[Cite as *State v. Lunsford*, 2011-Ohio-6529.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BROWN COUNTY

STATE OF OHIO,	:	
Plaintiff-Appellee,	:	CASE NO. CA2010-10-021
	:	O P I N I O N
- vs -		12/19/2011
	:	
KELLY LUNSFORD,	:	
Defendant-Appellant.	:	

CRIMINAL APPEAL FROM BROWN COUNTY MUNICIPAL COURT
Case No. CRB 1000273 A

Jessica Little, Brown County Prosecuting Attorney, 200 East Cherry Street, Georgetown, Ohio 45121, for plaintiff-appellee

John Scaccia, 536 West Central Avenue, Second Floor, Springboro, Ohio 45066, for defendant-appellant

POWELL, P.J.

{¶1} Defendant-appellant, Kelly Lunsford, appeals her conviction and sentence in the Brown County Municipal Court for menacing.

{¶2} In April 2010, appellant was charged with two counts of menacing in violation of R.C. 2903.22(A) (fourth-degree misdemeanors). Testimony at a bench trial revealed the following facts:

{¶3} On April 27, 2010, 15-year-old C.F. and 12-year-old K.C. were riding their bicycles on Washington Street in the village of Higginsport, Ohio. As they approached the post office, they observed appellant pulling out around the corner of the post office. To get out of her way, the adolescents pulled over in a parking spot on Washington Street and waited for appellant to turn the corner. However, after she turned the corner, appellant swerved her car toward the adolescents, then drove back into her lane and kept going. Both adolescents testified they were within an arm's length of appellant's car when she swerved toward them. K.C. thought appellant was "really going to try to hit [them];" C.F. thought appellant was going to hit them. Both adolescents thought they were going to get hit by the car. Both were scared.

{¶4} Appellant testified that she pulled out of her parking spot behind the post office, came to a stop at the corner of the post office, turned the corner, and saw both adolescents "holding hands walking in front of [her] house on the sidewalk." Appellant testified that the adolescents were not riding bicycles. Appellant denied swerving out of her lane of travel, or knowingly causing anyone to think she was going to hit them with her car.

{¶5} K.C. testified that she used to be friends with appellant's daughter. However, following a fight between the two girls, appellant no longer likes K.C. K.C. testified that as appellant swerved toward them, she and appellant made eye contact. Appellant testified that her former husband and C.F.'s mother "had a fling for close to fifteen years." Appellant admitted she does not like C.F.'s mother but denied it had anything to do with the incident between her and the two adolescents.

{¶6} At the close of the trial, the trial court found appellant guilty as charged, sentenced her to three days in jail on each count which it suspended, and ordered appellant to pay a $150 fine.

{¶7} Appellant now appeals, raising three assignments of error.

{¶8} Assignment of Error No. 1:

{¶9} "THE CONVICTION FOR MENACING WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶10} Assignment of Error No. 2:

{¶11} "THE EVIDENCE WAS INSUFFICIENT TO SUPPORT A CONVICTION."

{¶12} At the heart of both assignments of error is appellant's claim that the state failed to prove she *knowingly* caused the adolescents to be in fear of physical harm.

{¶13} As this court has previously stated, "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. As a result, a determination that a conviction is supported by the manifest weight of the evidence will also be dispositive of the issue of sufficiency. *State v. Bates*, Butler App. No. CA2009-06-174, 2010-Ohio-1723, ¶7.

{¶14} "When considering whether a judgment is against the manifest weight of the evidence in a bench trial, an appellate court will not reverse a conviction where the trial court could reasonably conclude from substantial evidence that the state has proven the offense beyond a reasonable doubt." *State v. Cooper*, Butler App. No. CA2010-05-113, 2011-Ohio-1630, ¶ 7; *State v. Eskridge* (1988), 38 Ohio St.3d 56, 59. In conducting its review, an appellate court examines the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines whether in resolving conflicts in the evidence, the trial court "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *Cooper* at ¶7, citing *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52. The discretionary power to grant a new trial should be exercised only in exceptional cases where the evidence weighs heavily against the conviction. *Thompkins* at 387.

{¶15} Appellant was charged with menacing in violation of R.C. 2903.22(A), which states in relevant part: "No person shall knowingly cause another to believe that the offender will cause physical harm to the person or property of the other person[.]" "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." R.C. 2901.22(B).

{¶16} Both adolescents testified that although they moved out of her way, appellant swerved her vehicle toward them as she was driving. Both adolescents testified that they were within an arm's length of appellant's car when she swerved toward them; both believed they were going to get hit by appellant's car; and both were scared. K.C. also testified she believed appellant was "really going to try to hit [them]." By contrast, appellant denied she swerved toward the adolescents as she was driving. She also testified the adolescents were not riding bicycles but were walking instead.

{¶17} After a careful review of the record, we cannot say the trial court lost its way in convicting appellant of menacing. It is well-established that when conflicting evidence is presented at trial, a conviction is not against the manifest weight of the evidence simply because the trier of fact believed the prosecution testimony. See *State v. White*, Butler App. No. CA2003-09-240, 2004-Ohio-3914. Further, "[t]he decision whether, and to what extent, to credit the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness." *State v. Rhines*, Montgomery App. No. 23486, 2010-Ohio-3117, ¶39 (upholding a conviction for aggravated menacing following a bench trial).

{¶18} Given the adolescents' testimony, the fact appellant looked at K.C. as she swerved her car toward the adolescents, the fact appellant does not like K.C., and appellant's feelings toward C.F.'s mother, we find that the trial court could reasonably conclude that

appellant knowingly caused both adolescents to believe she was going to cause physical harm to them. See *Rhines*, 2010-Ohio-3117; *State v. Boyle* (Mar. 8, 1996), Portage App. No. 95-P-0037; and *State v. Helmling* (Nov. 6, 1987), Portage App. No. 1672.

{¶19} We therefore find that appellant's menacing conviction is not against the manifest weight of the evidence. As a result, we also necessarily find that appellant's menacing conviction is supported by sufficient evidence. Appellant's first and second assignments of error are accordingly overruled.

{¶20} Assignment of Error No. 3:

{¶21} "IT WAS AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO CONVICT APPELLANT BASED ON IMPROPER MOTIVES."

{¶22} At trial, after finding appellant guilty of menacing and sentencing her, the trial court stated, "What I'm attempting to do is end these problems in Higginsport. Maybe because they don't have a village court. I'm amazed at how many bicycle and car incidents are coming through here with adults and children. I don't see them from Georgetown. Maybe that's because they're handling their own. But what we would like to see is that there be no further incidents. So the only thing to be done today is pay court costs. If there is a violation of probation being -- I'm not even going to put you on probation. If there's another incident like this and there's conviction, I will revoke and have the time served. But all I want is an end to it. Thank you."

{¶23} Appellant argues the statements show that the trial court "was improperly motivated by its desire to deter further bicycle and car accidents. [Further], the trial court improperly considered other acts/incidents that did involve Appellant, were not in evidence, and were not relevant." We disagree.

{¶24} Pursuant to R.C. 2929.21 and 2929.22, trial courts have broad discretion to fashion sentences that are appropriate to each case. *State v. Barnes*, Montgomery App. No.

24201, 2011-Ohio-2424, ¶20. When determining the appropriate sentence, the trial court must be guided by the purposes of misdemeanor sentencing which are "to protect the public from future crime by the offender and others and to punish the offender." R.C. 2929.21(A). The trial court must also consider the factors listed in R.C. 2929.22(B)(1), including the nature and circumstances of the offense, and may consider any other factors that are relevant to achieving the purposes and principles of misdemeanor sentencing. R.C. 2929.22(B)(2).

{¶25} We review a trial court's sentence on a misdemeanor violation under an abuse of discretion standard. See *State v. Davis*, Mahoning App. No. 10-MA-98, 2011-Ohio-3184; R.C. 2929.22(A).

{¶26} Upon reviewing the record, we find that neither appellant's conviction for menacing nor her sentence were influenced by improper motives. Contrary to appellant's assertion, the trial court did not consider "other acts/incidents that did involve Appellant." Rather, the trial court clearly referred to several previous bicycle and car incidents between adults and children in Higginsport. As for the statement, "If there's another incident like this and there's conviction, I will revoke and have the time served," it clearly refers to appellant's current conviction for menacing and not to a prior conviction. Baffled by the number of past bicycle and car accidents in Higginsport, the trial court also expressed its desire to prevent future similar incidents. Consideration of these incidents was relevant as one of the purposes of misdemeanor sentencing is to protect the public from future crime by others. R.C. 2929.21(A). As noted above, a trial court is also required to consider the nature and circumstances of the offense.

{¶27} We therefore find no evidence of improper motive by the trial court in its statements. Further, there is nothing in the statements that indicates the court did not properly consider and apply the proper sentencing criteria. Appellant's third assignment of

error is overruled.

{¶28} Judgment affirmed.

HENDRICKSON and PIPER, JJ., concur.