

[Cite as *State v. Dart*, 2010-Ohio-5637.]

IN THE COURT OF APPEALS OF MONTGOMERY COUNTY, OHIO

STATE OF OHIO	:	
Plaintiff-Appellee	:	C.A. CASE NO. 23955
vs.	:	T.C. CASE NO. 09CRB654
GREGORY L. DART	:	(Criminal Appeal from Municipal Court)
Defendant-Appellant	:	

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O P I N I O N

Rendered on the 19th day of November, 2010.

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GRADY, J.:

Defendant, Gregory Dart, appeals from his conviction and sentence for telecommunications harassment.

Defendant owns a construction business, Dart General Contracting Co. In November 2007, Lisa Garber hired Defendant

to fix a water problem in her home in Kettering. Defendant performed the work over the course of three to four weeks. Garber was dissatisfied with Defendant's work because the water problem returned after the work was completed. Garber insisted that Defendant fix the problem. Defendant's last attempt to fix the problem was on or about December 21, 2007.

In December 2008, Garber filed a civil suit against Defendant in Montgomery County Common Pleas Court Case No. 2008-CV-11304.

That action is pending. On March 4, 2009, at around 10:00 p.m., three phone calls were made to Garber's cell phone. Garber did not listen to the calls until the next morning, March 5, 2009. The content of the phone calls was vulgar, and referenced the caller's wanting to have sexual relations with Garber.

The calls were disturbing and threatening to Garber, who is single and lives alone. Garber saved two of the phone calls in her voicemail and contacted Kettering police. An investigation revealed that the calls to Garber were made from the cell phone of one of Defendant's employees, Robert Hawk. Both Hawk and Defendant initially denied making the calls to Garber. Subsequently, Hawk claimed that he made the calls.

Defendant was charged by criminal complaint filed in Kettering Municipal Court with two counts of telecommunications harassment in violation of R.C. 2917.21(B), a misdemeanor of the first degree.

Following a trial to the court, Defendant was found guilty as charged. The trial court sentenced Defendant to a suspended one hundred and eighty day jail term, a two hundred dollar fine, and two years of unsupervised probation. Defendant timely appealed to this court from his conviction and sentence. FIRST ASSIGNMENT

OF ERROR

"DENIAL OF APPELLANT'S CRIMINAL RULE 29 MOTION WAS ERRONEOUS."

SECOND ASSIGNMENT OF ERROR

"COURT'S FINDING OF GUILTY WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

THIRD ASSIGNMENT OF ERROR

"APPELLANT'S CONDUCT DID NOT RISE TO THE LEVEL OF ABUSE, THREATEN OR HARASS."

In these related assignments of error, Defendant argues that his conviction for telecommunications harassment is not supported by legally sufficient evidence and is against the manifest weight of the evidence.

Defendant first argues that the trial court erred in not granting his Crim.R. 29 motion for acquittal because the evidence the State presented was legally insufficient to support his conviction for telecommunications harassment because it failed to prove that Defendant made the phone calls to Garber.

When considering a Crim.R. 29 motion for acquittal, the trial

court must construe the evidence in a light most favorable to the State and determine whether reasonable minds could reach different conclusions on whether the evidence proves each element of the offense charged, beyond a reasonable doubt. *State v. Bridgeman* (1978), 55 Ohio St.2d 261. The motion will be granted only when reasonable minds could only conclude that the evidence fails to prove all of the elements of the offense. *State v. Miles* (1996), 114 Ohio App.3d 738.

A Crim.R. 29 motion challenges the legal sufficiency of the evidence. A sufficiency of the evidence argument challenges whether the State has presented evidence on each element of the offense alleged to allow the case to go to the jury or sustain the verdict as a matter of law. *State v. Thompkins*, (1997), 78 Ohio St.3d 380. The proper test to apply to such an inquiry is the one set forth in paragraph two of the syllabus of *State v. Jenks* (1991), 61 Ohio St.3d 259:

"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."

Defendant was convicted of telecommunications harassment in violation of R.C. 2917.21(B), which provides:

"No 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."

A telecommunications device includes a telephone and a cellular telephone. R.C. 2913.01(Y).

Defendant argues that the only evidence offered to prove that it was Defendant who made the phone calls to Garber was Garber's own testimony, and that is insufficient because Garber had a motive to falsely accuse Defendant. Further, Robert Hawk testified that he, not Defendant, made the calls to Garber, Defendant denied making the calls, and Officer Young testified that when he first questioned Garber she was not sure it was Defendant who made the phone calls.

Garber testified at trial that she recognized the caller's voice as Defendant's, who has a distinctive voice. The phone messages contained inappropriate sexual content and Garber felt very threatened by the messages. The calls were placed to Garber from a cell phone owned by Robert Hawk, Defendant's employee. Hawk initially denied making the calls but subsequently took responsibility for them. The trial court found Hawk's testimony

untrustworthy, and that his and Defendant's stories were concocted.

On the other hand, the court found the testimony of Garber and Officer Young credible.

Viewing this evidence in a light most favorable to the State, as we must, we conclude that it is sufficient to permit a rational trier of facts to find beyond a reasonable doubt all of the essential elements of telecommunications harassment, including Defendant's identity as the perpetrator of the offense. Defendant's conviction is supported by legally sufficient evidence and the trial court properly overruled Defendant's Crim.R. 29 motion for acquittal.

Defendant next argues that his conviction for telecommunications harassment is against the manifest weight of the evidence. Specifically, Defendant contends that Garber's testimony lacks credibility because (1) she has an obvious bias against Defendant, which is demonstrated by her pending civil suit seeking damages in excess of twenty-five thousand dollars as a result of her dissatisfaction with the home repairs Defendant performed, (2) the testimony of Officer Young contradicts Garber's testimony that she told police from day one that the caller was Defendant, (3) Robert Hawk testified that he left the messages for Garber, and signed a sworn affidavit taking responsibility for the calls, and (4) Defendant has always denied any involvement

in this matter.

A weight of the evidence argument challenges the believability of the evidence and asks which of the competing inferences suggested by the evidence is more believable or persuasive. *State v. Hufnagle* (Sept. 6, 1996), Montgomery App. No. 15563. The proper test to apply to that inquiry is the one set forth in *State v. Martin* (1983), 20 Ohio App.3d 172, 175:

"[t]he court, reviewing 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 jury lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered."

The credibility of the witnesses and the weight to be given to their testimony are matters for the trier of facts to resolve. *State v. DeHass* (1967), 10 Ohio St.2d 230. In *State v. Lawson* (Aug. 22, 1997), Montgomery App.No. 16288, we observed:

"Because the factfinder ... has the opportunity to see and hear the witnesses, the cautious exercise of the discretionary power of a court of appeals to find that a judgment is against the manifest weight of the evidence requires that substantial deference be extended to the factfinder's determinations of credibility. The decision whether, and to what extent, to credit

the testimony of particular witnesses is within the peculiar competence of the factfinder, who has seen and heard the witness."

This court will not substitute its judgment for that of the trier of facts on the issue of witness credibility unless it is patently apparent that the trier of facts lost its way in arriving at its verdict. *State v. Bradley* (Oct. 24, 1997), Champaign App. No. 97-CA-03.

The credibility of the witnesses and the weight to be given to their testimony were matters for the trier of facts, the trial court here, to determine. *DeHass*. The trial court in its decision finding Defendant guilty concluded that the testimony of Garber and Officer Young was credible, that the testimony of Defendant and Robert Hawk was not trustworthy, and that their claims that Hawk made the calls to Garber was concocted. The trial court did not lose its way simply because it chose to believe the State's version of these events rather than Defendant's, which it had a right to do. Reviewing this record as a whole, we cannot say that the evidence weighs heavily against a conviction, that the trier of facts lost its way in choosing to believe the State's witnesses, or that a manifest miscarriage of justice has occurred. Defendant's conviction is not against the manifest weight of the evidence.

Finally, Defendant argues that the evidence presented by the

State was insufficient because it fails to prove that Defendant's purpose in making the calls was to abuse, threaten or harass Garber.

The evidence demonstrates that the three phone calls in question were all made within a ten minute period, with the first call being made at 9:55 p.m., and lasting ninety-three seconds, the second call being made at 9:57 p.m., and lasting ninety-six seconds, and the third call being made at 10:05 p.m., and lasting thirty-eight seconds. Defendant argues that the limited duration of each call and the short period of time in which all of the calls were made does not rise to the level of being annoying or harassing. Defendant further argues that the content of the calls does not rise to the level of being annoying or harassing, especially given Garber's description of the third call as "down right silly."

R.C. 2917.21(B) prohibits making a phone call with purpose to abuse, threaten or harass another person. Harass means to annoy or torment repeatedly and persistently. Webster's New Revised University Dictionary (1994). Direct evidence of a defendant's intent to annoy or harass is not required when the circumstances surrounding the calls tend to show that intent. *City of Alliance v. Cagey*, Stark App. No. 2007CA00273, 2008-Ohio-3653.

The evidence presented in this case permits a finding that Defendant called Garber three times in the span of just ten minutes at around 10:00 p.m. Each call contained vulgar language and was

sexual in nature. These repeated phone calls containing vulgar, sexually explicit language tend to show Defendant's purpose to harass Garber. Cagey. Furthermore, the conduct at issue, which involved an adult male who was drunk, phoning a single female who lives alone, late in the evening, using vulgar language and leaving sexually oriented messages, some of which express a desire to engage in sexual relations with her, tends to show Defendant's purpose to threaten or harass. Garber testified that she perceived the calls as threatening.

The evidence the State presented is sufficient to prove all of the elements of the telecommunications harassment, including Defendant's purpose to threaten or harass Garber. Defendant's conviction for that offense is not against the manifest weight of the evidence. The trial court found the placing of the three phone calls within a short period of time, and the content of each call, to be annoying and harassing. We agree with that assessment.

Defendant's assignments of error are overruled. The judgment of the trial court will be affirmed.

FROELICH, J. And WAITE, J., concur.

(Hon. Cheryl L. Waite, Seventh District Court of Appeals, sitting

by assignment of the Chief Justice of the Supreme Court of Ohio.)

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Hon. Thomas M. Hanna