[Cite as *State v. Harbarger*, 2011-Ohio-5749.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

WARREN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-05-045
	:	O P I N I O N
- vs -		11/7/2011
	:	
ROBERT HARBARGER II,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM WARREN COUNTY COURT
Case No. 2010CRB01165

David P. Fornshell, Warren County Prosecuting Attorney, Michael Greer, 500 Justice Drive, Lebanon, Ohio 45036, for plaintiff-appellee

Fowler, Demos & Stueve, Jeffrey Stueve, 12 West South Street, Lebanon, Ohio 45036, for defendant-appellant

RINGLAND, J.

{¶1} Defendant-appellant, Robert Harbarger II, appeals from his conviction in the Warren County Court for one count of disorderly conduct. For the reasons outlined below, we affirm.

{¶2} On November 9, 2010, the Springboro Community Schools Resource Officer filed a complaint against appellant charging him with one count of disorderly conduct as a result of an incident that took place at Springboro Junior High School. On April 19, 2011,

following a bench trial, appellant was found guilty and sentenced to serve five days in jail. Appellant now appeals from his conviction, raising one assignment of error for review.

{¶3} "THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION AND AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶4} In his single assignment of error, appellant argues that the state provided insufficient evidence to support his conviction and that his conviction was against the manifest weight of the evidence. In support of this claim, appellant argues that his conviction must be reversed because it was "based upon words spoken," which, "although profane, were not 'fighting words,' and therefore, were protected speech." We disagree.

{¶5} As this court has stated previously, "a finding that a conviction is supported by the weight of the evidence must necessarily include a finding of sufficiency." *State v. Wilson*, Warren App. No. CA2006-01-007, 2007-Ohio-2298, ¶35; *State v. Urbin*, 148 Ohio App.3d 293, 2002-Ohio-3410, ¶31. In turn, while a review of the sufficiency of the evidence and a review of the manifest weight of the evidence are separate and legally distinct concepts, this court's determination that appellant's conviction was supported by the manifest weight of the evidence will be dispositive of the issue of sufficiency. *State v. Rigdon*, Warren App. No. CA2006-05-064, 2007-Ohio-2843, ¶30, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52; see, e.g., *State v. Rodriguez*, Butler App. No. CA2008-07-162, 2009-Ohio-4460, ¶62.

{¶6} A manifest weight challenge concerns the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. *State v. Clements*, Butler App. No. CA2009-11-277, 2010-Ohio-4801, ¶19. 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 the witnesses. *State v. Hancock*, 108 Ohio St.3d 57, 2006-Ohio-160, ¶39; *State*

v. Lester, Butler App. No. CA2003-09-244, 2004-Ohio-2909, ¶33; *State v. James*, Brown App. No. CA2003-05-009, 2004-Ohio-1861, ¶9. However, while appellate review includes the responsibility to consider the credibility of witnesses and weight given to the evidence, these issues are primarily matters for the trier of fact to decide since it is in the best position to judge the credibility of the witnesses and the weight to be given to the evidence. *State v. Gesell*, Butler App. No. CA2005-08-367, 2006-Ohio-3621, ¶34; *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Therefore, the question upon review is 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. *State v. Good*, Butler App. No. CA2007-03-082, 2008-Ohio-4502, ¶25; *State v. Blanton*, Madison App. No. CA2005-04-016, 2006-Ohio-1785, ¶7.

{¶7} Appellant was charged with disorderly conduct in violation of R.C. 2917.11(A)(2) and (E)(2)(b), a fourth-degree misdemeanor, which prohibits any person from recklessly causing "inconvenience, annoyance, or alarm to another by * * * [m]aking unreasonable noise or an offensively coarse utterance, gesture, or display or communicating unwarranted and grossly abusive language to any person" while "in the vicinity of a school or in a school safety zone."

{¶8} At trial, the state presented evidence that officials refused to release his stepson after school without him first signing the child out and showing proper identification. Appellant, who was "swearing and angry," became "very belligerent." According to the state's witnesses, appellant became "angrier each time" he was asked for his identification, forcing school officials to escort several students out of the office when the situation became "more and more inappropriate with students." Appellant's profanity laced tirade ultimately concluded when he walked out of the office and called the school officials "all a bunch of pieces of s***." The child was later picked up from the school by his mother.

{¶9} In his defense, appellant testified that "everything just got out of hand" and he was "upset about the whole entire day," so when he went to pick up his stepson he used a "couple of cuss words" and called school officials a "bunch of asses." However, according to appellant, it was the assistant principal who raised his voice first. In fact, as appellant testified, "[h]e kept getting louder with me so I got louder with him[.]" When asked if he was "aware that there were people there while [he] was behaving like this," appellant testified, "[k]ids, yeah."

{¶10} After a thorough review of the record, and although we agree with appellant when he says "[p]unishment for disorderly conduct based upon spoken words is prohibited unless those words amount to 'fighting words,'" appellant's conduct was disorderly not because of the language he used, but because of the disturbance he caused while in the school building. As the trial court stated, and for which we certainly agree, "[a]s parents we drop our kids off at school and we expect that the schools are going to be safe haven from behavior, from weapons, from all kinds of problems, and when you walk into that school you are to observe the reverence that is to be given that school." Appellant failed to adhere to these basic societal norms by acting "very belligerent," by being loud and disruptive, and by using grossly abusive language in the presence of children while on school property. See *Middletown v. Ramsey* (Sept. 19, 1988), Butler App. No. CA87-11-149 (finding the "bad conduct" of defendant, not language used, justified his disorderly conduct conviction); *State v. Cunningham*, Franklin App. No. 06AP-145, 2006-Ohio-6373, ¶22; see, also, *State v. Stanifer*, Butler App. No. CA98-09-184, 2002-Ohio-4484.

{¶11} Exhibiting this type of behavior on school grounds while in the presence of children simply cannot be tolerated. Therefore, based upon the evidence presented, we find the trial court did not clearly lose its way so as to create a manifest miscarriage of justice requiring appellant's disorderly conduct conviction be reversed. Accordingly, having found no

reason to disturb the trial court's finding of guilt, appellant's single assignment of error is overruled.

{¶12} Judgment affirmed.

HENDRICKSON, P.J., and PIPER, J., concur.