

STATE OF OHIO)
)ss:
COUNTY OF MEDINA)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C. A. No. 08CA0079-M

Appellee

v.

JEFFREY W. ABEREGG

APPEAL FROM JUDGMENT
ENTERED IN THE
WADSWORTH MUNICIPAL COURT
COUNTY OF MEDINA, OHIO
CASE No. 08CRB00436-A

Appellant

DECISION AND JOURNAL ENTRY

Dated: August 24, 2009

BELFANCE, Judge.

{¶1} Jeffery Aberegg was charged with and then convicted by a jury of one count of telecommunications harassment pursuant to R.C. 2917.21(A)(5). He seeks to reverse his conviction arguing that his conviction was against the manifest weight of the evidence and that the trial court improperly denied his Criminal Rule 29 motion. For the reasons set forth below, we affirm.

FACTS

{¶2} In 2001, Jeffrey Aberegg was barred from contacting the prosecutor's office in Wadsworth, Ohio. Aberegg had been calling so frequently that his calls were interrupting the work of the office. His calls were described as bizarre and threatening on some occasions. Because he would not stop calling, on May 11, 2001, a letter was sent to Aberegg which informed him he could no longer contact the Wadsworth Law Director's office. Notwithstanding that letter, Aberegg called occasionally, prefacing his calls or message, by admitting he should

not be calling.

{¶3} On May 23, 2008, Aberegg left a voicemail message on the phone of a paralegal employee at the Wadsworth Law Director's office. The call was reported to the police, whereupon a police report was completed and the charge for telecommunications harassment was authorized against Aberegg. Aberegg was subsequently convicted by a jury of one count of telecommunications harassment pursuant to R.C. 2917.21(A)(5). Aberegg now appeals his conviction setting forth two assignments of error. For ease of review, we will consider Aberegg's assignments of error in reverse order.

FAILURE TO GRANT CRIMINAL RULE 29 MOTION

{¶4} In his second assignment of error, Aberegg argues that the trial court erred in denying his Criminal Rule 29 motion to dismiss because there was insufficient evidence to support his conviction for telecommunications harassment. We review a denial of a defendant's Crim.R. 29 motion for acquittal by assessing the sufficiency of the State's evidence. *State v. Flynn*, 9th Dist No. 06CA0096-M, 2007-Ohio-6210, at ¶8. The relevant inquiry is whether the prosecution has met its burden of production by presenting sufficient evidence to sustain a conviction. *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390 (Cook, J., concurring). In reviewing the evidence, we do not evaluate credibility and make all reasonable inferences in favor of the State. *State v. Jenks* (1991), 61 Ohio St.3d 259, 273. The State's evidence is sufficient if it allows the jury to reasonably conclude that the essential elements of telecommunications harassment were proven beyond a reasonable doubt. *Id.*

{¶5} Mr. Aberegg was charged with a violation R.C. 2917.21(A)(5) which provides:

"No person shall knowingly make or cause to be made a telecommunication, or knowingly permit a telecommunication to be made from a telecommunication device under the person's control, to another, if the caller * * * [k]nowingly 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.”

{¶6} To prove that Aberegg 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.” *Bentleyville v. Pisani* (Aug. 22, 1996), 8th Dist. No. 69063-69066, at *7. A person acts knowingly when, regardless of his purpose, he is aware of the existence of the facts and that his conduct will probably cause a certain result or be of a certain nature. R.C. 2901.22(B).

{¶7} In his merit brief, Aberegg argues that the State did not offer evidence to prove the purpose of the calls or whether the calls were made with specific intent to abuse, threaten, annoy, or harass. However, the State charged Aberegg with a violation of R.C. 2917.21(A)(5). This subsection of the telecommunications harassment statute does not require the State to prove that the purpose of the call was to abuse, threaten, annoy, or harass. Thus, Aberegg’s argument is misplaced.

{¶8} The State did offer unrebutted evidence that on May 11, 2001, a letter from the Wadsworth Law Director’s office was sent to Aberegg. The letter contained the admonition that Aberegg refrain from calling the Wadsworth Law Director’s office. The State further offered evidence that subsequent to the mailing of the letter, Aberegg placed calls to the Wadsworth Law Director’s office during which he acknowledged that he was not supposed to call. The State also presented evidence that on May 23, 2008, Aberegg placed a call to the Wadsworth Law

Director's office and left a voicemail message. The voicemail message itself was offered into evidence at trial. Further, the paralegal who had received the call testified that she had retrieved the call from her voicemail and she recognized Aberegg as the caller. Viewing the evidence in the light most favorable to the State, we determine that the evidence presented at trial was sufficient to allow the jury to find that Aberegg committed the offense of telecommunications harassment pursuant to R.C. 2917.21(A)(5).

MANIFEST WEIGHT OF THE EVIDENCE

{¶9} In his first assignment of error, Aberegg argues that his conviction was against the manifest weight of the evidence. We disagree.

{¶10} When determining whether a conviction is supported by 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 and a new trial ordered.” *State v. Cepec*, 9th Dist. No. 04CA0075-M, 2005-Ohio-2395, at ¶6, quoting *State v. Otten* (1986), 33 Ohio App.3d 339, 340.

We must only invoke the discretionary power to grant a new trial in “extraordinary circumstances when the evidence presented weighs heavily in favor of the defendant.” *Flynn* at ¶9, citing *Otten*, 33 Ohio App.3d at 340. When reviewing a conviction pursuant to the manifest weight standard, we must determine whether the State met its burden of persuasion. *Cepec* at ¶6.

{¶11} Aberegg again argues that his conviction was against the manifest weight of the evidence because the evidence did not warrant a finding that his call was abusive, annoying, harassing, or threatening. In support, he also directs the Court to *State v. Bonifas* (1993), 91 Ohio App.3d 208. However, as noted above, in order to convict Aberegg under R.C. 2917.21(A)(5), the State did not have to prove that Aberegg's call was abusive, threatening,

annoying, or harassing. Instead, the State had to prove that Aberegg knowingly made a telecommunication under circumstances where he had been previously told not to make a telecommunication to the premises or any persons at the premises. See R.C. 2917.21(A)(5). Furthermore, *Bonifas* is inapplicable to this matter because in that case, the court of appeals considered a conviction for telecommunications harassment under R.C. 2917.21(B) and not R.C. 2917.21(A)(5). *Bonifas*, 91 Ohio App.3d at 209.

{¶12} The State offered evidence that Aberegg had been notified via letter from the Wadsworth Law Director's office to refrain from contacting the office. The State offered evidence that Aberegg subsequently made calls to the law director's office in which he acknowledged that he knew he was not supposed to be calling. The State also offered evidence that subsequent to the mailing of the May 11, 2001 letter directing Aberegg not to call the law director's office, on May 23, 2008, Aberegg left a voicemail message at the law director's office.

{¶13} After careful review of all of the evidence presented at trial, we cannot say that the jury clearly lost its way in determining that Aberegg committed the offense of telecommunications harassment pursuant to R.C. 2917.21(A)(5). As Aberegg has not provided any credible support for his contention that his conviction was against the manifest weight of the evidence, we determine that this assignment of error lacks merit.

CONCLUSION

{¶14} In light of the foregoing, we affirm the judgment of the Wadsworth Municipal Court.

Judgment affirmed.

We order that a special mandate issue out of this Court, directing the Wadsworth Municipal Court, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

EVE V. BELFANCE
FOR THE COURT

WHITMORE, J.
MOORE, P. J.
CONCUR

APPEARANCES:

WESLEY A. JOHNSTON, Attorney at Law, for Appellant.

PAGE C. SCHROCK, III, Attorney at Law, for Appellee.