IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	APPEAL NO. C-150627 TRIAL NO. 15CRB-25900
Plaintiff-Appellee,	:	*JUDGMENT ENTRY.*
vs.	:	
JOHN MOSLEY	:	
Defendant-Appellant.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court. *See* Rep.Op.R. 2; App.R. 11.1(E); 1st Dist. Loc.R. 11.1.1.

Following a bench trial, defendant-appellant John Mosley was found guilty of menacing, in violation of R.C. 2903.22. The trial court sentenced him to 30 days' incarceration, credited 14 days, and remitted costs. Mosley moved the court for a stay of his sentence pending appeal. It was denied. This appeal followed.

At trial, Adrian Daniels testified that he had just left his apartment building and was walking his dog when Mosley, who was sitting outside of a nearby apartment building, asked to speak with him. Daniels did not wish to speak with Mosley, so he continued walking. Mosley then went inside. A girl, who had been sitting outside with Mosley, indicated to Daniels that he should return to his own apartment building. Daniels testified that, through the girl's hand gestures, it appeared that she was saying that Mosley was "going to get the gun."

Daniels then returned to his own apartment building. Shortly thereafter, Mosley appeared at the glass doors that lead into Daniels's building. The doors were locked. Mosley stood at the doors, pulling at them, and yelling at Daniels that he

wanted to fight him. Daniels stated that, at this point, he was afraid that Mosley was going to hurt him.

Over defense counsel's objection, the court then allowed Daniels to testify about his past interactions with Mosley. These included a physical fight that, Daniels claimed, had started after Mosley had kissed Daniels on the mouth. Daniels also testified that Mosley had come to his window once at 3 a.m. or 4 a.m., and had yelled that he was going to "whoop" Daniels. Daniels further stated that Mosley was "cool at a certain point." But that if Mosley started "drinking or popping those pills, whatever he do [sic], he's off his chain."

In his first assignment of error, Mosley contends that the trial court abused its discretion in admitting inadmissible evidence. He first claims that the trial court erred when it allowed Daniels to testify that the girl who had been outside with Mosley had gestured that Mosley was going inside to get a gun. Mosley argues that this testimony was inadmissible hearsay.

At the outset, we note that Mosley did not object to this testimony, although in his appellate brief he claims that he did. However, the objection Mosley referenced in his brief was to other testimony, and not to the statement that he complains of now. He therefore has forfeited all but plain error on appeal. *See* Evid.R. 103(A)(1) and 103(D); Crim.R. 52(B). An error rises to the level of plain error only where it is obvious, and where it has affected the outcome of the trial. *State v. Lewis*, 1st Dist. Hamilton Nos. C-050989 and C-060010, 2007-Ohio-1485, ¶ 39, citing *State v. Barnes*, 94 Ohio St.3d 21, 27, 759 N.E.2d 1240 (2002).

Even if Daniels's testimony concerning the girl's gestures constituted inadmissible hearsay, we hold that this testimony did not affect the outcome of Mosley's trial and therefore that Daniels cannot demonstrate plain error.

Here, the state had to prove that Mosley knowingly caused Daniels to believe that Mosley would cause Daniels physical harm. *See* R.C. 2903.22(A). Daniels

testified that, when Mosley was at his apartment building doors pulling on them and threatening to beat him, Daniels was afraid that Mosley was going to hurt him. Daniels's belief that he would be harmed did not turn on whether Mosley had gone inside to get a gun. Further, in a bench trial we presume that the court considered only relevant, material, and competent evidence unless it affirmatively appears to the contrary. *State v. Robbins*, 1st Dist. Hamilton No. C-120107, 2013-Ohio-612, ¶ 14, citing *State v. White*, 15 Ohio St.2d 146, 151, 239 N.E.2d 65 (1968). We find no indication to the contrary in this case. We therefore find no plain error in the admission of Daniels's testimony concerning the girl's gesturing that Mosley went inside to get a gun.

Mosley next contends that the trial court abused its discretion in admitting evidence of "other acts" in violation of Evid.R. 404(B) when it allowed Daniels to testify concerning his and Mosley's past interactions, and also about Mosley's supposed drug use. It did not.

Evid.R. 404(B) precludes the admission of evidence of an accused's other bad acts or crimes when offered to prove the character of the accused in order to show that the accused acted in conformity with that character. In this case, the complained of evidence was not offered to show that Mosley had acted in conformity with these "bad acts." Instead, the state contended, and the trial court found, that this evidence was admissible because it was offered to explain why Daniels felt threatened by Mosley's behavior. We therefore hold that the trial court did not violate Evid.R. 404(B) in admitting this evidence, nor did it otherwise abuse its discretion in allowing Daniels's testimony. *See State v. Sage*, 31 Ohio St.3d 173, 510 N.E.2d 343 (1987), paragraph two of the syllabus; *State v. Trowbridge*, 1st Dist. Hamilton No. C-110541, 2013-Ohio-1749, ¶ 20-21.

Mosley's first assignment of error is overruled.

In his second assignment of error, Mosley contends that the trial court violated his right to remain silent when it imposed sentence. In support of this argument, Mosley points to a comment from the trial court before it imposed sentence that "At the end of the day, one thing we never really heard was a denial." Taken in context, this statement was part of a larger discussion by the trial court concerning the fact that the state's evidence had been undisputed. There is no indication in the record that the trial court's musings formed an improper basis for the imposition of sentence, as Mosley seems to contend. Mosley's argument is based on mere speculation and it has no merit. *See Edwards v. Knapp Laboratories*, 61 Ohio St.2d 197, 199, 400 N.E.2d 384, (1980) (the appellant bears the burden of showing error by reference to matters in the record). Mosley's second assignment of error is overruled.

In his third assignment of error, Mosley contends that his conviction was not supported by sufficient evidence and was against the manifest weight of the evidence. Neither argument has merit.

Daniels testified that Mosley was pulling on the locked doors to Daniels's apartment building while yelling at Daniels that he wanted to hurt him. And Daniels testified that he thought that Mosley was going to hurt him. Viewing this evidence in a light most favorable to the prosecution, we hold that a rational trier of fact could have found all the essential elements of R.C. 2903.22(A) beyond a reasonable doubt. *See State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus. In regard to the weight of the evidence, upon a review of the record, we find no indication that the trier of fact clearly lost its way in weighing the evidence presented so as to create a manifest miscarriage of justice warranting a new trial. *See State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

Mosley's third assignment of error is overruled.

The trial court's judgment is affirmed.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

CUNNINGHAM, P.J., MOCK and **STAUTBERG, JJ.**

To the clerk:

Enter upon the journal of the court on September 2, 2016
per order of the court _____.

Presiding Judge