IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

STATE OF OHIO,

Plaintiff-Appellee,

v.

KEVIN JOHNSON,

Defendant-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 19 MA 0030

Criminal Appeal from the
Court of Common Pleas of Mahoning County, Ohio
Case No. 18 CR 1112

BEFORE:
Carol Ann Robb Cheryl Waite, David A. D'Apolito, Judges.

JUDGMENT:
Affirmed.

Atty. Paul J. Gains, Mahoning County Prosecutor, *Atty. Ralph M. Rivera*, Assistant Prosecuting Attorney, 21 West Boardman Street, 6th Floor, Youngstown, Ohio 44503, for Plaintiff-Appellee and

Atty. Brian A. Smith, Brian A. Smith Law Firm, LLC, 755 White Pond Dr., Akron, Ohio, for Defendant-Appellant.

Dated: June 30, 2020

Robb, J.

{¶1} Defendant-Appellant Kevin Johnson appeals from his conviction entered in Mahoning County Common Pleas Court for two counts of menacing by stalking and one count of telecommunications harassment. Two issues are raised in this appeal. The first is whether the convictions for aggravated menacing and telecommunications harassment were against the manifest weight of the evidence. The second issue is whether the eighteen-month sentence for menacing by stalking is supported by the record. For the reasons expressed below, the convictions are affirmed.

Statement of the Case

{¶2} Appellant was indicted for two counts of menacing by stalking, in violation of R.C. 2903.211(A)(1)(B)(2)(e) and (c), both fourth-degree felonies and one count of telecommunications harassment in violation of R.C. 2917.21(A)(1)(C), a first-degree misdemeanor. The incidents as a basis for the indictment occurred between July 12, 2018 and August 29, 2018. Ashley Taylor was named as the victim of the crimes. She and Appellant were previously in a four-year relationship and have a daughter together.

{¶3} Appellant entered a not guilty plea and the case proceeded to a jury trial. The jury found Appellant guilty of all counts. 2/12/19 Jury Verdicts; 3/11/19 J.E. For purposes of sentencing, the menacing by stalking convictions merged and the state elected to have Appellant sentenced on count 1. Appellant received an 18-month sentence. 3/11/19 J.E. He also received 180 days for the telecommunications harassment conviction. 3/11/19 J.E. That sentence was ordered to run concurrent to the sentence for menacing by stalking. 3/11/19 J.E. He was advised his sentence may include an optional three-year postrelease control term and was advised of consequences for violating postrelease control. 3/11/19 J.E. He additionally received 180 days for a postrelease control violation in case number 16 CR 148 and that was ordered to be served consecutive to the sentence imposed in this case. 3/11/19 J.E.

{¶4} Appellant timely appealed from his conviction. 3/11/19 Notice of Appeal.

First Assignment of Error

"Appellant's convictions were against the manifest weight of the evidence."

{¶5} 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." *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). It depends on the effect of the evidence in inducing belief, but is not a question of mathematics. *Id.* In addressing the argument that a conviction is against the manifest weight of the evidence, the appellate court reviews the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses, and determines 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. Lang*, 129 Ohio St.3d 512, 2011-Ohio-4215, 954 N.E.2d 596, ¶ 220, citing *Thompkins* at 387.

{¶6} However, in reviewing the record under a manifest weight of the evidence analysis, we are cognizant that "the weight to be given the evidence and the credibility of the witnesses are primarily for the trier of the facts." *State v. Hunter*, 131 Ohio St.3d 67, 2011-Ohio-6524, 960 N.E.2d 955, ¶ 118, quoting *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus. The underlying rationale for giving deference to the trier of facts is that they are in the best position to view the witnesses, and observe their demeanor, gestures and voice inflections. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶7} Appellant was convicted of menacing by stalking in violation of R.C. 2903.211(A)(1)(B)(2)(e) and (c) and telecommunications harassment in violation of R.C. 2917.21(A)(1). Menacing by stalking is defined as:

> (A)(1) 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 a family or household member of the other person or cause mental distress to the other person or a family or household member of the other person. In addition to any other basis for the other person's belief that the offender will cause physical harm to the other person or the other person's family or household member or mental distress to the other person or the other person's family or household member, the other person's belief

or mental distress may be based on words or conduct of the offender that are directed at or identify a corporation, association, or other organization that employs the other person or to which the other person belongs.

* * *

(B) Whoever violates this section is guilty of menacing by stalking.

* * *

(2) Menacing by stalking is a felony of the fourth degree if any of the following applies:

* * *

(c) In committing the offense under division (A)(1), (2), or (3) of this section, the offender trespassed on the land or premises where the victim lives, is employed, or attends school, or as a result of an offense committed under division (A)(2) or (3) of this section, a third person induced by the offender's posted message trespassed on the land or premises where the victim lives, is employed, or attends school.

* * *

(e) The offender has a history of violence toward the victim or any other person or a history of other violent acts toward the victim or any other person.

R.C. 2903.211.

{¶8} Telecommunications harassment is defined as:

> (A) No person shall knowingly make or cause to be made a telecommunication, or knowingly permit a telecommunication to be made from a telecommunications device under the person's control, to another, if the caller does any of the following:
>
> (1) Makes the telecommunication with purpose to harass, intimidate, or abuse any person at the premises to which the telecommunication is made, whether or not actual communication takes place between the caller and a recipient.

R.C. 2917.21.

{¶9} Appellant asserts his convictions for menacing by stalking and telecommunications harassment are against the manifest weight of the evidence because the victim and her sister were not credible and were shown to have a bias against Appellant. Appellant contends that the testimony of Ashley Taylor, the alleged victim, and April Perez, her sister, established Taylor only chose to press charges after Appellant made a statement on Facebook about Taylor's mom testing positive for HIV and having unprotected sex. He further contends the testimony from both Taylor and Perez indicated that Taylor called and texted back and forth and she initiated contact with Appellant. He claims that Taylor's testimony was not supported by any exhibits or evidence other than a few screenshots from her phone.

{¶10} At trial, Ashley Taylor testified that she and Appellant had been in a relationship and had a daughter together. Tr. 169. She testified that while their relationship was good at the beginning, it changed and Appellant became controlling and physically violent. Tr. 170-172. Her sister, April Perez, testified that she saw Taylor with black eyes and saw the damage done to the house when there was domestic violence. Tr. 254.

{¶11} During her testimony, Taylor described three incidents of physical violence. One incident occurred at a hotel where she caught Appellant cheating on her with another woman. Tr. 171, 172. She indicated that she did not pursue criminal charges after that incident because she was scared of Appellant. Tr. 172. Another incident occurred at her

house on Christmas Day. Tr. 173. The police were called and he left. Tr. 174. She also described an incident that occurred in May 2018. The police incident report of this occurrence was introduced into evidence. State's Exhibit 9. This incident report indicated that on May 1, 2018, the police were called to her residence because Appellant hit her and left. State's Exhibit 9. Taylor, however, admitted other than the May 1, 2018 incident and the Christmas Day incident, the police were not called. Tr. 203. Furthermore, no pictures were ever taken of her injuries and she did not seek any medical treatment for the injuries Appellant caused. Tr. 203.

{¶12} Taylor testified that after the May 1, 2018 incident she moved to Georgia because she was tired of the abuse and Appellant robbed his cousin around the corner from her home. Tr. 177-178. Perez confirmed this was the reason Taylor moved to Georgia. Tr. 255. Taylor further indicated that Appellant's temper scared her. Tr. 177. She stayed in Georgia for one month, but returned because she needed help with her daughters.

{¶13} Upon returning she lived with her mom and then with Perez. Tr. 179-180. She indicated at first she wanted to try to co-parent with Appellant. Tr. 179. She stated Appellant would try to communicate with her by text messages, phone calls and driving by her sister's house. Tr. 180. She indicated he would drive by everyday. Tr. 181. It was not until August 8, 2018 that she first told Appellant not to text or call her. Tr. 180, 207. She testified that in response to her requests to leave her alone, Appellant would send back pictures of him and his other daughter, his girlfriend, and indicate he did not care about their daughter. Tr. 181.

{¶14} The state introduced call logs from Taylor's phone demonstrating how many times he called her. She identified the phone numbers Appellant used when they were amicable. Tr. 188. State's Exhibits 1 and 2 were call logs from her phone of those two numbers. Those represented the calls she received from Appellant in one day. Tr. 190-191. There were more than 20 calls made between 10:00 p.m. and 12:30 a.m. State's Exhibit 1 and 2. Appellant did not answer any of the calls and indicated that getting back to back calls from Appellant scared her. Tr. 191-192. She also indicated Appellant would leave voicemails; "He would leave voicemails saying big ass. I don't care if you don't care anymore. I only want my daughter so that they could reap the benefits of what I'm doing

in the streets. He said if I go downtown, that he will sign his parental rights over for [their daughter].” Tr. 187. Perez also confirmed that Appellant would call Taylor repeatedly and hang up at all times of the day. Tr. 26.

{¶15} One text message from Appellant to Taylor was introduced as an exhibit. State's Exhibit 3. Appellant texted Taylor that he did not mean to pocket dial her. State's Exhibit 3. She texted back that he should delete her number. State's Exhibit 3. He responded, “Ashley I told ur father fuck you and [their daughter] that simple I have a better women and new baby don't need her no more.” State's Exhibit 3. Taylor testified there were many more text messages Appellant sent her in July and August of 2018. Tr. 185. She indicated she would not respond all the time, but if she did respond it was in a way telling him to leave her alone. Tr. 185.

{¶16} As to drive-by incidents, Taylor explained that one day Appellant pulled into Perez's driveway while Taylor was playing with their daughter outside. He yelled to Taylor, “I want my daughter.” Tr. 192-193. Perez confirmed that Appellant would drive by the house daily. Tr. 258-259. She also indicated that she became aware that Appellant would pull into the driveway and would sit there. Tr. 259. Perez testified that his action of driving by and pulling into her driveway scared her. Tr. 259-260.

{¶17} Appellant also posted pictures of Perez and Taylor's best friend on Facebook with disparaging comments about them. State's Exhibit 4 and 5. Taylor testified that these posts hurt her and scared her. Tr. 197.

{¶18} Taylor admitted she did not call the police when these incidents first started occurring because she was “too scared” that Appellant would hurt her or her family. Tr. 194. She indicated that she just tried to ignore it. Tr. 194. It was not until August 21, 2018 that she went to the police and filed a report. State's Exhibit 8. She told the officer that Appellant has repeatedly called her, and left threats with her family and friends about taking her child. State's Exhibit 8. She indicated he would show up at her family members' houses looking for her and her child. State's Exhibit 8. She stated she believed Appellant would try to harm her or take her child. State's Exhibit 8. Taylor testified that she thought filing the report would keep him away. Tr. 198. The prosecutor then asked if she is currently afraid of Appellant, to which she responded yes. Tr. 198.

{¶19} Taylor admitted that the catalyst for her filing the August 21 report was a post Appellant put on Facebook about her mom testing positive for HIV and having unprotected sex. Tr. 209. She explained that this statement was part of an ongoing back and forth argument he was having with people in her life; he was targeting people in her life and saying bad things about them. Tr. 209-210. Perez indicated that Appellant used social media to attack her and her family and admitted that she and Taylor decided to file the report because of the HIV positive comment. Tr. 260, 275. Perez, however, explained the Facebook post was the final straw, and both she and Taylor had decided enough was enough. Tr. 277.

{¶20} In addition to Taylor's testimony regarding her interactions with Appellant, Perez testified that she had an altercation with Appellant that scared her. She explained that while she was in Save-A-Lot, Appellant and two of his friends came in. Tr. 263. Appellant asked Perez, "Where's my daughter?" Tr. 263. She answered she did not know and to ask Taylor. Tr. 263. She stated she was frightened and hurried up and left the store. Tr. 263. She testified at trial that she is still afraid of Appellant. Tr. 265. When asked why she and Taylor waited to go to the police she stated:

> I was scared because I didn't know what he was capable of doing. I know he abused my sister multiple times. I know for a fact that if I was to go forth with what happened, I know that it could get further and further into possible us being hurt in some way.

Tr. 274.

{¶21} Admittedly, Appellant does point out that Taylor initiated communication in instances, did not tell him to stop contacting her until August 8, 2018, and that if Perez was scared of him in Save-A-Lot she could have told the police officer who was in the store. He asserts their statements clearly show they were lying about being afraid of him. He also focuses on the fact that both Perez and Taylor admitted that they decided to file the police report after he posted the HIV positive message about their mother and this shows it was done in response to that, not to the phone calls, texts, drive-bys, and being afraid of him.

{¶22} Ultimately, his argument presents a credibility question. If the testimonies of Taylor and/or Perez are believed, then the convictions are not against the manifest weight of the evidence. The actions of calling, texting, and driving-by the number of times they indicated in addition to the statement that they are both scared of him based on his abuse of Taylor constitutes the elements of menacing by stalking and telecommunications harassment. As stated above, the weight to be given the evidence and the credibility of the witnesses are primarily issues for the trier of the facts because the trier of facts is in the best position to view the witnesses, and observe their demeanor, gestures and voice inflections. *Hunter*, 131 Ohio St.3d 67 at ¶ 118, quoting *DeHass*, 10 Ohio St.2d 230 at paragraph one of the syllabus; *Seasons Coal Co.*, 10 Ohio St.3d at 80.

{¶23} This assignment of error is meritless.

<u>Second Assignment of Error</u>

"The trial court's sentence of Appellant was not supported by the record."

{¶24} Appellant asserts the record does not support the imposition of the 18-month sentence for menacing by stalking; Appellant does not address the misdemeanor sentence in this appeal. Appellant contends the seriousness and recidivism factors in R.C. 2929.12 do not weigh in favor of a maximum sentence for the fourth-degree felony menacing by stalking conviction when considering the facts of the case.

{¶25} The standard of review in a felony sentencing appeal is dictated by R.C. 2953.08(G). *State v. Benitez*, 7th Dist. Jefferson No. 18 JE 0016, 2019-Ohio-4634, ¶ 31, citing *State v. Marcum*, 146 Ohio St.3d 516, 2016-Ohio-1002, 59 N.E.3d 1231, ¶ 1. That statute provides:

> The court hearing an appeal under division (A), (B), or (C) of this section shall review the record, including the findings underlying the sentence or modification given by the sentencing court. The appellate court may increase, reduce, or otherwise modify a sentence that is appealed under this section or may vacate the sentence and remand the matter to the sentencing court for resentencing. The appellate courts' standard for review is not whether the sentencing court abused its discretion. The appellate

> court may take any action authorized by this division if it clearly and convincingly finds either of the following:
>
> (a) That the record does not support the sentencing court's findings under division (B) or (D) of section 2929.13, division (B)(2)(e) or (C)(4) of section 2929.14, or division (I) of section 2929.20 of the Revised Code, whichever, if any, is relevant;
>
> (b) That the sentence is otherwise contrary to law.

R.C. 2953.08(G)(2).

{¶26} Although trial courts have full discretion to impose any term of imprisonment within the statutory range, they must consider the sentencing purposes in R.C. 2929.11 and the guidelines contained in R.C. 2929.12. *Benitez*, 2019-Ohio-4634 at ¶ 33.

{¶27} At issue in this case are the seriousness and recidivism factors in R.C. 2929.12. R.C. 2929.12 provides discretion to the trial court "to determine the most effective way to comply with the purposes and principles of sentencing * * *." It requires that "[i]n exercising that discretion, the court shall consider the factors set forth in divisions (B) and (C) * * * relating to the seriousness of the conduct, the factors provided in divisions (D) and (E) * * * relating to the likelihood of the offender's recidivism * * * and in addition to any other factors relevant to achieving the purposes and principles of sentencing." R.C. 2929.12(A). Thus, the list of seriousness and recidivism factors set forth in R.C. 2929.12 is a non-exhaustive list. R.C. 2929.12 does not require the trial court to "use specific language or make specific findings on the record in order to evince the requisite consideration of the applicable seriousness and recidivism factors." *State v. Shaw*, 7th Dist. Belmont No. 15 BE 0065, 2017-Ohio-1259, ¶ 36, citing *State v. Arnett*, 88 Ohio St.3d 208, 215, 724 N.E.2d 793 (2000).

{¶28} At the sentencing hearing, the trial court stated that it had balanced the seriousness and recidivism factors. Sentencing Tr. 16-17. Likewise, the sentencing judgment entry indicated that the trial court considered the seriousness and recidivism factors. 3/11/19 J.E.

{¶29} The arguments made in this appeal that this conduct was less serious and there was a less likely chance he would reoffend also were made at the sentencing hearing. Appellant and his counsel argued at sentencing that the victim and her sister were not afraid of him, the victim initiated and continued to communicate back and forth with Appellant, and that Appellant would not reoffend "because it's over with" the victim. Sentencing Tr. 7-9, 10-11, 14-15. The trial court indicated that it heard the evidence and it is clear the mindset of the victim was that she was afraid and that all the other evidence of the victim initiating contact was made, but rejected by the jury. Sentencing Tr. 11, 15.

{¶30} Accordingly, the record reflects the trial court gave due deliberation to the relevant statutory considerations. A trial court's imposition of a maximum term of imprisonment for a felony conviction is not contrary to law as long as the sentence is within the statutory range for the offense and the court considers the purposes and principles of felony sentencing R.C. 2929.11 and R.C. 2929.12 when imposing a sentence. *State v. West*, 8th Dist. Cuyahoga No. 105568, 2018-Ohio-956, ¶ 9, 10 (stressing a trial court's full discretion to impose the maximum sentence as long as the sentence is within the statutory range and the court considered the relevant statutory purposes and guidelines). The sentence imposed was within the statutory range. R.C. 2929.14(A)(4) (Prior version stating sentencing range for a fourth-degree felony is a definite prison term of six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, or eighteen months.). The court complied with all applicable rules and statutes. Therefore, the sentence imposed was not clearly and convincingly contrary to law.

{¶31} This assignment of error is meritless.

<u>Conclusion</u>

{¶32} Neither assignment of error has merit. The convictions are affirmed.

Waite, P.J., concurs.

D'Apolito, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Mahoning County, Ohio, is affirmed. Costs waived.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.