[Cite as *State v. Hess*, 2014-Ohio-4143.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

		JUDGES:
STATE OF OHIO	:	Hon. William B. Hoffman, P. J.
	:	Hon. W. Scott Gwin, J.
Plaintiff-Appellee	:	Hon. John W. Wise, J.
	:	
-vs-	:	
	:	Case No. 14-CA-11
DONALD HESS, JR.	:	
	:	
Defendant-Appellant	:	O P I N I O N

CHARACTER OF PROCEEDING:	Criminal appeal from the Licking County Municipal Court, Case No. 13CRB02233
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	September 12, 2014

APPEARANCES:

For Plaintiff-Appellee	For Defendant-Appellant
TRICIA MOORE Assistant Law Director 40 West Main Street, 4th Fl. Newark, OH 43055	WILLIAM CRAMER 470 Olde Worthington Road, Ste. 200 Westerville, OH 43082

Gwin, J.

{¶1} Appellant Donald Hess ["Hess"] appeals his conviction and sentence for one count of telecommunications harassment in violation of R.C. 2917.21, a first-degree misdemeanor, following a bench trial in the Licking County Municipal Court.

Facts and Procedural History

{¶2} Darlena Messina and Hess had been in a relationship for approximately a year and a half, but have known each other since 1982. On October 14, 2013, Messina had an appointment with her probation officer Angela Laughlin. Messina was on probation for credit card theft. Probation Officers Laughlin and Josh Varble were both present for the appointment

{¶3} Although telephones are not permitted in the courthouse where the probation office is located, Messina was permitted to bring her telephone into the courthouse to show her probation officer some text messages from Hess, her ex-boyfriend. Messina claimed that Hess had been harassing her and it was causing many problems. Her probation officer was worried about her and wanted to see the text messages from Hess. Courthouse security brought her telephone into the probation office.

{¶4} Shortly after showing the probation officer the text messages from Hess, Messina claimed to receive a call from Hess' niece. Messina testified that she could hear Hess in the background. Hess was trying to talk to Messina, but Messina did not want to talk. Hess started yelling and screaming. The niece did not want to be in the middle of it, so they hung up the phone.

{¶5} A few minutes later, Hess allegedly called Messina back from his own telephone. Messina again told Hess that she did not want to talk with him and he began threatening her. Messina put her phone on speaker so her probation officer could hear. Hess said that he and Messina were both going to die and they were going to bury them both. The probation officer told Messina to hang up the telephone. Hess tried to call back. After the call, Messina and her probation officer called the police and filled out statements.

{¶6} Messina admitted that she and Hess have been on and off for some time. Messina also admitted that she went to Hess's house to socialize with him even after this incident.

{¶7} Probation Officer Varble testified that he shared an office with Messina's probation officer and was present for the telephone calls. Varble testified that he heard a male voice say that he was going to kill Messina and bury her and then kill himself if he did not get what he wanted. Messina told Varble that the caller was Hess.

{¶8} Messina's probation officer was not able to testify. However, her report indicated that Hess said they were both going to die and be buried, not that he was going to kill her and bury her. Officer Varble could not account for the difference, but admitted that he wrote out his statement later in the day. Additionally, Officer Varble admitted that it was possible Messina had someone else make the call and just said it was Hess.

{¶9} Hess testified in his own defense and denied making the phone call. Hess said he was probably working the day in question from 9:00 a.m. to 4:00 p.m. Hess testified that he lost his phone that day and did not find it until later that afternoon. Hess

admitted that he had been seeing Messina and they were romantically involved even after this charge was filed. Hess claimed that Messina actually slept over at his house in his bed as recently as December 2013.

{¶10} Hess admitted the police told him to stop calling Messina. Hess claimed he stopped, but Messina kept calling him.

{¶11} At the conclusion of the evidence, the trial court found Hess guilty. Hess was sentenced to one year of community control and a fine of $175, with 90 days in jail suspended.

Assignments of Error

{¶12} Hess raises two assignments of error,

{¶13} "I. APPELLANT'S STATE AND FEDERAL RIGHTS TO DUE PROCESS WERE VIOLATED BECAUSE HIS CONVICTION WAS NOT SUPPORTED BY SUFFICIENT EVIDENCE.

{¶14} "II. APPELLANT'S CONVICTION WAS NOT SUPPORTED BY THE WEIGHT OF THE EVIDENCE."

I. & II.

{¶15} Because Hess' first and second assignments of error each require us to review the evidence, we shall address the assignments collectively.

{¶16} Hess' first assignment of error challenges the sufficiency of the evidence; his second assignment of error contends his convictions are against the manifest weight of the evidence produced by the state at trial. Specifically, Hess contends the state failed to prove he was the man who telephoned Messina. Hess further contends that

because Messina's credibility was suspect the trial court could not rely on it to convict Hess.

Analysis

{¶17} Our review of the constitutional sufficiency of evidence to support a criminal conviction is governed by *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), which requires a court of appeals to determine whether "after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id.; see also *McDaniel v. Brown*, 558 U.S. 120, 130 S.Ct. 665, 673, 175 L.Ed.2d 582(2010) (reaffirming this standard); *State v. Fry*, 125 Ohio St.3d 163, 926 N.E.2d 1239, 2010–Ohio–1017, ¶146; *State v. Clay*, 187 Ohio App.3d 633, 933 N.E.2d 296, 2010–Ohio–2720, ¶68.

{¶18} Weight of the evidence addresses the evidence's effect of inducing belief. *State v. Thompkins*, 78 Ohio St.3d 380, 386-387, 678 N.E.2d 541 (1997), *superseded by constitutional amendment on other grounds as stated by State v. Smith,* 80 Ohio St.3d 89, 684 N.E.2d 668, 1997-Ohio–355. Weight of the evidence concerns "the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other. It indicates clearly to the jury that the party having the burden of proof will be entitled to their verdict, if, on weighing the evidence in their minds, they shall find the greater amount of credible evidence sustains the issue, which is to be established before them. Weight is not a question of mathematics, but depends on its effect in inducing belief." (Emphasis sic.) Id. at 387, 678 N.E.2d 541, quoting Black's Law Dictionary (6th Ed. 1990) at 1594.

{¶19} When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a "'thirteenth juror'" and disagrees with the fact finder's resolution of the conflicting testimony. Id. at 387, 678 N.E.2d 541, quoting *Tibbs v. Florida*, 457 U.S. 31, 42, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982). However, an appellate court may not merely substitute its view for that of the jury, but must find that "'the jury 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*, supra, 78 Ohio St.3d at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717, 720–721(1st Dist. 1983). Accordingly, reversal on manifest weight grounds is reserved for "'the exceptional case in which the evidence weighs heavily against the conviction.'" Id.

> "[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts.
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> * * *
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> "If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment."

Seasons Coal Co., Inc. v. Cleveland, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 60, at 191–192 (1978).

{¶20} Messina was familiar with Hess' voice and could properly identify him as the caller. See, Evid.R. 901(B)(5). "Once sufficient evidence is offered to satisfy the admissibility requirements of Evid. R.901(B)(5), the sufficiency of such testimony to prove the defendant's identity is a matter to be weighed and considered by the trier of fact. *See United States v. Armedo Sarmiento* (1976 2d.Cir.) 545 F.2d.785." *State v. Howland*, Fourth District, Highland No. 439, 1982 WL 3424(Apr. 15, 1982) at *5.

{¶21} If the state relies on circumstantial evidence to prove an essential element of an offense, it is not necessary for "such evidence to be irreconcilable with any reasonable theory of innocence in order to support a conviction." *State v. Jenks*, 61 Ohio St.3d 259, 272, 574 N.E. 2d 492(1991), paragraph one of the syllabus, *superseded by State constitutional amendment on other grounds as stated in State v. Smith*, *80 Ohio St.3d 89, 684 N.E.2d 668(1997).* "Circumstantial evidence and direct evidence inherently possess the same probative value [.]" *Jenks*, 61 Ohio St.3d at paragraph one of the syllabus. Furthermore, "[s]ince circumstantial evidence and direct evidence are indistinguishable so far as the jury's fact-finding function is concerned, all that is required of the jury is that i[t] weigh all of the evidence, direct and circumstantial, against the standard of proof beyond a reasonable doubt." *Jenks*, 61 Ohio St.3d at 272, 574 N.E. 2d 492. While inferences cannot be based on inferences, a number of conclusions can result from the same set of facts. *State v. Lott*, 51 Ohio St.3d 160, 168, 555 N.E.2d 293(1990), citing *Hurt v. Charles J. Rogers Transp. Co*, 164 Ohio St. 329, 331, 130 N.E.2d 820(1955). Moreover, a series of facts and circumstances can be employed by a jury as the basis for its ultimate conclusions in a case. *Lott,* 51 Ohio St.3d at 168, 555 N.E.2d 293, citing *Hurt,* 164 Ohio St. at 331, 130 N.E.2d 820.

{¶22} Viewing the evidence in a light most favorable to the prosecution, we conclude that a reasonable person could have found beyond a reasonable doubt that Hess was the person who telephoned and threatened Messina on October 14, 2013. We hold, therefore, that the state met its burden of production regarding each element of the crime of telecommunications harassment, and, accordingly, there was sufficient evidence to support Hess' conviction.

{¶23} As an appellate court, we are not fact finders; we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent and credible evidence upon which the fact finder could base his or her judgment. *Cross Truck v. Jeffries*, 5th Dist. Stark No. CA–5758, 1982 WL 2911(Feb. 10, 1982). Accordingly, judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed as being against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction*, 54 Ohio St.2d 279, 376 N.E.2d 578(1978). The Ohio Supreme Court has emphasized: "'[I]n determining whether the judgment below is manifestly against the weight of the evidence, every reasonable intendment and every reasonable presumption must be made in favor of the judgment and the finding of facts. * * *.'" *Eastley v. Volkman*, 132 Ohio St.3d 328, 334, 972 N.E. 2d 517, 2012-Ohio-2179, *quoting Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3, quoting 5 Ohio Jurisprudence 3d, Appellate Review, Section 603, at 191–192 (1978). Furthermore, it is well established that the trial court is in the best position to determine the credibility of witnesses. *See, e.g., In re Brown*, 9th Dist. No. 21004, 2002–Ohio–3405, ¶ 9, *citing State v. DeHass*, 10 Ohio St .2d 230, 227 N.E.2d 212(1967).

{¶24} Ultimately, “the reviewing court must determine whether the appellant or the appellee provided the more believable evidence, but must not completely substitute its judgment for that of the original trier of fact ‘unless it is patently apparent that the fact finder lost its way.’” *State v. Pallai*, 7th Dist. Mahoning No. 07 MA 198, 2008-Ohio-6635, ¶31, *quoting State v. Woullard*, 158 Ohio App.3d 31, 2004-Ohio-3395, 813 N.E.2d 964 (2nd Dist. 2004), ¶ 81. In other words, “[w]hen there exist two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one we believe.” *State v. Dyke*, 7th Dist. Mahoning No. 99 CA 149, 2002-Ohio-1152, at ¶ 13, *citing State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125(7th Dist. 1999).

{¶25} The weight to be given to the evidence and the credibility of the witnesses are issues for the trier of fact. *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212(1967), paragraph one of the syllabus; *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶118. *Accord, Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 86 L.Ed. 680 (1942); *Marshall v. Lonberger*, 459 U.S. 422, 434, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

{¶26} The judge as the trier of fact was free to accept or reject any and all of the evidence offered by the parties and assess the witness’s credibility. "While the jury may take note of the inconsistencies and resolve or discount them accordingly * * * such inconsistencies do not render defendant's conviction against the manifest weight or sufficiency of the evidence." *State v. Craig*, 10th Dist. Franklin No. 99AP-739, 1999 WL 29752 (Mar 23, 2000) *citing State v. Nivens*, 10th Dist. Franklin No. 95APA09-1236, 1996 WL 284714 (May 28, 1996). Indeed, the trier of fact need not believe all of a

witness' testimony, but may accept only portions of it as true. *State v. Raver*, 10th Dist. Franklin No. 02AP-604, 2003-Ohio-958, ¶21, *citing State v. Antill*, 176 Ohio St. 61, 67, 197 N.E.2d 548 (1964); *State v. Burke*, 10th Dist. Franklin No. 02AP-1238, 2003-Ohio-2889, *citing State v. Caldwell*, 79 Ohio App.3d 667, 607 N.E.2d 1096 (4th Dist. 1992). Although the evidence may have been circumstantial, we note that circumstantial evidence has the same probative value as direct evidence. *State v. Jenks, supra.*

{¶27} We find that this is not an "'exceptional case in which the evidence weighs heavily against the conviction.'" *Thompkins*, 78 Ohio St.3d at 387, 678 N.E.2d 541, *quoting Martin*, 20 Ohio App.3d at 175, 485 N.E.2d 717. The judge neither lost his way nor created a miscarriage of justice in convicting Hess of the charge.

{¶28} Based upon the foregoing and the entire record in this matter, we find Hess' conviction is not against the sufficiency or the manifest weight of the evidence. To the contrary, the judge appears to have fairly and impartially decided the matters before him. The judge as a trier of fact can reach different conclusions concerning the credibility of the testimony of the state's witnesses and Hess. This court will not disturb the judge's finding so long as competent evidence was present to support it. *State v. Walker*, 55 Ohio St.2d 208, 378 N.E.2d 1049 (1978). The judge heard the witnesses, evaluated the evidence, and was convinced of Hess' guilt.

{¶29} Finally, upon careful consideration of the record in its entirety, we find that there is substantial evidence presented which if believed, proves all the elements of the crime beyond a reasonable doubt.

{¶30} Hess' first and second assignments of error are overruled.

{¶31} The judgment of the Licking County Municipal Court is affirmed.

By Gwin, J.,

Hoffman, P.J., and

Wise, J., concur