

[Cite as *State v. Mitchell*, 2010-Ohio-2890.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93273

STATE OF OHIO

PLAINTIFF-APPELLEE

vs.

RASHAD MITCHELL

DEFENDANT-APPELLANT

**JUDGMENT:
AFFIRMED**

Criminal Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CR-518665

BEFORE: Kilbane, P.J., Blackmon, J., and Stewart, J.

RELEASED: June 24, 2010

JOURNALIZED:

ATTORNEY FOR APPELLANT

Thomas A. Rein
Leader Building - Suite 940
526 Superior Avenue
Cleveland, Ohio 44114

ATTORNEYS FOR APPELLEE

William D. Mason
Cuyahoga County Prosecutor
Kerry A. Sowul
Assistant County Prosecutor
Justice Center - 9th Floor
1200 Ontario Street
Cleveland, Ohio 44113

N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

MARY EILEEN KILBANE, P.J.:

{¶ 1} Appellant, Rashad Mitchell (“Mitchell”), appeals his convictions on one count of intimidation and one count of menacing by stalking. Mitchell argues that the trial court erred in denying his motion for acquittal based upon the sufficiency of the evidence, and that his convictions are against the manifest weight of the evidence. After reviewing the appropriate law and facts, we affirm.

Procedural and Factual History

{¶ 2} On December 9, 2008, the Cuyahoga County Grand Jury filed a two-count indictment against Mitchell alleging intimidation, a third degree felony, in violation of R.C. 2921.04(B), and menacing by stalking, a fourth degree felony, in violation of R.C. 2903.211(A)(1), with a “furthermore” specification that Mitchell threatened physical harm to the victim, Amber Quadir (“Quadir”), and/or that he had a history of violence toward the victim or any other person.

{¶ 3} On April 2, 2009, Mitchell waived his right to a jury trial and proceeded with a trial to the bench. During trial, the court granted Mitchell’s Crim.R. 29 motion as it pertained to the “furthermore” specification of Count 2, reducing the menacing by stalking charge to a first degree misdemeanor because the furthermore specification was incorrect as Mitchell had no prior convictions.

{¶ 4} That same day, the court found Mitchell guilty of intimidation, a third degree felony, as charged in Count 1, and guilty of menacing by stalking, a first degree misdemeanor, as charged in Count 2.

{¶ 5} On April 14, 2009, Mitchell was sentenced to three years of incarceration on Count 1, and six months of incarceration on Count 2, to be served concurrently.

{¶ 6} On May 11, 2009, Mitchell appealed.

{¶ 7} The following facts were developed on the record at trial.

Amber Quadir

{¶ 8} Amber Quadir was a college student at Baldwin-Wallace College in Berea, Ohio, who testified that she dated Mitchell from January 2005 until October of 2008. She testified that the relationship was abusive and characterized Mitchell as controlling. Quadir further testified that she feared Mitchell and knew he had a gun because he was a part-time police officer in Oakwood Village, East Cleveland, and Highland Hills.

{¶ 9} Quadir testified that after she ended their relationship, Mitchell continued to abuse her. On October 28, 2008, the abuse culminated in a physical assault when Mitchell punched Quadir in the face after discovering that she was having text message conversations with other males.

{¶ 10} Quadir reported the assault to Berea Police on October 29, 2008, who documented her claims and took pictures of her bruised and swollen face.

After investigating Quadir's claims, Mitchell was charged with assault. An initial pretrial hearing on the matter was set for November 12, 2008. On November 9, 2008, three days before the hearing, Mitchell sent Quadir a series of threatening text messages, and even indicated that he would kill her before the hearing, stating specifically: "I was going to wait for court but I would rather just get it out of the way 2marrow [sic]." (See State's Exhibit 14.) After receiving these messages, Quadir again reported Mitchell to the police on November 11, 2008.

Detective Dennis Bort

{¶ 11} According to the testimony of Detective Dennis Bort ("Detective Bort") of the Berea Police Department, Mitchell was charged with assault on October 29, 2008. Detective Bort testified that after Quadir visited them a second time and showed them Mitchell's threatening messages, Berea police detectives called Mitchell and asked him to turn himself in. Detective Bort testified that they advised Mitchell that his scheduled court date on the pending assault charge was November 12, 2008.

{¶ 12} Detective Bort testified that he and Detective Christopher Holmes ("Detective Holmes") took pictures of a series of text messages Mitchell sent to Quadir before the November 12, 2008 hearing. In all, there were 17 text messages admitted into evidence, most of which threatened Quadir in some way. Some threatened to kill her, others indicated the

specific nature in which she would be killed, and some stated that she would have to beg for her life, describing in detail the pain she would feel as Mitchell killed her and that “death” would find her. Detective Bort testified that he and Detective Holmes also made a copy of a threatening voicemail message Mitchell left for Quadir. All of the messages were left after Mitchell became aware Quadir reported his assault to the police.

{¶ 13} According to the evidence, Mitchell repeatedly sent Quadir text messages threatening to kill her beginning on November 9, 2008, just three days before his scheduled court date in Berea Municipal Court:

9:11 p.m.:

“Nah, I would rather find u, I’m not tellin you sh*t * * * there’s nothin like the element of surprise. [sic]”

9:13 p.m.:

“[A]nd I was gonna wait to see you at court but I would rather just get it out the way 2marrow. [sic]”

9:14 p.m.:

“So repent all night tonight because death will find u. [sic]”

9:51 p.m.:

“I am gona find u and I am going to kill u, I know its supposed to happen like this. [sic]”

10:21 p.m.:

“u won’t be suffering 2marrow, its what u wanted. I’m bringing a knife. I think I’m gona stab u idk yet. [sic]”

11:40 p.m.:

“I’m gona make sure it hurts, worse than u hurt me. [sic]”

11:31 p.m.:

“But don’t beg for ur life. [sic]”

11:35 p.m.:

“Its going to hurt, u will beg me to stop. And I’m going to slit ur throat so u can’t speak. [sic]”

{¶ 14} On November 12, 2008, Mitchell sent Quadir an email message on Facebook titled “wh*re!” The body of the email read: “ur a f*ckin c*nt. I will see you in court b*itch!! Better bring ur A game.”

{¶ 15} On November 13, 2008, Mitchell left Quadir a voicemail message stating, among other things, “[w]hat I was wondering, are you that f*cking stupid to try and get me into trouble?”

{¶ 16} At the conclusion of trial, Mitchell was found guilty.

Analysis

{¶ 17} Mitchell’s assignments of error will be addressed together because they are closely related in fact and law. They state as follows:

Assignment of Error Number One

“The trial court erred in denying appellant’s motion for acquittal as to the charges when the state failed to present sufficient evidence to sustain a conviction.”

Assignment of Error Number Two

“Appellant’s convictions are against the manifest weight of the evidence.”

{¶ 18} In his first assignment of error, Mitchell argues that the trial court erred in denying his motion for acquittal because his conviction was not supported by sufficient evidence. In his second assignment of error, he contends that his conviction was against the manifest weight of the evidence. Mitchell's discussion as to both of these assignments of error is limited to the trial court's finding that Mitchell's actions could not have constituted intimidation or menacing by stalking. As these arguments involve different standards of review but a review of the same evidence, we discuss them together.

{¶ 19} The standard of review for sufficiency of evidence is set forth in *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184. “Pursuant to Criminal Rule 29(A), a court shall not order an entry of judgment of acquittal if the evidence is such that reasonable minds can reach different conclusions as to whether each material element of a crime has been proven by a reasonable doubt.” *Id.* at syllabus.

{¶ 20} In *State v. Thompkins*, 78 Ohio St.3d 380, 387, 1997-Ohio-52, 678 N.E.2d 541, the court illuminated its test for manifest weight of the evidence as follows:

“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.*" Id., quoting Black's Law Dictionary (6 Ed. 1990) 1594. (Emphasis in sic.)

{¶ 21} The court, reviewing the entire record, essentially sits as a "thirteenth juror," weighing the evidence and all reasonable inferences. See *State v. Martin* (1983), 20 Ohio App.3d 172, 175, 485 N.E.2d 717. In so doing, we consider the credibility of witnesses and determine whether, in resolving conflicts in the evidence, "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." Id. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction. Id.

{¶ 22} The elements of intimidation in violation of R.C. 2921.04(B), which Mitchell was found guilty of in Count 1, state: "No person, knowingly and by force or by unlawful threat of harm to any person or property, shall attempt to influence, intimidate, or hinder the victim of a crime in the filing or prosecution of criminal charges or an attorney or witness involved in a criminal action or proceeding in the discharge of the duties of the attorney or witness."

{¶ 23} Here, Quadir was the victim of a crime who reported an assault to the police. After the report, and while the case was being prosecuted, Mitchell sent a stream of text messages threatening to kill her, and indicated in State's Exhibit 14, that he was going to do so before the municipal court hearing. While Mitchell's counsel argues that such threats were not intimidating when viewed in the context of their abusive relationship, we disagree. Once Quadir reported the assault to the police, her status changed from ex-girlfriend to the victim of an alleged assault. Mitchell's continued threats during the prosecution of the case were a clear attempt to not only influence her, but also to hinder her from prosecuting him for assaulting her.

{¶ 24} The elements of menacing by stalking, in violation of R.C. 2903.211(A)(1), state: "No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person."

{¶ 25} At trial, the State presented not only the testimony discussed above, but also photographs of the text messages he sent to Quadir three days before his scheduled hearing in Berea Municipal Court where he threatened to kill her in graphic detail after she complained to the police. The State presented documentary evidence of Mitchell's repeated attempts to reach

Quadir on the telephone before the hearing, the email discussed above, and the audio recording mentioned above.

{¶ 26} In light of the foregoing, we cannot say that, after reviewing the evidence in the light most favorable to the prosecution, Mitchell's convictions were unsupported by sufficient evidence. Given the explicit stream of threatening text messages in the two-hour period directly following Mitchell's declaration that he was going to wait for court but would rather "get it out of the way" the next day, and then relayed his plan to murder her before the initial court hearing, any rational trier of fact could have found the essential elements of intimidation and menacing by stalking proven beyond a reasonable doubt. *State v. Bradley*, 8th Dist. No. 87024, 2006-Ohio-4589, at ¶12.

{¶ 27} Contrary to Mitchell's argument regarding the insufficiency and lack of credibility of Quadir's testimony, the trial court was free to believe all, some, or none of her testimony, and indeed was in the best position to do so. Credibility of witnesses and the weight to be given to their testimony are primarily matters for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227 N.E.2d 212, at paragraph one of the syllabus. A trier of fact is entitled to believe or not believe the State's witnesses and/or the defense's witnesses. *State v. Antill* (1964), 176 Ohio St. 61, 197 N.E.2d 548. A review of the record reveals that Quadir's testimony was credible and

consistent with the documentary evidence presented by the State and Detective Bort's testimony.

{¶ 28} Further, the trial court had ample documentary evidence with which to convict Mitchell, based solely upon the text messages, email, and audio recording that were presented in evidence.

{¶ 29} Though Mitchell also argues that his conviction is against the manifest weight of the evidence, we find that the trier of fact was in the best position to weigh the evidence and the credibility of the witnesses. Based upon the overwhelming evidence in the record, the trial court believed that Mitchell knowingly intimidated Quadir by unlawful threat of harm to attempt to influence, intimidate, or hinder her, in the prosecution of the assault charge in Berea Municipal Court. The trial court also believed that Mitchell engaged in a pattern of conduct knowingly causing Quadir to believe that he would cause physical harm or mental distress to her.

{¶ 30} As the reviewing court, we are unable to state that the evidence weighs heavily against Mitchell's conviction or that the trier of fact lost its way in convicting him. The trial court did not create a manifest miscarriage of justice by convicting Mitchell of intimidation under R.C. 2921.04(B), or of menacing by stalking under R.C. 2903.211(A)(1), because evidence was presented by the State as to each and every element of these offenses.

Judgment affirmed.

It is ordered that appellee recover from appellant 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.

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

MARY EILEEN KILBANE, PRESIDING JUDGE

**PATRICIA A. BLACKMON, J., and
MELODY J. STEWART, J., CONCUR**