

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

STATE OF OHIO,	:	Case No. 15CA18
Plaintiff-Appellee,	:	
v.	:	<u>DECISION AND</u>
VICTORIA MITCHELL,	:	<u>JUDGMENT ENTRY</u>
Defendant-Appellant.	:	RELEASED: 03/15/2016

APPEARANCES:

Nicholas J. Testa and Douglas W. Shaw, Shaw and Testa, LLP, Columbus, Ohio, for appellant.

Gary D. Kenworthy, City of Circleville Law Director, and Jeffrey A. Catri, City of Circleville Assistant Law Director, Circleville, Ohio, for appellee.

Hoover, J.

{¶1} Defendant-appellant, Victoria Mitchell (“Mitchell”), appeals her conviction in the Circleville Municipal Court for telecommunications harassment in violation of R.C. 2917.21(A)(5). On appeal, Mitchell contends that (1) the trial court improperly considered a document that was not admitted as evidence when ruling on her Criminal Rule 29 motion for acquittal; (2) evidence presented by the State at her bench trial was insufficient to support a conviction beyond a reasonable doubt; and (3) her conviction is against the manifest weight of the evidence. After a careful review of the record, we find Mitchell’s assignments of error to be meritless; and we affirm her conviction.

I. Facts and Procedural History

{¶2} Mitchell was charged in the Circleville Municipal Court with one count of violation of a protection order, a misdemeanor of the first degree, and one count of telecommunications harassment, a misdemeanor of the first degree. Mitchell pleaded not guilty to both counts; and the matter proceeded to a bench trial. On the day of trial, the State dismissed the count of violation of a protection order; and the telecommunications count was tried before the court.

{¶3} In its case-in-chief, the State called two witnesses: Eva Smith, the alleged victim, and Sergeant James Zimmerman, one of the investigating officers from the Ashville Police Department. Sergeant Zimmerman's testimony was brief. Notably, he testified that he was dispatched to Smith's home on March 8, 2014, around midnight, due to complaints that Mitchell was calling Smith in violation of a protective order and/or an Agreed Order of no contact.

{¶4} Smith testified that she and Mitchell were once in a romantic relationship; however, the two had broken-up under hostile terms. According to her testimony, Smith first told Mitchell that she no longer wanted to communicate with her in October 2013. Smith also testified that, prior to Thanksgiving 2013, she again "contacted her * * * and let her know that I no longer wanted to speak to her." Smith also testified about the Agreed Order between her and Mitchell, noting that the two "had an agreed stay away order and in the process of having that in place she called me 126 times and left me 3 voice mails." She also noted that the Agreed Order had been issued from a court in Franklin County, Ohio, and that according to the document they "were not to have any calls, texts, no communication * * *."

{¶5} Furthermore, Smith testified that she received three voicemails and 126 calls between March 7 and March 10, 2014, from the same telephone number. She identified the phone number that had called her as belonging to Mitchell. The three voicemails were also

played in court; and Smith identified the caller's voice as belonging to Mitchell. Mitchell's phone call records were also admitted as evidence upon the stipulation of the parties.

{¶6} At the conclusion of the State's case-in-chief, Mitchell made a Criminal Rule 29 motion for acquittal. In support of the motion, Mitchell's trial counsel argued that no evidence had been presented to the trial court to suggest that Smith had requested that the telephone communication stop. The trial court overruled the motion, noting that "[y]ou got a document dated January of 2014 that says that thou shall not contact and thou shall not contact and here we are contacting. * * * That's [the Agreed Order] just laying in the file here. I think that everybody's referenced that stuff * * *." The trial court further noted that "there's apparently an agreement that says don't contact me which seems big as a dog to me. I overrule the 29 * * *." It is undisputed that while there was a copy of the Agreed Entry in the court file, it had not been presented as an exhibit by the State in its case-in-chief.

{¶7} In her defense, Mitchell testified on her own behalf, and also presented the testimony of Melody Basil and Cierra Mitchell. Mitchell denied making the telephone calls to Smith during the time period in question. Mitchell admitted that she owned the phone number used to make the phone calls; however, she claimed that at the time of the alleged calls the phone associated with the number had been deactivated. Both Basil and Cierra Mitchell testified that they were with Mitchell during the time period in question. Basil, Mitchell's live-in girlfriend, testified that the only calls she saw Mitchell make were to her daughter, Cierra Mitchell. Furthermore, she claimed that Mitchell only had one phone. Cierra Mitchell likewise testified that her mother only had one phone; and that that phone had a number different than the number alleged to have called Smith. Cierra Mitchell further testified that she too was with her mother during the time period in question; and she did not witness her mother make any calls.

{¶8} At the conclusion of trial, the trial court found Mitchell guilty of telecommunications harassment and sentenced her immediately. A short time later the trial court filed a sentencing entry memorializing the sentence. Mitchell filed a timely notice of appeal.

II. Assignments of Error

{¶9} Mitchell assigns the following errors for our review:

First Assignment of Error:

The trial court erred in considering documents not admitted into evidence when deciding and subsequently denying Appellant's Criminal Rule 29 Motion for Acquittal.

Second Assignment of Error:

The trial court erred in denying Appellant's Criminal Rule 29 Motion for Acquittal because the evidence presented by the City was insufficient to support a conviction beyond a reasonable doubt.

Third Assignment of Error:

Appellant's conviction for telecommunications harassment was against the manifest weight of the evidence.

III. Law and Analysis

{¶10} Because Mitchell's first and second assignments of error are interrelated, we elect to address them jointly.

A. Criminal Rule 29 Motion for Acquittal

{¶11} In her first and second assignments of error, Mitchell contends that the trial court erred by failing to grant her Criminal Rule 29 motion for acquittal. Mitchell argues that the trial court improperly considered the Agreed Order of no contact because a copy of the document was never admitted as evidence during the State's case-in-chief; and absent the Agreed Order of no

contact, no evidence was before the trial court to support each and every element necessary to sustain a conviction for telecommunications harassment. Specifically, Mitchell contends that absent the Agreed Order of no contact, the State failed to provide sufficient evidence to prove that Smith told Mitchell not to call her.

{¶12} “A motion for acquittal under Crim.R. 29(A) is governed by the same standard as the one for determining whether a verdict is supported by sufficient evidence.” *State v. Tenace*, 109 Ohio St.3d 255, 2006–Ohio–2417, 847 N.E.2d 386, ¶ 37. “When a court reviews a record for sufficiency, ‘[t]he relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.’ ” *State v. Maxwell*, 139 Ohio St.3d 12, 2014–Ohio–1019, 9 N.E.3d 930, ¶ 146, quoting *State v. Jenks*, 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus; *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Furthermore, a reviewing court is not to assess “whether the state’s evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction.” *State v. Thompkins*, 78 Ohio St.3d 380, 390, 678 N.E.2d 541 (1997) (Cook, J., concurring). Therefore, “[a] reviewing court will not overturn a conviction on a sufficiency of the evidence claim unless reasonable minds could not reach the conclusion the trier of fact did.” *State v. Warren*, 4th Dist. Ross No. 12CA3324, 2013–Ohio–3542, ¶ 15, citing *State v. Tibbetts*, 92 Ohio St.3d 146, 162, 749 N.E.2d 226 (2001); *State v. Treesh*, 90 Ohio St.3d 460, 484, 739 N.E.2d 749 (2001).

{¶13} Mitchell was convicted of telecommunications harassment, in violation of R.C. 2917.21(A)(5), which reads:

(A) No person shall knowingly make or cause to be made a telecommunication, or knowingly permit a telecommunication to be made from a telecommunications device under the person's control, to another, if the caller does any of the following: * * *

(5) Knowingly makes the telecommunication to the recipient of the telecommunication, to another person at the premises to which the telecommunication is made, or to those premises, and the recipient or another person at those premises previously has told the caller not to make a telecommunication to those premises or to any persons at those premises.

Thus, to prove that Mitchell committed the offense of telecommunications harassment as described in R.C. 2917.21(A)(5), the State was required to show: “ ‘(1) the offender knowingly makes a telephone call; (2) to the recipient of the phone call, to another person at the premises to which the phone call is made or to the premises to which the phone call is made; (3) when the recipient or another person on the premises to which the phone call is made had previously told the caller not to call.’ ” *State v. Aberegg*, 9th Dist. Medina No. 08CA0079-M, 2009-Ohio-4253, ¶ 6, quoting *Bentleyville v. Pisani*, 8th Dist. Cuyahoga No. 69063-69066, 1996 WL 476434, *7 (Aug. 22, 1996).

{¶14} Here, while the trial court did mention seeing a copy of the Agreed Order of no contact in the court file, it also stated when ruling on the motion for acquittal that the State's witnesses also “referenced” the document. We agree with the trial court; and we note that Smith did testify in regards to the Agreed Order of no contact. Specifically, Smith testified the two “had an agreed stay away order” and that the order was “in place” at the time of the

telecommunications. She also noted that the Agreed Order had been issued from a court in Franklin County, and that according to the document they “were not to have any calls, texts, no communication * * *.” Besides testimony about the Agreed Order of no contact, the State further offered evidence that Smith asked Mitchell to stop contacting her. For instance, Smith testified that in October 2013, fresh out of her break-up with Mitchell, she told Mitchell that she no longer wanted to communicate. Further, Smith also testified that around Thanksgiving 2013, she again contacted Mitchell “and let her know that I no longer wanted to speak to her.” Thus, despite Mitchell’s arguments to the contrary, it does not appear that the trial court relied solely on seeing the Agreed Order in the court file. Rather, sufficient alternative evidence in the form of testimony was available to the trial court proving the existence and contents of the Agreed Order and Smith’s requests to be left alone. Viewing this evidence in the light most favorable to the State, we determine that the evidence presented at trial was sufficient to allow the trial court to find that Mitchell committed the offense of telecommunications harassment pursuant to R.C. 2917.21(A)(5). Accordingly, Mitchell’s first and second assignments of error are overruled.

B. Manifest Weight of the Evidence

{¶15} In her third assignment of error, Mitchell contends that her conviction for telecommunications harassment was against the manifest weight of the evidence.

{¶16} In determining whether a criminal conviction is against the manifest weight of the evidence, an appellate court must review the entire record, weigh the evidence and all reasonable inferences, consider the credibility of 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. *Thompkins*, 78 Ohio St.3d 380 at 387, 678 N.E.2d 541; *State v. Hunter*, 131 Ohio St.3d 67, 2011–Ohio–6524, 960 N.E.2d 955, ¶ 119. “Although a

court of appeals may determine that a judgment of a trial court is sustained by sufficient evidence, that court may nevertheless conclude that the judgment is against the weight of the evidence.” *Thompkins* at 387. But the weight and credibility of evidence are to be determined by the trier of fact. *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014-Ohio-1941, ¶ 23. A trier of fact “is free to believe all, part or none of the testimony of any witness who appears before it.” *Id.* We defer to the trier of fact on these evidentiary weight and credibility issues because it is in the best position to gauge the witnesses’ demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility. *Id.*

{¶17} Mitchell again argues that her conviction is against the manifest weight of the evidence because the evidence does not warrant a finding that Smith told her to stop calling. However, as noted above, the State offered evidence that Mitchell had been notified by Smith in October and November 2013 to refrain from contacting her. The State also offered evidence that an Agreed Order of no contact was in place that barred telephone communications between the parties. Finally, Mitchell, in her defense, offered no evidence to rebut Smith’s claims that she told Mitchell to stop contacting her.

{¶18} Mitchell also argues that her testimony and supporting evidence was more credible than the State’s evidence. However, the trial court as the trier of fact was in the best position to judge witness credibility. *West* at ¶ 23; *see also State v. Gavin*, 4th Dist. Scioto No. 13CA3592, 2015-Ohio-2996, ¶ 29. Moreover, 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 testimony presented by the State. *State v. Tyson*, 4th Dist. Ross No. 12CA3343, 2013–Ohio–3540, ¶ 21.

{¶19} After careful review of all of the evidence presented at trial, we cannot say that the trial court clearly lost its way or created a manifest miscarriage of justice in determining that Mitchell committed the offense of telecommunications harassment pursuant to R.C. 2917.21(A)(5). Because this is not an exceptional case where the evidence weighs heavily in favor of the defendant, we overrule Mitchell's third assignment of error.

IV. Conclusion

{¶20} Having overruled all of Mitchell's assignments of error, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED. Appellant shall pay the costs.

The Court finds that reasonable grounds existed for this appeal.

It is ordered that a special mandate issue out of this Court directing the Circleville 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.

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

For the Court

BY: _____
Marie Hoover, 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.