[Cite as *State v. Panko*, 2015-Ohio-2092.]

STATE OF OHIO, BELMONT COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

STATE OF OHIO,	)	CASE NO. 14 BE 33
	)	
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	OPINION
	)	
MARK ALLEN PANKO,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Criminal Appeal from the Court of Common Pleas of Belmont County, Ohio Case No. 14CRB00295-01/02
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellee:	Attorney. Helen Yonak Assistant Prosecuting Attorney 147 West Main St. St.Clairsville, Ohio 43950
For Defendant-Appellant:	Attorney Donna Jewell McCollum 3685 Stutz Drive, Suite 100 Canfield, Ohio 44406

JUDGES:

Hon. Carol Ann Robb
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: May 29, 2015

[Cite as *State v. Panko*, 2015-Ohio-2092.]
ROBB, J.

{¶1} Defendant-Appellant Mark Allen Panko ("Appellant") appeals from his menacing conviction and sentence entered in the Belmont County Court, Western Division. Appellate counsel has filed a no-merit brief and has requested leave to withdraw. A review of the case file and brief reveals there are no appealable issues. Accordingly, appointed counsel's motion to withdraw is granted and the conviction and sentence are affirmed in all respects.

Statement of the Case

{¶2} A criminal complaint was filed in Belmont County Court on May 21, 2014, charging Appellant with two counts of aggravated menacing in violation of R.C. 2903.21(A), a first-degree misdemeanor. The complaint alleged that on two separate dates, May 16, 2014 and May 17, 2014, Appellant knowingly caused Randy Taylor ("Taylor") to believe that Appellant would cause serious physical harm to Taylor, or Taylor's property.

{¶3} A bench trial occurred on August 5, 2014. At trial testimony was elicited from Taylor and Appellant. Taylor testified that on the evening of May 16, 2014 while he, his roommate, and his roommate's girlfriend were standing on their porch smoking cigarettes, Appellant, who lived across the street, came out of his house with a gun and fired a shot above Taylor's house. Taylor immediately went into his house and called 911. The sheriff's department investigated the matter and found shell casings on Appellant's front porch. According to Taylor, the next day Appellant said to Taylor that he had missed last night, but he would not miss next time. Taylor called the police again.

{¶4} Appellant testified that he did not fire his gun from the front porch; he sells scrap metal; he accidently dumped a bucket of shell casings in his driveway/front yard; and he has never spoken to Taylor. He did admit that he shoots his guns into his backyard for target practice and to get rid of raccoons, which kill the birds he raises. He also acknowledged that he has problems with Taylor's dogs because, according to Appellant, the dogs try to bite children that walk down the street. Appellant stated that he has called the dog warden about the dogs.

{¶5} Following the testimony, the trial court, on count one, found Panko guilty of the lesser offense of menacing in violation of R.C. 2903.22(A), a fourth-degree misdemeanor. As to the second count of the complaint, the trial court found Appellant not guilty.

{¶6} Appellant received a 30 day sentence and was fined $200. 8/5/14 J.E.; 8/11/14 J.E. Those sentences were suspended on the condition that Appellant pay court costs, not violate the law for one year, and have no contact with Taylor. 8/5/14 J.E.; 8/11/14 J.E.

{¶7} Panko timely appealed his conviction and sentence. After reviewing the record, appointed counsel filed a no merit brief and asked to withdraw because there are allegedly no appealable issues.

Analysis

{¶8} When appellate counsel seeks to withdraw and discloses that there are no meritorious arguments for appeal, the filing is known as a no merit brief or an *Anders* brief. *Anders v. California,* 386 U.S. 738, 87 S.Ct. 1396 (1967). In this district, it has also been called a *Toney* brief. *State v. Toney,* 23 Ohio App.2d 203, 262 N.E.2d 419 (7th Dist.1970).

> In *Toney,* this court set forth the procedure to be used when counsel of record determines that an indigent's appeal is frivolous:
>
> 3. Where court-appointed counsel, with long and extensive experience in criminal practice, concludes that the indigent's appeal is frivolous and that there is no assignment of error which could be arguably supported on appeal, he should so advise the appointing court by brief and request that he be permitted to withdraw as counsel of record.
>
> 4. Court-appointed counsel's conclusions and motion to withdraw as counsel of record should be transmitted forthwith to the indigent, and the indigent should be granted time to raise any points that he chooses, pro se.
>
> 5. It is the duty of the Court of Appeals to fully examine the proceedings in the trial court, the brief of appointed counsel, the arguments pro se of

> the indigent, and then determine whether or not the appeal is wholly frivolous.
>
> * *
>
> 7. Where the Court of Appeals determines that an indigent's appeal is wholly frivolous, the motion of court-appointed counsel to withdraw as counsel of record should be allowed, and the judgment of the trial court should be affirmed.

Id. at syllabus.

{¶9} The no merit brief was filed by appellate counsel on October 30, 2014. On November 10, 2014, this court informed Appellant of counsel's no merit brief and granted him 30 days to file his own written brief. Appellant did not file a brief. Our analysis will proceed with an independent examination of the record to determine if the appeal is frivolous. There were no pre-trial motions filed in this case and the only evidence presented was the testimony of Appellant and Taylor. Our review will address whether there was sufficient evidence to support the conviction, whether the conviction was against the manifest weight of the evidence, and if the sentence complied with the law.

Sufficiency of the Evidence

{¶10} "The test of sufficiency is whether after reviewing the probative evidence and inferences reasonably drawn therefrom in the light most favorable to the prosecution, any rational trier of fact could have found all the essential elements of the offense beyond a reasonable doubt." *State v. Bulin,* 7th Dist. 09 BE 27, 2011–Ohio–3398, ¶ 57 citing *State v. Martin,* 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). The court does not examine the credibility of the witnesses, nor does it weigh the evidence in this process. *State v. Goff,* 82 Ohio St.3d 123, 139, 694 N.E.2d 916 (1998). A reviewing court should not disturb the decision below unless it finds that reasonable minds could not reach the conclusion reached by the trier of fact. *State v. Jenks,* 61 Ohio St.3d 259, 273, 574 N.E.2d 492 (1991). "Whether the evidence is legally sufficient to sustain a verdict is a question of law." *State v. Thompkins,* 78 Ohio St.3d 380, 386, 678 N.E.2d 541 (1997). In a review of

sufficiency of the evidence, this court must "assess not whether the state's evidence is to be believed, but whether, if believed, the evidence against a defendant would support a conviction." *Id*. at 390.

{¶11} Appellant was convicted of menacing in violation of R.C. 2903.22(A), which provides:

> 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.

R.C. 2903.22(A).

{¶12} Taylor testified that he lived directly across the street from Appellant. 8/5/14 Tr. 5. Taylor explained that on the evening of May 16, 2014, he, his roommate and his roommate's girlfriend were standing on their porch smoking cigarettes. 8/5/14 Tr. 5. Taylor identified Appellant and explained that while he and his friends were on their porch, Appellant went out onto his own porch and stood there for approximately three minutes. 8/5/14 Tr. 5, 8. Appellant then went into his house, came back out with a gun in his hand and fired shots into the air above Taylor's house. 8/5/14 Tr. 5. Taylor testified that Appellant did not make any statements to him at that time. 8/5/14 Tr. 5. He explained that he was afraid, felt threatened, and immediately following the shots went into his house and called 911. 8/5/14 Tr. 5-6. Taylor stated that the sheriff's department came to the scene and found shell casings in Appellant's front yard/porch. 8/5/14 Tr. 5.

{¶13} This testimony established all of the essential elements of menacing. It has been explained that a person has knowledge of circumstances when he is aware that such circumstances probably exist. R.C. 2901.22(B). It is common knowledge that a firearm is an inherently dangerous instrumentality and use of it is reasonably likely to produce harm or death. *State v. Harn*, 7th Dist. No. 04 CO 33, 2005-Ohio-6776, ¶ 14, citing *State v. Widner*, 69 Ohio St.2d 267, 270, 431 N.E.2d 1025 (1982); *State v. Young,* 8th Dist. Cuyahoga No. 99752, 2014–Ohio–1055, ¶ 11. Therefore, there is evidence that Appellant acted knowingly when he fired the gun, and that

such action caused Taylor to believe that physical harm would occur either to his person or property. Consequently, there are no appealable issues concerning sufficiency of the evidence.

Manifest Weight of the Evidence

{¶14} A claim that a verdict is against the manifest weight of the evidence requires a reviewing court to review the entire record and weigh the evidence, including witness credibility, and determine whether, "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." *Thompkins,* 78 Ohio St.3d at 387. A reversal on weight of the evidence is ordered only in exceptional circumstances. *Id.* This is because the trier of fact is in the best position to determine the credibility of the witness and the weight due to the evidence. *State v. DeHass,* 10 Ohio St.2d 230, 227 N.E.2d 212 (1967).

{¶15} In this case, the evidence establishes two different versions of events. As aforementioned, Taylor testified that Appellant fired shots into the air above Taylor's house.

{¶16} Appellant, however, testified that he did not. He avowed that he never fires his guns in the front of his house. 8/5/14 Tr. 11. He testified that he fires his guns in the backyard for target practice and to kill the raccoons. 8/5/11 Tr. 11-12. He explained that the casings the sheriff's department found may have been from a bucket of casings that got dumped in his front yard/driveway. 8/5/14 Tr. 12. Appellant stated that he sells scrap metal and that is why he had a bucket of casings. 8/5/14 Tr. 12.

{¶17} These two versions of events cannot be reconciled. Either Appellant fired a shot over Taylor's house or he did not; it is plausible that he did, but it is also plausible that he did not. With two plausible versions, it becomes a credibility question. Credibility of the witnesses is best left to the trier of fact as it is "best able to view the witnesses and observe their demeanor, gestures and voice inflections." *Seasons Coal Co., Inc. v. Cleveland,* 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

We, as a reviewing court, will not substitute our judgment for that of the trier of fact if there is competent and credible evidence to support the conviction. *State v. Trembly,* 137 Ohio App.3d 134, 141–142, 738 N.E.2d 93 (8th Dist.2000). Reversal based upon the manifest weight of the evidence should occur "only in the exceptional case in which the evidence weighs heavily against conviction." *Thompkins,* 78 Ohio St.3d at 387, citing *Martin,* 20 Ohio App.3d at 175. As such, this court must respect the deference due to the trial court's conclusion.

{¶18} Consequently, there are no appealable manifest weight of the evidence arguments.

Sentence

{¶19} As stated above, Appellant was convicted of a fourth-degree misdemeanor and he received a 30 day sentence and $200.00 fine, both of which were suspended.

{¶20} We have previously stated that misdemeanor sentences are subject to an abuse of discretion review. R.C. 2929.22(A); *State v. McColor,* 7th Dist. No. 11 MA 64, 2013–Ohio–1279, ¶ 14. *See also State v. Pope,* 9th Dist. Medina No. 13CA0031–M, 2014–Ohio–2864, ¶ 7 ("[u]nless a sentence is contrary to law, we review challenges to misdemeanor sentencing for an abuse of discretion"). An "[a]buse of discretion means an error in judgment involving a decision that is unreasonable based upon the record; that the appellate court merely may have reached a different result is not enough." *State v. Dixon,* 7th Dist. No. 10 MA 185, 2013–Ohio–2951, ¶ 21.

{¶21} The sentence imposed in this instance is within the statutory mandates. R.C. 2929.24 provides that for a fourth-degree misdemeanor an offender can receive no more than a definite jail term of 30 days. R.C. 2929.24(A)(4). Appellant received a 30 day jail sentence. As for a fine, R.C. 2929.28 provides that for a fourth-degree misdemeanor an offender cannot be fined more than $250. R.C. 2929.28(A)(2)(a)(iv). Appellant was fined $200.

{¶22} In addition to the length of the sentence and the amount of a fine, statutes also dictate what a trial court must consider in determining the appropriate

sentence for a misdemeanor violation. These statutes are R.C. 2929.21 and R.C. 2929.22. R.C. 2929.21 enumerates the purposes and principles of misdemeanor sentencing, while R.C. 2929.22(B) lists the factors that the trial court must consider in determining the appropriate sentence. As to both of these statutory sections, we have explained that "[n]one of the statutory criteria controls the trial court's discretion, and the court may consider other relevant factors, but the criteria must be used as a guide in exercising sentencing discretion." *State v. DeSalvo,* 7th Dist. No. 04–MA–127, 2005–Ohio–3312, ¶ 14. "Failure to consider these criteria constitutes an abuse of discretion, but when the sentence imposed is within the statutory limit, a reviewing court will presume that the trial judge followed the standards set forth in R.C. 2929.22 and 2929.12, absent a showing to the contrary." *Id*.

{¶23} The record in this case is silent as to the trial court's consideration of R.C. 2929.21 and R.C. 2929.22. Therefore, we must presume that the trial court considered them.

{¶24} Consequently, since the sentence is within the permissible range and there is no indication that the trial court failed to consider the appropriate factors, there is no appealable error concerning the sentence imposed.

Conclusion

{¶25} Panko's conviction and sentence for menacing, a fourth-degree misdemeanor, is hereby affirmed. Furthermore, as there are no appealable errors, appellate counsel's motion to withdraw is granted.

Donofrio, P.J., concurs.

DeGenaro, J., concurs.