IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

STATE OF OHIO	:	APPEAL NOS. C-190610 C-190612
Plaintiff-Appellee,	:	TRIAL NOS. C-19CRB-14949A C-19CRB-14949B
	:	
vs.	:	*O P I N I O N.*
DAVID HUMMEL,	:	
Defendant-Appellant.	:	

Appeals From: Hamilton County Municipal Court

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded.

Date of Judgment Entry on Appeal: October 28, 2020

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Ronald Springman,* Assistant Prosecuting Attorney, for Plaintiff-Appellee,

Raymond T. Faller, Hamilton County Public Defender, and *David Hoffman,* Assistant Public Defender, for Defendant-Appellant.

BERGERON, Judge.

{¶1} In this appeal from domestic violence and telecommunications harassment convictions, the defendant-appellant challenges the effectiveness of his trial counsel, the trial court's failure to merge his two offenses, and the weight and sufficiency of the evidence supporting his convictions. We find no issue with trial counsel's effectiveness, or with the weight and sufficiency of the evidence in this case. However, because the trial court erred in failing to merge allied offenses of similar import under R.C. 2941.25, we remand the cause for merger and resentencing.

I.

{¶2} Both convictions in this case stem from a series of four phone calls between defendant-appellant, David Hummel, and his daughter, Samantha Hummel, on June 14, 2019. The parties presented divergent accounts of the calls at trial, although they agreed that the exchange began when Samantha called her father to discuss a letter (received by another family member) concerning his social security disability. All four calls took place as Samantha drove down the highway with her three children in the backseat, with the conversations lasting just seven minutes in total. Mr. Hummel, meanwhile, was wandering around King's Island amusement park with his two young sons.

{¶3} Samantha testified that, during the first phone call, Mr. Hummel requested that she become his payee on his social security disability. When she demurred, Mr. Hummel began screaming at her and calling her back repeatedly to threaten her and her children's lives. Samantha testified that Mr. Hummel said: "You're going to regret this, you're going to be begging and pleading for your life." He threatened to have his "friends in vests" (which Samantha interpreted to mean

the "Iron Horsemen," a motorcycle gang) pay her a visit. In response, she queried: "You're going to have your own daughter murdered?" Mr. Hummel replied: "[Y]ou really think I care? Yeah, I don't care." Mr. Hummel repeatedly asked where she was and about her anticipated whereabouts over the following days and weeks. When Samantha threatened to call the police, he responded: "[Y]ou think they're going to save you, you think they can save you." At this point, Samantha pulled over, shaking and distraught, and called the police. Officer Jessica Grgas responded to the call, met Samantha at her home, and left a voicemail instructing Mr. Hummel not to contact his daughter. Officer Grgas filed the complaints in this case and testified on the state's behalf at trial.

{¶4} On redirect examination of Samantha, the state entered call logs from her phone on June 14 into evidence. These logs confirmed four phone calls between Samantha and Mr. Hummel, none of which lasted more than two minutes.

{¶5} As Mr. Hummel tells the story, the repeated calls on June 14 revolved around his attempts to retrieve his social security disability letter from his daughter, with Samantha balking at returning the letter to him. That refusal prompted Mr. Hummel to explore alternative arrangements for him to retrieve the letter. Mr. Hummel emphasized that, during these short phone conversations, he was milling about amongst a crowd of people at King's Island (an environment supposedly not conducive to yelling threats). He denied making any threats and claimed that only Officer Grgas's voicemail alerted him to a potential problem.

{¶6} Following a bench trial, the trial court convicted Mr. Hummel of domestic violence in violation of R.C. 2919.25(C) and telecommunications harassment in violation of R.C. 2917.21(B)(1). On the domestic violence charge, the

court sentenced him to 30 days in jail and a $100 fine, but suspended the jail sentence and placed Mr. Hummel on probation for a year. On the telecommunications harassment, the court imposed a sentence of 180 days in jail and a $100 fine, with the jail sentence also suspended and a concurrent term of probation.

II.

{¶7} On appeal, Mr. Hummel raises three assignments of error. First, he contends that he was deprived of his Sixth Amendment right to the effective representation of counsel at trial. Next, he argues that the trial court erred by failing to merge his convictions for domestic violence and telecommunications harassment as allied offenses of similar import under R.C. 2941.25. Finally, he challenges the sufficiency of the evidence supporting his conviction for domestic violence, and asserts that both of his convictions were against the manifest of the evidence. We address each assignment of error in turn.

A.

{¶8} Mr. Hummel was charged with domestic violence under R.C. 2919.25(C), which prohibits any person, "by threat of force," from "knowingly caus[ing] a family or household member to believe that the offender will cause imminent physical harm." The child of an offender qualifies as a "family or household member" only if the child "is residing or has resided with the offender." *State v. Sims*, 169 Ohio App.3d 579, 2006-Ohio-6285, 863 N.E.2d 1110, ¶ 13 (1st Dist.). The only testimony at trial regarding whether Samantha ever resided with Mr. Hummel was elicited by defense counsel in cross-examining her. Mr. Hummel maintains that without this shared-residency testimony, no conviction for domestic

violence could stand—and therefore, his counsel proved his ineffectiveness by eliciting the inculpatory testimony on cross.

{¶9} To succeed in his ineffective assistance of counsel claim, Mr. Hummel "must demonstrate that (1) trial counsel's performance fell beneath an objective standard of reasonableness, and (2) but for this deficient performance, a reasonable probability exists that the outcome would differ." *State v. Williams*, 1st Dist. Hamilton No. C-180588, 2020-Ohio-1368, ¶ 21, citing *Strickland v. Washington*, 466 U.S. 668, 687-688, 694, 104 S.Ct. 2052, 80 L.E.2d 674 (1984). In reviewing a claim for ineffective assistance of counsel, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *State v. Bradley,* 42 Ohio St.3d 136, 142, 538 N.E.2d 373 (1989), quoting *Strickland* at 689.

{¶10} Mr. Hummel's claim of ineffective assistance fails under both of the *Strickland* prongs. First, a review of defense counsel's full cross-examination reveals that the line of questioning about Samantha's earlier residence with Mr. Hummel represented an attempt to bolster his credibility with the court. Defense counsel inquired: "During this * * * [time you lived together] did you ever have an occasion to call the police on [Mr. Hummel]?" According to Mr. Hummel's subsequent testimony, the answer to this question should have been "no," which would have supported his claim that he never previously threatened Samantha.

{¶11} This line of questioning, however, backfired on multiple levels. Not only did Samantha testify that multiple, similar incidents occurred when she was younger, but she also established the critical shared-residence element of the domestic violence charge. However, when reviewing an ineffective assistance of

counsel claim, a "court must presume that numerous choices, perhaps even disastrous ones, are made on the basis of a tactical decision * * * ." *State v. Barr*, 158 Ohio App.3d 86, 2004-Ohio-3900, 814 N.E.2d 79, ¶ 30 (7th Dist.), citing *State v. Carpenter,* 116 Ohio App.3d 615, 626, 688 N.E.2d 1090 (2d Dist. 1996). "Trial counsel's decision to cross-examine a witness and the extent of such cross-examination are tactical matters * * * and cannot form the basis for a claim of ineffective assistance of counsel." *State v. Russell*, 2d Dist. Montgomery No. 21458, 2007-Ohio-137, ¶ 55. Even when cross-examination goes awry, we generally will not second-guess a line of questioning that can be characterized as "reasonable trial strategy" on appeal. *State v. Hartman*, 2016-Ohio-2883, 64 N.E.3d 519, ¶¶ 48-49 (2d Dist.) (rejecting an ineffective assistance claim even where defense counsel "brought up factual matters not presented during the direct examination * * * that may have helped the State prove [a necessary] element"). And here, it seems to us that the question was born of reasonable trial strategy, even if it ultimately imploded.

{¶12} Finally, even if we believed that defense counsel's decision to inquire about Samantha's history of residence with Mr. Hummel reflected inadequate assistance, the error did not clearly prejudice his case. To demonstrate prejudice, Mr. Hummel must offer "more than vague speculations * * * [he] must show that there is a reasonable possibility that, but for counsel's errors, the result of the proceeding would have been different." *Barr* at ¶ 29, citing *Strickland,* 466 U.S. at 694. A "reasonable possibility" is a "probability sufficient to undermine confidence in the outcome" of the case. *Bradley,* 42 Ohio St.3d at 142, 538 N.E. 2d 373.

{¶13} Mr. Hummel maintains that it is "not likely" that the prosecution expected to elicit the shared-residence testimony from another witness—and absent

the bumbling of counsel, Mr. Hummel could not have been convicted of domestic violence. But when defense counsel asked his questions about shared residence, the state had not yet rested its case. Given that any effective examination of Samantha was sure to address her relationship with Mr. Hummel, the state could have inquired about shared residence during redirect. No party contests the admissibility of the shared residence testimony, and Mr. Hummel's belief of the improbability of that testimony emerging later falls short of showing prejudice under *Strickland* based on the state of our record. *See Williams,* 2020-Ohio-1368 at ¶ 22 ("Conclusory statements that the outcome would have been different, without more, are not enough to carry a defendant's burden on the issue of prejudice."). We accordingly overrule Mr. Hummel's first assignment of error.

B.

{¶14} In his second assignment of error, Mr. Hummel contends that the trial court erred by failing to merge his convictions as allied offenses. Pursuant to R.C. 2941.25, if the defendant's conduct constitutes two or more allied offenses of similar import, and this conduct demonstrates that the offenses were not committed separately or with a separate animus, then the court must merge the offenses. *See State v. Bailey*, 1st Dist. Hamilton No. C-140129, 2015-Ohio-2997, ¶ 74. However, convictions do not merge for allied offenses if the offenses were (1) dissimilar in import or significance, (2) committed separately, or (3) committed with a separate animus or motivation. *See State v. Ruff*, 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, paragraph three of the syllabus. We may end our inquiry upon finding that any of the three apply. *See State v. Lee*, 1st Dist. Hamilton No. C-190149, 2020-

Ohio-944, ¶ 6 ("A reviewing court may end its analysis upon finding that any one of the three applies.").

{¶15} Mr. Hummel neglected to raise the issue of allied offenses below, forfeiting all but plain error. To prevail on his claim, then, Mr. Hummel " 'must demonstrate a prejudicial effect—a reasonable probability that he has, in fact, been convicted of allied offenses of similar import committed with the same conduct and with the same animus.' " *State v. Burrows*, 1st Dist. Hamilton No. C-190277, 2020-Ohio-3646, ¶ 11, quoting *State v. Rogers*, 143 Ohio St.3d 385, 2015-Ohio-2459, 38 N.E.3d 860, ¶¶ 3 and 25. This fact-intensive inquiry requires the court to review the entire record, including arguments and information presented at the plea or sentencing hearing. *See Ruff* at ¶ 26 ("At its heart, the allied-offense analysis is dependent upon the facts of a case * * * . "). The defendant ultimately bears the burden of demonstrating his or her entitlement to the protection afforded in R.C. 2941.25. *See State v. Washington,* 137 Ohio St.3d 427, 2013-Ohio-4982, 999 N.E.2d 661, ¶ 18 ("We have consistently recognized that 'the defendant bears the burden of establishing his entitlement to the protection, provided by R.C. 2941.25, against multiple punishments for a single criminal act.' ").

{¶16} Mr. Hummel was convicted of domestic violence under R.C. 2919.25(C), which prohibits any person, "by threat of force," from "knowingly caus[ing] a family or household member to believe that the offender will cause imminent physical harm." He was also convicted of telecommunications harassment under R.C. 2917.21(B)(1), which provides that "[n]o person shall make * * * a telecommunication * * * with purpose to abuse, threaten, or harass another person."

Both convictions were based exclusively on the four phone calls between Mr. Hummel and Samantha, which lasted seven minutes in total.

{¶17} Both of Mr. Hummel's offenses were directed at the same victim, and the same alleged statements supported the "threaten" prong of the telecommunications charge and the "imminent physical harm" prong of the domestic violence charge. Indeed, the state made no effort at trial to distinguish between the substance of these four calls. Accordingly, we find that Mr. Hummel's offenses were not "committed separately," and proceed to inquire whether the offenses were "dissimilar in import" or "committed with separate animus."

{¶18} The state urges us to hold that the making of repeated threatening phone calls (as opposed to a single call) suffices to demonstrate non-allied offenses. We disagree. Certainly, we can imagine many circumstances in which separate calls produce a separate, identifiable harm. *See Ruff,* 143 Ohio St.3d 114, 2015-Ohio-995, 34 N.E.3d 892, at ¶ 26 ("[A] defendant's conduct that constitutes two or more offenses against a single victim can support multiple convictions if the harm that results from each offense is separate and identifiable from the harm of the other offense."). But the record here fails to substantiate a finding of separate animus or dissimilar import. All four phone calls between Samantha and Mr. Hummel took place not just during a single afternoon, but during a single car ride. Samantha's testimony drew no distinction in the contents of the calls: she never clarified which calls contained which threats, and she did not allege changing behavior or motives by Mr. Hummel over the short window during the battery of calls. *See Ruff* at ¶ 25 (offenses are non-allied when committed with "separate animus or motivation"). In short, Samantha's testimony treated each of the four phone calls as equal

contributors to a single, threatening incident. We consequently hold that Mr. Hummel's two offenses were allied offenses of similar import within the meaning of R.C. 2941.25(A), and the trial court erred when it convicted and sentenced Mr. Hummel on both offenses.

{¶19} The Ohio Supreme Court has clarified that "imposition of multiple sentences for allied offenses of similar import is plain error." *State v. Underwood*, 124 Ohio St.3d 365, 2010-Ohio-1, 922 N.E.2d 923, ¶ 31, citing *State v. Yarbrough,* 104 Ohio St.3d 1, 2004-Ohio-6087, 817 N.E.2d 845, ¶ 96-102. Moreover, even though the trial court assigned Mr. Hummel's sentences to run concurrently, the failure to merge allied offenses is not a harmless error. *See State v. Goshade*, 1st Dist. Hamilton No. C-120586, 2013-Ohio-4457, ¶ 23 ("Even when the sentences are to be served concurrently, a defendant is prejudiced by having more convictions than are authorized by law."), citing *Underwood* at ¶ 31. Accordingly, we sustain Mr. Hummel's second assignment of error and remand for merger of the offenses and correspondent resentencing.

C.

{¶20} In his third assignment of error, Mr. Hummel challenges the sufficiency of the evidence supporting his conviction for domestic violence. He also argues that both of his convictions were against the manifest weight of the evidence.

{¶21} First, to determine whether a conviction is supported by sufficient evidence, we inquire "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*, 61 Ohio St.3d 259, 274, 574 N.E.2d 492 (1991); *see State v. Curry,* 1st Dist. Hamilton No. C-190107,

2020-Ohio-1230, ¶ 11. Whether the evidence is sufficient to sustain a verdict is a question of law, which we review de novo. *State v. Jackson,* 1st Dist. Hamilton Nos. C-180159 and C-180209, 2020-Ohio-80, ¶ 11.

{¶22} Mr. Hummel claims that the state presented insufficient evidence that his alleged threats were threats of "imminent physical harm" as required by R.C. 2919.25(C). Even taking Samantha's testimony as true, Mr. Hummel insists that the statements she relates did not describe harm "threatening to occur immediately." *State v. Collie*, 108 Ohio App.3d 580, 583, 671 N.E.2d 338 (1st Dist. 1996); *see Bargar v. Kirby*, 12th Dist. Butler No. CA2010–12–334, 2011–Ohio–4904, ¶ 19. In particular, Mr. Hummel emphasizes the impracticality of dispatching the Iron Horsemen to kill a young mother at a location unknown to him as undermining the immediacy of any threatened harm.

{¶23} Viewed in the light most favorable to the prosecution, however, the evidence at trial sufficed to support Samantha's fear of imminent physical harm. The critical inquiry for a domestic violence charge is " 'whether a reasonable person would be placed in fear of imminent (in the sense of unconditional, non-contingent), serious physical harm * * * . ' " *Bargar* at ¶ 19. Samantha testified that Mr. Hummel had associations with the Iron Horsemen in the past, and that similar, threatening incidents had occurred with her father when they lived together. *See Collie* at 583-584 (evidence of prior acts admissible and relevant to show that victim's fear of imminent physical harm was reasonable); *State v. Schweitzer,* 2015-Ohio-925, 30 N.E.3d 190, ¶¶ 35-37 (3d Dist.) (defendant's threat to "kick [victim's] ass" was sufficient, given past and present circumstances, to establish fear of imminent physical harm). The alleged threats were not conditional in nature; Samantha

testified that Mr. Hummel screamed: "You're *going* to regret this, you're *going* to be begging and pleading for your life." (Emphasis added.) *See Collie* at 582-583 (offering examples of conditional threats not sufficient to show victim's belief of threat of imminent physical harm); *see also Wohleber v. Wohleber,* 9th Dist. Lorain No. 10CA009924, 2011-Ohio-6696, ¶ 19 (contrasting conditional threats in *Collie* with offender's threat to "pull [victim] out of her car and shoot her" the next time they met). Officer Grgas testified that when she interviewed Samantha about the incident, Samantha appeared "very upset, almost to the point where she was shaking." *See State v. McClelland,* 10th Dist. Franklin No. 01AP-630, 2002 WL 356306, *5 (victim's fearful behavior following threats established belief that offender could carry out threats). Taken as true, the testimony at trial established that Samantha harbored a genuine, reasonable fear of imminent physical harm. We therefore overrule Mr. Hummel's third assignment of error as it pertains to the sufficiency of the evidence underlying the domestic violence charge.

{¶24} Finally, when reviewing a challenge to the manifest weight of the evidence, we sit as a "thirteenth juror." *State v. Thompkins*, 78 Ohio St.3d 380, 388, 678 N.E.2d 541 (1997). We must "review the entire record, weigh the evidence, consider the credibility of the witnesses, and determine whether the trier of fact clearly lost its way and created a manifest miscarriage of justice." *State v. Powell*, 1st Dist. Hamilton No. 190508, 2020-Ohio-4283, ¶ 16, citing *Thompkins* at 397.

{¶25} Mr. Hummel's manifest-weight argument—for both convictions—boils down to a claim that his testimony was more credible than his daughter's. He suggests that she "harbored resentment against him" and "fabricate[d] the story of the threats." But the trial court in this case made an explicit finding that it did not

consider Mr. Hummel to be a credible witness—and the trial court, as the finder-of-fact, sat in the best position to evaluate the credibility of the witnesses before it. *Powell* at ¶ 22, citing *State v. Spaulding*, 151 Ohio St.3d 378, 2016-Ohio-8126, 89 N.E.3d 554, ¶ 165. A review of the record in this case does not demonstrate that the trial court's decision to believe Samantha's account of events (and disbelieve Mr. Hummel's) was so unfounded as to constitute a "manifest miscarriage of justice." *See Powell* at ¶ 16. Consequently, we find that Mr. Hummel's convictions were not against the manifest weight of the evidence, and overrule Mr. Hummel's third assignment of error in full.

III.

{¶26} Mr. Hummel's first and third assignments of error are overruled. However, because the trial court erred in convicting and sentencing Mr. Hummel of allied offenses of similar import, we sustain Mr. Hummel's second assignment of error and remand this cause for resentencing pursuant to the state's election. *See State v. Whitfield,* 124 Ohio St.3d 319, 2010-Ohio-2, 922 N.E.2d 182, paragraphs one and two of the syllabus ("The state retains the right to elect which allied offense to pursue on sentencing on a remand to the trial court after appeal.").

Judgment affirmed in part, reversed in part, and cause remanded.

MOCK, P. J., and **CROUSE, J.,** concur.

Please note:

The court has recorded its entry on the date of the release of this opinion