[Cite as *Cleveland v. Garrett*, 2018-Ohio-4713.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 106512

CITY OF CLEVELAND

PLAINTIFF-APPELLEE

vs.

CLAUDE D. GARRETT

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Cleveland Municipal Court
Case No. 2017 CRB 011725

BEFORE: Blackmon, J., McCormack, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: November 21, 2018

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PATRICIA ANN BLACKMON, J.:

{¶1} Claude D. Garrett ("Garrett") appeals his conviction of aggravated menacing in violation of Cleveland Codified Ordinances 621.06 and assigns the following errors for our review:

> I. The Appellant's conviction for aggravated menacing was not supported by sufficient evidence.
>
> II. The Appellant's conviction for aggravated menacing was against the manifest weight of the evidence.

{¶2} Having reviewed the record and pertinent law, we affirm the decision of the trial court. The apposite facts follow.

{¶3} Garrett and Q.G. ("the victim") have a one-year-old child together. The victim and the child live in a house in Cleveland. Garrett does not live with them. On June 5, 2017,

Garrett appeared unexpectedly at the victim's house, wanting to take their son. The victim said no, because she and Garrett "were having too many problems." Garrett took their son anyway and began to leave the house. Garrett and the victim got into an argument, and Garrett threatened the victim. Eventually, Garrett gave the child back to the victim and she called the police.

{¶4} Garrett was charged with one count of aggravated menacing, and after a bench trial, the court found Garrett guilty. On October 18, 2017, the court sentenced him to 18 months of community control sanctions. It is from this conviction that Garrett appeals.

Aggravated Menacing

{¶5} Cleveland Codified Ordinances 621.06 defines aggravated menacing as follows: "(a) No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of such other person or member of his or her immediate family."

{¶6} Cleveland Codified Ordinances 601.01(e) defines "[s]erious physical harm" as:

> (1) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
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> (2) Any physical harm which carries a substantial risk of death;
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> (3) Any physical harm which involves some permanent incapacity, whether partial or total, or which involves some temporary, substantial incapacity;
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> (4) Any physical harm which involves some permanent disfigurement, or which involves some temporary, serious disfigurement; [or]
>
> (5) Any physical harm which involves acute pain of such duration as to result in substantial suffering, or which involves any degree of prolonged or intractable pain.

Sufficiency of the Evidence

{¶7} Crim.R. 29 mandates that the trial court issue a judgment of acquittal where the prosecution's evidence is insufficient to sustain a conviction for the offense. Crim.R. 29(A) and sufficiency of the evidence require the same analysis. *State v. Taylor*, 8th Dist. Cuyahoga No. 100315, 2014-Ohio-3134. "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *State v. Driggins*, 8th Dist. Cuyahoga No. 98073, 2012-Ohio-5287, ¶ 101, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997).

{¶ 8} 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. Vickers*, 8th Dist. Cuyahoga No. 97365, 2013-Ohio-1337, citing *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991).

{¶8} In the instant case, the victim testified that when Garrett showed up at her house on June 5, 2017, they started talking about planning their son's birthday party, but it turned into an argument. The victim testified that Garrett "took my son out the house, and I chased behind him and that's when he got in my face, calling me all kinds of names, threatening me, ripped my shirt and eventually he gave my son back." As to the threats, the victim testified that Garrett "was just saying he should knock me out and called me all types of N****s." The victim explained in further detail: "I followed behind him. I kept telling him give me my son, give me my son, and it escalated outside, and that's when he ripped my shirt, ripped — snatched the baby

diaper bag off my shoulder, threw it in the street. I kept trying to pick it up and he kept constantly throwing it down, throwing it down."

{¶9} Asked if she was concerned for her safety, the victim testified as follows: "For my safety, no. I was more fearful for my son, because I didn't know if he was going to take my son and don't [sic] bring him back. I didn't know what to think." Asked if she was concerned for her son's safety, the victim answered, "Yes."

{¶10} The victim next testified about why she contacted the police, and she gave two different answers. First, she stated that she called the police because she was concerned about eviction or getting in trouble with her landlord. "Because the way he came to my apartment complex, they don't tolerate stuff like that. I can be evicted for things like that, so I had to call law enforcement, so I don't get in trouble with my apartment complex." However, the victim also testified about why she filed a police report "[a]bout 20 or 30 minutes after it happened": "Because I didn't know what he was — I thought he was going to try to kidnap my son. I thought he was going to show up at his daycare. So many different thoughts were running through my mind, I didn't know what to do. I wanted my son to be safe." Asked to clarify what her primary concern was, the victim testified that "he was going to take my son."

{¶11} The police officer who took the victim's report testified that the victim told him "Mr. Garrett became upset and irate, and he had picked up the child in his arms, and with his other hand, he grabbed Ms. Graham by her T-shirt and pulled her to the ground and then had threatened her and told her that he would beat her ass." The officer further testified that the victim "seemed a little uneasy, upset," and said "she feared" Garrett when she filed the report.

{¶12} The police officer who followed up on this investigation testified that the victim's "main concern [was] she wanted a Protection Order, just because she was concerned for the safety of her son." The officer further testified that the victim "was fearful, you know, primarily for her safety, as well as her son's safety, and she just didn't want that to occur again."

{¶13} Upon review, we find that the victim's testimony, coupled with the testimony of the two police officers, is sufficient to show the essential elements of aggravated menacing. Accordingly, Garrett's first assigned error is overruled.

Manifest Weight of the Evidence

{¶14} In *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, 865 N.E.2d 1264, ¶ 25, the Ohio Supreme Court addressed the standard of review for a criminal manifest weight challenge, as follows:

> The criminal manifest-weight-of-the-evidence standard was explained in *State v. Thompkins* (1997), 78 Ohio St.3d 380, 1997 Ohio 52, 678 N.E.2d 541. In *Thompkins*, the court distinguished between sufficiency of the evidence and manifest weight of the evidence, finding that these concepts differ both qualitatively and quantitatively. *Id.* at 386, 678 N.E.2d 541. The court held that sufficiency of the evidence is a test of adequacy as to whether the evidence is legally sufficient to support a verdict as a matter of law, but weight of the evidence addresses the evidence's effect of inducing belief. *Id.* at 386-387, 678 N.E.2d 541. In other words, a reviewing court asks whose evidence is more persuasive — the state's or the defendant's? We went on to hold that although there may be sufficient evidence to support a judgment, it could nevertheless be

against the manifest weight of the evidence. *Id*. at 387, 678 N.E.2d 541. "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Id.* at 387, 678 N.E.2d 541, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652.

{¶15} An appellate court may not merely substitute its view for that of the jury, but must find that "in resolving conflicts in the evidence, 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. Accordingly, reversal on manifest weight grounds is reserved for "the exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶16} In the case at hand, the victim testified inconsistently about whether she subjectively believed Garrett would cause physical harm to her son. At one point, the victim testified that she did not know what Garrett would do to her son, but it would be "nothing harmful." However, as reviewed previously, the victim also testified that she was concerned for her son's safety. Furthermore, both police officers testified that the victim was fearful for her safety and her son's safety when they spoke with her. Both police officers also testified that, at the time of the incident, the victim did not mention anything about being evicted or having trouble with her landlord. Additionally, both police officers testified that, in their experience with domestic violence situations, they found the victim's statements to them to be truthful.

{¶17} In convicting Garrett of aggravated menacing, the trial court found the following: "The Court does make a finding of guilt, based on all of the testimony, but, particularly, the

testimony of the detective, who had indicated that her testimony was that she had no problem with the credibility of the complaining witness in this matter."

{¶18} This court has consistently held that "the credibility of the witnesses are matters primarily for the factfinder to access. The rationale behind this principle is that the trier of fact is in the best position to take into account inconsistencies, along with the witnesses' manner and demeanor, and determine whether the witnesses' testimonies are credible." (Citations omitted.) *State v. Hernandez*, 8th Dist. Cuyahoga No. 104976, 2018-Ohio-738, ¶ 28. This court has also consistently held that "a conviction is not against the manifest weight of the evidence solely because the jury heard inconsistent or contradictory testimony." *State v. Shutes*, 8th Dist. Cuyahoga No. 105694, 2018-Ohio-2188, ¶ 55.

{¶19} This court recently held that "[f]or the offense of aggravated menacing, '[i]t is sufficient to prove that the victim, in the moment, believed the defendant to be in earnest and capable of acting.' 'Evidence of a person's belief that an offender will cause serious physical harm can be proven with circumstantial evidence.'" (Citations omitted.) *Cleveland v. Reynolds*, 8th Dist. Cuyahoga No. 105546, 2018-Ohio-97, ¶ 6. *See also State v. Bonton*, 8th Dist. Cuyahoga No. 102918, 2016-Ohio-700, ¶ 34 ("the victim's testimony that she was not afraid of Bonton's threats * * * loses credibility when the 911 tape * * * is played [and t]he sister's plea for help and her emotional state upon the arrival of the police showed this was more than a simple verbal argument").

{¶20} The victim in the case at hand called the police after the incident and later went to the police station to file a report. She told two police officers on separate occasions that Garrett

threatened her and she was fearful, both for her safety and her son's safety. Furthermore, the victim testified, albeit in part, that she was concerned for her son's safety.

{¶21} "The power to reverse a judgment of conviction as against the manifest weight must be exercised with caution and only in the rare case in which the evidence weighs heavily against the conviction." *State v. Hinzman*, 8th Dist. Cuyahoga No. 92767, 2010-Ohio-771, ¶ 51.

{¶22} Upon review, we do not find that the court lost its way and created a manifest miscarriage of justice. Rather, we find that the court could have reasonably concluded by evidence of Garrett's actions, the victim's reactions, and the police officers' testimonies that the victim subjectively believed that Garrett would cause serious physical harm to her or her son. Accordingly, Garrett's second assigned error is overruled.

{¶23} Judgment affirmed.

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

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cleveland Municipal Court to carry this judgment into execution. The defendant's conviction 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.

PATRICIA ANN BLACKMON, JUDGE

TIM McCORMACK, P.J., CONCURS;

MELODY J. STEWART, J., DISSENTS
WITH ATTACHED OPINION

MELODY J. STEWART, J., DISSENTING:

{¶24} I respectfully dissent from the majority's decision to affirm Garrett's conviction. The city presented no evidence sufficient to prove that the victim believed that Garrett would cause serious physical harm to her or their child. And the victim's unequivocal testimony was that she did not believe Garrett would cause her serious physical harm, and that the "fear" she had with regard to their son was not of serious physical harm. *Compare Cleveland v. Reynolds*, 8th Dist. Cuyahoga No. 105546, 2018-Ohio-97, ¶ 7 (sufficient evidence where victim stated she was in fear based on verbal threats and defendant's prior violent history).

{¶25} It bears noting again that Cleveland Codified Ordinances 601.01(e) defines "[s]erious physical harm to persons" as:

> (1) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;
>
> (2) Any physical harm which carries a substantial risk of death;
>
> (3) Any physical harm which involves some permanent incapacity, whether partial or total, or which involves some temporary, substantial incapacity;
>
> (4) Any physical harm which involves some permanent disfigurement, or which involves some temporary, serious disfigurement; [or]
>
> (5) Any physical harm which involves acute pain of such duration as to result in substantial suffering, or which involves any degree of prolonged or intractable pain.

The definition is all inclusive and does allow for any and all kinds of mental or physical harm to be characterized as "serious physical harm."

{¶26} I find nothing in the record sufficient to show beyond a reasonable doubt that the victim believed Garrett would cause any of the aforementioned harms. To the contrary, the victim's testimony made clear that she did *not* believe Garrett would cause her serious physical harm.

{¶27} Viewing the evidence in a light most favorable to the city shows that during the argument between the victim and Garrett, Garrett became verbally and physically abusive. The victim testified that Garrett "got in [her] face," called her names, said he "should knock [her] out," and ripped her shirt. She made no claim, however, that Garrett's statements or actions caused her to fear that any serious physical harm, as specifically defined above, would befall her or her son. To the contrary, when asked if she was concerned about her safety, the victim testified unequivocally: "[f]or my safety, no." Rather than characterizing Garrett's behavior as threatening, she instead described it as "very disrespectful," and "embarrassing." When asked about her shirt she stated that "he grabbed my shirt, and he just ripped my shirt."

{¶28} The victim's testimony also made clear that she did not believe Garrett would cause their child serious physical harm. While the victim did use the word "fearful" with regard to their son and agree that she was concerned for his safety, she gave no indication she believed Garrett would cause him any *serious physical harm*. The victim's testimony was in the context of concern that their son accompany her to an appointment. She explained that she "didn't know if [Garrett] was going to take my son and don't [sic] bring him back." On cross-examination, the victim clarified the nature of her fear:

> Counsel: You indicated to the prosecutor that you were fearful. You didn't know what he was going to do to your son?

Victim: Right. As far as, *not nothing* [sic] *harmful*. I didn't know if he was going to try to keep him without bringing him home[.]

Counsel: You weren't worried that he was going to do anything harmful? You just didn't know where he was going to go?

Victim: Right.

(Emphasis added.) This testimony does not establish that she feared serious physical harm. *See State v. Striley*, 21 Ohio App.3d 300, 300, 488 N.E.2d 499 (12th Dist.1985) ("Where a witness testifies that he did not interpret defendant's remarks as a threat to inflict harm, there is no evidence of a 'threat of serious physical harm' as required for a conviction of aggravated menacing * * *.").

{¶29} Moreover, the testimony of the police officer likewise fails to establish the requisite proof of fear of serious physical harm. One officer's statements that the victim appeared "a little uneasy, upset," and "kinda seemed fearful" and the other officer's observation that she "was fearful, you know, primarily for her safety, as well as her son's safety, and she just didn't want that to occur again," is evidence that falls short of proving that the victim believed that she or her son would be subject to serious physical harm. Viewed most favorably to the prosecution, a reasonable trier of fact could find that the victim had her clothing torn, suffered mental anguish, and feared for her son's and her own safety. And while these findings are certainly serious, troubling, and may rise to the level of a criminal offense (i.e. Cleveland Codified Ordinances 621.07 Menacing), aggravated menacing it is not. *See In re Cleo W.*, 6th Dist. Erie No. E-00-020, 2000 Ohio App. LEXIS 4453, 6-7 (Sept. 29, 2000) (evidence of fear of "some physical harm" is insufficient to prove fear of "serious physical harm"). I would therefore vacate Garrett's conviction.