[Cite as *State v. Kronenberg*, 2024-Ohio-4673.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	No. 111840
v.	:	
MICHELLE KRONENBERG,	:	
Defendant-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: September 26, 2024

Criminal Appeal from the Cuyahoga County Court of Common Pleas
Case No. CR-21-661238-A

Appearances:

Michael C. O'Malley, Cuyahoga County Prosecuting Attorney, and Owen W. Knapp, Assistant Prosecuting Attorney, *for appellee*.

Scott J. Friedman, *for appellant*.

FRANK DANIEL CELEBREZZE, III, J.:

{¶ 1} In this reopened appeal, appellant Michelle Kronenberg ("appellant") challenges her conviction and sentence in the Cuyahoga Court of Common Pleas. After a thorough review of the applicable law and facts, we confirm our prior

judgment in *State v. Kronenberg*, 2023-Ohio-1749 (8th Dist.), *reopening granted,* Mar. 25, 2024 *("Kronenberg I"*) and affirm the judgment of the trial court.

I. Factual and Procedural History

{¶ 2} Appellant was charged with three counts of violation of a protection order, one felony of the third degree and two felonies of the fifth degree, in violation of R.C. 2919.27(A)(2); one count of menacing by stalking, a felony of the fourth degree, in violation of R.C. 2903.211(A)(1); and one count of telecommunications harassment, a felony of the fifth degree, in violation of R.C. 2917.21(A)(5).

{¶ 3} The charges arose from appellant's continued prohibited contact with the victim, J.L., via phone, email, and letters. J.L. had obtained a protection order against appellant as a result of her prior contact with him, but appellant had continued to contact him. Appellant was convicted of telecommunications harassment and violation of the protection order on several prior occasions.

{¶ 4} Several days after appellant was released from prison on the most recent previous charges, she again contacted J.L. by sending him a letter. She further contacted him by phone several times. In the letter, appellant stated that she knew that she was violating the protection order.

{¶ 5} Appellant pled not guilty to the charges, and the matter was assigned to the mental health docket. Appellant was assigned counsel but filed a motion to proceed pro se. Her court-appointed attorney requested a competency evaluation to determine if appellant was competent to represent herself.

{¶ 6} Following several evaluations and a hearing, appellant was determined to be competent and able to waive her right to counsel and proceed pro se.

{¶ 7} The matter proceeded to a bench trial where the state presented the testimony of J.L. and the police officer who took his statement. After the State rested, appellant moved for a Crim.R. 29 acquittal. The motion was denied, but the State agreed to delete the "furthermore" clause in Count 4, which reduced the menacing-by-stalking charge to a first-degree misdemeanor.

{¶ 8} Appellant testified in her own defense and admitted to violating the protection order by calling and sending a letter to the victim.

{¶ 9} The court found appellant guilty of all counts. Appellant, pro se, moved to vacate her conviction, which was denied. Appellant was sentenced to a total of 40 months in prison.

{¶ 10} Appellant then filed her direct appeal through counsel, raising two assignments of error for our review: (1) the trial court committed prejudicial error when it allowed appellant to waive counsel and represent herself; and (2) the trial court abused its discretion when it denied appellant's motion to vacate judgment and conviction.

{¶ 11} We affirmed her convictions, finding that the first assignment of error lacked merit. We also overruled her second assignment of error, noting that appellant had not presented a separate argument but instead had attempted to incorporate by reference the arguments contained in her motion to vacate, which was improper.

{¶ 12} Appellant then filed a pro se application for reopening her appeal, arguing that she was deprived the effective assistance of counsel when her appellate counsel failed to separately argue the issue of merger of her convictions for purposes of sentencing. She alternatively asserted that her conviction for violation of a protection order violated the Double Jeopardy Clause because she was receiving an additional punishment for the same offense.

{¶ 13} The State opposed Kronenberg's application, arguing that she had failed to demonstrate a reasonable probability of success had the issues presented in her application been properly raised. The State further contended that Kronenberg misstated the record.

{¶ 14} We granted Kronenberg's application for reopening, appointed counsel, and noted that the filing of the record and briefs would be governed by App.R. 26(B)(7). The clerk supplemented the record, and the parties filed their respective briefs.

{¶ 15} Kronenberg now raises the following assignments of error:

1. Kronenberg's convictions for violating a protection order were not supported by sufficient evidence.

2. Kronenberg's conviction for menacing by stalking was not supported by sufficient evidence.

3. The trial court erred when it failed to merge Kronenberg's convictions for violating a protection order, menacing by stalking, and telecommunications harassment.

II. Law and Analysis

A. Standard of Review

{¶ 16} App.R. 26(B) "establish[es] a procedural mechanism to adjudicate and, if warranted, reopen a direct appeal based on a claim of ineffective assistance of appellate counsel." *State v. Leyh*, 2022-Ohio-292, ¶ 16. The rule sets forth a two-stage procedure. *Id.* at ¶ 19. Under the first stage, an applicant must show that there is "a genuine issue as to whether the applicant was deprived of the effective assistance of counsel on appeal." App.R. 26(B)(5). In *Leyh*, the Supreme Court of Ohio noted that "[t]he burden is on the applicant to demonstrate 'a genuine issue' as to whether there is a 'colorable claim' of ineffective assistance of counsel." *Leyh* at ¶ 21, quoting *State v. Spivey*, 84 Ohio St.3d 24, 25 (1998). If an appellant makes the above showing and the application is granted, the matter will proceed to the second stage. *See id.* at ¶ 25.

{¶ 17} Under the second stage, "the case shall proceed as on an initial appeal . . . except that the court may limit its review to those assignments of error and arguments not previously considered." App.R. 26(B)(7). "The parties shall address in their briefs the claim that representation by prior appellate counsel was deficient and that the applicant was prejudiced by that deficiency." *Id.* "If the court finds that the performance of appellate counsel was deficient and the applicant was prejudiced by that deficiency, the court shall vacate its prior judgment and enter the appropriate judgment. If the court does not so find, the court shall issue an order confirming its prior judgment." App.R. 26(B)(9). "[T]he applicant must . . . establish at the second

stage the merits of both the direct appeal and the claim of ineffective assistance of appellate counsel." *Leyh* at ¶ 25.

{¶ 18} The application has been granted, and the appeal is reopened, so we are now at the second stage.

B. Sufficiency of the Evidence

{¶ 19} Kronenberg's first two assignments of error assert that her convictions were not supported by sufficient evidence. 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 (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.'" *State v. Getsy*, 84 Ohio St.3d 180, 193 (1998), quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). "[A] conviction based on legally insufficient evidence constitutes a denial of due process." *Thompkins* at 386. 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 (1996).

1. Violating a Protection Order

{¶ 20} In her first assignment of error, Kronenberg argues that there was insufficient evidence to support her conviction for violating a protection order because the State did not prove (1) that Kronenberg was served with the protection order; or (2) that she had been shown the protection order or that a judge,

magistrate, or law enforcement officer had informed her of the order. She contends that her original appellate counsel was ineffective for failing to raise this issue.

{¶ 21} Kronenberg was convicted of violation of a protection order under R.C. 2919.27. Subsection (D) of this statute provides:

> In a prosecution for a violation of this section, it is not necessary for the prosecution to prove that the protection order or consent agreement was served on the defendant if the prosecution proves that the defendant was shown the protection order or consent agreement or a copy of either or a judge, magistrate, or law enforcement officer informed the defendant that a protection order or consent agreement had been issued, and proves that the defendant recklessly violated the terms of the order or agreement.

See Cleveland v. L.K.P., 2018-Ohio-5233, ¶ 10 (8th Dist.). Thus, to establish a violation of R.C. 2919.27(A)(2), the State was required to establish (1) that Kronenberg recklessly violated the terms of a protection order, and (2) that Kronenberg either received service of the protection order or constructive notice of the order as provided in R.C. 2919.27(D). *Cleveland v. Bolden*, 2023-Ohio-1476, ¶ 14 (8th Dist.), citing *State v. Wilson*, 2021-Ohio-1444, ¶ 8 (6th Dist.).

{¶ 22} The letter that Kronenberg sent to J.L. made specific reference to the protection order, stating that she was "well aware that [she was] violating the protection order . . . ." She acknowledged the same in her own testimony. From that evidence, a reasonable factfinder could conclude beyond a reasonable doubt that Kronenberg had constructive notice of the protection order.

{¶ 23} Viewing the evidence in a light most favorable to the State, we find that there was sufficient evidence presented to support a conviction for violation of

a protection order. Consequently, we find no deficient performance on the part of appellate counsel in failing to raise this argument in Kronenberg's direct appeal. Kronenberg's first assignment of error is overruled.

2. Menacing by Stalking

{¶ 24} In her second assignment of error, Kronenberg argues that there was insufficient evidence to support her conviction for menacing by stalking. Specifically, she contends that the State failed to present sufficient evidence that she knowingly caused J.L. to believe that she would cause physical harm or that he suffered anything more than mere mental stress or annoyance.

{¶ 25} Kronenberg was convicted under R.C. 2903.211(A)(1), which provides:

> 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.

{¶ 26} R.C. 2903.211(D)(1) defines a pattern of conduct as two or more actions or incidents closely related in time. "The incidents need not occur within any specific temporal period." *Rufener v. Hutson*, 2012-Ohio-5061, ¶ 16 (8th Dist.). "A person acts knowingly, 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." R.C. 2901.22(B). "A person has knowledge of circumstances when he is aware that such circumstances probably exist." *Id.* It does not matter whether the defendant "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*, 2017-Ohio-298, ¶ 15 (8th Dist.), citing R.C. 2901.22(B).

{¶ 27} R.C. 2903.211(D)(2) defines mental distress as "any mental illness or condition that involves some temporary substantial incapacity" or "any mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services, whether or not the person requested or received" such treatment or services. "'Incapacity is substantial if it has a significant impact upon the victim's daily life.'" *M.D. v. M.D.*, 2018-Ohio-4218, ¶ 99 (8th Dist.), quoting *State v. Horsley*, 2006-Ohio-1208, ¶ 48 (10th Dist.). "Mental distress need not be incapacitating or debilitating . . . [, and] expert testimony is not required to find mental distress." *Perry v. Joseph*, 2008-Ohio-1107, ¶ 8 (10th Dist.). "Evidence of changed routine can support a finding of mental distress." *Morton v. Pyles*, 2012-Ohio-5343, ¶ 15 (7th Dist.). So can evidence that the complainant involved the police. *State v. Calliens*, 2020-Ohio-4064, ¶ 48 (8th Dist.).

{¶ 28} After reviewing the record, we find there was sufficient evidence for the jury to find that Kronenberg knowingly engaged in a pattern of conduct that

caused J.L. mental distress. Here, J.L. testified that his home life was affected by Kronenberg's actions, he was "nervous all the time," and that "[i]t was always on [his] mind." J.L. testified that he had concern for the physical safety of his family members, noting that Kronenberg had told his wife that she was "gonna [sic] take her out," and that Kronenberg had yelled at his daughter. He stated that he had felt "[a]nxiety ridden" and that he was sure he had suffered mental distress from Kronenberg's conduct.

{¶ 29} Viewing the evidence in the light most favorable to the State, we find that there was sufficient evidence presented to support a conviction for menacing by stalking. Consequently, we find no deficient performance on the part of appellate counsel in failing to raise this argument in Kronenberg's direct appeal. Kronenberg's second assignment of error is overruled.

C. Merger

{¶ 30} In her third assignment of error, Kronenberg argues that the trial court should have merged her convictions for violation of a protection order, menacing by stalking, and telecommunications harassment because they were allied offenses of similar import.

{¶ 31} The allied offenses statute, R.C. 2941.25, codifies Ohio's double-jeopardy protections regarding when multiple punishments may be imposed. *State v. Ruff*, 2015-Ohio-995, ¶ 12. Under the statute, where the same conduct by a defendant can be construed to constitute two or more allied offenses of similar import, the indictment or information may contain counts for all such offenses, but

the defendant may be convicted of only one offense. A defendant charged with multiple offenses may be convicted of all the offenses, however, if (1) the defendant's conduct constituted offenses of dissimilar import, i.e., each offense caused separate, identifiable harm; (2) the offenses were committed separately; or (3) the offenses were committed with separate animus or motivation. R.C. 2941.25(B); *Ruff* at ¶ 25. Thus, to determine whether offenses are allied, courts must consider the defendant's conduct, the animus, and the import. *Id.* at paragraph one of the syllabus.

{¶ 32} Specifically, Kronenberg contends that Count 1, violating a protection order, was charged as a third-degree felony because it alleged that she violated a protection order while committing a felony, which was said to be menacing by stalking and/or telecommunications harassment. Since the menacing-by-stalking charge was reduced to a misdemeanor, Count 1 was based upon Count 5, the telecommunications-harassment charge. Kronenberg argues that she was therefore punished for the same conduct and those charges should have merged.

{¶ 33} Kronenberg further contends that the conduct that formed the basis for Counts 1 through 3 (the letter and phone calls) forms the basis for the "pattern of conduct" that constituted the offense of menacing by stalking in Count 4. She asserts that Count 4 should have merged with Counts 1 through 3. Finally, Kronenberg argues that all of the charges involved the same animus.

{¶ 34} The charges against Kronenberg arose from the letter and multiple phone calls, which each constituted separate acts (Counts 2, 3, and 5). Count 1 involved the commission of the felony offense in Count 5, which required the

separate animus of knowingly rather than the animus of recklessly in Count 1. While Count 4, menacing by stalking, was based upon a pattern of conduct that constituted Counts 1 through 3, the menacing charge required the animus of knowingly rather than recklessly.

{¶ 35} Accordingly, the offenses were either based on separate acts or required a separate animus. None of the offenses were allied offenses and could not merge for purposes of sentencing. Consequently, we cannot find that appellate counsel's performance was deficient in failing to argue this issue in Kronenberg's direct appeal. Kronenberg's third assignment of error is overruled.

III. Conclusion

{¶ 36} Kronenberg's convictions were supported by sufficient evidence. Further, the trial court did not err in declining to merge the counts for sentencing. Kronenberg's original appellate counsel was not ineffective for failing to raise and/or argue the above assignments of error.

{¶ 37} Pursuant to App.R. 26(B)(9), we confirm our prior judgment in *Kronenberg I*.

{¶ 38} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution. The defendant's

convictions having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

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FRANK DANIEL CELEBREZZE, III,

KATHLEEN ANN KEOUGH, A.J., and
LISA B. FORBES, J., CONCUR