[Cite as *State v. Thomas*, 2017-Ohio-957.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104174

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

JAMES THOMAS

DEFENDANT-APPELLANT

JUDGMENT:
AFFIRMED IN PART;
VACATED IN PART; REMANDED

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-15-597373-A

BEFORE: S. Gallagher, J., Kilbane, P.J., and Stewart, J.

RELEASED AND JOURNALIZED: March 9, 2017

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SEAN C. GALLAGHER, J.:

{¶1} Appellant James Thomas appeals his conviction and sentence. Upon review, we affirm his conviction, vacate his sentence, and remand for resentencing.

{¶2} On July 10, 2015, appellant was indicted in a four-count indictment. Appellant pled not guilty to the indictment. He was appointed new counsel several times during the proceedings and, at one point, had retained counsel who subsequently withdrew. On February 9, 2016, while represented by appointed counsel, appellant filed a pro se motion to dismiss the complaint.

{¶3} On February 17, 2016, the state made a motion to dismiss Counts 1 and 2 of the indictment, which was granted by the trial court. The case proceeded to a jury trial on Counts 3 and 4, which charged aggravated menacing and assault, both misdemeanors of the first degree. Appellant waived his right to counsel, and the trial court granted appellant's motion to terminate legal counsel and represent himself pro se. Standby counsel was present for trial.

{¶4} Testimony was presented at trial from the alleged victim, who is a social worker from the Cuyahoga County Department of Senior and Adult Services, Adult Protective Services Division. Part of her job responsibilities is to investigate allegations of abuse, neglect, self-neglect and/or exploitations of seniors. She testified to the circumstances surrounding her investigation of a case involving an elderly woman who was at appellant's home.

{¶5} The social worker testified that once a case is assigned, she tries to make contact with the senior within 72 hours. In this instance, the social worker had trouble contacting the elderly woman and did not have face-to-face contact with her until three weeks after the case was opened. At the first visit, the elderly woman was not present. At the second visit, contact was made with the elderly woman, who the social worker indicated was alone and confused. The social worker testified that the woman said she did not want to be there.

{¶6} The social worker was able to obtain the phone number of the elderly woman's godson and called him to ask that he pick her up and take her to his residence. They were unsuccessful because the elderly woman could not get into the godson's SUV. It was understood that the godson would return with another vehicle. Subsequently, the social worker learned that the elderly woman had not gone to the godson's residence and had been prevented from going there.

{¶7} The social worker testified that when she returned to appellant's residence a few days later, she knocked on the door and was let into the residence by an unidentified female. The social worker said she identified herself to the female as a social worker with the Cuyahoga County Department of Senior and Adult Services. The social worker testified that she greeted the elderly woman, who asked if she could speak with her outside. The social worker stated that she encountered appellant in the dining room and also identified herself to him as being from the Cuyahoga County Department of Senior and Adult Services. The social worker testified that she then explained to appellant that

she was there to investigate allegations of neglect and exploitation and indicated she wanted to speak with him as well.

{¶8} At that time, the social worker began to go over the content of her report with appellant and questioned him about allegations that the elderly woman had been removed from a nursing home against medical advice and that she did not have her medications. The social worker claimed that at that point, appellant sprung from his chair, got within four inches of her face, and told her to get out of the home. She further stated he used profanity and threatened to "blow [her] motherf***ing brains out." The social worker testified that she was afraid for her safety and attempted to leave the house. She stated that appellant continued "to [barrage] me with insults, threats, name calling," and that as she got to the door, appellant physically put his hands on her and "pushed me out the door." The social worker responded: "That was not necessary. Why did you have to put your hands on me? I was already leaving. Now I'm pressing charges on you."

{¶9} The social worker testified that appellant followed her out of the house and over to her car, while he continued to verbally assault her and demand her business card, which she did not provide. After the social worker got into her car and locked the door, she called her supervisor, who instructed her to go to the nearest police department. The social worker went to the police station and reported the incident. She testified that she then went home because of the anxiety she suffered.

{¶10} On cross-examination, the social worker could not recall telling appellant to hit her, though she conceded she may have said it. She also denied using profanity at

appellant, and she denied refusing to leave the house. The trial court denied appellant's Crim.R. 29 motion for acquittal.

{¶11} Appellant testified to his relationship with the elderly woman and the circumstances of her being at his home. Appellant testified that he has many signs by the front steps, including a no-trespassing sign. He stated that on the day of the alleged incident, his front door was slightly open because the fan was broken. He claimed that the social worker just came into the house and that he encountered her in the kitchen asking the elderly woman if she knew her, and the elderly woman was responding "no." Appellant testified that when he asked the social worker who she was and what she was doing in his house, the social worker began making accusations against him and did not answer his questions. He stated that he told the social worker to "get the hell out of my house," and that she responded that she "did not have to go anywhere." He then "started cussing at her" and telling her to "get the hell out of my house." He claimed the social worker then verbally attacked him.

{¶12} Appellant denied pushing the social worker out the door. He stated that as the social worker was leaving, he unlocked the door, pushed the door open for her, and she walked out. He testified that he pointed out the signs to the social worker. He also stated that he questioned the social worker about entering his home, that he did not know who she was, and that he asked for her business card or to see her identification so he could call her supervisor. He claimed the social worker tried to provoke him to hit her and indicated she was going to come back with the police.

{¶13} On cross-examination, appellant conceded that he did not see how the social worker entered the home. Although appellant maintained he did not know who the social worker was, he conceded he asked her "how she got a county job if she couldn't read" and expressed his intention to call her supervisor.

{¶14} A neighbor who lives across the street from appellant testified that he heard yelling, "get the hell out of my house" and "I don't have to go anywhere," and went to look out his window. He observed appellant was in his house behind the doorway, the social worker was going down the steps outside appellant's house, and the two were "yelling and screaming and cursing at each other back and forth." He observed the social worker get into her car, appellant leave the house and approach the car, and appellant ask her for some type of identification. He indicated that they still were yelling and were cursing at each other and that the social worker drove off. He testified that there are no-trespassing signs at appellant's house. He did not remember hearing anything like "hit me, hit me."

{¶15} The jury returned a verdict of guilty on Counts 3 and 4. The trial court mistakenly sentenced appellant on Counts 1 and 2 at sentencing, and imposed a three-month sentence on each count, to be served concurrently.

{¶16} Appellant was appointed appellate counsel by the trial court. He filed a notice of appeal pro se. Subsequently, his appointed counsel filed a notice of appearance. An appellant's brief was filed by counsel on June 13, 2016. This court denied two pro se motions by appellant for an extension of time to file a brief because

appellant was represented by appointed counsel. Appellant filed a pro se brief on June 24, 2016, without leave, which was received by the court. Although this court granted a motion by appellant's counsel to waive oral argument, appellant appeared pro se and was permitted to address the court.

{¶17} Appellant's pro se brief raises one assignment of error, which claims the trial court erred when it denied his motion to dismiss the indictment. In his motion, appellant claimed he was arrested when he was served a copy of the indictment without a determination of probable cause. On appeal, he claims that there was no complaint, affidavit, or arrest warrant in this case; that there must be a determination of probable cause to issue an arrest warrant; and that there was not sufficient evidence to sustain a prosecution in this case. However, in this matter, appellant's apprehension followed a secret indictment by the grand jury pursuant to Crim.R. 6(E). The indictment by the grand jury created a legal presumption of probable cause. *Hinton v. Newburgh Hts.*, 8th Dist. Cuyahoga No. 103412, 2016-Ohio-2727, ¶ 16. Further, the issuance of an arrest warrant on that indictment was required without further inquiry. *State v. Lawson*, 11th Dist. Lake No. 2001-L-071, 2002-Ohio-5605, at *7, citing *Gerstein v. Pugh*, 420 U.S. 103, 119, fn. 19, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975). Accordingly, appellant's arguments are without merit.

{¶18} Appellant's brief that was filed by counsel raises two assignments of error for our review. Under the first assignment of error, appellant claims the trial court erred in sentencing him on Counts 1 and 2. Counts 1 and 2 were felony offenses that had been

dismissed prior to trial. Appellant was tried and convicted on Counts 3 and 4, which are misdemeanor offenses.

{¶19} At sentencing, the trial court indicated that "a jury returned a verdict of guilt on both counts of the indictment. It was Count 3, aggravated menacing, and Count 4, assault, both misdemeanors of the first degree." However, the trial court erroneously sentenced appellant on the wrong counts, stating as follows: "In Count 1, I sentence you to three months. In Count 2, three months. They'll be served concurrently." The trial court's sentencing entry likewise erroneously references Counts 1 and 2.

{¶20} The record reflects the convictions were on Counts 3 and 4. The sentences imposed were within the statutory range for first-degree misdemeanors. Nevertheless, the trial court erroneously imposed the sentence on Counts 1 and 2. This error may not be corrected through a nunc pro tunc judgment entry because such entries are limited to reflecting what the court actually decided and "cannot be used to reflect what the court might or should have decided, or intended to decide." *State v. Carter*, 8th Dist. Cuyahoga No. 101810, 2015-Ohio-1834, ¶ 40. Because the trial court actually sentenced appellant on the wrong counts, we must vacate the sentence imposed and remand the matter for resentencing. This assignment of error is sustained.

{¶21} Under his second assignment of error, appellant claims that his conviction on Counts 3 and 4 was against the manifest weight of the evidence. When reviewing a claim challenging the manifest weight of the evidence, the court, reviewing the entire record, must 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 and a new trial ordered. *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541. Reversing a conviction as being against the manifest weight of the evidence should be reserved for only the exceptional case in which the evidence weighs heavily against the conviction. *Id*.

{¶22} R.C. 2903.21(A), aggravated menacing, provides as follows: "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 * * *." "In order to prove aggravated menacing, the state must show that the victim had a subjective belief of fear of serious physical harm." *State v. Landrum*, 1st Dist. Hamilton No. C-150718, 2016-Ohio-5666, ¶ 9.

{¶23} R.C. 2903.13(A), assault, provides the following: "No person shall knowingly cause or attempt to cause physical harm to another * * * ."

{¶24} With regard to Count 3, aggravated menacing, appellant claims the record does not show that the social worker believed appellant would cause serious physical harm to her or her property. He argues that if the social worker feared serious physical harm, she would not have sat in her car, locked the door, and called her supervisor. He also claims she would not have stated she did not "have to go anywhere," or provoked appellant by asking him to hit her. With regard to Count 4, assault, appellant argues that

the social worker was not pushed out of the door because he had to open the front door and he politely walked her out and pointed to the signs.

{¶25} We are cognizant that the appellant was in his own home at the time of this incident, and it is plausable that he could have been initially alarmed by the presence of an unknown person in his residence. Nevertheless, the record reflects that the state presented credible evidence supporting the conviction for each offense. The social worker testified to being verbally and physically assaulted by appellant when she was at his home to investigate allegations of abuse and neglect of an elderly woman. She testified that appellant jumped in her face and profanely told her to get out of his house or he would blow her brains out, and that she feared for her safety and was afraid appellant was going to hurt her. Even if the social worker verbally responded to appellant's profanities and threats, the record demonstrates that the social worker had a subjective belief that appellant would cause her serious physical harm. The social worker testified that she tried to get out of the house as quickly as possible. She testified that appellant put his hands on her and pushed her out the door; that he followed her to her vehicle, where she locked the car door; and that he was continuously threatening her and using profanities. She testified that after she filed a police report, she retreated to her home because of the severe anxiety she suffered.

{¶26} After reviewing the entire record, we cannot conclude that the trier of fact clearly lost its way. We find that appellant's conviction was not against the manifest weight of the evidence.

{¶27} Accordingly, we affirm appellant's conviction on Counts 3 and 4, but we vacate the sentence that was erroneously imposed on Counts 1 and 2. We remand the case to the trial court for resentencing on the proper counts.

{¶28} Conviction affirmed; sentence vacated; cause remanded.

It is ordered that appellant and appellee share 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 common pleas 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.

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

SEAN C. GALLAGHER, JUDGE

MARY EILEEN KILBANE, P.J., CONCURS;
MELODY J. STEWART, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE OPINION

MELODY J. STEWART, J., CONCURRING IN PART AND DISSENTING IN PART:

{¶29} I concur with the majority with regard to Thomas's pro se assignment of error and the aggravated menacing conviction. However, I respectfully dissent from the majority's conclusion that Thomas's assault conviction was not against the manifest weight of the evidence.

{¶30} Although Thomas raises a manifest weight argument with regard to the assault conviction, when viewing the evidence in the light most favorable to the state, there does not appear to be sufficient evidence in this case to sustain the conviction and therefore it should be vacated. *See State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983), fn. 2 (stating, "[o]bviously, if the evidence is insufficient to support a conviction, the judgment is against the manifest weight of the evidence."). When reviewing the record for sufficient evidence to sustain a conviction, "'the 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. Pratts*, 8th Dist. Cuyahoga No. 104235, 2016-Ohio-8053, ¶ 46, quoting *State v. Jenks,* 61 Ohio St.3d 259, 574 N.E.2d 492 (1991), paragraph two of the syllabus.

{¶31} The evidence shows that even if Thomas pushed the social worker (a fact that Thomas disputes), it was in an attempt to get her to leave his home and not to cause her physical harm. There was no testimony as to the amount of force used such that it would be reasonable to infer that Thomas meant to cause physical harm to the social worker, or knowingly knew that the push could cause her such harm. Further, the push — although perhaps gratuitous based on the fact that the social worker was already leaving — appears to have been nothing more than Thomas's assertion of authority in his own home. Simply put, the facts of this case, at most, support the aggravated menacing charge by giving the victim a reason to believe that she may have been in danger of

serious physical harm, but do not establish a knowing attempt to cause harm. *Accord State v. Curlee-Jones*, 8th Dist. Cuyahoga No. 98233, 2013-Ohio-1175 (finding insufficient evidence of assault where the defendant's contact with a police officer was plainly part and parcel of her resisting arrest, and was not done to cause the officer harm); *State v. Kemper*, 2012-Ohio-5958, 983 N.E.2d 951(12th Dist.) (concluding that there was insufficient evidence to support defendant's assault conviction where there was no indication that defendant knowingly caused or attempted to cause physical harm to his girlfriend when he shoved her aside to gain entrance into his former residence in order to retrieve certain belongings). I therefore dissent with regard to this assigned error.