[Cite as *State v. McCrary*, 2011-Ohio-3161.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State of Ohio,	:	
Plaintiff-Appellee,	:	
		No. 10AP-881
v.	:	(M.C. No. 2010 CRB 8896)
Alexander E. McCrary,	:	(REGULAR CALENDAR)
Defendant-Appellant.	:	

D E C I S I O N

Rendered on June 28, 2011

Richard C. Pfeiffer, Jr., City Attorney, *Lara N. Baker*, City Prosecutor, and *Melanie R. Tobias*, for appellee.

Yeura R. Venters, Public Defender, and *Paul Skendelas*, for appellant.

APPEAL from the Franklin County Municipal Court

KLATT, J.

{¶1} Defendant-appellant, Alexander E. McCrary, appeals from a judgment of conviction and sentence entered by the Franklin County Municipal Court. For the following reasons, we affirm that judgment.

Factual and Procedural Background

{¶2} On April 25, 2010, complaints were filed in the trial court alleging that appellant committed three counts of aggravated menacing in violation of R.C. 2903.21. The charges arose out of an altercation appellant had that day with the Dickey family.

Appellant entered a not guilty plea to the charges and proceeded to a trial. Appellant waived his right to a jury trial and proceeded to a bench trial.

{¶3} The trial court received conflicting testimony regarding the incident that resulted in the charges. John Dickey testified that he and his family were driving north on Gender Road in Columbus, Ohio, on the morning of April 25, 2010. He had just gotten off work and was taking his wife and daughter to lunch. Dickey was employed as a police officer. As they approached the World Harvest Church, traffic became somewhat congested on the two-lane road. Dickey observed a car make a left-hand turn out of the church's parking lot and proceed north on Gender Road. Appellant was the driver of that car. Appellant drove his car into the northbound lane of traffic just ahead of Dickey. Dickey had to brake to avoid hitting appellant's car.

{¶4} Dickey threw up his hands as if to say to appellant "what are you doing?" (Tr. 29.) Dickey then saw appellant display a handgun in front of the rearview mirror. Dickey, a police officer familiar with firearms, testified that he owned the same type of handgun that appellant displayed, a Keltec P32, and that he could "clearly tell it was a handgun." (Tr. 71.) Dickey's wife, who was sitting in the front passenger seat, testified that she saw the handgun and told their daughter, who was in the back seat, to take off her seatbelt and to get down. Their daughter also testified that she saw appellant display a gun.

{¶5} Once traffic began moving, Dickey stopped his car and told off-duty Columbus police officers directing traffic what had happened. One officer told Dickey to follow the car and call 911. Dickey began to follow appellant. The police stopped

appellant less than two miles away. They found one gun, a Keltec P32, holstered in his pants pocket and another in his glove box.

{¶6} Appellant described a different version of events. Appellant testified that after he turned onto Gender Road, he was stopped by traffic when Dickey's SUV approached his car very closely. Appellant bent over to pick up his cell phone which had fallen on the floor of his car. As he reached for the phone, the SUV behind him honked. Before he noticed that the cars in front of him had moved, appellant threw his hands up in the air as if to say "what do you want me to do?" (Tr. 255.) Appellant had his cell phone in his right hand as he made this gesture. Appellant then drove off and was soon stopped by police.

{¶7} Appellant's wife, who was in the car's front passenger seat at the time, also testified that appellant had his cell phone in his hand when he made a gesture towards the Dickey car. Appellant and his wife also testified that appellant put his handgun in his pants pocket after the incident occurred even though they were driving to a restaurant only minutes away where appellant knew he could not bring in a handgun.[1]

{¶8} The trial court rejected appellant's version of events, noting that Mr. Dickey's testimony that appellant brandished a gun was more credible than appellant's testimony that he had a cell phone in his hand. The trial court also specifically found appellant's explanation for why he had his handgun in his pants pocket not credible. However, the trial court concluded that the state failed to prove all the elements of aggravated menacing. Instead, the trial court found appellant guilty of two counts of

[1] Appellant has a permit to carry a concealed weapon.

menacing and one count of disorderly conduct, lesser included offenses of aggravated menacing. The trial court sentenced appellant accordingly.

{¶9} Appellant appeals and assigns the following errors:

> [1.] THE GUILTY VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, THEREBY, DEPRIVING APPELLANT OF HIS DUE PROCESS PROTECTIONS UNDER THE STATE AND FEDERAL CONSTITUTIONS.
>
> [2.] THERE WAS INSUFFICENT COMPETENT, CREDIBLE EVIDENCE TO SUPPORT THE JURY'S VERDICT, THEREBY, DENYING APPELLANT DUE PROCESS UNDER THE STATE AND FEDERAL CONSTITUTIONS.

Appellant's Assignments of Error - Sufficiency and Manifest Weight of the Evidence

{¶10} Appellant contends that his convictions are not supported by sufficient evidence and are against the manifest weight of the evidence. We disagree.

{¶11} Although sufficiency and manifest weight are different legal concepts, manifest weight may subsume sufficiency in conducting the analysis; that is, a finding that a conviction is supported by the manifest weight of the evidence necessarily includes a finding of sufficiency. *State v. Braxton,* 10th Dist. No. 04AP-725, 2005-Ohio-2198, ¶15 (citing *State v. Roberts* (Sept. 17, 1997), 9th Dist. No. 96CA006462). "[T]hus, a determination that a conviction is supported by the weight of the evidence will also be dispositive of the issue of sufficiency." Id. In that regard, we first examine whether appellant's conviction is supported by the manifest weight of the evidence. *State v. Sowell*, 10th Dist. No. 2008-Ohio-3285, ¶89.[2]

[2] We also note that appellant does nothing more than incorporate his manifest weight arguments to support his claim that his convictions are not supported by sufficient evidence.

{¶12} The weight of the evidence concerns the inclination of the greater amount of credible evidence offered to support one side of the issue rather than the other. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52. When presented with a challenge to the manifest weight of the evidence, an appellate court may not merely substitute its view for that of the trier of fact, but must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine whether in resolving conflicts in the evidence, the trier of fact clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. Id. An appellate court should reserve reversal of a conviction as being against the manifest weight of the evidence for only the most " 'exceptional case in which the evidence weighs heavily against the conviction.' " Id.; *State v. Strider-Williams*, 10th Dist. No. 10AP-334, 2010-Ohio-6179, ¶12.

{¶13} In addressing a manifest weight of the evidence argument, we are able to consider the credibility of the witnesses. *State v. Cattledge*, 10th Dist. No. 10AP-105, 2010-Ohio-4953, ¶6. However, in conducting our review, we are guided by the presumption that the trial court in a bench trial, " 'is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony.' " Id. (quoting *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80). Thus, a reviewing court must give great deference to the factual findings of the judge in a bench trial regarding the credibility of the witnesses. *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶14} In order to be found guilty of menacing in this case, the state had to prove that appellant knowingly caused another to believe that he would cause physical harm to the person or property of the other person or a member of the other person's immediate family. R.C. 2903.22(A). Similarly, in order to be found guilty of disorderly conduct in this case, the state had to prove that appellant caused inconvenience, annoyance, or alarm to another by threatening harm to persons or property. R.C. 2917.11(A).

{¶15} The basis of appellant's convictions is the trial court's factual finding that appellant displayed a handgun to the Dickeys, which caused the Dickeys to believe that appellant would cause them physical harm. All three of the Dickeys testified that they saw appellant holding a gun. Appellant contends that the Dickeys incorrectly thought the cell phone he was holding was a gun. The trial court concluded otherwise, noting that the testimony of Officer Dickey and his wife describing the incident were more credible than the testimony presented by appellant. That determination is within the province of the trier of fact, and we will not second guess or substitute our judgment for that of the trier of fact. *State v. Neff*, 10th Dist. No. 09AP-360, 2009-Ohio-6846, ¶18. To impugn the Dickeys' testimony, appellant points to various inconsistencies in their testimony describing the events that day. However, a defendant is not entitled to a reversal on manifest weight grounds merely because inconsistent evidence was presented at trial. Id.

{¶16} In essence, appellant contends that his version of events (that he had a cell phone in his hand) was more credible than that of the Dickeys (that appellant had a gun in his hand). A conviction is not against the manifest weight of the evidence because the trier of fact believed the state's version of events over the appellant's version. Id. (citing

State v. Williams, 10th Dist. No. 08AP-719, 2009-Ohio-3237, ¶17); *Strider-Williams* at ¶17.

{¶17} Given the evidence presented at trial, the trial court did not lose its way or create a manifest miscarriage of justice when it concluded that appellant displayed a handgun, which caused the Dickeys to believe that appellant would cause them physical harm. Accordingly, appellant's convictions are not against the manifest weight of the evidence and we overrule appellant's first assignment of error. This conclusion is also dispositive of appellant's second assignment of error, which claims that his convictions are not supported by sufficient evidence. *Braxton* at ¶15.

{¶18} In conclusion, we overrule appellant's two assignments of error and affirm the judgment of the Franklin County Municipal Court.

Judgment affirmed.

BROWN and FRENCH, JJ., concur.