[Cite as *State v. Gibson*, 2023-Ohio-2202.]

IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
UNION COUNTY

STATE OF OHIO,

PLAINTIFF-APPELLEE, **CASE NO. 14-23-01**

v.

CODY M. GIBSON, **O P I N I O N**

DEFENDANT-APPELLANT.

Appeal from Marysville Municipal Court
Trial Court No. CRB 2200557

Judgment Reversed and Cause Remanded

Date of Decision: June 29, 2023

APPEARANCES:

Kyle Phillips **for Appellant**

Ashley L. Johns **for Appellee**

MILLER, P.J.

{¶1} In this appeal we are asked to decide whether calling one's neighbor a "redheaded bitch" as part of a festering feud over driveway access constitutes "fighting words" sufficient to result in a conviction for disorderly conduct in violation of R.C. 2917.11(A)(3).

Background

{¶2} On October 11, 2022, a complaint was filed in the Marysville Municipal Court charging Cody M. Gibson with one count of disorderly conduct in violation of R.C. 2917.11(A)(3), a minor misdemeanor. Gibson subsequently pleaded not guilty, and the matter proceeded to a bench trial on December 2, 2022.

{¶3} At trial, the State's first witness was Darren Foley—Gibson's neighbor and the reputed victim in this matter. Foley testified that on October 6, 2022, he parked his truck in his driveway in a fashion that blocked egress to the public street. (Dec. 2, 2022 Tr. at 11-12). Foley claimed the driveway was entirely on his property and no other property owner had a right to use it, but he suggested that Gibson had used the driveway on previous occasions. (Dec. 2, 2022 Tr. at 9, 12). Foley stated he blocked his driveway "[t]o protect [his] family from [his] neighbors going too fast up and down [his] driveway." (Dec. 2, 2022 Tr. at 12).

{¶4} According to Foley, after he parked his truck in the driveway, Gibson appeared outside. Foley testified that he "remember[ed] [Gibson] yelling at [him].

[He] ignored most of it. And [he] remember[ed] [Gibson] saying something – calling [him] something along the lines of a redheaded bitch." (Dec. 2, 2022 Tr. at 12). Foley stated that after Gibson called him a "redheaded bitch," he did not respond to Gibson either physically or verbally. (Dec. 2, 2022 Tr. at 13). Foley testified that he instead went inside and called the police department. (Dec. 2, 2022 Tr. at 14). Later, on re-direct examination, Foley stated he did not like Gibson's insult and that he felt "[a] little" alarmed or bothered. (Dec. 2, 2022 Tr. at 20).

{¶5} On cross-examination, Foley testified he had an ongoing dispute with Gibson regarding use of the driveway, which led him to call the police department on Gibson on several previous occasions. (Dec. 2, 2022 Tr. at 15). Foley further stated he was on his property and Gibson was on his own property when Gibson called him a "redheaded bitch." (Dec. 2, 2022 Tr. at 16). Foley testified that Gibson did not approach him, and he estimated that Gibson was 40-50 yards away at the time of the incident. (Dec. 2, 2022 Tr. at 18). Finally, Foley confirmed he did not say anything to Gibson in reply, and he stated he did not try to fight Gibson or "cuss him out." (Dec. 2, 2022 Tr. at 19).

{¶6} The State also offered the testimony of Officer Joseph North of the Village of Richwood Police Department. Officer North, who responded to Foley's request for assistance, testified that Gibson admitted to calling Foley a "redheaded bitch." (Dec. 2, 2022 Tr. at 24). Officer North also stated that he did not uncover

anything to suggest that Gibson was provoked by Foley. (Dec. 2, 2022 Tr. at 24). However, on cross-examination, Officer North testified that he was aware of the ongoing driveway dispute, and he acknowledged that Foley had blocked the driveway. (Dec. 2, 2022 Tr. at 25-26). Officer North further stated that he believed Gibson was trying to leave his property in his tow truck to respond to a call at the time Foley blocked the driveway. (Dec. 2, 2022 Tr. at 26). But on re-direct examination, Officer North indicated that there are two driveways adjacent to Gibson's house and that he could have left in his tow truck via the other driveway. (Dec. 2, 2022 Tr. at 30-31).

{¶7} At the conclusion of Officer North's testimony, the State rested. Thereafter, Gibson moved for a judgment of acquittal pursuant to Crim.R. 29. The trial court denied Gibson's motion, and Gibson then proceeded to testify in his own defense. Following his testimony, Gibson rested.

{¶8} Subsequently, the trial court concluded on the record that "calling someone a redheaded bitch is insulting" so the only question was whether "it's under circumstances in which the conduct is likely to provoke a violent response." (Dec. 2, 2022 Tr. at 48). After argument from the parties on that issue, the trial court found the State had "proven beyond a reasonable doubt that there was a likelihood that using that language between neighbors would result in a violent response." (Dec. 2, 2022 Tr. at 57). Accordingly, the trial court found Gibson guilty of

disorderly conduct as charged in the complaint, fined him $58, and ordered him to pay court costs. The trial court filed its judgment entry of conviction and sentence on December 2, 2022.

Assignments of Error

{¶9} On January 3, 2023, Gibson filed a notice of appeal. He raises the following two assignments of error for our review:

First Assignment of Error

> **The trial court erred when it failed to grant defendant-appellant Cody M. Gibson's Criminal Rule 29 motion to dismiss as the guilty verdict at the trial court was not supported by sufficient evidence.**

Second Assignment of Error

> **The trial court erred when it entered judgment against defendant-appellant Cody M. Gibson as the judgment of the trial court was not supported by the manifest weight of the evidence.**

Discussion

<u>First Assignment of Error</u>

{¶10} In his first assignment of error, Gibson argues that the trial court erred by denying his Crim.R. 29 motion. Gibson maintains that to convict him of disorderly conduct, the State needed to introduce evidence sufficient to prove he insulted Foley with constitutionally unprotected "fighting words." According to Gibson, the State failed to do so, and the trial court should therefore have granted his motion for a judgment of acquittal.

1. Standard of Review

{¶11} Under Crim.R. 29(A), "[t]he court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses." "Because the purpose of a Crim.R. 29 motion for acquittal 'is to test the sufficiency of the evidence presented at trial,' we 'review[] a denial of a Crim.R. 29 motion for judgment of acquittal using the same standard that is used to review a sufficiency of the evidence claim.'" (Bracketing in original.) *State v. Brown*, 3d Dist. Allen No. 1-19-61, 2020-Ohio-3614, ¶ 35, quoting *State v. Willis*, 12th Dist. Butler No. CA2009-10-270, 2010-Ohio-4404, ¶ 9.

{¶12} "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." *State v. Jenks*, 61 Ohio St.3d 259 (1991), paragraph two of the syllabus, *superseded by state constitutional amendment on other grounds*, *State v. Smith*, 80 Ohio St.3d 89 (1997). Consequently, "[t]he 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." *Id.* "In

deciding if the evidence was sufficient, we neither resolve evidentiary conflicts nor assess the credibility of witnesses, as both are functions reserved for the trier of fact." *State v. Jones*, 1st Dist. Hamilton Nos. C-120570 and C-120571, 2013-Ohio-4775, ¶ 33.

2. Relevant Authority

{¶13} Gibson was convicted of disorderly conduct in violation of R.C. 2917.11(A)(3), which provides that "[n]o person shall recklessly cause inconvenience, annoyance, or alarm to another by * * * [i]nsulting, taunting, or challenging another, under circumstances in which that conduct is likely to provoke a violent response[.]" "Ohio courts have interpreted R.C. 2917.11(A)(3) as prohibiting both the offender's use of 'fighting words' and/or conduct likely to 'provoke a violent response.'" *State v. Schils*, 12th Dist. Clermont No. CA2019-08-067, 2020-Ohio-2883, ¶ 19. Here, Gibson's conviction was based on the particular words he directed at Foley rather than his participation in belligerent or disruptive conduct. Consequently, the question in this case is whether Gibson uttered "fighting words" for which he can be punished under the disorderly-conduct statute.

{¶14} "Punishment for disorderly conduct based on spoken words is prohibited unless those words amount to 'fighting words.'" *Middletown v. Carpenter*, 12th Dist. Butler No. CA2006-01-004, 2006-Ohio-3625, ¶ 14. "[N]o

matter how rude, abusive, offensive, derisive, vulgar, insulting, crude, profane or opprobrious spoken words may seem to be, their utterance may not be made a crime unless they are fighting words * * *." *Cincinnati v. Karlan*, 39 Ohio St.2d 107, 110 (1974). "Fighting words" are those that "by their very utterance inflict injury or are likely to provoke the average person to an immediate retaliatory breach of the peace." *Id.* To distinguish "fighting words" from expression fully protected under the First Amendment, "'one must look at the circumstances surrounding such utterance.'" *State v. Harvey*, 3d Dist. Marion No. 9-19-34, 2020-Ohio-329, ¶ 16, quoting *State v. Presley*, 81 Ohio App.3d 721, 724 (12th Dist.1992); *see State v. Hoffman*, 57 Ohio St.2d 129, 133 (1979) (indicating the court was unable to determine whether the defendant uttered "fighting words" because the trial court "did not take evidence in order to construe [the disorderly-conduct statute] in light of all the circumstances and the alleged speech of the defendant").

{¶15} The "fighting-words" analysis is intensely fact specific and outcomes will vary from case to case, but decisional law offers several helpful guideposts. First, as a general matter, "'something more than mere profanity is required to constitute fighting words.'" *Harvey* at ¶ 17, quoting *Chillicothe v. Lowery*, 4th Dist. Ross No. 97 CA 2331, 1998 WL 396316, *7 (July 13, 1998). "In determining whether profane utterances constitute fighting words, courts have considered whether the conduct accompanying these statements is hostile or threatening." *Id.*

at ¶ 18. Moreover, "to constitute 'fighting words,' the words chosen must be 'used to describe a person or be directed at a person.'" *State v. Hale*, 6th Dist. Ottawa No. OT-17-023, 2018-Ohio-1431, ¶ 19, quoting *Toledo v. Grince*, 48 Ohio App.3d 126 (6th Dist.1989). Finally, although "a person need not actually be provoked to a violent response" for words to be "fighting words," the failure of the targeted party to respond might evidence that the words were not "fighting words." *State v. Blair*, 2d Dist. Montgomery No. 24784, 2012-Ohio-1847, ¶ 9; *see Cohen v. California*, 403 U.S. 15, 20, 91 S.Ct. 1780 (1971) (no "fighting words" where there was "no showing that anyone who saw Cohen was in fact violently aroused or that [he] intended such a result"); *Wood v. Eubanks*, 25 F.4th 414, 425 (6th Cir.2022) (concluding that the speaker's insults were not "fighting words" in part because the targets of the insults did not react with violence or view the insults as an invitation to fight); *State v. Richardson*, 43 Ohio App.3d 114, 116 (8th Dist.1988) (concluding that words were not "fighting words" in part because no one who heard the defendant's remarks responded to them).

3. Analysis

{¶16} Under circumstances like those present in this case, we do not find the simple act of calling someone a "redheaded bitch" would have provoked immediate retaliation. Thus, we conclude that no trier of fact could find that Gibson leveled

"fighting words" against Foley as necessary to sustain a conviction for disorderly conduct.

{¶17} To begin, considering contemporary standards, Gibson's epithet was of a milder variety compared to other cases where more-egregious expletives were not found to be "fighting words." *See Greene v. Barber*, 310 F.3d 889, 896 (6th Cir.2002) (noting that since the "fighting-words" doctrine was first expounded in 1942, "[s]tandards of decorum have changed dramatically * * * and indelicacy no longer places speech beyond the protection of the First Amendment"). Indeed, courts have found terms far more loathsome than used by Gibson in this case not to be "fighting words." *See, e.g.*, *State v. Dotson*, 133 Ohio App.3d 299, 301, 303 (7th Dist.1999) (under the circumstances, it was not "fighting words" to call various police officers "motherfuckers"); *Lowery* at *1, 8 (saying "fuck you" to police officers and repeatedly calling them "motherfuckers" did not constitute "fighting words"); *see also State v. Baccala*, 326 Conn. 232, 251-256 (Conn.2017) (calling a store manager a "fat ugly bitch," and worse, and saying, "fuck you, you're not a manager," were not "fighting words" under facts of the case); *People in the Interest of R.C.*, 411 P.3d 1105, 2016 COA 166, ¶ 26-34 (Colo.App.2016) (rejecting an argument that the term "cocksucker," "by its mere utterance qualifies as fighting words").

{¶18} To be sure, we cannot rule out that the insult used by Gibson might be sufficient in another instance involving a simmering feud between neighbors to move the offended party to immediate violence. Depending on the particular circumstances, such an insult might be the proverbial "straw that breaks the camel's back," causing relations to devolve into physical conflict. But here, even with the existing discord between Gibson and Foley, the other circumstances surrounding Gibson's disparaging remark provide ample reason to reject the notion that a reasonable person would have reacted with instant aggression.

{¶19} Although Foley testified that he remembered Gibson yelling at him, he did not specify how loudly or persistently Gibson was yelling, whether Gibson repeatedly called him a "redheaded bitch," or whether Gibson lobbed any other slights at him. Thus, from the evidence, it appears that Gibson's indiscretion was limited to a single use of the phrase. In addition, there was no evidence that Gibson paired his invective with express or implied threats of present or future violence, that Gibson directed any intimidating or disrespectful gestures toward Foley, or that Gibson behaved in a manner challenging Foley to fight. Nor was Foley insulted under physically imposing circumstances. Gibson was, by Foley's estimate, some 40-50 yards away on his own property at the time, and he never made any attempt to approach Foley. Furthermore, although Foley testified to feeling "a little" alarmed or bothered by Gibson's insult, he did not indicate that he felt threatened or

that he feared violence. And while not dispositive by itself, the fact that Foley exhibited restraint and did not respond to Gibson is some evidence undercutting the assertion that Gibson's remark was likely to induce immediate violence. Therefore, in light of the single specific insult used by Gibson and all the attendant circumstances, we conclude that Gibson's statement did not constitute "fighting words." *See State v. Miller*, 110 Ohio App.3d 159, 161, 164 (4th Dist.1996) (where defendant, separated by a fence and a distance of at least 30 feet, told her neighbor, "I think you are a sick son-of-a-bitch," evidence was insufficient to support disorderly-conduct conviction because the defendant "merely expressed an opinion, without any threat of present or future violence," which was not "fighting words").

{¶20} To be clear, we do not commend Gibson for his behavior. Gibson had the right to voice his displeasure with Foley's decision to block the driveway, and for this purpose, he had the entire English language at his disposal. But in place of eloquence, Gibson resorted to vulgarity and petty insults. However, as inappropriate as it was for Gibson not to take the high ground, the law does not proscribe mere incivility. Although use of repugnant words may show the character of the speaker, speakers are free to choose from the full array of lawful means for expressing their dissatisfaction and cannot be penalized simply for straying from nobler standards of decency. Only when speech crosses the line dividing offensive criticism from provocation to immediate violent retaliation—that is, the wall

between objectionable, but permissible, speech and "fighting words"—may the law intervene. Here, even viewing the evidence in a light most favorable to the State, Gibson's remark did not breach that wall. In view of all the circumstances, Gibson's insult, while foul, was not "fighting words" subject to criminal punishment. Accordingly, we conclude that the State failed to present sufficient evidence to sustain Gibson's conviction for disorderly conduct in violation of R.C. 2917.11(A)(3) and that the trial court therefore erred by denying Gibson's Crim.R. 29 motion for a judgment of acquittal.

{¶21} Gibson's first assignment of error is sustained.

Conclusion

{¶22} For the foregoing reasons, Gibson's first assignment of error is sustained. As a consequence, Gibson's second assignment of error relating to the weight of the evidence supporting his disorderly-conduct conviction is rendered moot, and we decline to address it. *See* App.R. 12(A)(1)(c). Having found error prejudicial to Gibson in the particulars assigned and argued in his first assignment of error, we reverse the judgment of the trial court. Concluding that Gibson's conviction is not supported by sufficient evidence, we remand the cause to the trial

court to vacate Gibson's judgment of conviction.

Judgment Reversed and
Cause Remanded

WALDICK and ZIMMERMAN, J.J., concur.

/jlr