[Cite as *State v. Davidson*, 2009-Ohio-6750.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

PREBLE COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2009-05-014
	:	O P I N I O N
- vs -		12/21/2009
	:	
MICHELLE K. DAVIDSON,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM EATON MUNICIPAL COURT
Case No. 08-CRB-00531

Martin P. Votel, Preble County Prosecuting Attorney, Eric E. Marit, 101 East Main Street, Courthouse, First Floor, Eaton, OH 45320, for plaintiff-appellee

The Hobbs Law Office, H. Steven Hobbs, 119 North Commerce Street, Lewisburg, OH 45338-0489, for defendant-appellant

POWELL, J.

{¶1} Defendant-appellant, Michelle K. Davidson, appeals her conviction from Eaton Municipal Court on the charge of telecommunications harassment.

{¶2} Appellant was charged with a violation of R.C. 2917.21 after it was alleged that she called multiple times in 2008 to the home telephone of her ex-husband, Rex Wysong, and his wife, with the intent to abuse, threaten, or harass.

{¶3} Appellant's case was tried to the bench. The municipal court found

appellant guilty. Appellant now appeals, presenting a single assignment of error for our review.

{¶4} "THE TRIAL COURT ERRED IN FINDING THE APPELLANT GUILTY AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶5} Although a verdict is supported by sufficient evidence, an appellate court may nevertheless conclude that the verdict is against the manifest weight of the evidence because the test under the manifest weight standard is much broader than that for sufficiency of the evidence. *State v. Mathews* (Oct. 27, 1995), Lawrence App. No. 94CA42, 1995 WL 638572 at *4.

{¶6} A manifest weight challenge requires a determination of whether the state has appropriately carried its burden of persuasion. *State v. Rigdon*, Warren App. No. CA2006-05-064, 2007-Ohio-2843, ¶30. Weight is not a question of mathematics, but depends on its effect in inducing belief. *State v. Norris*, Monroe App. No. 06 MO 5, 2007-Ohio-6915, ¶29, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52.

{¶7} A court considering whether a conviction is against the manifest weight of the evidence must review the entire record, weighing the evidence and all reasonable inferences, and consider the credibility of witnesses. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶39.

{¶8} The question is whether, in resolving conflicts in the evidence, the fact-finder clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed. Id; *State v. Blanton*, Madison App. No. CA2005-04-016, 2006-Ohio-1785, ¶7.

{¶9} The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. *Thompkins* at 387.

{¶10} We must be mindful that the original trier of fact was in the best position to judge the credibility of witnesses and the weight to be given the evidence. See *State v. DeHass* (1967), 10 Ohio St.2d 230, 231.

{¶11} It appears undisputed that appellant and her ex-husband have some version of a shared parenting agreement for their children. The record demonstrates that the relationship between appellant and her ex-husband in regard to parenting is not always amicable. Appellant asserts that she is entitled to have telephone contact with the children while they are with her ex-husband and she is permitted to contact her ex-husband about parenting issues. According to appellant, any conviction based on her calls to her ex-husband's home telephone for such parenting matters is erroneous and contrary to the manifest weight of the evidence.

{¶12} The complaint filed in this case listed the statutory provisions of R.C. 2917.21(A)(1) and/or (B). The municipal court did not specify in its written decision whether it was finding appellant guilty of R.C. 2917.21(A)(1) or R.C. 2917.21(B).

{¶13} R.C. 2917.21(A)(1) states that no one shall knowingly make a telecommunication when the caller fails to identify the caller to the recipient of the communication, whether or not an actual communication takes place. The language of the complaint filed against appellant does not contain (A)(1) language. Further, a review of the record shows that R.C. 2917.21(A)(1) could not form the basis of the conviction, as no evidence was presented at trial that appellant failed to identify herself or that her identity as the caller was in question.

{¶14} Based upon the lack of evidence for an R.C. 2917.21(A)(1) conviction, we will review appellant's conviction in reference to R.C. 2917.21(B).

{¶15} R.C. 2917.21(B) involves telecommunicating with the purpose to abuse, threaten or harass another person. See R.C. 2917.21(B). The crime of

telecommunications harassment under R.C. 2917.21(B) can occur whenever the defendant places a single telephone call for the purpose of harassing, abusing, or threatening the victim. *State v. Shaver* (July 28, 1997), Warren App. No. CA96-09-094, 1997 WL 423138 at *3.

{¶16} R.C. 2917.21(B) does not define "abuse," "threaten," or "harass." By applying the common everyday meaning of these words, "harass" is defined as "to exhaust," to "fatigue," or "to annoy persistently." *State v. Stanley*, Franklin App. No. 06AP-65, 2006-Ohio-4632, ¶14 [internal citations omitted]; *State v. Dennis* (Oct. 30, 1997), Allen App. No. 1-97-42, 1997 WL 760680 at *2.

{¶17} R.C. 2917.21(B) must be proven in terms of the defendant's purpose. See *State v. Bonifas* (1993), 91 Ohio App.3d 208, 211-212. However, there need not be direct evidence of the defendant's intent to harass when the circumstances surrounding the calls tend to show that intent. *State v. Lucas*, Belmont App. No. 05 BE 10, 2005-Ohio-6786, at ¶15; Stanley at ¶13.

{¶18} Evidence was presented at trial that appellant was told not to call her ex-husband's home phone by the ex-husband's wife, and was subsequently told by her ex-husband to call his cell phone. The municipal court, as trier of fact, indicated in its written decision that a sheriff's deputy visited appellant and instructed her not to use the victim's "land line" again.[1] Despite some confusion regarding the actual date when the deputy told appellant not to call the home, the deputy testified that he talked with appellant about calling the ex-husband's cell phone instead of the home phone on April 17, 2008.

{¶19} We note that appellant was not charged with R.C. 2917.21(A)(5), which proscribes calling a recipient or another person on the premises after being told not to call

1. The municipal court identified appellant's ex-husband as the victim of the offense. The municipal court also made the finding that the deputy told appellant to "use her son's cell phone," but the record does not support this finding.

that recipient or premises. If the state was attempting to charge appellant with the offense, it was unsuccessful in doing so.

{¶20} We are mindful that testimony from witnesses that appellant was previously told not to call the home phone may be evidence pertinent to appellant's intent when she placed the calls. Cf. *Dennis* at *3-4 (intent derived from evidence demonstrating relationship between caller and the recipient).

{¶21} However, the evidence and the municipal court's finding do not favor such determination. Specifically, the municipal court observed in its decision that appellant acknowledged making most of the calls in question, but did so to discuss "her and the victim's children." In finding appellant guilty of the charges, the municipal court stated, "While some of the calls may well have been about the children, the number of calls that were made after being told by Deputy Plaugher to not do so, whether meant to be or not, constituted harassment."

{¶22} As we previously observed, a conviction based upon R.C. 2917.21(B) must show that a call was made with the intent to abuse, threaten, or harass. The municipal court essentially acknowledged that it was not persuaded after viewing the testimony of the witnesses that appellant called with the purpose required to sustain the conviction; the record was likewise not persuasive on appellant's intent.[2]

{¶23} Reviewing the record under the applicable standard, we find the conviction for R.C. 2917.21(B) was contrary to the manifest weight of the evidence. Appellant's single assignment of error is sustained.

{¶24} Judgment reversed and this cause remanded to the municipal court for a new trial.

2. The ex-husband testified that he found calls from appellant harassing to him and his wife "[b]ecause she [appellant] complained about, usually their [children's] uh, extracurricular activities or whether or not she needed to take them or if it was her time during her visitation with the children, her parenting time."

BRESSLER, P.J., and HENDRICKSON, J., concur.

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