[Cite as *N. Olmsted v. Rieck*, 2011-Ohio-1557.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94905

CITY OF NORTH OLMSTED

PLAINTIFF-APPELLEE

vs.

RICHARD R. RIECK

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED

Criminal Appeal from the
Rocky River Municipal Court
Case No. 09-CRB-0843

BEFORE: Celebrezze, J., Boyle, P.J., and Sweeney, J.

RELEASED AND JOURNALIZED: March 31, 2011

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FRANK D. CELEBREZZE, JR., J.:

{¶ 1} Appellant, Richard Rieck, appeals from his 2009 conviction for violating a criminal protective order ("CPO"). Appellant argues that his conviction was against the manifest weight of the evidence and not supported by sufficient evidence. He also claims his sentence is contrary to law. After a thorough review of the record and law, we affirm.

{¶ 2} Appellant and Christine Mastanuono began a relationship after appellant had been a customer at Christine's hair salon for about two months. As their relationship grew, appellant moved into Christine's home for a time. After a dispute, the couple broke up, appellant moved out, and, according to Christine, appellant engaged in a pattern of harassing and abusive behavior. Christine sought and received a CPO from Berea Municipal Court on April 15, 2009. The CPO required appellant to stay at least 500 feet away from Christine, to not contact her, and to leave immediately if he should accidentally encounter her.[1]

{¶ 3} Appellant was indicted on four counts of violating a CPO pursuant to R.C. 2919.27. The case proceeded to a hearing before a magistrate on October 29, 2009. Christine testified that on April 22, 2009, she pulled into a BP gas station in North Olmsted, Ohio. She went inside the store to purchase a few items and emerged to find appellant, seated in his sister's car, stopped near the door of the store. Upon seeing her, appellant smiled. She hurriedly walked to her car and drove away. She stated she felt scared. She immediately drove to a Middleburg Heights police station where she was told she must go to a North Olmsted police station, which she did.

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[1] The CPO advised appellant that if he "accidentally comes in contact with [Christine] in any public or private place, [he] must depart immediately."

{¶ 4} Appellant testified that he pulled into the gas station to buy a pack of cigarettes while on the way to his mother's house a short distance away. Upon pulling into the lot, he saw Christine exit the store, and he immediately left. He even stated that he "peeled out," and returned later to buy a pack of cigarettes and to apologize to the gas station attendant working behind the counter for peeling out.

{¶ 5} The gas station attendant, Russell Lynch, testified that appellant was inside the store when Christine was inside and that upon seeing her, appellant left the store, returned to his car, and waited for between two and five minutes before leaving. Lynch stated that appellant returned about an hour later and made some disparaging remarks about Christine, which Lynch thought was strange. A few days later, appellant returned to the gas station and asked Lynch if the police had been there and what Lynch had told them. Lynch characterized appellant's demeanor as arrogant and condescending.

{¶ 6} Officer Jennifer Hayner of the North Olmsted police testified that she investigated the allegation that appellant had violated a CPO by going to the gas station and talking to Lynch. Lynch conveyed his recollection of the events that day, including appellant returning to the store later in the evening.

{¶ 7} Officer Hayner followed up with appellant and his sister, Beth Flemming. Officer Hayner also investigated three hang-up phone calls

Christine had received and determined that they came from Flemming's home, where appellant was staying. Flemming had originally told Officer Hayner that appellant was home when she left for work that day, but at trial, testified that appellant usually left for work before she did and that she was 90 percent sure appellant was gone at the time the first call was placed.

{¶ 8} At the close of trial, the magistrate found appellant not guilty of the three counts related to the phone calls, but guilty of one count related to the incident at the BP station. This decision was reviewed by a judge, and on March 4, 2010, was adopted by the court.

{¶ 9} Appellant was sentenced to a 20-day jail term with ten days actual incarceration and 36 days of house arrest, a $1,000 fine, court costs, and four years of community control. Appellant filed for a stay of execution of sentence with both the trial court and this court, both of which were denied. Appellant timely appeals, citing two assignments of error.

Law and Analysis

Sufficiency and Manifest Weight

{¶ 10} Appellant first argues that his conviction is against the sufficiency and manifest weight of the evidence. Whether the evidence is legally sufficient to sustain a verdict is a question of law. *State v. Robinson* (1955), 162 Ohio St. 486, 124 N.E.2d 148. A conviction based on legally insufficient evidence constitutes a denial of due process. *Tibbs v. Florida* (1982), 457 U.S. 31, 45, 102 S.Ct. 2211, 72 L.Ed.2d 652, citing *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶ 11} Where there is substantial evidence upon which the trier of fact has based its verdict, a reviewing court abuses its discretion in substituting its judgment for that of the trier of fact as to the weight and sufficiency of the evidence. *State v. Nicely* (1988), 39 Ohio St.3d 147, 156, 529 N.E.2d 1236.

{¶ 12} The weight to be given the evidence and the credibility of the witnesses are primarily for the trier of fact to determine. *State v. DeHass* (1967), 10 Ohio St.2d 230, 231, 227 N.E.2d 212. On review, the appellate court must determine, after viewing the evidence in a light most favorable to the prosecution, whether any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273, 574 N.E.2d 492; *Jackson v. Virginia*, supra.

{¶ 13} Sufficiency of the evidence is subjected to a different standard than is manifest weight of the evidence. Article IV, Section 3(B)(3) of the Ohio Constitution authorizes appellate courts to assess the weight of the evidence independently of the factfinder. Thus, when a claim is assigned concerning the manifest weight of the evidence, an appellate court "has the authority and duty to weigh the evidence and to determine whether the findings of * * * the trier of facts were so against the weight of the evidence as to require a reversal and a remanding of the case for retrial." *State ex rel. Squire v. Cleveland* (1948), 150 Ohio St. 303, 345, 82 N.E.2d 709.

{¶ 14} The United States Supreme Court recognized the distinction in considering a claim based upon the manifest weight of the evidence as opposed to sufficiency of that evidence. The court held in *Tibbs v. Florida*, supra, that, unlike a reversal based upon the insufficiency of the evidence, an appellate court's disagreement with the jurors' weighing of the evidence does not require special deference accorded verdicts of acquittal, i.e., invocation of the double jeopardy clause as a bar to relitigation. Id. at 43.

{¶ 15} Upon application of the standards enunciated in *Tibbs*, the court in *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717, has set forth the proper test to be utilized when addressing the issue of manifest weight of the evidence. The *Martin* court stated: "The court, reviewing 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 jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." Id. at 720.

{¶ 16} In the present case, appellant was convicted of violating a criminal protective order granted pursuant to R.C. 2903.213. R.C. 2919.27(A)(2) prohibits one from recklessly violating the terms of a protective order of the type at issue here. Appellant claims he abided by the terms of the order, and left immediately upon encountering Christine in a public place. The protective order in this case specifies that "Defendant shall stay away from protected person named in this order, and shall not be present within 500 feet * * * of any protected person, wherever protected persons may be found, or any place the Defendant knows or should know the protected persons are likely to be, *even with protected persons' permission*. If Defendant accidentally comes in contact with protected persons in any public or private place, Defendant must depart *immediately*. This order includes encounters on public and private roads, highways, and thoroughfares." (Emphasis sic.)

{¶ 17} Appellant testified that upon seeing Christine, he immediately left, and therefore did not violate the terms of the CPO. However, Christine testified that appellant was parked close to the entrance of the gas station

store when she exited and that he smiled at her. He did not immediately leave. Appellant points to her testimony on cross-examination where she agreed with a question posed by appellant's counsel that appellant immediately left. However, what Christine testified to during direct and cross-examination was that she did not see appellant pull into the gas station and only noticed him parked outside the doorway when she exited. She further testified that, upon seeing him, she put her head down, hurriedly walked to her car, and immediately drove to the police station because she felt scared and threatened. She did not see him leave.

{¶ 18} This is not the only testimony the state produced at trial. Lynch, the gas station attendant, testified that appellant entered the store, saw Christine and left the building. He then saw appellant get into his car and wait. Lynch testified that appellant did not immediately leave, but was in the parking lot for possibly as long as five minutes before leaving. Lynch also testified that appellant returned to the station later and explained that he could not be in the same place as Christine and told Lynch to be careful what he said to Christine because she was crazy.

{¶ 19} Coupled with Christine's testimony, Lynch's testimony indicates that appellant knew Christine was inside the store, but that he waited until Christine emerged from the store to depart. He did not immediately depart as required by the CPO. Therefore, his conviction is supported by sufficient

evidence. The unbiased testimony of a third-party employee of the gas station indicates that appellant lingered in the gas station parking lot even after he knew Christine was inside.

{¶ 20} This same testimony demonstrates that there was no miscarriage of justice in this case. The magistrate and trial court reviewed the evidence and testimony and came to the well-supported conclusion that appellant violated the terms of the CPO.

Sentence Contrary to Law

{¶ 21} Appellant finally takes issue with the sentence imposed by the trial court, stating that "[t]he trial court incorrectly sentenced [him] to jail and an unreasonably harsh punishment in direct conflict with the overriding purpose for punishment contemplated in section 2929.11 and 2929.12 of the Ohio Revised Code. Further, said punishment was based inappropriately on assumptions taken by the trial court which were irrelevant erroneous, other cases which had been dismissed."

{¶ 22} In this assignment of error, appellant cites to sentencing provisions dealing with felony sentencing, which are inapplicable to this case. R.C. 2929.21(A) sets forth the overriding purposes of misdemeanor sentencing, including "to protect the public from future crime by the offender and others and to punish the offender. To achieve those purposes, the sentencing court shall consider the impact of the offense upon the victim and

the need for changing the offender's behavior, rehabilitating the offender, and making restitution to the victim of the offense, the public, or the victim and the public."

{¶ 23} R.C. 2929.22(B)(1) offers a trial court guidance in crafting a sentence to comport with these touchstones. These factors include: "(a) The nature and circumstances of the offense or offenses; (b) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender has a history of persistent criminal activity and that the offender's character and condition reveal a substantial risk that the offender will commit another offense; (c) Whether the circumstances regarding the offender and the offense or offenses indicate that the offender's history, character, and condition reveal a substantial risk that the offender will be a danger to others and that the offender's conduct has been characterized by a pattern of repetitive, compulsive, or aggressive behavior with heedless indifference to the consequences; (d) Whether the victim's youth, age, disability, or other factor made the victim particularly vulnerable to the offense or made the impact of the offense more serious; (e) Whether the offender is likely to commit future crimes in general, in addition to the circumstances described in divisions (B)(1)(b) and (c) of this section."

{¶ 24} Post-*Foster*,[2] appellate courts should apply a two-step analysis in determining the validity of a sentence. *State v. Kalish*, 120 Ohio St.3d 23, 2008-Ohio-4912, 896 N.E.2d 124, ¶4.[3] "First, they must examine the sentencing court's compliance with all applicable rules and statutes in imposing the sentence to determine whether the sentence is clearly and convincingly contrary to law. If this first prong is satisfied, the trial court's decision shall be reviewed under an abuse-of-discretion standard." Id. To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140.

{¶ 25} Appellant first argues that the trial court's imposition of a jail term is an affront to the principles of sentencing. Appellant's violation of R.C. 2919.27 is a misdemeanor of the first degree and is punishable by a jail term of up to 180 days. R.C. 2929.24(A)(1). House arrest, four years of community control, alcohol and drug treatment, and a $1,000 fine are also within the bounds provided for in R.C. 2929.25(A)(1)(b) and (A)(2) for a first degree misdemeanor. Therefore, they are clearly not contrary to law.

{¶ 26} The trial court considered the pattern of harassment appellant had engaged in, including his admitted filing of harassing complaints with

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[2] *State v. Foster*, 109 Ohio St.3d 1, 2006-Ohio-856, 845 N.E.2d 470.

[3] We recognize that *Kalish* is a plurality opinion, but it is instructive.

the state boards of cosmetology and health; two complaints for money appellant alleged Christine owed, but which were later dismissed; and the posting of flyers about sexually transmitted diseases on the window of her salon. Officer Hayden testified that appellant told her that even after the CPO was issued, he still drove past Christine's salon even though it took him within 500 feet of her. He said he should not have to change his route because of the CPO. This evidence speaks to the factors set forth in R.C. 2929.22(B)(1)(b) and (c) above.

{¶ 27} Appellant argues that he did not have a chance to review the presentence report ("PSI") and to investigate any inaccuracies contained therein. The report in this case was described as a police sentence report and was orally presented by community control officer Judy Nash. It contained a summary of an interview with appellant, Christine's victim impact statement, and a summary of the history between appellant and Christine and their various legal conflicts.

{¶ 28} Appellant complains that information from other court proceedings was improperly used at sentencing, including several hundred text messages introduced in a prior stalking case that was ultimately dismissed. However, this history may be properly considered by the court in crafting appellant's sentence as demonstrating whether the "offender's

conduct has been characterized by a pattern of repetitive, compulsive, or aggressive behavior." R.C. 2929.22(B)(1)(c).

{¶ 29} R.C. 2929.22(D)(1) states that "[a] sentencing court shall consider any relevant oral or written statement made by the victim, the defendant, the defense attorney, or the prosecuting authority regarding sentencing for a misdemeanor. *This division does not create any rights to notice other than those rights authorized by Chapter 2930. of the Revised Code.*" (Emphasis added.) Appellant claims that the state was required to present him with a copy of a PSI for review prior to the sentencing hearing. Appellant cites to no statute or case law to support this proposition. R.C. 2951.03(B)(1) does require this procedure in the case of felony sentencing where a PSI is required. Here, however, we have a misdemeanor sentence, where R.C. 2929.22(D)(1) specifies that use of such a statement does not give appellant any right to notice outside of Chapter 2930 of the Revised Code.

{¶ 30} R.C. 2930.13, states in pertinent part that a victim impact statement "may include the following: (1) An explanation of the nature and extent of any physical, psychological, or emotional harm suffered by the victim as a result of the crime * * *; (2) An explanation of the extent of any property damage or other economic loss suffered by the victim as a result of that crime * * *; (3) An opinion regarding the extent to which, if any, the victim needs restitution for harm caused by the defendant * * * as a result of

that crime * * *; (4) The victim's recommendation for an appropriate sanction or disposition for the defendant or alleged juvenile offender regarding that crime or specified delinquent act." Here, nothing in the victim impact statement falls outside of the allowed materials specified above. Also, the victim impact statement is not required to be disclosed to a defendant prior to sentencing. *State v. Wallace*, Richland App. No. 2002CA0072, 2003-Ohio-4119, ¶17, citing *State v. Stewart*, 149 Ohio App.3d 1, 2002-Ohio-4124, 775 N.E.2d 563. "'Just because a victim impact statement is included in a PSI does not mean that a defendant will have access to it.'" Id., quoting *Stewart* at 4. See, also, R.C. 2951.03(B).

{¶ 31} R.C. 2930.14 also specifies that if the victim's statement "includes new material facts, the court shall not rely on the new material facts unless it continues the sentencing or dispositional proceeding or takes other appropriate action to allow the defendant or alleged juvenile offender an adequate opportunity to respond to the new material facts."

{¶ 32} Here, Christine alleged that she lost her business because of appellant's constant harassing behavior and that she had to move out of the area to get away from appellant. While these were new material facts, the trial court gave appellant an opportunity to respond. Appellant argued that Christine lost her business because of financial difficulties that resulted in her declaring bankruptcy, not because she had to move away to avoid him.

Appellant was given an opportunity to respond and did respond to these allegations. Further, appellant never requested additional time to respond, but made arguments during the sentencing hearing addressing these new facts.

{¶ 33} Appellant's sentence is not contrary to law, nor does it constitute an abuse of discretion. The trial court was presented with a pattern of behavior that included vexatious reports to regulatory authorities and a demonstrated disregard for the protective order. The trial court did not err in crafting appellant's sentence.

Judgment affirmed.

It is ordered that appellee recover from appellant 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 Rocky River Municipal Court to carry this judgment into execution. The defendant's conviction having been affirmed, any bail pending appeal is terminated. Case remanded to the trial court for execution of sentence.

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

FRANK D. CELEBREZZE, JR., JUDGE

MARY J. BOYLE, P.J., and

JAMES J. SWEENEY, J., CONCUR