was guilty of menacing."

{¶31} We address these assigned errors in a consolidated fashion.

{¶32} We have found merit in Dengg's fourth assignment of error. However, this finding does not render Dengg's first and second assigned errors moot. Should we find merit in Dengg's sufficiency argument, he would be entitled to acquittal and the state would be barred from retrying him due to double jeopardy protections. See *State v. Freeman* (2000), 138 Ohio App.3d 408, 424, citing *State v. Thompkins* (1997), 78 Ohio

St.3d 380, 387. Likewise, if we were to find merit in Dengg's venue argument, he would be entitled to be discharged. *State v. Shaw* (1999), 134 Ohio App.3d 316, 320.

{¶33} R.C. 2901.12(A) provides "[t]he trial of a criminal case in this state shall be held in a court having jurisdiction of the subject matter, and in the territory of which the offense or any element of the offense was committed." Venue is not a material element of a criminal case. *State v. Shaw*, 134 Ohio App.3d at 318, quoting *State v. Headley* (1983), 6 Ohio St.3d 475, 477. However, "venue is a fact that must be proven beyond a reasonable doubt." *State v. Lahmann*, 12th Dist. No. CA2006-03-058, 2007-Ohio-1795, at ¶17, citing *State v. Smith* (2000), 87 Ohio St.3d 424, 435, citing *State v. Headley*, 6 Ohio St.3d at 477.

{¶34} In a menacing case that occurs over the telephone, venue is proper in either the location the calls are made or the location the calls are received. *Fairfield v. McRoberts* (1995), 100 Ohio App.3d 476, 478. (Citation omitted.) What makes the situation in the case sub judice more complicated is that the alleged call was received on Marble's cellular telephone. Thus, the fact that Marble may have received the call does not, by itself, establish that Marble was in a certain location at that time. In this matter, the evidence suggests Marble was driving between Akron, Ohio and Kent, Ohio at the time of the alleged call. Akron and other portions of this route are not located in Portage County.

{¶35} The following testimony occurred during the cross-examination of Marble:

{¶36} "Q. You just told the judge that you had picked up the kids in Akron that day?

{¶37} "A. Correct.

{¶38} "Q. And did this phone call happen sometime around that time?

{¶39} "A. I remember going and getting my children and going home. In between that, I can't tell you what I did until I got to the police station.

{¶40} "Q. Did you pick up the kids in Akron?

{¶41} "A. Correct.

{¶42} "Q. And you have no idea when the phone call was made?

{¶43} "A. No, ma'am.

{¶44} "Q. You have no idea - -

{¶45} "A. I have no idea that that phone call was made.

{¶46} "Q. You have - -

{¶47} "A. - - or if I was actually went to asleep [sic], and I was dreaming it, or if the pills had me so messed up that I thought that that happened.

{¶48} "Q. You have no idea if you were in Akron at the time the phone call was made?

{¶49} "A. No.

{¶50} "Q. You have no idea if any of this happened?

{¶51} "A. No. I remember taking my kids from Frank's and going home, and the next thing I'm at (Inaudible).

{¶52} "Q. So you don't know if any of this happened in Portage County?

{¶53} "A. Correct."

{¶54} Thus, the state did not establish venue through Marble's testimony.

{¶55} The state called Officer Todd to testify regarding Marble's police statement. He testified that Marble told him she was at her apartment in Kent, Ohio

when she received the phone call. The trial court acknowledged that this statement was hearsay; however, the court ruled that it was admissible as an excited utterance.

{¶56} One exception to the rules prohibiting the admission of hearsay evidence is the excited-utterance exception. Evid.R. 803(2). An excited utterance is defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Id. "The rationale for the admission of these statements is that the shock of the event causes the declarant's reflective process to be halted. Thus, the statement is unlikely to have been fabricated and carries a high degree of trustworthiness." *State v. Butcher*, 170 Ohio App.3d 52, 2007-Ohio-118, at ¶27. (Citation omitted.)

{¶57} Moreover, the Supreme Court of Ohio has held:

{¶58} "There is no *per se* amount of time after which a statement can no longer be considered to be an excited utterance. The central requirements are that the statement must be made while the declarant is still under the stress of the event and the statement may *not* be the result of reflective thought." *State v. Taylor* (1993), 66 Ohio St.3d 295, 303. (Emphasis sic.)

{¶59} In this matter, Marble's statement to the police was clearly the result of reflective thought. She made a concerted effort to go to the police station and fill out the report. Also, she testified that "other people" told her to go to the police station to fill out a report. Finally, the fact she chose the location to make the statement demonstrates it was a product of reflective thought. See, e.g., *State v. Novak*, 11th Dist. No. 2003-L-077, 2005-Ohio-563, at ¶34.

{¶60} When Officer Todd was asked if Marble was upset when she came to the police station, he responded "[a] little bit." He later clarified his testimony and stated she was "crying" and "visibly upset." This court has noted that "merely being 'upset,' without more, does not meet the standard of admissibility under Evid.R. 803(2)." *State v. Butcher*, 2007-Ohio-118, at ¶34, citing *State v. Taylor*, 66 Ohio St.3d at 303.

{¶61} The trial court abused its discretion by admitting this evidence, as it was not an excited utterance.

{¶62} A trial court shall grant a motion for acquittal when there is insufficient evidence to sustain a conviction. Crim.R. 29(A). When determining whether there is sufficient evidence presented to sustain a conviction, "[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307.

{¶63} Dengg was charged with one count of menacing, in violation of R.C. 2903.22, which provides, in part:

{¶64} "(A) No person shall knowingly cause another to believe that the offender will cause physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family."

{¶65} Marble was asked if she recalled the statement she made, and she answered "[s]omething about he had called me and said that he may have a bullet for my head and a bullet for the van."

{¶66} At trial, Marble testified that she did not have any recollection of the alleged phone call. On two occasions, Marble specifically referred to her police statement as a "false statement." She said she reported the alleged incident because "other people" told her to do it. When asked by the trial court what Dengg said to her, Marble responded "I suppose that he said that he was going to put a bullet into my head, *but I'm not honestly sure if that really happened*." (Emphasis added.)

{¶67} The evidence presented in relation to venue and the underlying elements of the offense was minimal.

{¶68} The state introduced oral assertions regarding a prior police statement. When conducting a sufficiency of the evidence analysis, this court is to look at the actual evidence admitted at trial, both admissible and inadmissible. See *State v. Jeffries*, 11th Dist. No. 2005-L-057, 2007-Ohio-3366, at ¶100, citing *Lockhart v. Nelson* (1988), 488 U.S. 33, 34. (*State v. Jeffries* overruled on other grounds in *State v. Jeffries*, 119 Ohio St.3d 265, 2008-Ohio-3865.) Thus, for the purposes of the analysis of these issues, we will consider the hearsay testimony of Officer Todd, including the portions that we have determined were improperly admitted as an excited utterance.

{¶69} However, at trial, the witness who provided that statement described it as a "false statement" and testified that other people told her to make the statement and that she was not certain the incident in question actually happened. There was no other evidence, such as telephone records, introduced to show that the phone call actually occurred or, if it did, where Marble was located when she received the alleged threat from Dengg.

{¶70} This evidence, even when viewed in a light most favorable to the state, is insufficient as a matter of law to establish venue and the underlying elements of menacing *beyond a reasonable doubt*. Under the facts and circumstances of this matter, specifically that Marble described her statement as false and there was no other evidence to corroborate the statement, there was at least a *reasonable* doubt that the statement was true.

{¶71} Dengg's first and second assignments of error have merit.

{¶72} Dengg's third assignment of error is:

{¶73} "The weight of the evidence did not prove beyond a reasonable doubt that the appellant was guilty of menacing."

{¶74} Dengg's third assignment of error is moot.

{¶75} The judgment of the Kent Division of the Portage County Municipal Court is reversed. This matter is remanded to the trial court for further proceedings consistent with this opinion. Specifically, the trial court shall enter a judgment of acquittal.

MARY JANE TRAPP, P.J., concurs,

COLLEEN MARY O'TOOLE, J., concurs in judgment only.