[Cite as *Maumee v. Kriner*, 2007-Ohio-2146.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

City of Maumee — Court of Appeals No. L-06-1001

Appellee — Trial Court No. 05-CRB-00006

v.

Kelly Kriner — **DECISION AND JUDGMENT ENTRY**

Appellant — Decided: May 4, 2007

* * * * *

Esteban R. Callejas, Special Prosecutor, for appellee.

Jeffrey J. Helmick, for appellant.

* * * * *

HANDWORK, J.

{¶ 1} Defendant-appellant, Kelly J. Kriner, appeals his conviction in the Maumee Municipal Court on one charge of menacing, a misdemeanor of the fourth degree, in violation of Maumee Codified Ordinance 537.06.[1] For the conviction on the

[1]Appellant was also convicted on one charge of disorderly conduct in violation of Maumee Codified Ordinance 509.03(A)(1), a minor misdemeanor, but he does not appeal that conviction.

menacing charge, the court imposed: (1) a sentence of 30 days incarceration in the Corrections Center of Northwest Ohio, but suspended the 30 days; (2) imposed a $250 fine, but suspended all but $100 of that fine; and (3) a three year period of community control.

{¶ 2} Appellant appeals the trial court's judgment and contends that the following errors occurred in the proceedings below:

{¶ 3} "THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUPPORT THE VERDICT.

{¶ 4} "THE VERDICT WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

{¶ 5} As of October 14, 2004, the alleged victim in this cause, Nina Rae Wenzel, lived with her parents in a home next to appellant's residence. It is undisputed that the two neighbors did not have a good relationship, but until the day of the alleged incident, Nina and appellant had never spoken to each other. At appellant's bench trial, Nina provided the following version of the events that occurred on that date.

{¶ 6} At approximately noon, Nina, a college student, was returning home from an internship to change her clothes so that she could go to her "second job." Her vehicle passed appellant's vehicle going in the opposite direction. She and appellant looked at each other as their vehicles passed. Upon arriving at her residence, Nina carried her books and purse inside. When she returned to her automobile to retrieve the rest of her "stuff," appellant had parked his vehicle at the at the end of her driveway. He told Nina,

"Don't ever look at me like that again." She answered that she could look at whomever she wanted because "there is no law against it."

{¶ 7} Appellant then claimed that Nina looks at his wife and children and calls them names. Specifically, appellant asserted that Nina called his wife a bitch. Nina replied that she never spoke to his wife. She then told appellant that his children play in appellant's front yard and are always watching her and her family. Appellant responded by saying that his children could play anywhere they wanted to, including her front yard and the street. According to Nina, she then stated that "[T]hey're [the children] gonna get hurt playing in the street." At that point, appellant and Wenzel began "yelling" at each other.

{¶ 8} As the argument escalated, appellant eventually told Nina that she and her family had "incidences" in their "old neighborhood" because they would call the police if "somebody stepped foot on" their driveway or on their property. Nina replied that she had heard that appellant "put a gun in his neighbor's face in his old neighborhood." According to Nina, appellant responded by saying, "[Y]eah, I might just have to put the gun in your face and show you just like I showed him." At that point, Nina, who knew that appellant was a Lucas County Sheriff's Deputy, that he was on duty at the time, and that he carried a gun, felt threatened and scared. Nina also knew that there was no one at home but her. She therefore turned and went into the house. Appellant drove away.

{¶ 9} Crying, Nina called her place of employment to talk to someone about the incident and informed them that she would not be working that day. After determining

that appellant was not in the area, Nina got into her car and drove to her mother's place of employment, Maumee High School.

{¶ 10} In her testimony, Nina's mother, Patricia A. Wenzel, avowed that her daughter was visibly upset, shaking, and crying when she arrived at the high school. After learning that appellant allegedly threatened to put a gun in Nina's face, Patricia called the Maumee Police Department and asked that a police officer be waiting for her and her daughter when they arrived home. Officer Richard Gable of the Maumee Police Department met with Nina and her mother at their home. He testified that Nina was still very upset, was shaking, and was crying. Based upon Nina's statement and, after interviewing two neighbors, Officer Gable presented the case to his superior and the prosecutor's office. Subsequently, Gable filed the charges against appellant.

{¶ 11} Appellant testified at trial in his own defense. He asserted that he had driven home during his work hours to go to the bathroom. Therefore, he had on his "work garb" and was carrying a gun. As he headed back to the Sheriff's office, his vehicle passed Nina's vehicle. According to appellant, Nina stuck her tongue out at him. Appellant maintained that he continued on his way to the office, but realized that he did not have his county cell phone.[2] Believing that the phone was at his residence, appellant drove back home. When he arrived, Nina was at the end of her driveway "getting some things out of her car." Appellant stopped, opened his car window, and said, "Don't look at me like that again."

[2]Appellant later found the cell phone in his motor vehicle.

{¶ 12} From that point on appellant described the escalating argument between himself and Nina, with only the following major, material differences from her version of the argument. First, he contended that Nina told him, "Just so you know if your kids ever go in the street [,] they're hit." Second, in appellant's rendition of the argument, he replied, "If you ever do anything to my kids, I'll put you in jail." Third, appellant asserted that Nina responded to this statement by saying that he was threatening her and then walked into her home without saying one word about a gun. He also testified that Nina never appeared to be afraid. Finally, appellant claimed that he never said that he would put a gun in Nina's face.

{¶ 13} The trial judge, basing his decision on the credibility of the witnesses, determined that the witness testimony produced by the prosecution was more credible and found appellant guilty of both charged offenses.

{¶ 14} Appellant's assignments of error relate to the sufficiency of the evidence and the weight of the evidence offered at appellant's trial and shall be considered together.

{¶ 15} The standards applicable to appellant's assignments of error are qualitatively and quantitatively different. *State v. Thompkins,* 78 Ohio St.3d 380, 386, 1997-Ohio-52, superseded by constitutional amendment on other grounds, *State v. Smith*, 80 Ohio St.3d 89, 1997-Ohio-355. An insufficiency of the evidence claim raises a question of law that an appellate court reviews de novo to determine "'whether, after reviewing the evidence in the 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. Stallings*, 89 Ohio St.3d 280, 289, 2000-Ohio-164, quoting *Jackson v. Virginia* (1979), 443 U.S. 307, 319.

{¶ 16} On the other hand, when it considers an allegation that a finding of guilty is against the manifest weight of the evidence, an appellate court reviews the entire record, weighs the evidence and all reasonable inferences therefrom, considers the credibility of witnesses, and determines whether the trier of fact clearly lost its way and created a manifest miscarriage of justice. *State v. Thompkins*, at 387, citing *State v. Martin* (1983), 20 Ohio App.3d 172, 175.

{¶ 17} Nevertheless, in engaging in this weighing, the appellate court must keep in mind the factfinder's superior, first-hand perspective in judging the demeanor and credibility of witnesses. See *State v. DeHass* (1967), 10 Ohio St.2d 230, paragraph one of the syllabus. Moreover, under the manifest weight standard of review a new trial should not be ordered unless the evidence weighs so heavily against conviction that the verdict appears unjust. *State v. Lindsey*, 87 Ohio St.3d 479, 483, 2000-Ohio-465.

{¶ 18} As can be seen from a reading of the above standards, the manifest weight standard is the stricter of the two. Thus, if that standard is satisfied, we do not need to address appellant's sufficiency of the evidence argument.

{¶ 19} Appellant claims that even if the trier of fact believed that appellant told Nina "yeah, I might just have to put the gun in your face and show you just like I showed him," the evidence offered at trial only established, beyond a reasonable doubt, that this

statement was a threat to, at some unspecified future time and based upon unspecified facts, threaten Nina. Therefore, it was not an actual threat to "put a gun" in Nina's face or even a conditional threat to do the same within the meaning of Maumee Codified Ordinance 503.06. We disagree.

{¶ 20} Maumee Codified Ordinance 537.06 provides, in pertinent part:

{¶ 21} "(a) No person shall knowingly cause another to believe that the offender will cause physical harm to the person or property of the other person, the other person's unborn, or a member of the other person's immediate family.

{¶ 22} "(b) Whoever violates this section is guilty of menacing. * * *"

{¶ 23} R.C. 2901.22(B), provides "[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."

{¶ 24} First, neither the intent of a defendant to carry out his threat nor his ability to do so are elements of the offense of menacing. *Dayton v. Dunnigan* (1995), 103 Ohio App.3d 67, 71 (addressing the offense of aggravated menacing). Even a conditional threat can constitute a violation of the menacing laws. *State v. Collie* (1996), 108 Ohio App.3d 580, 582. What is necessary to establish the offense of menacing is the victim's subjective belief that the defendant can cause physical harm to herself, her immediate family, or her property. *State v. Klempa*, 7th Dist. No. 01-BA-63, 2003-Ohio-3482, ¶ 24.

{¶ 25} As applied to the case under consideration, it is undisputed that appellant is a county deputy who was on duty at the time that the altercation with Nina occurred and

that, as a law enforcement officer, he had his gun with him. When he made the threatening statement, he referred to "the gun," which could be understood as the firearm he carried while he was performing his law enforcement duties. It is also undisputed that one of Nina's neighbors heard Nina yell "gun." The trial court, in deciding this cause, relied on the credibility of the witnesses. Therefore, the court necessarily determined that Nina evinced a subjective belief that appellant intended her physical harm at the time. Specifically, if the testimony of Nina, her mother, and Officer Gable is deemed credible, Nina was fearful, shaking, nervous and crying as the result of her encounter, thereby displaying a subjective belief that appellant was going to cause her physical harm by means of his firearm. Accordingly, we cannot say that the trial judge, as the trier of fact, clearly lost his way and created a manifest miscarriage of justice by finding appellant guilty of the offense of menacing.

{¶ 26} Appellant's first and second assignments of error are found not well-taken. The judgment of the Maumee Municipal Court is affirmed. Appellant is ordered to pay the costs of this appeal pursuant to App.R. 24. Judgment for the clerk's expense incurred in preparation of the record, fees allowed by law, and the fee for filing the appeal is awarded to Lucas County.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J. _____
JUDGE

Arlene Singer, J. _____
JUDGE

Thomas J. Osowik, J. _____
CONCUR.
JUDGE