[Cite as *Walton Hills v. Tate*, 2016-Ohio-697.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 102773

CITY OF WALTON HILLS

PLAINTIFF-APPELLEE

vs.

DONNELL C. TATE

DEFENDANT-APPELLANT

JUDGMENT:
MODIFIED IN PART; VACATED IN PART;
REMANDED

Criminal Appeal from the
Garfield Heights Municipal Court
Case No. CRB-14-02692A

BEFORE: Kilbane, J., E.A. Gallagher, P.J., and McCormack, J.

RELEASED AND JOURNALIZED: February 25, 2016

ATTORNEYS FOR APPELLANT

Robert L. Tobik
Cuyahoga County Public Defender
Erika B. Cunliffe
Paul A. Kuzmins
Assistant Public Defenders
310 Lakeside Avenue, Suite 200
Cleveland, Ohio 44113

ATTORNEY FOR APPELLEE

Blair N. Melling
Walton Hills Prosecutor
303 Columbus Road
Bedford, Ohio 44146

MARY EILEEN KILBANE, J.:

{¶1} Defendant-appellant, Donnell Tate ("Tate"), appeals from his convictions for aggravating menacing and vehicular vandalism. For the reasons set forth below, we modify Tate's conviction from aggravated menacing to menacing, vacate his conviction and sentence for vehicular vandalism, and remand for resentencing on menacing.

{¶2} In October 2014, Tate was charged in Garfield Heights Municipal Court with aggravated menacing and vehicular vandalism resulting from a "road rage" incident with Joyce Good ("Good"). The matter proceeded to a bench trial in January 2015, at which the following evidence was adduced.

{¶3} On October 16, 2014, Good was proceeding northbound in the left lane on Northfield Road in Walton Hills. There was a traffic signal ahead indicating that the left lane was ending because of construction, so Good proceeded to the right lane. She changed lanes in front of Tate, who was driving a dump truck. Tate then honked his horn at Good. Good testified that she was approximately one car length ahead of Tate when she changed lanes. Good allowed the two other cars in the left lane to go ahead of her. She continued on Northfield Road and came to a stop at the red light at the intersection of Northfield and Forbes Roads. She then observed Tate come "flying up on" her. As soon as he was behind her car, he exited his vehicle and approached the driver's side window. The two of them exchanged words. Tate screamed at Good that she "cut him off." Tate walked over to the front passenger side and exchanged words

with Good's boyfriend. Good told Tate to get back into his truck because she is calling the police. Tate ran back to his truck and grabbed what Good thought to be a baseball bat, but was later determined to be a tire thumper. He came back to Good's car and hit the front right-side fender with the tire thumper. He then went to the passenger side as Good was rolling up the window and stuck his tire thumper through the window. The end of Tate's tire thumper caught the window, causing it to pull off of its track. Good testified that she and her boyfriend never exited her vehicle or made any hand gestures toward Tate.

{¶4} At this point, Good noticed that the light was green and proceeded northbound on Northfield Road. She was on the phone with the Walton Hills Police Department, who advised her to pull over into a gas station. The police met her at the gas station and obtained a statement from Good. Police Officer Russ Vodila testified that he arrested Tate as a result of this incident.

{¶5} Tate testified on his own behalf. He testified that he was driving the dump truck for work. He was proceeding northbound on Northfield Road. Traffic was moving slow because of the construction. He testified that Good cut in front him, causing him to "violently hit" his brakes. He then honked his horn. Good honked her horn back at him, and they exchanged hand gestures. Good also "brake-checked" him, and there was more horn exchange and exchange of hand gestures. When traffic stopped, Good's boyfriend exited the car with his hands up in a suggestive gesture and began to walk toward the dump truck. At that point, Tate exited the dump truck with a

tire thumper to defend himself. Tate testified that a tire thumper is used to check for flat tires on a dump truck and almost identically resembles a baseball bat. The two of them had a verbal exchange, and each of them got back into their respective vehicle. Tate denied ever using the tire thumper to strike Good's vehicle or cause damage to her vehicle.

{¶6} After the conclusion of trial, the court found Tate guilty of aggravated menacing and vehicular vandalism. The court sentenced him to 180 days in jail, 170 days of which were suspended. The court ordered Tate to pay a $35 fine and $1,107.69 in restitution for the damage to Good's car.

{¶7} Tate now appeals, raising the following two assignments of error for review.

Assignment of Error One

> The city failed to present sufficient evidence in support [of] a conviction for aggravating menacing.

Assignment of Error Two

> The city failed to present sufficient evidence in support [of] a conviction for vehicular vandalism.

{¶8} Within these assigned errors, Tate challenges the sufficiency of evidence supporting his aggravated menacing and vehicular vandalism convictions.

{¶9} The Ohio Supreme Court in *State v. Diar*, 120 Ohio St.3d 460, 2008-Ohio-6266, 900 N.E.2d 565, ¶ 113, explained the standard for sufficiency of the evidence as follows:

> Raising the question of whether the evidence is legally sufficient to support the jury verdict as a matter of law invokes a due process concern. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E.2d 541. In reviewing such a challenge, "[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. Jenks* (1991), 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus, following *Jackson v. Virginia* (1979), 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560.

{¶10} We are mindful that, in considering the sufficiency of evidence, a certain perspective is required. *State v. Eley*, 56 Ohio St.2d 169, 172, 383 N.E.2d 132 (1978). "This court's examination of the record at trial is limited to a determination of whether there was evidence presented, 'which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt.'" *Id.*, quoting *Atkins v. State*, 115 Ohio St. 542, 546, 155 N.E. 189 (1926). It is the minds of the jurors, rather than a reviewing court, that must be convinced. *State v. Thomas*, 70 Ohio St.2d 79, 80, 434 N.E.2d 1356 (1982).

{¶11} In the instant case, Tate was convicted of aggravated menacing in violation of R.C. 2903.21(A), which provides that: "[n]o person shall knowingly cause another to believe that the offender will cause serious physical harm to the person or property of the other person[.]" Serious physical harm to persons is defined in R.C. 2901.01(A)(5)(b)-(d) as

> [a]ny physical harm that carries a substantial risk of death; [a]ny physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity; [a]ny physical harm that involves some permanent disfigurement or that involves some temporary disfigurement[.]

Serious physical harm to property is defined as any physical harm to property that either: "(a)__[r]esults in substantial loss to the value of the property or requires a substantial amount of time, effort, or money to repair or replace; [or] (b)__[t]emporarily prevents the use or enjoyment of the property or substantially interferes with its use or enjoyment for an extended period of time." R.C. 2901.01(A)(6).

{¶12} Tate, relying on *Garfield Hts. v. Greer*, 8th Dist. Cuyahoga No. 87078, 2006-Ohio-5936, argues there is no evidence that Good experienced fear of serious physical harm. In *Greer*, the defendant passed the victim, slammed his brakes, and flashed a gun at the victim. The victim did not know if the gun was real. He recorded the defendant's license plate number, returned to his home, and called the police. The police found a pistol similar to a BB gun in the defendant's car. The trial court found the defendant guilty of aggravated menacing.

{¶13} On appeal, this court found the evidence did not establish that the victim subjectively believed at the time of the offense that defendant would cause him physical harm. *Id*. at ¶ 7. The defendant did nothing more than brandish a gun that the victim questioned as being real. There was no evidence that he pointed the gun at the victim, or took any other action to make the victim believe that serious physical harm would ensue. Rather than retreat from the scene, the victim slowed down so as to write down the defendant's license number. *Id.* at ¶ 10.

{¶14} In the instant case, Good testified that Tate came "flying up on" her. As soon as he was behind her car, he exited his vehicle and approached the driver's side

window. Tate screamed at Good that she "cut him off." He walked over to the front passenger side and exchanged words with Good's boyfriend. According to Good, Tate was "screaming pretty provocative and mean things at me." Good told Tate to get back into his truck because she is calling the police. Tate ran back to his car, grabbed a tire thumper, which appeared to Good as a baseball bat, and then ran to the front of Good's car. He hit the front right-side fender with the tire thumper and then went to the passenger side as Good was rolling up the window. He stuck his tire thumper through the window as if he was going to hit the passenger. The end of Tate's tire thumper caught the window, causing the window to pull off of its track. Good drove away and met up with the police at a gas station.

{¶15} In thoroughly reviewing the evidence submitted regarding the confrontation between Good and Tate, no testimony was adduced that established that Good believed she would suffer serious physical harm at the hands of Tate. Tate's actions while foreboding, do not constitute a threat of serious physical harm. Good only testified that Tate screamed "pretty provocative and mean things at me." She never testified that she believed she was in danger of serious physical harm from Tate. Although, the evidence was that Good sustained approximately $1,100 damage to her car, the evidence does not support a finding of a belief that Tate would cause her or her property "serious physical harm." Therefore, we find that the evidence was insufficient to support a conviction for aggravated menacing.

{¶16} There is, however, sufficient evidence that Tate committed menacing. Menacing, a fourth-degree misdemeanor as described in R.C. 2903.22, is identical to aggravated menacing, except that the element of serious physical harm is not included. *State v. Britton*, 181 Ohio App.3d 415, 2009-Ohio-1282, 909 N.E.2d 176 (2d Dist.) (defendant's conviction for aggravated menacing was not supported by sufficient evidence as the evidence did not demonstrate the victim believed she was in danger of serious physical harm from defendant. The court did find that the evidence supported a conviction of the lesser included offense of menacing and modified defendant's conviction accordingly.). R.C. 2903.22(A) states in pertinent part:_ "[n]o person shall knowingly cause another to believe that the offender will cause physical harm to the person or property of the other person[.]"_ "Physical harm" is defined in R.C. 2901.01(A)(3) as "any injury, illness, or other physiological impairment, regardless of its gravity or duration."

{¶17} Accordingly, Tate's conviction for aggravated menacing is modified to the lesser included offense of menacing. *State v. Reddy*, 192 Ohio App.3d 108, 2010-Ohio-5759, 948 N.E.2d 454, ¶ 35 (8th Dist.), citing *State v. Davis*, 8 Ohio App.3d 205, 456 N.E.2d 1256 (8th Dist.1982) (appellate courts have authority to modify a conviction to a _lesser included offense supported by the record, rather than ordering an acquittal or a new trial).

{¶18} Therefore, the first assignment of error is sustained in part, and Tate's conviction is modified to menacing.

{¶19} Tate was also convicted of vehicular vandalism in violation of R.C. 2909.09(B), which provides that: "[n]o person shall knowingly, and by any means, drop or throw any object at, onto, or in the path of any * * * vehicle[.]" Tate argues the city failed to present any evidence that: (1) he did "drop or throw any object"; and (2) the object he used was dropped or thrown "at, onto, or in the path of" Good's car. We agree.

{¶20} The record in the instant case demonstrates that Tate ran in front of Good's car, while she was stopped in traffic, and hit the front of her car with a tire thumper. Based on these facts, we cannot say that the city proved the essential elements of the crime beyond a reasonable doubt. There is no evidence in the record that Tate dropped or threw his tire thumper at, onto, or in the path of Good's car. Therefore, Tate's conviction for vehicular vandalism is vacated.

{¶21} The second assignment of error is sustained.

{¶22} Accordingly, Tate's aggravated menacing conviction is modified to menacing and his vehicular vandalism conviction and sentence is vacated. The matter is remanded to the trial court for a sentencing hearing for the crime of menacing.

It is ordered that appellant recover of appellee 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 Garfield Heights Municipal Court to carry this judgment into execution.

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

MARY EILEEN KILBANE, JUDGE

EILEEN A. GALLAGHER, P.J., CONCURS;
TIM McCORMACK, J., CONCURS IN PART AND DISSENTS IN PART (SEE SEPARATE OPINION)

TIM McCORMACK, J., CONCURRING IN PART AND DISSENTING IN PART:

{¶23} I respectfully dissent regarding the modification of Tate's conviction from aggravated menacing to menacing. Aggravated menacing is committed when a person "knowingly cause[s] another to believe that the offender will cause serious physical harm to the person or property of the other person." A review of the victim's testimony reflects the fear of serious physical harm that any person in the victim's position would experience due to the convergence of out-of-control anger and the wielding of a potentially very dangerous instrument.

{¶24} After the victim changed lanes in front of Tate's truck, she saw Tate's truck "flying up on" her vehicle as she came to a stop at a red light. Tate then jumped out of his truck and ran up to her vehicle. As the two exchanged heated words, she rolled up her window. Tate then walked over to the passenger side and Tate and the victim's passenger yelled at each other. At this point, the victim locked her doors to avoid further confrontation. Tate then ran back to his truck and retrieved what appeared to be a

baseball bat. He came to her side first. Her window was already rolled up. He then ran to the passenger side, smacking the vehicle's front fender along the way, and threatened to hit her passenger. She immediately rolled up the passenger side window. As she did that, the end of Tate's bat caught the end of the window, causing the window to fall off its track.

{¶25} Construing this evidence in a light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that the victim subjectively believed Tate would cause serious physical harm to her. Carrying what appeared to be a baseball bat, Tate first approached the victim's side of the vehicle. Finding her window rolled up, he went to the passenger side and attempted to force the bat-like object inside the vehicle, after smacking the vehicle's front fender with it. Only the victim's quick action prevented the object from reaching inside the vehicle. The object was extended toward the passenger's window with such a force that it caused the window to fall off its track when the two collided.

{¶26} Tate's rage and use of a potentially very dangerous instrument during the altercation elevated the offense from menacing to aggravated menacing. Viewed most favorable to the prosecution, the victim's testimony regarding Tate's conduct was sufficient to prove her belief that Tate would cause serious physical harm to her. *See State v. Ayala*, 3d Dist. Union No. 14-13-22, 2014-Ohio-2576, *appeal not accepted*, *State v. Ayala*, 141 Ohio St.3d 1421, 2014-Ohio-5567, 21 N.E.3d 1114, ¶ 30 (the evidence was sufficient to support aggravated menacing during a road rage incident

when the defendant made threatening statements while brandishing a knife to the victim).

{¶27} For the foregoing reasons, I dissent in part.