MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Johanna McGhehey,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 14, 2021

Court of Appeals Case No. 20A-CR-1988

Appeal from the Marion Superior Court

The Honorable Helen W. Marchal, Judge

The Honorable Stanley E. Kroh, Magistrate

Trial Court Cause No. 49G15-1810-CM-33436

Bailey, Judge.

Case Summary

[1] Johanna McGhehey ("McGhehey") appeals her conviction of harassment, a Class B misdemeanor,[1] following a bench trial.

[2] We affirm.

Issues

[3] McGhehey raises two issues which we restate as follows:

I. Whether the State provided sufficient evidence that McGhehey made a telephone call with intent to harass, annoy, or alarm another person but with no intent of legitimate communication, per Indiana Code Section 35-45-2-2(a)(1).

II. Whether Indiana Code Section 35-45-2-2(a)(1) is unconstitutional as applied to her because it proscribed her protected speech.

Facts and Procedural History

[4] Between September 7 and September 28 of 2018, McGhehey made a series of telephone calls, including voicemail messages, to Eric Elmore ("Elmore"). Elmore is the CEO of Fatheads, Inc., an Indianapolis company for which McGhehey's husband, Richard Werkley ("Werkley"), worked until sometime

[1] Ind. Code § 35-45-2-2(a)(1).

in 2018. In McGhehey's initial telephone calls to Elmore, she inquired as to the whereabouts of Werkley, who had recently left the family residence and ceased communication with McGhehey. McGhehey was very upset during the phone calls she made to Elmore. Elmore informed McGhehey several times that he had no knowledge of Werkley's whereabouts, and Elmore asked McGhehey to stop calling him. McGhehey continued to call Elmore and became "more aggressive," "going after [Elmore] with personal attacks." Tr. at 11, 12. Therefore, Elmore blocked McGhehey's telephone number. However, McGhehey continued to call Elmore from other telephone numbers and leave voicemail messages for him.

[5] On October 1, 2018, the State charged McGhehey with one count of harassment, a Class B misdemeanor. At the October 19 bench trial, the court admitted, over McGhehey's objections, State's Exhibit 2 which consisted of audio recordings of seven voicemail messages McGhehey left for Elmore on his telephone between September 7 and September 28. Each voicemail message contained profanity and insults to Elmore, delivered in angry tones. In the first voicemail message, McGhehey complained, in crude terms, about her husband and asked Elmore (who McGhehey refers to as "Jabba") to give her husband her message. State's Ex. 2, voicemail 1447-090718(2). In the second voicemail message, McGhehey called Elmore various vulgar and/or profane names and insinuated, in crude terms, that Elmore was engaged in a sexual relationship with her husband.

[6] In the third voicemail message, McGhehey again called Elmore various crude names, using profane terms. She also stated that "this is not the end of this," and she was going to put an ad in a newspaper about "that heroin addict." *Id.*, voicemail 1467-091318. She continued, "Revenge is best served cold in Jesus's name. I will be calling Walmart, your distributor, and shooting them an e-mail and letting them know the dirty business practices you're doing and I have a lot of dirt on you, Mr. Elmore. And all you gotta do is be decent to me." *Id.* McGhehey further stated that Elmore was "gonna get served, and that's not a threat, nor is it a promise, that's just the way of life." *Id.* McGhehey also said she was going to get her child back and she might lose her dog and cat. McGhehey told Elmore about her family background and stated that she "[came] from money." *Id.*

[7] The fourth voicemail message began, "It's a good thing I'm not scared of jail. You know what, it's not over between you and I personally, Mr. Elmore." *Id.*, voicemail 1485-092118. McGhehey accused Elmore of having an affair and stated three more times, "It's not over." *Id.* McGhehey continued, "You're full of shit. It's on. And I'm not gonna stop until this man—oh, it's disgusting…." *Id.* At random points throughout the voicemail message, McGhehey also mentioned that: she wanted pictures of her children that Elmore had on his phone, she lost her children to "CPS" (i.e., Child Protective Services), she lost her cat and dog, her husband was at Elmore's "beck and call," she was going to have a garage sale, she had not seen her husband since September 3, she had

gone to jail twice, she was "in the court system" now, and she only cared about getting her children "out of CPS." *Id.*

[8] In the fifth voicemail message, McGhehey addressed Elmore as "Jaba," and discussed paying Elmore for Werkley's car. *Id.*, voicemail 1487-092118(2).

[9] In the sixth voicemail message, McGhehey stated that she had Elmore's drill and asked who needed to pick it up. She also stated, "This is not going to go away. By the way, I had a good conversation with the Speedway police department. I'm getting a hold of your wife, bitch." *Id.*, voicemail 1490-092118. McGhehey further stated in angry tones, "I'm about to knock on your door, bro. Maybe I should just freaking go to your fucking house off of Kessler and knock on your door. I think I should do that, you fucking Jabba fat-ass…" *Id.*

[10] In the seventh voicemail message, McGhehey accused Elmore of "fucking with [her] family," and stated that the police were going to come to Elmore's home. She further stated, "It's not gonna go away from you, bitch…. Put a restraining order on me, bitch….I'm gonna handle this. I'm not gonna vandalize your property," then laughs. *Id.*, at voicemail 091318 or 091418(2).[2] McGhehey then identified herself by name and ended with more insults to Elmore.

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[2] State's Exhibit 2 contains the alternative numbering for the seventh voicemail message, without explanation.

[11] The trial court admitted, over the State's objection, McGhehey's Defense Exhibit A, which was a recording of the June 10, 2019, deposition of Captain James Dierdorff ("Officer Dierdorff") of the Speedway Police Department. In his recorded deposition statement, Dierdorff indicated that he listened to the voicemail messages McGhehey sent to Elmore. Dierdorff stated that McGhehey's "main focus" in the voicemail messages was her marital problems, but the messages also contained "a lot of profanity." *Id*. Dierdorff also stated that "there were some threats made" on the messages to discredit Elmore's business. *Id*.

[12] McGhehey also testified on her own behalf. She stated, "I'm Bipolar," and further testified that her "main intent" in her telephone calls to Elmore was to find her husband. Tr. at 41.

[13] The trial court found McGhehey guilty as charged. In so finding, the court stated in relevant part:

> There's the phrase "with no intent of legitimate communication" and having heard these calls, I — I understand your argument Ms. Knipp, and I've listened very carefully to Ms. McGhehey's testimony, but the calls themselves, the nature of the calls, the, uh — it just does not appear to be any intent of legitimate communication in — in those calls. Both in the manner of speaking, the words chosen and the things that are said; I'm not gonna stop, the threatening nature of it. I do take very seriously your argument regarding infringing on anyone's rights, First Amendment Rights, but the Court does believe that the State has proven its case….

Id. at 49. The trial court sentenced McGhehey to 180 days' incarceration with 176 days suspended and no probation. This appeal ensued.

Discussion and Decision

[14] McGhehey challenges the sufficiency of the evidence to prove she lacked an intent to legitimately communicate with Elmore and alleges that the speech contained in the voicemail messages she left was constitutionally protected by both the federal and state constitutions.

> We approach a typical sufficiency challenge with "great deference" to the fact-finder. *Brewington v. State*, 7 N.E.3d 946, 955 (Ind. 2014). That is, "[w]e neither reweigh evidence nor judge witness credibility." *Gibson v. State*, 51 N.E.3d 204, 210 (Ind. 2016). Moreover, we view the "evidence and reasonable inferences drawn therefrom in a light most favorable to the conviction and will affirm 'if there is substantial evidence of probative value supporting each element of the crime from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.'" *Walker v. State*, 998 N.E.2d 724, 726 (Ind. 2013) (quoting *Davis v. State*, 813 N.E.2d 1176, 1178 (Ind. 2004)). However, to the extent the … appellate issues implicate principles of freedom of speech, the Indiana Supreme Court has held that "[d]eferential review ... creates an unacceptable risk of under-protecting speech." *Brewington*, 7 N.E.3d at 955. Indeed, because of the importance of protecting free public discourse, we have a "constitutional duty," *id*., to independently examine the record "to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression," *Journal-Gazette Co., Inc. v. Bandido's, Inc.*, 712 N.E.2d 446, 455 (Ind. 1999) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 285, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964)). This rule of independent review—conducted de novo—"assigns to

> judges a constitutional responsibility that cannot be delegated to the trier of fact," no matter whether the trier of fact is a judge or a jury. *Brewington*, 7 N.E.3d at 955 (quoting *Bandido's*, 712 N.E.2d at 455). The de novo approach has been applied to claims under the First Amendment, *see id.*, and we see no reason it would not apply to claims under Article 1, Section 9.

McGuire v. State, 132 N.E.3d 438, 442-43 (Ind. Ct. App. 2019), *trans. denied*.

Sufficiency of the Evidence

[15] McGhehey alleges there was insufficient evidence to prove she harassed Elmore. To prove harassment beyond a reasonable doubt, the State was required to provide evidence that McGhehey's telephone call(s) to Elmore were made with the intent to harass, annoy, or alarm him and with no intent of legitimate communication. I.C. § 35-45-2-2(a)(1). Whether comments are made with intent to harass, annoy, or alarm must be determined using an objective standard; that is, a consideration of whether the statements would harass, annoy, or alarm a "reasonable person." *Leuteritz v. State*, 534 N.E.2d 265, 267 (Ind. Ct. App. 1989). A trial court finding that there was no intent of legitimate communication "is a factual determination which will be disturbed only upon a showing [that] no substantial evidence of probative value exists from which the trier of fact could reasonably infer the defendant was guilty beyond a reasonabl[e] doubt." *Brehm v. State*, 558 N.E.2d 906, 908 (Ind. Ct. App. 1990).

[16] McGhehey's second voicemail message to Elmore does not contain any of the communications McGhehey alleges show an intent to legitimately

communicate; in that message she does not discuss looking for her husband, paying off her husband's car loan, or returning Elmore's drill. Rather, in an angry and aggressive tone, McGhehey calls Elmore multiple crude and/or profane names and ends by stating that Elmore should tell her husband that "he can shove a penis up his ass," followed by the question, "Are you the giver or receiver in that relationship." State's Ex. 2, voicemail 1447-090718(2). A reasonable person would feel harassed, annoyed, or alarmed by such statements. Thus, the evidence of the second voicemail message alone was sufficient to prove McGhehey committed harassment; i.e., that she intended to harass, annoy, or alarm Elmore with no intent of legitimate communication. I.C. § 35-45-2-2(a)(1).

[17] Evidence of additional voicemail messages provided additional proof of harassment, including threats. For example, in the third voicemail message, McGhehey noted that "revenge is best served cold" and then threatened to call Elmore's distributor and disparage Elmore's business unless Elmore was "decent" to her. State's Ex. 2, voicemail 1467-091318. In the fourth voicemail message, McGhehey repeatedly stated that "it's not over" between her and Elmore, and she also stated that she was "not gonna stop until" some undisclosed "man" did some undisclosed thing. State's Ex. 2, voicemail 1485-092118. In the sixth voicemail message, McGhehey similarly stated, "This is not going to go away, bitch" and threatened that she was "getting a hold of [Elmore's] wife" and would go to Elmore's house. *Id.*, voicemail 1490-092118. And in the seventh voicemail to Elmore, McGhehey again stated, "It's not

gonna go away from you, bitch," and then said she was "gonna handle this." *Id.*, voicemail 091318 or 091418(2). A reasonable person would consider these to be harassing and/or threatening statements. And McGhehey's additional, random comments about topics such as her missing husband, the loss of her children and pets, and returning a drill do not convert her harassing and threatening statements into attempts at legitimate communication. *See McGuire*, 132 N.E.3d at 445 (holding threatening speech showed lack of intent to engage in legitimate communication despite being accompanied by some political expression).

[18] Through testimony and exhibits, the State provided sufficient evidence that McGhehey made a telephone call to Elmore with the intent to harass, annoy, or alarm him and with no intent of legitimate communication. McGhehey's contention to the contrary is a request that we reweigh the evidence and judge witness credibility, which we cannot do. *Gibson*, 51 N.E.3d at 210.

Free Speech

[19] McGhehey asserts that the harassment statute, as applied to her, is unconstitutional under the federal and state constitutions because it proscribes her legitimate communication. As we noted in *McGuire*, the issue of intent to engage in legitimate communication under the statute collapses into the constitutional free speech challenge because we have interpreted the statutory phrase "no intent of legitimate communication" as creating a "'specific intent requirement preclud[ing] the application of this statute to constitutionally

protected legitimate communications.'" *McGuire*, 132 N.E.3d at 444 (quoting *Kinney v. State*, 404 N.E.2d 49, 51 (Ind. Ct. App. 1980)).

[20] As an initial matter, the State contends that McGhehey has waived her free speech claim by failing to raise it in a motion to dismiss prior to trial under Indiana Code Sections 35-34-1-4 and -6. Generally, failure to file a proper motion to dismiss raising a constitutional challenge to a criminal statute waives the issue on appeal. *E.g.*, *Coleman v. State*, 149 N.E.3d 313, 318 (Ind. Ct. App. 2020), *trans. denied*. However, the "'appellate courts are not prohibited from considering the constitutionality of a statute even though the issue otherwise has been waived[,] [a]nd indeed a reviewing court may exercise its discretion to review a constitutional claim on its own accord.'" *Id*. (quoting *Plank v. Cmty. Hosps. of Ind., Inc.*, 981 N.E.2d 49, 53-54 (Ind. 2013)). Although McGhehey failed to raise the issue of free speech in a motion to dismiss prior to trial, we exercise our discretion to review her constitutional claim. *Id*.

First Amendment to United States Constitution

[21] The harassment statute regulates speech, which is protected under the First Amendment.[3] *McGuire*, 132 N.E.3d at 442. To determine the proper standard for evaluating the harassment statute under the First Amendment, we must determine (1) whether the statute is content-neutral, and (2) what type of forum

[3] The First Amendment states, in relevant part: "Congress shall make no law … abridging the freedom of speech …". U.S. Const. amend. I.

is involved. *State v. Econ. Freedom Fund*, 959 N.E.2d 794, 801 (Ind. 2011). "[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech." *Id*. at 801-02. A restriction on speech that is unrelated to the content of expression is deemed neutral, "even if it has an incidental effect on some speakers or messages but not others." *Price v. State*, 622 N.E.2d 954, 965 (Ind. 1993). In addition, the standards used to evaluate restrictions on speech "differ depending on the character of the property at issue." *Econ. Freedom Fund*, 959 N.E.2d at 802 (quoting *Frisby v. Schultz*, 487 U.S. 474, 479 (1988)).

[22] The harassment statute is content-neutral because it only applies to an *intent* to engage in speech rather than applying to the content of the speech itself, and it does not apply to an intent to legitimately communicate. *Stone v. State*, 128 N.E.3d 475, 482 (Ind. Ct. App. 2019), *trans. denied*. Moreover, "the telephone system is neither a public property nonpublic forum, nor a limited public forum, but a private channel of communication." *Econ. Freedom Fund*, 959 N.E.2d at 802 (quotation and citation omitted). Because the statute is content-neutral and applies to speech made through private channels to reach private persons, the appropriate test for determining whether its restrictions violate the First Amendment is "whether it is narrowly tailored to serve a significant governmental interest while leaving open ample alternative channels for communication of the information." *Id*. (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

[23] Subsection (a)(1) of Indiana Code Section 35-45-2-2 is narrowly tailored to serve the significant governmental interest of protecting "the privacy, tranquility, and efficiency of telephone customers." *Econ. Freedom Fund*, 959 N.E.2d at 802 (holding the same regarding the "Autodialer Law"); *see also Stone*, 128 N.E.3d at 482 (holding there is a substantial public interest in protecting people from telephone harassment).

> [I]t is well established that the protection of residential privacy is a significant governmental interest. *See, e.g.*, *Frisby*, 487 U.S. at 484, 108 S. Ct. 2495. The United States Supreme Court has "repeatedly held that individuals are not required to welcome unwanted speech into their own homes and that the government may protect this freedom." *Id*. at 485, 108 S. Ct. 2495.

Econ. Freedom Fund, 959 N.E.2d at 802. Moreover, the harassment statute does not apply to speech that is intended to legitimately communicate with another. Therefore, it is narrowly tailored to serve its legitimate purpose, and it leaves open ample alternative forms of communication, e.g., telephone calls intended to legitimately communicate.

[24] In addition, there are certain categories of speech that are simply not protected by the First Amendment. *McGuire*, 132 N.E.3d at 444. True threats are one such category. *Id*. (citing *Virginia v. Black*, 538 U.S. 343, 359 (2003)). A "true threat" is one where "'the speaker intend[s] his communications to put his targets in fear for their safety, and the communications were likely to actually cause such fear in a reasonable person similarly situated to the target.'" *Id*. (quoting *Brewington*, 7 N.E.3d at 964). The First Amendment "does not permit

threats against the safety and security of any American, even public officials, regardless of whether those threats are accompanied by some protected criticism." *Brewington*, 7 N.E.3d at 963.

[25] Here, as we discussed above, McGhehey's voicemail messages to Elmore did not show an intent to legitimately communicate with him but rather to harass, annoy, or alarm him with profane slurs. And it is likely that a reasonable person in Elmore's place would feel harassed, annoyed, or alarmed by the messages. Moreover, McGhehey's speech contained true threats, which are not protected by the First Amendment at all; e.g., threatening to "get[] ahold of [Elmore's] wife" and go to his house. State's Ex. 2, voicemail 1490-092118. Therefore, the harassment statute does not violate the First Amendment either on its face or as applied to McGhehey.

Article 1, Section 9, of Indiana Constitution

[26] Article 1, Section 9, of the Indiana Constitution[4] also protects speech, with a focus on protecting political speech. *McGuire*, 132 N.E.3d at 442. In a challenge under Article 1, Section 9, we employ a two-step inquiry: first we determine whether the state action has restricted expressive activity and, second, we determine whether the restricted activity constituted an abuse of the right to speak. *Id*. at 444 (quoting *Whittington v. State*, 669 N.E.2d 1363, 1367

[4] Article 1, Section 9, states: "No law shall be passed, restraining the free interchange of thought and opinion, or restricting the right to speak, write, or print, freely, on any subject whatever: but for the abuse of that right, every person shall be responsible." Ind. Const. art. 1, § 9.

(Ind. 1996)). As to the second inquiry, if the expressive activity is not unambiguously political, we review it under a rational basis standard. That is, "we 'determin[e] whether the state could reasonably have concluded that [the] expressive activity ... was an 'abuse' of the right to speak or was, in other words, a threat to peace, safety, and well-being.'" *Id*. at 445 (quoting *Whittington*, 669 N.E.2d at 1371).

[27] As discussed above, the harassment statute clearly restricts expressive activity. However, McGhehey's expressive activity constituted an abuse of the right to speak in that it was not intended to be political speech or other legitimate communication, and it was a threat to the peace, safety, and well-being of another. *Id*. Therefore, that expressive activity could be regulated "without running afoul of Article 1, Section 9." *Id*.

Conclusion

[28] The State provided sufficient evidence that McGhehey made a telephone call to Elmore with the intent to harass, annoy, or alarm him and with no intent of legitimate communication, and thereby committed harassment, a Class B misdemeanor. Moreover, because the conviction concerned proscribable speech, it did not run afoul of the federal or state rights to free speech.

[29] Affirmed.

May, J., and Robb, J., concur.