

STATE OF OHIO)
)ss:
COUNTY OF WAYNE)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

STATE OF OHIO

C.A. No. 09CA0004

Appellee

v.

LISA M. OSBORNE

APPEAL FROM JUDGMENT
ENTERED IN THE
WAYNE COUNTY MUNICIPAL COURT
COUNTY OF WAYNE, OHIO
CASE No. CRB-08-02-00167

Appellant

DECISION AND JOURNAL ENTRY

Dated: May 3, 2010

BELFANCE, Judge.

{¶1} Appellant-Defendant Lisa M. Osborne appeals her conviction from the Wayne County Municipal Court for telecommunications harassment. For the reasons that follow, we affirm.

I.

{¶2} On November 16, 2007 between 4:00 and 5:00 p.m., Bailey Duncan (“Bailey”) received a series of derogatory, racially-charged text messages on her cell phone from an unfamiliar phone number while she was attending class. At that same time at a Verizon Wireless store in Wooster, Ohio, Bailey’s sister, Ashley Duncan (“Ashley”) noticed Lisa Osborne and Crystal Miller at one of the store’s displays of demonstration cell phones. The demonstration phones are fully operational to allow customers to experiment with the phones’ various features. Osborne and Miller were handling two of the demonstration phones and appeared to be intoxicated because they were loud and laughing. Another Verizon employee, Alyssa Johns, also

saw Osborne and Miller using the demonstration phones. Neither Ashley nor Johns was able to hear the conversation between Osborne and Miller because there were several customers present in the store for its grand opening.

{¶3} Ashley and Johns were aware that Bailey had received harassing calls and text messages from Osborne and Miller in the past. In addition, Bailey's boyfriend at the time had previously dated Osborne. After Osborne and Miller left the demonstration display, but before they left the store, Ashley asked Johns to look at the phones Osborne and Miller had been using. Johns examined the call log on one of the phones and noticed that it had very recently been used to make a series of contacts with Bailey's phone. Johns called Bailey from the phone to check on her. As Osborne and Miller walked past Ashley at the service counter to exit the store, Ashley shouted to them that they should leave Bailey alone. Miller slammed something on the counter and shouted back at Ashley. Osborne and Miller then left the store.

{¶4} The police were called to the Verizon Wireless store and Bailey left class to go to the store. Officer Bill Belcher of the Wooster Police Department responded and took statements from Bailey, Ashley, and Johns. He examined the text messages on Bailey's phone but was unable to photograph them clearly. Instead, Officer Belcher wrote the contents of the messages in his report. Officer Belcher returned Bailey's phone to her and did not seize it. Officer Belcher also spoke with Osborne the day of the incident and the next day. Osborne admitted that she had sent text messages to Bailey on occasions prior to November 16, 2007, but did not admit to sending any messages on November 16.

{¶5} Osborne pled not guilty and a trial to the bench was held. The trial court found Osborne guilty of telecommunications harassment and sentenced her accordingly. On appeal,

Osborne argues in her single assignment of error that her conviction was based on insufficient evidence and is against the manifest weight of the evidence.

II.

Sufficiency

{¶6} Whether a conviction is supported by sufficient evidence is a question of law that we review de novo. *State v. Williams*, 9th Dist. No. 24731, 2009-Ohio-6955, at ¶18, citing *State v. Thompkins* (1997), 78 Ohio St.3d 380, 386. The relevant inquiry is whether the prosecution has met its burden of production by presenting sufficient evidence to sustain a conviction. *Thompkins*, 78 Ohio St.3d at 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, when viewing the evidence in a light most favorable to the prosecution, it allows the jury to reasonably conclude that the essential elements of the charged crime were proven beyond a reasonable doubt. *Id.* The State must prove the identity of the perpetrator of the crime beyond a reasonable doubt. *State v. Flynn*, 9th Dist. No. 06CA0096-M, 2007-Ohio-6210, at ¶12. “The identity of a perpetrator may be established using direct or circumstantial evidence.” *Id.*

{¶7} Osborne was convicted of violating R.C. 2917.21(B), which states: “[n]o person shall make or cause to be made a telecommunication, or permit a telecommunication to be made from a telecommunications device under the person’s control, with purpose to abuse, threaten, or harass another person.” Text messages sent between cell phones are telecommunications from a telecommunications device. R.C. 2913.01(X), (Y). One acts with purpose “when it is [her] specific intention to cause a certain result, or, when the gist of the offense is a prohibition against

conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is [her] specific intention to engage in conduct of that nature.” R.C. 2901.22(A).

{¶8} Johns testified that Osborne was in the Verizon Wireless store on November 16, 2007, between 4:00 and 5:00 p.m. Osborne was in the store with her friend, Miller, and the two were talking loudly and laughing. Johns noticed Osborne handling and using one of the demonstration cell phones. Immediately after Osborne and Miller left the display, Johns went to the phones and saw that one had been used to contact a phone number she recognized as Bailey’s. Johns was aware that Osborne and/or Miller had harassed Bailey in the past with derogatory calls and text messages. Johns called Bailey from the demonstration phone to ask if she was okay.

{¶9} Bailey stated that she had received several text messages around 5:00 p.m. on November 16, 2007, containing harsh and racist language. She did not recognize the phone number from which the messages came. Immediately after receiving the messages, she spoke with Johns at that same number. Bailey testified that Osborne and Miller had sent her similar messages in the past. The State asserts in its reply brief that Osborne admitted to sending text messages to Bailey on November 16, 2007. However, our review of the transcript demonstrates that Osborne admitted only to sending text messages in the past but did not comment on whether she sent text messages on the day of the incident.

{¶10} Osborne contends that, at best, the evidence leads to the conclusion that she or Miller sent the text messages to Bailey because no witness could testify as to when Osborne used the demonstration cell phone versus when Miller used the phone. In support of this assertion, Osborne cites two cases from the Second District Court of Appeals, *State v. Hulsey* (1968), 15 Ohio App.2d 153, and *Dayton v. Glisson* (1987), 36 Ohio App.3d 159. In *Hulsey*, the defendant

was convicted of making harassing telephone calls to a neighbor. *Hulsey*, 15 Ohio App.2d at 153-154. The defendant lived at home with her husband and teenage daughter. *Id.* at 155. Although the calls to the neighbor were placed from the defendant's home phone, the defendant denied using the telephone at the time at which the call was placed and no one witnessed her on the phone at the time. *Id.* at 158. Additionally, the defendant's daughter admitted to making several telephone calls near the time the neighbor was called. *Id.* The appellate court reversed the conviction as against the manifest weight of the evidence. *Id.* at 159.

{¶11} A similar situation was presented in *Glisson*. The defendant was an apartment complex manager convicted of telephone harassment of a tenant. *Glisson*, 36 Ohio App.3d at 159. The evidence established that the calls to the tenant originated from the defendant's home telephone; however, the phone number was registered to the defendant and her husband. *Id.* The appellate court held that *Glisson*'s conviction was based on insufficient evidence because the State could not prove beyond a reasonable doubt that *Glisson*, rather than her husband, had made the calls. *Id.* at 160-161.

{¶12} The cases discussed are factually distinct from the case at bar. Unlike *Hulsey* and *Glisson*, in the instant matter, eyewitness testimony established that Osborne and Miller used the demonstration cell phone from which the text messages were sent to Bailey. Thus, when viewing the evidence in the light most favorable to the State, the above evidence is sufficient to establish that Osborne made, caused to be made, or permitted telecommunications to be made to Bailey with the purpose to harass or abuse her. See R.C. 2917.21(B). Osborne and Miller were both seen handling and using the cell phone as they were talking and laughing together. Thus, for some portion of the time that the two were in the store, Osborne had both the control and use of the phone. See *id.* Immediately after they ceased using the phone, Johns observed that the

phone had been used to contact Bailey. While no witness could testify as to which woman typed each text message or which woman physically hit the button to send them, evidence was presented at trial from which a rational trier of fact could reasonably infer that Osborne either made, caused to be made or permitted the offensives messages to be sent to Bailey's cell phone.

Manifest Weight

{¶13} 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.

{¶14} Osborne raises questions of credibility as to a key piece of evidence – Bailey's cell phone. On the day of the incident, Officer Belcher reviewed the offensive text messages on Bailey's phone, but was not able to photograph them clearly. Officer Belcher wrote the contents of the messages, the phone number from which they emanated, and the time-stamp of the messages in his report and returned the phone to Bailey. Officer Belcher did not actually gain possession of the phone itself until Bailey gave it to him at a hearing scheduled shortly before trial. On that occasion, he was able to photograph the text messages on the phone. The police report, the photographs Officer Belcher took of the text messages and the phone itself were presented during the trial. These exhibits and the others admitted at the trial were not made part

of the record on appeal. Notwithstanding this omission, the transcript of the trial provides an adequate basis upon which to affirm Osborne's conviction.

{¶15} Osborne demonstrated at trial that the contents of the messages as written by Officer Belcher in his report contained slight differences in spelling from those shown on the phone's display. Despite this fact, Officer Belcher testified that the photographs of the messages and the messages that appeared on the phone the day of trial were the same messages that he observed on the day of the incident.

{¶16} Moreover, a technical support employee with Verizon Wireless testified that a text message received by a specific cell phone cannot be edited by the recipient and saved in the recipient's cell phone. The employee further testified that it is not possible to edit the number displayed on the recipient's cell phone that indicates the phone number from which the text message was sent. Thus, it is not possible that the contents of the text messages could have been altered while the phone was in Bailey's possession.

{¶17} Having addressed Osborne's only argument with respect to the manifest weight of the evidence, we determine that the trier of fact did not lose its way in resolving conflicts in the evidence. See *Cepec* at ¶6, quoting *Otten*, 33 Ohio App.3d at 340. Osborne's conviction for telecommunications harassment is not against the manifest weight of the evidence.

III.

{¶18} Osborne's sole assignment of error is overruled. The decision of the Wayne County Municipal Court is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Wayne County Municipal Court, County of Wayne, 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

MOORE, J.
DICKINSON, P. J.
CONCUR

APPEARANCES:

AARON J. WILSON, Attorney at Law, for Appellant.

MARTIN FRANTZ, Prosecuting Attorney, and LATECIA E. WILES, Assistant Prosecuting Attorney, for Appellee.