[Cite as *State v. Keeney*, 2009-Ohio-3094.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
LAWRENCE COUNTY

STATE OF OHIO,	:	
	:	
Plaintiff-Appellee,	:	
	:	Case No. 08CA36
v.	:	
	:	**DECISION AND**
JOHN KEENEY,	:	**JUDGMENT ENTRY**
	:	
Defendant-Appellant.	:	File-stamped date: 6-22-09

APPEARANCES:

David Reid Dillon, South Point, Ohio, for appellant.

J.B. Collier, Jr., Lawrence County Prosecutor, and Jeffrey M. Smith, Assistant Lawrence County Prosecutor, Ironton, Ohio, for appellee.

Kline, P.J.:

{¶1} John Keeney appeals his conviction and sentence for aggravated menacing, a misdemeanor of the first degree. After a bench trial, the Lawrence County Municipal Court found Keeney guilty and sentenced him accordingly, which included a jail term. On appeal, Keeney contends that his conviction is against the manifest weight of the evidence. Because we find substantial evidence upon which the trier of fact could reasonably conclude that the state proved all the elements of aggravated menacing beyond a reasonable doubt, we disagree. Keeney further contends that the trial court abused its discretion when it sentenced him to a jail term. Because Keeney failed to provide this court with a transcript of the sentencing hearing, and thus, we must presume the validity of the lower court's proceedings, we disagree. Accordingly, we affirm the judgment of the trial court.

I.

{¶2} Keeney's wife (hereinafter "victim") filed an aggravated menacing complaint against her husband on July 25, 2008 alleging that Keeney had caused her to believe that he would cause serious physical harm to her in violation of R.C. 2903.21. Keeney entered a not guilty plea, and the case proceeded to a bench trial.

{¶3} According to the victim, Keeney got in her face, called her names, "cussed" at her, and cornered her so that she could not leave the house. Finally, the victim testified that Keeney had threatened to kill her "[t]hat day before I left the house."

{¶4} Keeney testified and completely denied that any of the victim's allegations took place.

{¶5} The trial court found the victim's testimony credible and found Keeney guilty of aggravated menacing.

{¶6} At the sentencing hearing, the trial court ordered Keeney to pay a $200.00 fine, $100.00 in court costs, and a $25.00 probation fee. It furthered ordered Keeney to perform 30 hours of community service and restrained Keeney from his victim wife. In addition, the trial court sentenced Keeney to a jail term of 60 days, but suspended 50 days of the sentence. The court stayed the imposition of the sentence pending this appeal.

{¶7} Keeney appeals his conviction and sentence. He asserts the following two assignments of error: "I. THE TRIAL COURT'S JUDGMENT OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE." And, "II. THE TRIAL COURT ERRED TO THE PREJUDICE OF DEFENDANT-APPELLANT AND ABUSED ITS DISCRETION IN SENTENCING DEFENDANT TO JAIL."

II.

{¶8} Keeney contends in his first assignment of error that his conviction is against the manifest weight of the evidence. He maintains that the state failed to introduce proof that the victim believed her husband's threat of killing her or experienced fear as a result of the alleged threat.

{¶9} When determining whether a criminal conviction is against the manifest weight of the evidence, we "will not reverse a conviction where there is substantial evidence upon which the [trier of fact] could reasonably conclude that all the elements of an offense have been proven beyond a reasonable doubt." *State v. Eskridge* (1988), 38 Ohio St.3d 56, paragraph two of the syllabus. See, also, *State v. Smith*, Pickaway App. No. 06CA7, 2007-Ohio-502, at ¶41. We "must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of the 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 granted." *Smith* at ¶41, citing *State v. Garrow* (1995), 103 Ohio App.3d 368, 370-71; *State v. Martin* (1983), 20 Ohio App.3d 172, 175. However, "[o]n the trial of a case, * * * the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus.

{¶10} R.C. 2903.21(A) states, "No person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family."

{¶11} An essential element of the crime of aggravated menacing is that the victim believed that the offender would cause him or her serious physical harm. *State v. Manley*, Montgomery App. No. 20229, 2004-Ohio-4930, at ¶28.

{¶12} Conditional threats or future threats "can constitute a violation of menacing laws." *State v. Ali*, 154 Ohio App.3d 493, 2003-Ohio-5150, at ¶26; *State v. Collie* (1996), 108 Ohio App.3d 580, 582-83. Thus, "menacing can encompass a present state of fear of bodily harm and a fear of bodily harm in the future." *Ali* at ¶26. The state need not "prove that the offender is able to carry out the threat or even that the offender intended to carry out the threat." Id. at ¶27. The "sufficiency of the threat is a factual question reserved for the trier of fact." Id. at ¶28, citing *Dayton v. Dunnigan* (1995), 103 Ohio App.3d 67, 71. Further, the victim's fear or belief may be demonstrated by circumstantial evidence as well as direct evidence. *Garfield Hts. v. Greer*, Cuyahoga App. No. 87078, 2006-Ohio-5936, at ¶¶8-9.

{¶13} Here, the victim testified that Keeney threatened to kill her. Transcript at 7. Specifically, the victim testified as follows:

Q. Okay, did he make any other threats to you then?

A. Yes he told me that he was going to kill me.

Q. When did he tell you that?

A. That day before I left the house.

Q. Before you left the house, alright. Anything else any other threats?

A. Not that I can remember at this moment.

Q. Alright, any other behavior that made you feel like he would cause you harm on the 23rd of July?

A. Just the getting in my face and calling me names and things that he had done in the past.

{¶14} In context, the victim here is agreeing with the statement of the prosecutor that the behavior of Keeney "made [her] feel like he would cause [her] harm on the 23rd of July." This behavior, according to her testimony, included a threat that he would kill her. A death threat, if believed, is sufficient to satisfy the statute's requirement that the defendant cause the victim to believe the defendant will cause the victim serious physical harm. R.C. 2901.01(A)(5)(b). As we stated earlier, the trier of fact primarily decides whether a witness is credible, and if the trier of fact finds a certain witness credible, then the trier of fact must further decide what weight to give that witness's testimony.

{¶15} The victim also testified that she went to the court immediately after leaving the house. "And as I was leaving he was backing down the driveway; driving towards me as I was getting in the van to leave to go to the court." Transcript at 7. The seventh district court of appeals has held that where a victim called the police immediately following a threat, a reasonable trier of fact could find that the threat was believed. *State v. Bunfill*, Belmont App. No. 03 BE 14, 2004-Ohio-1199, at ¶13.

{¶16} Here, the victim took action, albeit it was obtaining a civil protection order, and immediately after she obtained the civil protection order, she reported the incident to the police. Further, whether the victim did or did not believe that the defendant intended to kill her is a matter for the trier of fact to decide. The victim's very demeanor and tone of voice in answering questions may have convinced the trial court that she believed the threat.

{¶17} Therefore, based on the above reasoning, we find substantial evidence upon which the trier of fact could reasonably conclude that the state proved all the elements of aggravated menacing beyond a reasonable doubt. Consequently, we do not find that Keeney's conviction for aggravated menacing is against the manifest weight of the evidence.

{¶18} Accordingly, we overrule Keeney's first assignment of error.

III.

{¶19} Next, Keeney contends the trial court abused its discretion in sentencing him to a jail term. Keeney is challenging the court's decision making process and the basis of the court's decision.

{¶20} Generally, trial courts enjoy broad discretion when imposing sentences in misdemeanor cases, and we will not vacate a sentence unless the court abused its discretion. *State v. Fitzpatrick*, Lawrence App. No 07CA18, 2007-Ohio-7170, at ¶9; *State v. Polick* (1995), 101 Ohio App.3d 428, 430-31. An abuse of discretion involves more than an error of judgment; it connotes an attitude on the part of the court that is unreasonable, unconscionable, or arbitrary. *Franklin Cty. Sheriff's Dept. v. State Emp. Relations Bd.* (1992), 63 Ohio St.3d 498, 506.

{¶21} The judgment entry from which Keeney appeals provides little more than the outcome of the sentencing hearing. Keeney failed to provide this court with the transcript of the sentencing hearing. "When portions of the transcript necessary for resolution of assigned errors are omitted from the record, the reviewing court has nothing to pass upon and thus, as to those assigned errors, the court has no choice but to presume the validity of the lower court's proceedings, and affirm." *Knapp v. Edwards*

Laboratories (1980), 61 Ohio St.2d 197, 199. If a criminal defendant is not responsible for the lack of a record, such lack itself may be grounds for reversal. *State v. Jones* (1994), 71 Ohio St.3d 293, 297. Of course this ground for reversal only arises "after all reasonable solutions are exhausted." Id. at 298. As construed by the lower courts, this includes an attempt to reconstruct the record through App.R. 9. *State v. Smith* (July 31, 2000), Clermont App. No. CA-99-09-088, unreported. See *State v. Parker* (Mar. 6, 2002), Mahoning App. No. 92 CA 135, unreported (finding failure to make timely App.R. 9 motion prevented reversal).

{¶22} Here, Keeney has not provided us with a sentencing hearing transcript and never made an App.R. 9 motion. Under these circumstances, we presume the validity of the proceedings below and affirm the decision of the trial court. Consequently, we find that the trial court did not abuse its discretion when it sentenced Keeney.

{¶23} Accordingly, we overrule Keeney's second assignment of error and affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT BE AFFIRMED, and that Appellant pay the costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Lawrence County Municipal Court to carry this judgment into execution.

IF A STAY OF EXECUTION OF SENTENCE AND RELEASE UPON BAIL HAS BEEN PREVIOUSLY GRANTED BY THE TRIAL COURT OR THIS COURT, it is temporarily continued for a period not to exceed sixty days upon the bail previously posted. The purpose of a continued stay is to allow Appellant to file with the Supreme Court of Ohio an application for a stay during the pendency of proceedings in that court. If a stay is continued by this entry, it will terminate at the earlier of the expiration of the sixty day period, or the failure of the Appellant to file a notice of appeal with the Supreme Court of Ohio in the forty-five day appeal period pursuant to Rule II, Sec. 2 of the Rules of Practice of the Supreme Court of Ohio. Additionally, if the Supreme Court of Ohio dismisses the appeal prior to expiration of sixty days, the stay will terminate as of the date of such dismissal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

Harsha, J. and Abele, J.: Concur in Judgment and Opinion.

For the Court

BY: _____
Roger L. Kline, Presiding Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.