[Cite as *State v. Davis*, 2015-Ohio-2965.]

IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

STATE OF OHIO	:	
	:	
Plaintiff-Appellee	:	C.A. CASE NO. 26399
	:	
v.	:	T.C. NO. 2014-CRB-467
	:	
ASHLEY DAVIS	:	(Criminal appeal from Montgomery
	:	County Municipal Court – Western
Defendant-Appellant	:	Division)
	:	

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O P I N I O N

Rendered on the 24th day of July, 2015.

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DONOVAN, J.

{¶ 1} This matter is before the Court on the Notice of Appeal of Ashley Davis, filed September 20, 2014. Ashley appeals from the September 2, 2014 "Indirect Sentencing Entry," issued by the Municipal Court of Montgomery County, Western Division, which indicates that Ashley pled guilty to aggravated menacing, in violation of R.C. 2903.21, a misdemeanor of the first degree, and that the court sentenced her to 30 days in the Montgomery County Jail, with 28 days suspended. In a previous "Decision & Verdict," dated June 25, 2014, the court indicated that it found Ashley guilty of the lesser included offense of menacing, a misdemeanor of the fourth degree, following a bench trial.

{¶ 2} The transcript of the June 24, 2014 bench trial reflects that Diana Williams, the victim herein, testified that she resides at 34 North State Street in Phillipsburg, Ohio, and that Ashley is her next door neighbor. Diana stated that on the evening of April 1, 2014, she, her husband, and her son were outside erecting a fence. She testified that the Chief of Police stopped by to discuss the fence, and that Ashley " * * * told me that she was going to bust me in my face - - bust my ass and my face." Diana stated that at the time, Ashley "was sitting in her garage and I was standing at the corner of my fence, which kind of meets her driveway * * *." Diana testified that she took Ashley's words "very seriously," and that she "felt threatened." She stated that she "believed [Ashley] would come out and hit me in my face." On cross-examination, Diana stated that she was 15 feet away from Ashley when Ashley made the statement. She testified that Ashley never got out of her chair in the garage in the course of the incident, and that because she believed Ashley would approach her, she "went on up into the yard" away from Ashley.

{¶ 3} When the State rested, counsel for Ashley moved the court for an acquittal

pursuant to Crim.R. 29, asserting that there "was no testimony that was related to any of those elements with regards to the definition of serious physical harm." The State responded that Diana testified that she believed that Ashley "was going to bust her in the face and - - and that should satisfy the serious physical harm requirement." The court overruled the motion.

{¶ 4} Ashley then testified that she resides at 38 North State Street in Phillipsburg, and that on the night of the incident, she was in her garage, "sitting in a green chair and [Diana] was at the end of the driveway in front of our driveway, which is probably about a hundred yards away." Ashley testified that Diana, Diana's son, and Ashley's fiancé were arguing about the fence, and that the Chief of Police was present. Ashley denied threatening Diana, but she acknowledged that she "said one phrase," namely, "shut your f * * *ing face." Ashley denied that she directed the phrase to anyone in particular. Ashley stated that Diana's husband began to approach her, and that she then went inside her home. Ashley testified that she "was scared what was going on and this is an on-going thing so I just left the scene." In response to a question by the court, Ashley stated that the police have responded to disputes between the instant neighbors 10 to 12 times in the past.

{¶ 5} The June 25, 2014 "Decision and Verdict" provides in relevant part as follows:

> * * * Based upon the evidence presented this court finds the Defendant guilty of the lesser included offense of menacing a misdemeanor of the fourth degree.
>
> The State had the burden to prove beyond a reasonable doubt each

and every element of the original charge of aggravated menacing including a believed threat of serious physical harm. Serious physical harm to a person is defined by 2901(A)([5]) as:

(A) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

(B) Any physical harm that carries a substantial risk of death;

(C) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

(D) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

(E) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

While there was sufficient proof to establish a believed threat, the evidence was insufficient to prove that the harm threatened fell to this level. In all other respects, this trier of fact finds that the State met its burden of proof on all other elements of this crime.

Therefore, the Defendant is found guilty of menacing. * * *

{¶ 6} At the sentencing hearing, the court indicated that the "Defendant was found guilty after a bench trial" and then imposed sentence.

{¶ 7} Ashley asserts three assignments of error herein. Her first assigned error is as follows:

THE TRIAL COURT ERRED WHEN IT OVERRULED DEFENDANT'S RULE 29 MOTION AS THERE WAS NOT SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION.

{¶ 8} According to Ashley:

In viewing the evidence in favor of the State, Ashley Davis yelled[,] "I'm going to bust your ass and face", to a neighbor that was 15 feet away and standing next to the Chief of Police * * *. Ashley then did not come toward the victim, nor did she make any other movements * * *. Ashley had never made any threats or comments to the victim prior * * *. An average minded individual would not consider words alone to be a threat of physical violence without more, when they are standing next to the Chief of Police.

While the State may argue, that there [have] been numerous incidents in the past, none had come from Ashley * * *. Therefore, Ashley could not have known that her outburst would cause Mrs. Williams to feel threatened.

{¶ 9} As this Court has previously noted:

A Crim. R. 29(A) motion for acquittal tests the sufficiency of the evidence presented at trial. *See, State v. Williams* (1996), 74 Ohio St.3d 569, 576, 660 N.E.2d 724. Under Crim.R. 29, a trial court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proved beyond a reasonable doubt. *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184, syllabus. Furthermore, a trial

> court must view the evidence in a light most favorable to the State when considering a motion for acquittal. *State v. Evans* (1992), 63 Ohio St.3d 231, 248, 586 N.E.2d 1042.
>
> An appellate court undertakes de novo review of the trial court's decision on a Crim.R. 29(A) motion and will not reverse the trial court's judgment unless reasonable minds could only reach the conclusion that the evidence failed to prove all the elements of the crime beyond a reasonable doubt. * * *

State v. Turner, 2d Dist. Montgomery No. 18866, 2002 WL 10491, *3-4 (Jan. 4, 2002).

{¶ 10} The trial court found Ashley guilty of menacing, in violation of R.C. 2903.22, which is a lesser included offense of aggravated menacing, in violation of R.C. 2903.21; the "sole difference between the two offenses is the degree of harm threatened." *State v. Britton*, 181 Ohio App.3d 415, 2009-Ohio-1282, 909 N.E.2d 176, ¶ 58 (2d Dist.).

{¶ 11} R.C. 2903.22(A) provides in 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 purpose, when the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when the person is aware that such circumstances probably exist." R.C. 2901.22(B). " 'Physical harm to persons' means any injury, illness, or other physical impairment, regardless of its gravity or duration." R.C. 2901.01(A)(3). As this court has noted, " '[m]enacing does not require that the offender be able to carry out a given threat. * * * Instead, it is sufficient if the offender knowingly causes the victim to believe that the threat will be executed.' "

State v. Howard, 2d Dist. Montgomery No. 23588, 2010-Ohio-5158, ¶ 10 (Citations omitted).

{¶ 12} Based upon Diana's testimony, which the trial court credited, Ashley's conduct in threatening Diana, while not rising to the level of threatening serious physical harm, was such that reasonable minds could conclude that Ashley knowingly caused Diana to believe that Ashley would cause her physical harm. Diana stated that she felt threatened and believed that Ashley would hit her in the face. As the State asserts, it was not required to prove that Ashley was able to carry out her threat. Construing the evidence most strongly in favor of the State, we conclude that the trial court did not err in overruling Ashley's Crim.R. 29 motion for acquittal, since the State presented sufficient evidence to support Ashley's conviction beyond a reasonable doubt. Ashley's first assigned error is overruled.

{¶ 13} Ashley's second assigned error is as follows:

> THE TRIAL COURT ERRED WHEN IT FOUND APPELLANT GUILTY OF MENACING AS SUCH A FINDING IS AGAINT THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶ 14} Ashley asserts that Diana "was 15 or more feet away" when Ashley made her statement. She asserts that Diana "was standing beside the Chief of Police, and made no immediate effort to retreat. * * * Ashley didn't even come out of her garage the entire night. * * * Ashley didn't even stand up."

{¶ 15} As this Court noted in *State v. Weaver*, 2d Dist. Montgomery No. 24925, 2012-Ohio-4087, ¶ 14-16:

> In contrast to the sufficiency of the evidence standard, "a weight of

the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive." [*State v.*] *Wilson*, [2d Dist. Montgomery No. 22578, 2009-Ohio-5525], at ¶ 12. When evaluating whether a conviction is contrary to the manifest weight of the evidence, the appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider witness credibility, 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." [*State v.*] *Thompkins,* 78 Ohio St.3d [380], 387, 678 N.E.2d 541 [1997], citing *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

Because the trier of fact sees and hears the witnesses at trial, we must defer to the factfinder's decisions whether, and to what extent, to credit the testimony of particular witnesses. *State v. Lawson*, 2d Dist. Montgomery No. 16288, 1997 WL 476684 (Aug. 22, 1997). However, we may determine which of several competing inferences suggested by the evidence should be preferred. *Id.*

The fact that the evidence is subject to different interpretations does not render the conviction against the manifest weight of the evidence. *Wilson* at ¶ 14. A judgment of conviction should be reversed as being against the manifest weight of the evidence only in exceptional circumstances. *Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717.

{¶ 16} Diana testified that Ashley threatened her, and while Ashley denied threatening any one, the trial court clearly credited Diana's testimony over Ashley's, and we defer to the trial court's assessment of credibility. Having thoroughly reviewed the entire record and having considered the evidence, we cannot conclude that the court lost its way and created a manifest injustice in finding Ashley guilty of menacing, since Ashley knowingly caused Diana to believe that she would hit her in the face. Accordingly, Ashley's second assigned error is overruled.

{¶ 17} Ashley's third assigned error is as follows:

> THE TRIAL COURT ERRED IN INDICATING THAT THE CONVICTION WAS UPON THE GUILTY PLEA OF DEFENDANT.

{¶ 18} Ashley correctly asserts that the "Indirect Sentencing Entry" erroneously indicates that she was convicted following a guilty plea. Although not raised by either party, as noted above, the "Indirect Sentencing Entry" also incorrectly provides that Ashley pled guilty to *aggravated* menacing, in violation of R.C. 2903.21, when in fact it was a bench trial conviction of menacing, in violation of R.C. 2903.22. Accordingly, we remand the judgment of the trial court with instructions to correct the clerical mistakes in the September 2, 2014 order to correctly reflect the court's determination in its June 25, 2014 "Decision and Verdict," namely that the court found Ashley guilty of the lesser included offense of menacing, in violation of R.C. 2903.22. The judgment of the trial court is affirmed in all other respects.

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HALL, J. and WELBAUM, J., concur.

Copies mailed to:

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Hon. James L. Manning