

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
WILLIAMS COUNTY

State of Ohio

Court of Appeals No. WM-12-002

Appellee

Trial Court No. 11 CR 117

v.

Joseph C. Bates

DECISION AND JUDGMENT

Appellant

Decided: March 29, 2013

* * * * *

Thomas A. Thompson, Williams County Prosecuting Attorney, and
Katherine J. Middleton, Assistant Prosecuting Attorney, for appellee.

John C. Filkins, for appellant.

* * * * *

YARBROUGH, J.

I. Introduction

{¶ 1} Appellant, Joseph Bates, appeals the judgment of the Williams County Court of Common Pleas, sentencing him to a four-year term of community control following a

jury trial in which he was found guilty of numerous offenses including identity fraud, menacing by stalking, and possessing criminal tools.

A. Facts and Procedural Background

{¶ 2} The facts surrounding this case begin in 2005. Sometime that year, Bates traveled to an auction where he met June Fry. June runs a catering business that consists of several food trucks she operates at various auction sites and other venues around the country. After purchasing some refreshments from June, Bates struck up a conversation with her. Over time, the friendship grew into a dating relationship. During the 2007 Christmas season, Bates, June, and June's daughter Megan vacationed together in California. Following the vacation, the relationship between Bates and June deepened and they began to see one another more frequently. In order to do so, Bates would often travel from his home in Wood County to Fry's residence in Williams County.

{¶ 3} By mid-summer of 2008, the relationship began to deteriorate as a result of frequent disagreements. One such disagreement began when Bates expressed his desire for June to move closer to him somewhere in Wood County. Not wanting to advance the relationship, June began to distance herself from Bates by removing his belongings from her house on several occasions and putting them back into Bates' automobile. In addition, June stopped inviting Bates to go to auctions with her. Soon after the relationship started "slowing down," June fell victim to a number of unfortunate events.

{¶ 4} At first, the activity was limited to prank phone calls, which both June and Megan would receive several times a day. Since their phones were equipped with caller

ID, June and Megan observed that the calls were coming from a Cincinnati area code. This led June to suspect that Bates was involved, because she knew Bates replaced his cell phone while in Cincinnati on a water-skiing trip after the previous cell phone suffered water damage.

{¶ 5} In addition to the prank phone calls, June noticed a three-inch spike in one of her tires on her personal vehicle on the morning of November 1, 2008. Once again, June suspected Bates was responsible.

{¶ 6} As a result of these incidents, June ended her relationship with Bates sometime around Thanksgiving 2008. In early December 2008, while June was away at an auction in Georgia, an outside water faucet at her home was turned on and left to run for two days. When she arrived home on December 4, 2008, she discovered the water faucet with a towel wrapped around the handle in order to keep it in the open position. The pump that fed the water faucet was destroyed as a result of the episode.

{¶ 7} The following day, June received a phone call from Bates in which Bates instructed June to take some money to a driver who was stranded on the Ohio Turnpike. June refused to take the money, and completed her preparations for an auction she was attending the next day. She left her business for the night at around 11 p.m. When she returned the next morning, she noticed that the front door was unlocked, lights were left on, and the oven doors were open. In addition, June noticed that the gas cap on one of her food trucks had been removed, and a 25-foot water hose was lying on the garage floor next to the truck.

{¶ 8} Although June suspected that someone had broken into her business, she noticed no apparent damage, and proceeded to finalize her preparations for the auction. After finishing, June instructed her employees to take the loaded food truck to the auction. On their way, the employees encountered problems with the food truck and had to have it towed. Once she was finished with the auction that day, June called the towing service and inquired about the food truck. The towing service informed her that the truck's gas tank was full of water. Suspecting that the truck had been vandalized, June filed a police report with the Williams County Sheriff's Department.

{¶ 9} After the incidents that took place at the end of 2008, June's business began to experience an unusual number of health inspections based on several anonymous reports of health code violations. Since these inspections occurred at the auction site, they interfered with June's ability to conduct business.

{¶ 10} While these events were taking place, June and Megan began to receive multiple mailings, telephone calls, and emails from various firms that were responding to requests for services that were made on behalf of June and Megan using their personal information. Both June and Megan testified that they were not involved in making the requests, nor did they authorize anyone, including Bates, to make the requests for them. These communications came from law firms, debt relief agencies, colleges, magazines, and even adult entertainment firms. Upon further investigation, June discovered that the IP address from the computer that requested these services was visible on some of the emails. She subsequently reported these events to the police.

{¶ 11} The police subpoenaed the name under which the IP address was registered. Pursuant to that subpoena, the police were informed by an internet service provider that the IP address on the emails came from Bates' Gateway laptop computer. Consequently, the Bowling Green Municipal Court issued a search warrant for Bates' laptop. After securing the laptop, Deputy Steven Mueller searched the laptop and discovered that it was used to visit numerous websites matching the emails June received. In addition, Mueller's search of the computer's internet browsing history revealed that Bates had searched for health departments and information about June and Megan, prank calls, and how to hide an IP address.

{¶ 12} Although June testified that she had previously used Bates' laptop, she stated that she never borrowed or possessed the laptop and only used it in Bates' presence. Specifically, June stated that she had no access to the laptop after she started receiving the solicitations. While Bates testified that he allowed June to borrow the computer, that testimony was not corroborated by anyone with personal knowledge of that fact.

{¶ 13} On September 24, 2009, Bates was indicted by the Williams County Grand Jury. That indictment was subsequently withdrawn on October 6, 2010, and followed by another indictment on July 20, 2011. A jury trial commenced on November 28, 2011. After an eight-day trial, Bates was found guilty of five counts of identity fraud in violation of R.C. 2913.49(B)(1), felonies of the fifth degree, one count of possessing criminal tools in violation of R.C. 2923.24(A), a felony of the fifth degree, one count of

menacing by stalking in violation of R.C. 2903.211(A)(1)(B)(2)(d), a felony of the fourth degree, and one count of menacing by stalking in violation of R.C. 2903.211(A)(1)(B)(1), a misdemeanor of the first degree. In addition, the jury found Bates not guilty of one count of vandalism, one count of breaking and entering, and one count of tampering with evidence. Bates was sentenced to a four-year term of community control and ordered to pay \$18,000 in fines.

B. Assignments of Error

{¶ 14} Bates appeals his sentence, assigning the following errors for our review:

I. THE TRIAL COURT ABUSED ITS DISCRETION TO THE MATERIAL PREJUDICE OF THE APPELLANT WHEN IT ALLOWED HEARSAY TESTIMONY FOR WHICH THE RULES OF EVIDENCE DO NOT PROVIDE AN EXCEPTION.

II. THE TRIAL COURT ERRED AS A RESULT OF ITS FAILURE TO GRANT APPELLANT'S MOTION FOR ACQUITTAL AND THE EVIDENCE PRESENTED WAS INSUFFICIENT AS A MATTER OF LAW AND/OR AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE TO SUSTAIN THE APPELLANT'S CONVICTION.

III. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO GRANT APPELLANT'S MOTION TO DISMISS BASED UPON VIOLATION OF THE RIGHT TO SPEEDY TRIAL.

IV. THE TRIAL COURT ERRED AS A RESULT OF ITS FAILURE TO SUPPRESS EVIDENCE.

V. THE TRIAL COURT ERRED BY ORDERING APPELLANT TO SERVE A CONSECUTIVE SENTENCE WITHOUT MAKING THE APPROPRIATE FINDINGS REQUIRED BY R.C. 2929.14(E)(4) AND IMPOSED A FINANCIAL SANCTION OF \$18,000.00 WITHOUT CONSIDERING APPELLANT'S PRESENT AND FUTURE ABILITY TO PAY.

VI. APPELLANT WAS DENIED DUE PROCESS WHEN THE TRIAL COURT GAVE A JURY INSTRUCTION WHICH ELIMINATED THE STATE'S OBLIGATION TO PROVE EACH ELEMENT OF THE OFFENSE OF MENACING BY STALKING AND THE ELEMENT OF VENUE.

II. Analysis

{¶ 15} For ease of discussion, we address Bates' assignments of error out of order.

A. Right to Speedy Trial

{¶ 16} In his third assignment of error, Bates argues that the trial court abused its discretion when it denied his motion to dismiss and found that his right to a speedy trial was not violated.

{¶ 17} The right to a speedy trial is guaranteed by the United States and Ohio Constitutions. *State v. Adams*, 43 Ohio St.3d 67, 68, 538 N.E.2d 1025 (1989). Pursuant

to R.C. 2945.71(C)(2), a person charged with a felony must be brought to trial within 270 days of his arrest. Further, each day an accused is held in jail in lieu of bail on the pending charge is counted as three days for purposes of computing the time limit. R.C. 2945.71(E). Since Bates was not held in jail while he awaited trial, the “triple count” provision does not apply.

{¶ 18} Therefore, the state was required to bring Bates to trial within 270 days of his indictment. However, the 270-day time limit may be tolled under certain conditions. Specifically, R.C. 2945.72 provides that the limit may be tolled for various reasons, including:

(E) Any period of delay necessitated by reason of a * * * motion, proceeding, or action made or instituted by the accused;

* * *

(H) The period of any continuance granted on the accused’s own motion, and the period of any reasonable continuance granted other than upon the accused’s own motion[.]

{¶ 19} Thus, where an accused requests a continuance of a pretrial, that request tolls the statutory speedy trial period from the date of the request until the date of the rescheduled hearing. *State v. Grissom*, 6th Dist. No. E-08-008, 2009-Ohio-2603, ¶ 15. Similarly, the Ohio Supreme Court has stated that an accused’s demand for discovery or a bill of particulars is a tolling event pursuant to R.C. 2945.72(E). *State v. Brown*, 98 Ohio St.3d 121, 2002-Ohio-7040, 781 N.E.2d 159, syllabus.

{¶ 20} Here, Bates was initially indicted on September 24, 2009. Consequently, excluding any tolling periods, the state was required to try him by June 20, 2010. However, Bates was not tried until November 28, 2011, which is 795 days from the date of his first indictment. While he acknowledges that the speedy trial period was tolled during some of the intervening time as a result of various motions he filed, Bates contends that, after factoring the tolling periods into the calculation, 349 days elapsed between his initial indictment and the trial date. On the contrary, the state argues that most of the time between the indictment and the trial was tolled as a result of Bates' motions.

{¶ 21} After a thorough review of the record, we conclude that Bates' speedy trial rights were not violated. The first tolling event occurred on October 7, 2009, when Bates filed his demand for discovery. The state was allowed a reasonable time to respond to that request, during which the speedy trial period is tolled. Other courts have concluded that 30 days is a "reasonable time." *State v. Nichols*, 4th Dist. No. 12CA955, 2013-Ohio-308, ¶ 24, citing *State v. Barb*, 8th Dist. No. 90768, 2008-Ohio-5877, ¶ 9; *State v. Bailey*, 11th Dist. No. 2005-P-0081, 2006-Ohio-6206, ¶ 19; *State v. Saultz*, 4th Dist. No. 09CA3133, 2011-Ohio-2018, ¶ 15. Since the state did not respond until February 8, 2010, we conclude that the applicable tolling period attributable to the discovery request was 30 days, or until November 6, 2009.

{¶ 22} The second tolling event took place on November 13, 2009, when Bates filed a number of motions including a motion for disclosure of grand jury testimony, a

motion for disclosure of witness list, and a request for notice of intention to use evidence. These motions tolled the speedy trial period until February 8, 2010, the date they were resolved. Thus, the period was tolled by 88 days by virtue of these motions.

{¶ 23} The time period was further tolled by 89 days when Bates filed a motion to dismiss on March 5, 2010. Before the trial court could issue its order on the motion to dismiss, Bates filed a motion to suppress on April 7, 2010. The court issued its order resolving the pending motions on June 2, 2010.

{¶ 24} On October 6, 2010, the case was dismissed without prejudice. The state did not indict Bates again until July 20, 2011, which is 287 days after the original case was dismissed. The Ohio Supreme Court has stated that “the time period between the dismissal without prejudice of an original indictment and the filing of a subsequent indictment, premised upon the same facts as alleged in the original indictment, shall not be counted unless the defendant is held in jail or released on bail pursuant to Crim.R. 12(I).” *State v. Broughton*, 62 Ohio St.3d 253, 581 N.E.2d 541 (1991), paragraph one of the syllabus. Since Bates was not held in jail or released on bail pursuant to Crim.R. 12(I), the 287-day period between the dismissal and the second indictment does not count toward the 270-day requirement.

{¶ 25} Finally, the time period was also tolled on September 26, 2011, pursuant to several motions filed by Bates. The trial court decided the last of these motions 58 days later, on November 23, 2011. Adding these tolling periods together results in a total of 552 days. After reducing the 795-day period between the initial indictment and the trial

date by the 552 days in which it was tolled, only 243 days are chargeable to the state. Since Bates was brought to trial within the statutory 270-day requirement, his constitutional right to a speedy trial was not violated.

{¶ 26} Accordingly, Bates' third assignment of error is not well-taken.

B. Motion to Suppress

{¶ 27} In his fourth assignment of error, Bates argues that the trial court erred when it failed to suppress the evidence found on his laptop computer, which was seized by the police as they were executing a search warrant at his home. Specifically, Bates argues that Bryan Police Department patrolman Corey Bush, the officer that submitted the search warrant affidavit, "materially and deliberately misstated supporting facts in order to obtain the search warrant in contravention of the Fourth Amendment." Bates further argues that the scope of the search warrant was exceeded when the officers examined the contents of the computer's hard drive.

{¶ 28} An appellate review of a ruling on a motion to suppress evidence presents mixed questions of law and fact. *United States v. Martinez*, 949 F.2d 1117, 1119 (11th Cir.1992); *State v. Long*, 127 Ohio App.3d 328, 332, 713 N.E.2d 1 (4th Dist.1998). During a suppression hearing, the trial court assumes the role of the trier of fact and is, therefore, in the best position to resolve questions of fact and evaluate witness credibility. *State v. Mills*, 62 Ohio St.3d 357, 366, 582 N.E.2d 972 (1992); *State v. Hopfer*, 112 Ohio App.3d 521, 548, 679 N.E.2d 321 (2d Dist.1996). As a result, an appellate court must accept a trial court's factual findings if they are supported by competent and credible

evidence. *State v. Guysinger*, 86 Ohio App.3d 592, 594, 621 N.E.2d 726 (4th Dist.1993).

The reviewing court must then review the trial court's application of the law de novo.

State v. Russell, 127 Ohio App.3d 414, 416, 713 N.E.2d 56 (9th Dist.1998).

{¶ 29} Pursuant to the Fourth Amendment of the U.S. Constitution and Article I, Section 14 of the Ohio Constitution, only warrants “particularly describing the place to be searched and the person or things to be seized” may issue. In determining whether a search warrant satisfies the Fourth Amendment's particularity requirement, reviewing courts employ a standard of practical accuracy rather than technical precision. *United States v. Otero*, 563 F.3d 1127 (10th Cir.2009).

{¶ 30} With regard to an officer's application for a search warrant, R.C. 2933.23 and Crim.R. 41(C) require the officer to file an affidavit with the judge or magistrate that particularly describes the person, place, and property to be searched. Additionally, the affidavit must name the alleged offense, and state the factual basis for the officer's belief that the described property is located at the place listed in the affidavit.

{¶ 31} First, Bates argues that the warrant was deficient because it was based on an affidavit containing false statements made by June to patrolman Bush. Bates contends that the affidavit “does not provide sufficient information for the issuance of a search warrant because the officer took no steps to confirm or deny its accuracy.”

{¶ 32} The affidavit supporting the search warrant issued in this case provided:

Victim is being harassed by being signed up for services online.

Representatives from these businesses then call her over the phone causing

her not to be able to run her business due to the volume of calls. There was also material of a pornographic nature sent to her 15 year old daughter [through] the mail. All these instances are being done via the internet and email. Most of the companies have been cooperative and provided the victim with a copy of the email they received. These emails contain an IP address [that] can be traced. A subpoena was served to Alltel in which they provided a trace for an email showing it came from Joseph Bates' residence. Any evidence seized will be held by the Bryan City Police Department and inspected by the Defiance County Sherriff's Office.

{¶ 33} In order to successfully challenge the veracity of a search warrant affidavit, a defendant must show that the affiant made a false statement either intentionally or with reckless disregard for the truth. *State v. Waddy*, 63 Ohio St.3d 424, 441, 588 N.E.2d 819 (1992). Bates argues that patrolman Bush's statements were false and were made with reckless disregard for the truth. He contends that the Alltel information did not actually link the emails to his residence. Further, he argues that the information provided by Alltel was not shown to be reasonably reliable, as it was not based on June's personal knowledge and was not previously relied upon by law enforcement personnel. We disagree.

{¶ 34} At the suppression hearing, patrolman Bush testified that he spoke with June regarding the harassing emails and phone calls. Further, he stated that he actually observed printouts of the emails containing Bates' IP address, listened to messages left on

June's voicemail, and personally examined the information provided by Alltel, which listed Bates as the name on the account and provided his address. Finally, Bush stated that he believed the information in the affidavit was correct when he provided it, and he had no reason to question June's credibility or the validity of the Alltel report.

{¶ 35} In light of the foregoing, we conclude that Bush did not intentionally or recklessly provide false information in order to secure the search warrant. Thus, Bates' first argument is without merit.

{¶ 36} Second, Bates argues that the examination of the computer's hard drive exceeded the scope of the search warrant. Specifically, Bates contends that the warrant only authorized the seizure of the computer and did not grant the officers authority to search the contents of the computer.

{¶ 37} The warrant at issue here is similar to the warrant at issue in *State v. King*, 5th Dist. No. CT2006-0021, 2007-Ohio-2810. In *King*, the warrant "directed officers to search for hardware (including computers), software, data storage devices, printed and recorded media and other items related to the crime of pandering sexually oriented material involving a minor." *Id.* at ¶ 30. After examining this language, the Fifth District held that the authorization to seize the computers implicitly allowed the officers to inspect the contents of the computer. *Id.*

{¶ 38} In the case sub judice, the warrant authorized the officers to search for "[c]omputers and all related electronic storage devices. Also any electronic device sending and receiving email. Any pornographic related material." We agree with the

rationale in *King* that the search of the contents of the computer is implied by the use of the phrase “computers and all related electronic storage devices.” This makes sense, since oftentimes a computer is of little or no evidentiary value apart from an examination of its contents. Thus, Bates’ second argument is without merit.

{¶ 39} Accordingly, Bates’ fourth assignment of error is not well-taken.

C. Hearsay Testimony

{¶ 40} In his first assignment of error, Bates argues that the trial court abused its discretion when it permitted the state to elicit several instances of hearsay testimony. The state, on the other hand, argues that the testimony did not constitute hearsay because it was not offered to prove the truth of the matter asserted.

{¶ 41} Although evidentiary challenges based on relevance are typically reviewed for abuse of discretion, there is no discretion to admit hearsay. *State v. Sutorius*, 122 Ohio App.3d 1, 7, 701 N.E.2d 1 (1st Dist.1997). Thus, hearsay rulings are reviewed de novo, rather than under the more deferential “abuse of discretion” standard. *State v. Ricks*, 196 Ohio App.3d 798, 965 N.E.2d 1018, 2011-Ohio-5043, ¶ 109 (6th Dist.) (Yarbrough, J., concurring in part and dissenting in part), citing *State v. Sorrels*, 71 Ohio App.3d 162, 165, 593 N.E.2d 313 (1st Dist.1991).

{¶ 42} Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter

asserted.” Evid.R. 801(C). Such outside statements are generally inadmissible unless an exception applies. Evid.R. 802; *State v. DeMarco*, 31 Ohio St.3d 191, 195, 509 N.E.2d 1256 (1987).

{¶ 43} Here, Bates points to several instances in which the trial court allegedly erred in allowing hearsay testimony. The first instance occurred when patrolman Bush was asked about the contents of a voicemail message he listened to while investigating June’s complaint. He answered, over objection, that the company that left the voicemail was “responding to information off of their website that they believe [June] had signed up for asking them to call her for their services.” Rather than offering the contents of the voicemail to prove the truth of the matter asserted (i.e. that June did, in fact, solicit the company’s services), it is evident that the state elicited this testimony to explain why Bush called the company that left the voicemail, which ultimately led him to discover that the solicitation was made while June was in his office filing the complaint. Since the testimony was not offered to prove the truth of the matter asserted, its admission was not erroneous.

{¶ 44} The next hearsay challenge occurred when detective Terry James testified regarding a computer analysis report performed on Bates’ laptop computer. The state called James to testify about events surrounding a complaint Bates filed with the police regarding a breaking and entering at his business. Bates alleged that June had broken into the business and taken several items, including his laptop. James testified, over objection, that a computer analysis report prepared by deputy Steven Mueller showed that

the laptop computer was not used during the time period in which the alleged incident occurred. Once again, when read in its context, it is clear that this testimony was not being offered for the truth of the matter asserted. Instead, the testimony was necessary in order for James to explain his doubts about the validity of Bates' complaints.¹

{¶ 45} During June's testimony, the state sought to introduce numerous emails into evidence that were received by June without her request. Bates objected on hearsay grounds, arguing that the emails were hearsay and, if admitted, he would have no way of cross-examining the author of the emails. In response, the state contended that it was trying to show that June actually received the emails, not to prove the truth of the matters asserted within the emails (i.e. whether the personal information contained therein was actually accurate).

{¶ 46} While the trial court agreed that the evidence was merely offered to show that June actually received the emails, it took extra steps to limit their use to that purpose by issuing a limiting instruction to the jury prior to the introduction of the evidence. Further, the court instructed the state to limit its questions regarding the emails. In complying with those instructions, the prosecutor was careful only to ask June to state the name of the addressee and addressor on the email, the date of the email, and the subject

¹ Notably, James' testimony concerning the computer analysis report was supplemented by deputy Mueller's testimony, in which Mueller explained the process he used to analyze the computer and testified as to the findings of the report in great detail, subject to cross-examination. Thus, even if we were to conclude the trial court erroneously allowed James to testify concerning the results of the computer analysis report, such error would be harmless in light of Mueller's testimony.

of the email. The prosecutor did not attempt to elicit the contents of the email. Since the emails were not used to prove the truth of the matter asserted, they are non-hearsay by definition. This conclusion is buttressed by the fact that we must presume that the jury followed the court's limiting instruction. *State v. Franklin*, 62 Ohio St.3d 118, 127, 580 N.E.2d 1 (1991).

{¶ 47} Accordingly, Bates' first assignment of error is not well-taken.

D. Sufficiency of the Evidence and Manifest Weight of the Evidence

{¶ 48} In his second assignment of error, Bates argues that the trial court erred when it denied his Crim.R. 29(A) motion for acquittal. In addition, Bates contends that his conviction was not supported by sufficient evidence and was against the manifest weight of the evidence.

{¶ 49} We review a ruling on a Crim.R. 29(A) motion under the same standard used to determine whether the evidence was sufficient to sustain a conviction. *State v. Brinkley*, 105 Ohio St.3d 231, 2005-Ohio-1507, 824 N.E.2d 959, ¶ 40. Under the sufficiency standard, we must determine whether the evidence admitted at trial, "if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The 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*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus, citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.E.2d 560 (1979). See also *State v. Thompkins*, 78

Ohio St.3d 380, 678 N.E.2d 541 (1997). Therefore, “[t]he verdict will not be disturbed unless the appellate court finds that reasonable minds could not reach the conclusion reached by the trier-of-fact.” *State v. Dennis*, 79 Ohio St.3d 421, 430, 683 N.E.2d 1096 (1997), citing *Jenks* at paragraph two of the syllabus.

{¶ 50} In determining whether the evidence is sufficient to support the conviction, the appellate court does not weigh the evidence nor assess the credibility of the witnesses. *State v. Walker*, 55 Ohio St.2d 208, 212, 378 N.E.2d 1049 (1978). *See also State v. Willard*, 144 Ohio App.3d 767, 777–778, 761 N.E.2d 688 (10th Dist.2001). If the state “relies on circumstantial evidence to prove an element of the offense charged, there is no requirement that the evidence must be irreconcilable with any reasonable theory of innocence in order to support a conviction[,]” so long as the jury is properly instructed as to the burden of proof, i.e., beyond a reasonable doubt. *Jenks* at paragraph one of the syllabus.

{¶ 51} Even when there is sufficient evidence to support the verdict, a court of appeals may decide that the verdict is against the weight of the evidence. *Thompkins* at paragraph two of the syllabus. When reviewing a manifest weight challenge, we must consider whether the evidence in the case is conflicting or where reasonable minds might differ as to the inferences to be drawn from it, consider the weight of the evidence, and consider the credibility of the witnesses to determine if the jury clearly “lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175,

485 N.E.2d 717 (1st Dist.1983), and *State v. Smith*, 80 Ohio St.3d 89, 114, 684 N.E.2d 668 (1997).

{¶ 52} In this case, Bates was convicted of three different offenses: (1) identity fraud; (2) menacing by stalking; and (3) possessing criminal tools. The elements of identity fraud are set forth in R.C. 2913.49(B)(1), which provides:

(B) No person, without the express or implied consent of the other person, shall use, obtain, or possess any personal identifying information of another person with intent to do either of the following:

(1) Hold the person out to be the other person.

{¶ 53} Bates was convicted of four counts of identity fraud relating to June's personal identifying information and one count relating to Megan's personal identifying information. At trial, the state presented evidence demonstrating that June and Megan each received a voluminous amount of harassing mail, phone calls, and emails from various companies using derogative names such as "Megan Fat Fry" and "Megan Slut Fry." In addition, the state introduced evidence from Bates' laptop computer that contained internet history from many of the websites belonging to the companies that contacted June and Megan. The laptop also contained June and Megan's names, addresses, and other personal identifying information.² Further, both June and Megan

² R.C. 2913.49(A) defines "personal identifying information" to include, without limitation, the following: "the name, address, telephone number, driver's license, driver's license number, commercial driver's license, commercial driver's license number, state identification card, state identification card number, social security card, social security

testified that they did not request these communications, nor did they authorize anyone else to make such requests. Viewing this evidence in a light most favorable to the prosecution, a rational trier of fact could have found the elements of identity fraud proven beyond a reasonable doubt. Thus, the evidence was sufficient to support Bates' convictions.

{¶ 54} The elements of menacing by stalking are contained in R.C. 2903.211(A)(1), which states that “[n]o 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 cause mental distress to the other person.”

{¶ 55} Here, the state established Bates' pattern of conduct through evidence that he walked by June with a gun in his waistband, leered at her, threatened one of her friends, fraudulently reported her business to the health department on numerous occasions, vandalized her food trucks, and requested various products and services on behalf of Megan and June, including materials of a pornographic nature. Both June and Megan testified that this pattern of conduct terrified them, interfered with their day-to-day activities, and made them feel overwhelmed, upset, and embarrassed. This evidence, viewed in a light most favorable to the prosecution, is sufficient to support Bates' conviction for menacing by stalking. After weighing the evidence and considering the

number, birth certificate, place of employment, employee identification number, mother's maiden name, demand deposit account number, savings account number, money market account number, mutual fund account number, other financial account number, personal identification number, password, or credit card number of a living or dead individual.”

credibility of the witnesses, we conclude that Bates' conviction for menacing by stalking is not against the manifest weight of the evidence.

{¶ 56} Finally, the elements of possessing criminal tools are set forth in R.C. 2923.24(A), which provides: "No person shall possess or have under the person's control any substance, device, instrument, or article, with purpose to use it criminally."

{¶ 57} The criminal tool Bates was alleged to have possessed was the laptop computer. To support that conviction, the state established that the computer belonged to Bates. Further, the state used the computer analysis report to show that the computer was used to commit the identity fraud offenses. While Bates testified that the computer was not in his possession at the time of the offenses, his testimony was largely uncorroborated and contradicted by June's testimony. Bates also contends that venue was improper because the computer was not possessed in Williams County. However, the state correctly points out that an appropriate venue for a course of conduct case is the jurisdiction in which the *victim's* computer is located. R.C. 2901.12(I). Since the state clearly established that June's computer was located in Williams County, venue was proper there.

{¶ 58} In light of the foregoing, we conclude that the state met its burden of providing sufficient evidence to establish each element of the charged offenses. Thus, the trial court did not err in denying Bates' motion for acquittal. In addition, we hold that the jury's verdict was not against the manifest weight of the evidence.

{¶ 59} Accordingly, Bates' second assignment of error is not well-taken.

E. Jury Instructions

{¶ 60} In his sixth assignment of error, Bates argues that he was denied due process when the trial court provided deficient jury instructions regarding venue and the definition of “mental distress.”

{¶ 61} Abuse of discretion is the standard of review for disputed instructions. *State v. Lillo*, 6th Dist. No. H-10-001, 2010-Ohio-6221, ¶ 15. Generally, a trial court has broad discretion in deciding how to fashion jury instructions. The court must not, however, fail to “give the jury all instructions which are relevant and necessary for the jury to weigh the evidence and discharge its duty as the fact finder.” *State v. Comen*, 50 Ohio St.3d 206, 553 N.E.2d 640 (1990), paragraph two of the syllabus. Further, the defendant is entitled to “complete and accurate jury instructions on all the issues raised by the evidence.” *State v. Sneed*, 63 Ohio St.3d 3, 9, 584 N.E.2d 1160 (1992).

{¶ 62} First, Bates challenges the jury instruction given by the trial court with respect to venue. The contested portion of the instruction stated as follows:

Venue. * * *

When the offense involves a computer, computer system, or computer network, the offender may be tried in any jurisdiction containing any location of the computer, computer system, or computer network of the victim of the offense, in any jurisdiction from which or into which, as part of the offense, any writing, data, or images disseminated or transmitted by means of a computer, computer system, computer network,

telecommunication, telecommunications device, telecommunications service, or information service.

{¶ 63} Second, Bates argues that the trial court improperly instructed the jury on the definition of “mental distress” relating to the menacing by stalking count. In its instruction, the court stated:

{¶ 64} Mental Distress means any mental illness or condition that involves some temporary substantial incapacity that would normally require psychiatric treatment, psychological treatment or other mental health services. Proof that Megan Fry requested or received psychiatric treatment, psychological treatment, or other mental health services is not required in order to show that she was caused mental distress.

{¶ 65} While Bates contends that these instructions improperly eliminated the state’s burden to prove every element of the offenses, he offers no argument or authority to support that contention. Moreover, contrary to Bates’ position, we see no error in the court’s instructions to the jury on the issue of venue or mental distress. Rather than misstating the law, the court used the actual statutory language from R.C. 2901.12(I) (relating to venue) and R.C. 2903.211(D)(2) (relating to “mental distress”). Where, as here, the meaning of the statutory language is clear and does not require interpretation, the trial court does not err by limiting its instruction to the language of the statute. *See* 89 Ohio Jurisprudence 3d, Trial, Section 379 (2013) (“Where the law governing a case is expressed in a statute, the better practice is for the court to instruct the jury by use of the

actual language used in the statute.”). Thus, Bates’ argument concerning the jury instructions is without merit.

{¶ 66} Accordingly, Bates’ sixth assignment of error is not well-taken.

F. Sentencing

{¶ 67} Finally, in Bates’ fifth assignment of error, he argues that the trial court erred by ordering him to “serve a consecutive sentence without making the appropriate findings required by [R.C. 2929.14(C)(4)] and imposed a financial sanction of \$18,000 without considering [his] present and future ability to pay.”

{¶ 68} Bates’ initial argument concerning consecutive sentences overlooks the fact that the trial court is not required to make statutory findings of fact under R.C. 2929.14(C)(4) when it sentences a defendant to community control in lieu of a consecutive prison sentence. *See State v. Madaffari*, 12th Dist. No. CA2004-08-193, 2005-Ohio-3625, ¶ 14 (concluding that “a trial court is required to make the statutory findings and supporting reasons under R.C. 2929.14(E)(4), not when it sentences a defendant to community control, but when it actually imposes a consecutive prison term.”). Since Bates’ consecutive prison sentence does not apply unless he violates the terms of his community control, that sentence has not been “actually imposed.” Thus, the trial court did not err in failing to make the statutory findings of fact under R.C. 2929.14(C)(4).

{¶ 69} Bates also argues that the trial court failed to find that he had the present and future ability to pay fines amounting to \$18,000. However, the record contradicts

Bates' argument. Indeed, the sentencing hearing transcript and the sentencing journal entry contain the court's finding that he has the "current and future ability to pay all fines, restitution and costs assessed herein." That finding is supported by the testimony presented at trial, which revealed Bates' average yearly income.

{¶ 70} Accordingly, Bates fifth assignment of error is not well-taken.

III. Conclusion

{¶ 71} Based on the foregoing, the judgment of the Williams County Court of Common Pleas is affirmed. Costs are hereby assessed to Bates in accordance with App.R. 24.

Judgment affirmed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Arlene Singer, P.J.

JUDGE

Thomas J. Osowik, J.

JUDGE

Stephen A. Yarbrough, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.