[Cite as *State v. Brandon*, 2011-Ohio-1349.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF SUMMIT	)	

STATE OF OHIO	C.A. No. 25299
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
KEVIN DWAYNE BRANDON	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. CR 09 12 3625

DECISION AND JOURNAL ENTRY

Dated: March 23, 2011

CARR, Presiding Judge.

{¶1} Appellant, Kevin Brandon, appeals the judgment of the Summit County Court of Common Pleas. This Court affirms.

I.

{¶2} This case stems out of a dispute between Kevin Brandon and his wife, Terri Peake-Brandon, which occurred in the early morning hours of November 30, 2009, at 1163 Herman Ave., in Akron, Ohio. The substantive facts are discussed in detail below.

{¶3} On December 10, 2009, the Summit County Grand Jury indicted Brandon on one count of domestic violence in violation of R.C. 2919.25(A), a felony of the third degree, as well as domestic violence in violation of R.C. 2919.25(C), a misdemeanor of the first degree. Brandon pleaded not guilty to the charges in the indictment. On February 11, 2010, the matter proceeded to trial. The parties stipulated on the record that Brandon had three prior domestic violence convictions. A jury subsequently found Brandon guilty of domestic violence menacing

under R.C. 2919.25(C). Brandon was found not guilty of domestic violence assault under R.C. 2919.25(A). The trial court sentenced Brandon to six months in jail. On March 16, 2010, Brandon filed his notice of appeal.

{¶4} On appeal, Brandon raises two assignments of error.

II.

ASSIGNMENT OF ERROR I

> "THE EVIDENCE IN THIS CASE WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT A CONVICTION OF FELONIOUS ASSAULT AND AS A RESULT THE APPELLANT'S RIGHTS AS PROTECTED BY ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION AND FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION WERE VIOLATED."

ASSIGNMENT OF ERROR II

> "THE VERDICTS IN THIS CASE WERE AGAINST THE MANIFEST WEIGHT EVIDENCE AND AS A RESULT, APPELLANT'S RIGHTS AS PROTECTED BY ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION AND FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION WERE VIOLATED."

{¶5} In his first assignment of error, Brandon argues that his domestic violence menacing conviction was not supported by sufficient evidence. In his second assignment of error, Brandon argues that his domestic violence menacing conviction was against the manifest weight of the evidence. This Court disagrees with both assertions.

{¶6} Brandon was convicted of domestic violence in violation of R.C. 2919.25(C), which states, "No person, by threat of force, shall knowingly cause a family or household member to believe that the offender will cause imminent physical harm to the family or household member." R.C. 2901.22(B) states:

> "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶7} This Court has noted that while the term "threat" is not defined in the Revised Code, the Supreme Court of Ohio has stated that "[t]he term 'threat' represents a range of statements or conduct intended to impart a feeling of apprehension in the victim, whether of bodily harm, property destruction, or lawful harm, such as exposing the victim's own misconduct." *State v. McKinney*, 9th Dist. No. 24430, 2009-Ohio-2225, at ¶8, quoting *State v. Cress*, 112 Ohio St.3d 72, 2006-Ohio-6501, at ¶39. R.C. 2901.01(A)(1) defines "force" as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing." R.C. 2919.25(F)(1)(a)(i) defines "Family or household member" as "[a]ny *** spouse, a person living as a spouse, or a former spouse of the offender." This Court has defined the term "imminent" as:

> "'ready to take place,' 'near at hand,' 'impending,' 'hanging threateningly over one's head,' or 'menacingly near.' 'Imminent' does not mean that 'the offender carry out the threat immediately or be in the process of carrying it out.' Rather, the critical inquiry is 'whether a reasonable person would be placed in fear of imminent (in the sense of unconditional, non-contingent), serious physical harm[.]" *McKinney* at ¶11, quoting *State v. Tackett*, 4th Dist. No. 04CA12, 2005-Ohio-1437, at ¶14.

R.C. 2901.01(A)(3) defines "physical harm" as "any injury, illness, or other physiological impairment, regardless of its gravity or duration."

Sufficiency of the Evidence

{¶8} The law pertaining to a challenge to the sufficiency of the evidence is well settled:

> "An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. 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. Galloway* (Jan. 31, 2001), 9th Dist. No. 19752.

The test for sufficiency requires a determination of whether the State has met its burden of production at trial. *State v. Walker* (Dec. 12, 2001), 9th Dist. No. 20559; see, also, *State v. Thompkins* (1997), 78 Ohio St.3d 380, 390.

{¶9} In support of his first assignment of error, Brandon argues that while the State presented evidence which demonstrated that he was irritated with his wife as well as the responding officers, no evidence was presented which tended to show that Brandon, by the use of threat of force, caused his wife to believe that he would cause imminent physical harm. Brandon contends that his actions when the police arrived at the scene cannot be construed as evidence that he violated R.C. 2919.25(C) because of the "substantial lapse in time" between the time he had an argument with Ms. Peake-Brandon and the time the police arrived. Brandon further contends that any statements he made during jail calls could not have resulted in Ms. Peake-Brandon fearing imminent harm because there was no evidence presented that Ms. Peake-Brandon was aware of those statements.[1]

{¶10} The State called three witnesses at trial. The first was Officer Michael Kline of the Akron Police Department. Officer Kline testified as follows. In the early morning hours of November 30, 2009, he responded to a domestic disturbance call at 1163 Herman Ave., in Akron, Ohio. Upon arrival, Terri Peake-Brandon met him at the front door and he went inside. Officer Kline testified Ms. Peake-Brandon was "very shaken up" because "something obviously had just occurred." Brandon was "yelling" and "being pretty loud" when Officer Kline entered the home. Ms. Peake-Brandon "needed to take a minute to settle down" before she could give

[1] While Brandon was in the Summit County Jail, he made calls to his mother and sister in which he discussed his relationship with Ms. Peake-Brandon. Several of these calls were played for the jury at trial.

her statement to the police officers. Ms. Peake-Brandon told the officers that her husband had not been home for a couple days and then he entered the home just after midnight. Ms. Peake-Brandon indicated that when she inquired as to why Brandon was in the house, he "immediately started yelling at her." Ms. Peake-Brandon told the officers that her husband "grabbed her by her shirt" and said "get out of my f***ing face." Officer Kline testified that he did not observe injuries on Ms. Peake-Brandon and that she did not claim to have sustained injuries. Officer Kline further testified that Brandon was "very loud the whole time we were dealing with him." Brandon indicated that he "was not going anywhere" and he "kept cursing" at the officers. Officer Kline testified that Brandon was arrested for domestic violence "based on the fact that he grabbed [Ms. Peake-Brandon] by the shirt and shook her. And she was afraid for her well-being." Officer Kline indicated he surmised that Ms. Peake-Brandon feared for her well-being because "she was very *** shaken up" and she "didn't seem like she felt safe."

{¶11} Officer Anthony Roetzel of the Akron Police Department also testified on behalf of the State at trial. Officer Roetzel testified that he was Officer Kline's partner on November 30, 2009, and that he also responded to the domestic disturbance call at 1163 Herman Ave. Officer Roetzel testified that Ms. Peake-Brandon "stated that [Brandon] came home after a few days [of] her not seeing him and [he] grabbed her by the shirt and shook her." Officer Roetzel testified that when he had contact with Ms. Peake-Brandon, she "seemed distraught, upset." Officer Roetzel testified that he had limited contact with Brandon. Officer Roetzel indicated that Brandon was "hard to talk to because he was so agitated."

{¶12} Ms. Terri Peake-Brandon also testified on behalf of the State at trial. Ms. Peake-Brandon testified as follows. She and Brandon had been married for four years at the time of the trial. Brandon was living with Ms. Peake-Brandon at the Herman Ave. residence. At just after

midnight on November 30, 2009, Ms. Peake-Brandon was getting ready to go to bed and she went downstairs to make sure all of the doors to the house were locked. When Ms. Peake-Brandon went to check the door on the closed-in front porch, she noticed a car in the driveway which belonged to Brandon's cousin. Ms. Peake-Brandon had not heard anyone enter the home but she went into the basement to see if anyone was there. She found Brandon and she proceeded to ask, "What are you doing here?" When Brandon did not answer, Ms. Peake-Brandon again asked, "Why are you here?" Brandon then asked, "What [do] you mean?" Ms. Peake-Brandon responded, "You have not been here all weekend. *** So why are you here now?" Ms. Peake-Brandon then said:

> "Kevin, *** you got paid on Friday, *** you have not given me any money, and you been gone all weekend long. *** As a matter of fact, you have not given me any money in I don't know when. So you think you are supposed to come in here, eat up my food, not help pay the rent, not help pay any of the utilities, and I'm supposed to be all right with that? *** Well, I'm not. *** So wherever you was at this entire weekend, that is where you need to go back."

{¶13} Ms. Peake-Brandon testified that Brandon then got up off the couch, walked toward her and said, "You know what, you didn't give a f*** about where I been, so why you give a f*** now? And no, I'm not giving you no f***ing money." Ms. Peake-Brandon testified that Brandon then grabbed her by her collar of her pajamas and said, "So you better get the f*** out of my face."

{¶14} Ms. Peake-Brandon then testified as follows:

> "When he let me go, I got up out of his face. I went up the steps. As I was going up the steps, I came across the basement steps, and I thought he was coming behind me, but he must not have. And as I got to the other part of our steps that curve around, I got to the one part of them, before I could get all the way to the second part, I had hollered out to my daughter to dial 911. And that is when she dialed 911. And when I got up there, she handed me the phone."

{¶15} The ensuing 911 call was played for the jury at trial. When Ms. Peake-Brandon took the phone from her daughter, she identified the man in her house as her husband, Kevin Brandon, and indicated that she was in the midst of a "domestic situation." She further told the dispatcher that Brandon had not been there "in a couple days" and that he got "up in my face trying to fight me." Ms. Peake-Brandon testified that after she concluded her call she waited for the police to arrive. When she saw that the police had arrived, she let them into the house. Ms. Peake-Brandon testified that Brandon was acting "belligerent" and "going off on the police officer." When asked how she felt when Brandon grabbed her in "the neck area," Ms. Peake-Brandon testified that she "felt threatened because it was not his first time ever doing that." Ms. Peake-Brandon testified that while Brandon made contact with her neck when he was grabbing her collar, she did not suffer any injuries as a result of the incident.

{¶16} Reviewing the evidence presented at trial in the light most favorable to the State, this Court concludes that any rational trier of fact could have found the essential elements of the charge of domestic violence menacing were proved beyond a reasonable doubt. See *Galloway*, supra. The State presented evidence that Brandon appeared unexpectedly at the residence located at 1163 Herman Ave. and was involved in an argument with Ms. Peake-Brandon. Ms. Peake-Brandon testified that Brandon approached her and said, "You know what, you didn't give a f*** about where I been, so why you give a f*** now? And no, I'm not giving you no f***ing money." Ms. Peake-Brandon testified that Brandon then grabbed her by the collar of her pajamas and said, "So you better get the f*** out of my face." While Ms. Peake-Brandon did not suffer any injuries, she testified that Brandon did make contact with her neck when he grabbed her by the collar. It is reasonable that a rationale trier of fact would conclude that, at that moment, Brandon's words and actions caused Ms. Peake-Brandon to believe that she was in

danger of experiencing imminent physical harm. The jury's conclusion was supported by the fact that Ms. Peake-Brandon's testimony that she thought Brandon was "coming behind [her]" as she attempted to leave the basement. When Ms. Peake-Brandon talked to the 911 dispatcher immediately thereafter, she stated that Brandon got in her face and tried "to fight" her. Ms. Peake-Brandon testified at trial that she "felt threatened because it was not his first time ever doing that." Accordingly, the evidence presented at trial, when construed in the light most favorable to the State, was sufficient to show that Brandon had violated R.C. 2919.25(C).

{¶17} Brandon's first assignment of error is overruled.

Manifest Weight of the Evidence

{¶18} An appellate court's review of the sufficiency of the evidence and the manifest weight of the evidence adduced at trial are separate and legally distinct determinations. *State v. Gulley* (Mar. 15, 2000), 9th Dist. No. 19600. "While the test for sufficiency requires a determination of whether the state has met its burden of production at trial, a manifest weight challenge questions whether the state has met its burden of persuasion." Id., citing *Thompkins*, 78 Ohio St.3d at 390 (Cook J., concurring).

{¶19} A determination of whether a conviction is against the manifest weight of the evidence, however, does not permit this Court to view the evidence in the light most favorable to the State to determine whether the State has met its burden of persuasion. *State v. Love*, 9th Dist. No. 21654, 2004-Ohio-1422, at ¶11. Rather,

> "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. Otten* (1986), 33 Ohio App.3d 339, 340.

> "Weight of the evidence concerns the tendency of a greater amount of credible evidence to support one side of the issue more than the other. *Thompkins*, 78 Ohio St.3d at 387. Further, when reversing a conviction on the basis that it was against the manifest weight of the evidence, an appellate court sits as a 'thirteenth juror,' and disagrees with the factfinder's resolution of the conflicting testimony. Id." *State v. Tucker*, 9th Dist. No. 06CA0035-M, 2006-Ohio-6914, at ¶5.

This discretionary power should be exercised only in exceptional cases where the evidence presented weighs heavily in favor of the defendant and against conviction. *Thompkins*, 78 Ohio St.3d at 387.

{¶20} In support of his position, Brandon argues that no evidence was presented showing that he threatened his wife either during their argument or after the police were called. Brandon again emphasizes that no evidence was presented that Ms. Peake-Brandon was aware of the statements he made during jail calls. Brandon contends that the jury clearly "lost its way in believing that the State of Ohio had met its burden of proof in this matter."

{¶21} While Brandon correctly notes that a verdict can be against the manifest weight of the evidence even though it is supported by legally sufficient evidence, he has not pointed to competing evidence which would suggest that the greater amount of credible evidence supported an acquittal on the domestic violence menacing charge. Instead, Brandon's argument in support of his second assignment of error amounts to a renewal his assertion that the State did not meet its burden of proof. As we discussed above, Ms. Peake-Brandon testified that Brandon approached her during the midst of an argument about why he was in the house. Ms. Peake-Brandon testified that her husband said, "You know what, you didn't give a f*** about where I been, so why you give a f*** now? And no, I'm not giving you no f***ing money." Ms. Peake-Brandon testified that Brandon then grabbed her by the collar of her pajamas and said, "So you better get the f*** out of my face." Ms. Peake-Brandon further testified that she "felt threatened because it was not his first time ever doing that." The testimony of Officer Kline and Officer

Roetzel indicates that Ms. Peake-Brandon's statement on the night of the incident was consistent with her testimony at trial. Thus, as Brandon has not pointed to any evidence tending to show that Ms. Peake-Brandon's testimony was not credible or that the event transpired in a different manner, this Court concludes that the jury did not clearly lose its way in finding that Brandon was guilty of domestic violence menacing in violation of R.C. 2919.25(C).

{¶22} Brandon's second assignment of error is overruled.

III.

{¶23} Brandon's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, 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.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
MOORE, J.
CONCUR

APPEARANCES:

CHRISTOPHER R. SNYDER, Attorney at Law, for Appellant.

SHERRI BEVAN WALSH, Prosecuting Attorney, and RICHARD S. KASAY, Assistant Prosecuting Attorney, for Appellee.