MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Jonathan Flick,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 28, 2022

Court of Appeals Case No. 21A-CR-1697

Appeal from the Adams Superior Court

The Honorable Samuel K. Conrad, Judge

Trial Court Cause No. 01D01-2103-CM-98

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Jonathan R. Flick (Flick), appeals his conviction for harassment, a Class B misdemeanor, Ind. Code § 35-45-2-2(a)(4)(A).

[2] We affirm.

ISSUES

[3] Flick presents this court with two issues on appeal, which we restate as:

(1) Whether the State presented sufficient evidence beyond a reasonable doubt to support his conviction for harassment; and
(2) Whether the trial court committed fundamental error when it permitted a police officer to remain at the State's table despite a separation-of-witnesses order.

FACTS AND PROCEDURAL HISTORY

[4] Jennifer Sprunger (Sprunger) and Flick became romantically involved in the Fall of 2020, with Flick moving in with Sprunger. Their relationship was tumultuous and the couple broke up and rekindled their relationship a couple of times. In February 2021, Flick became suspicious that Sprunger was cheating on him with other men on Facebook. He had "a problem" with Sprunger being friends with men from her hometown in Ohio and did not like it when she left them messages. (Transcript p. 8). Checking up on her, Flick took Sprunger's phone, accessed her Facebook Messenger, and noticed a message from a man,

named Daniel. Flick became angry, threw Sprunger's phone, and accused her of cheating on him. At that point, Sprunger ended their relationship.

[5] Even though they had broken up, Flick continued to contact Sprunger and he "was consistently texting [her] threatening text messages," telling her that "[i]f he could not have [her], nobody can." (Tr. p. 9). Sprunger asked Flick to "stop over and over and over," but he continued to call and send her text messages. (Tr. p. 9). At one point, he "stated that he was going to chop [Sprunger] up into a wood chipper and feed [her] to the catfish in the Wabash River." (Tr. p. 9). He followed up on that verbal threat by sending her a picture of a wood chipper.

[6] On February 23, 2021, Sprunger filed a report with the Berne Police Department. She reported that Flick was harassing her and had sent her "hundreds" of text messages despite being asked numerous times to stop. (Tr. p. 10). Sprunger provided a copy of the text messages to Officer Joshua Kimberlin (Officer Kimberlin). The following day, Officer Kimberlin's shift partner spoke with Flick's parole officer and requested that he contact Flick to inform him to stop contacting Sprunger.

[7] On March 20, 2021, Sprunger returned to the police department to report that Flick continued to contact her. Officer Kimberlin contacted Flick and questioned him about his continuous efforts to contact Sprunger. Flick informed the officer that the messages Sprunger had shown him were from "when they were dating" and that he was done contacting her. (Tr. p. 48). On

March 23, 2021, Flick called Officer Kimberlin and told him that any additional phone calls that Sprunger might have received since their last conversation were from his niece and daughter and that they "were the ones making harassing phone calls." (Tr. p. 49). When contacted by Officer Kimberlin, Flick's niece denied contacting Sprunger and Flick's daughter explained that she had called Sprunger one time but had not left any voicemails. Four days later, on March 24, 2021, Sprunger filed another report. She reported that she had received approximately twenty phone calls from a blocked number and that Flick had left her a voicemail.

[8] Between February 23, 2021, and March 19, 2021, Sprunger received 78 text messages from Flick. Of these 78 messages, 21 messages dealt with personal property that Flick wanted returned, while the remainder of the text messages were questions, comments, pleas, and statements of Flick's feelings for Sprunger. For example, on February 24, 2021, Flick texted Sprunger, "I don't want to end this on these terms." (State's Exh. 1). Later that same day, "[Sprunger] plz?" (State's Exh. 1). Again later, he texted, "Babe plz stop." (State's Exh. 1). On February 26, 2021, Flick texted Sprunger "I won't bother you anymore! Can I send some ppl over this weekend to get my things?" (State's Exh. 1). A little later that same day, he texted, "Where is [] TV and TV stand? I need the rest of my things." (State's Exh. 1). On March 2, 2021, he texted, "[Sprunger] seriously? You shut me off like this." (State's Exh. 1). And again, "Plz talk to me." (State's Exh. 1).

[9] On March 23, 2021, the State filed an Information, charging Flick with Class B misdemeanor harassment. On July 7, 2021, the trial court conducted a bench trial. At the onset of trial, the trial court announced the parties present and recognized Officer Kimberlin representing the Berne Police Department. Subsequently, Flick's counsel made a motion for separation of witnesses, which was granted by the trial court. The trial court instructed "those individuals that are in the gallery that are witnesses in this trial to step outside in the hallway until your time to testify." (Tr. p. 4). Officer Kimberlin remained seated at the State's table and Flick's counsel did not object. After the presentation of evidence, the trial court found Flick guilty as charged and sentenced him to serve 180 days in the Adams County jail with the possibility of serving that time on home detention, if found eligible.

[10] Flick now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION[1]

I. *Sufficiency of the Evidence*

[11] Flick contends that the State failed to present sufficient evidence beyond a reasonable doubt to sustain his conviction for harassment. For sufficiency

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[1] Flick appears to argue that there was a fatal variance between the charging Information and the evidence admitted at trial as he claims that we should confine our review to the text messages sent to Sprunger without regard to the voicemails and phone calls as these were not specifically pled in the charging information. However, Flick failed to object to the admission of the voicemails and phone calls at trial and did not allege a variance argument during the proceedings. Because Flick failed to object before the trial court, he has waived the argument on appeal. *Crittendon v. State*, 106 N.E.3d 1100, 1103, n.3 (Ind. Ct. App. 2018) (noting that a defendant waives a fatal variance claim by failing to raise it to the trial court).

challenges, we neither reweigh evidence nor judge witness credibility. *McCallister v. State*, 91 N.E.3d 554, 558 (Ind. 2018). We consider only the evidence most favorable to the judgment together with all reasonable inferences that may be drawn from the evidence. *Id*. We will affirm the judgment if it is supported by substantial evidence, even if the evidence is conflicting. *Id*.

[12] To convict Flick of harassment, the State was required to establish beyond a reasonable doubt that he, with the intent to harass Sprunger, but with no intent of legitimate communication, used a form of electronic communication to communicate with Sprunger. *See* I.C. § 35-43-2-2(a)(4)(A). As a mental state, a person's intent generally must be inferred from the surrounding circumstances and from the natural and usual consequences of the person's conduct. *See Gaerte v. State*, 808 N.E.2d 164, 166 (Ind. Ct. App. 2004), *trans. denied*.

[13] Focusing his challenge mainly on the legitimate communication prong, Flick likens his situation to *Leuteritz v. State*, 534 N.E.2d 265 (Ind. Ct. App. 1989). In *Leuteritz*, the defendant had worked for the victim's husband, whom he alleged owed him forty dollars. *Id*. at 266. When Leuteritz phoned the victim's residence, he asked "to speak to Diaper Rash Face Charlie." *Id*. The victim testified that she told Leuteritz to stop calling and the conversation ended. *Id*. After he was found guilty by the trial court, Leuteritz argued on appeal that there was insufficient evidence to prove that he had no intent to enter into a legitimate communication. *Id*. at 267. We agreed, and noted that although Leuteritz' request to speak to "Diaper Rash Face Charlie," was "discourteous, [it] was itself a legitimate communication for the defendant communicated his

desire to speak to the [victim's] husband[.]" *Id*. We held that, "we can do no more than speculate that, if Leuteritz had been permitted to speak to [the victim's husband], there would have been no legitimate communication." *Id*. Accordingly, we reversed the trial court's judgment. *Id*.

[14] Relying on *Leuteritz*, Flick argues that his requests for Sprunger to "stop ignoring him" were legitimate communications, indicating his "desire to speak" with Sprunger. (Appellant's Br. p. 15). We find Flick's analogy to *Leuteritz* without merit. Flick's barrage of messages to Sprunger that she "talk to me plz," "[Sprunger] plz," "babe plz stop," were met with silence, yet he was relentless in texting her up to numerous times a day. The evidence reflects that he also accused Sprunger of cheating on him, stealing food stamps, and sending an innocent man to jail. In total, Flick sent Sprunger 78 text messages over a span of approximately 25 days despite repeatedly being told to stop by Sprunger, his parole officer, and Officer Kimberlin. He called her from blocked numbers, hung up on her, and left her voicemails. As such, Flick's actions went well beyond a single, discourteous phone call that could not be completed. While we acknowledge that some of the messages related to Flick's attempts to retrieve personal property, they do not mitigate the majority of his texts in which he was pestering Sprunger to respond to him or in which he accused her of cheating and theft.

[15] Flick's attempt to distinguish these facts from *Crose v. State*, 650 N.E.2d 1187 (Ind. Ct. App. 1995) is equally unsuccessful. In *Crose*, a patron to a restaurant became attracted to a waitress and began to leave her love letters during his

visits. *Id*. at 1188. In those letters, the defendant "proclaimed his love for her and pled with her to marry him." *Id*. at 1189. Disturbed by the letters, the waitress told the manager, who notified the police. *Id*. The defendant was convicted for harassment but on appeal argued that his "love letters conveyed legitimate communications that were not intended to harass" the waitress. *Id*. at 1191. We upheld the conviction, concluding that the defendant "persisted in the undesired communications" with the waitress despite her protests. *Id*. Flick now claims that sending love letters to a complete stranger should be distinguished from persistent "[c]ommunications expressing love" to a former partner. (Appellant's Br. p. 16). We disagree. *Crose* was not decided on the basis that the victim was a stranger; rather, we found Crose guilty because, like Flick, he persisted in reaching out to the waitress despite her repeated protests and requests to cease.

[16] Accordingly, based on the sheer volume of communications Flick sent Sprunger, her repeated requests to stop, and his lack of intent to engage in legitimate communications, we conclude that the State established beyond a reasonable doubt that Flick harassed Sprunger.

II. *The Officer's Presence at the Counsel's Table*

[17] Next, Flick contends that the trial court erred when it allowed Officer Kimberlin to remain in the courtroom despite a separation-of-witnesses order. Where there is a violation of a separation-of-witnesses order, we will not disturb the trial court's exercise of discretion unless there is a showing of prejudice

tantamount to an abuse of discretion. *Heeter v. State*, 661 N.E.2d 612, 614 (Ind. Ct. App. 1996). However, the record reflects that Flick failed to object to the officer's continued presence in the courtroom, and therefore, to avoid procedural default, he must now establish that a fundamental error occurred. The "fundamental error" exception is extremely narrow and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process. *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006).

[18] Indiana Rule of Evidence 615 provides that "[a]t a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. [] But this rule does not authorize excluding: [] (b) an officer or an employee of a party that is not a natural person, after being designated as the party's representative by its attorney; or (c) a person whose presence a party shows to be essential to presenting the party's claim or defense." Flick maintains that "[a]s Officer Kimberlin was not designated as a party representative by the Deputy Prosecuting Attorney who tried the case, and he was never shown to be a person whose presence was essential for presenting the State's case, his presence in the courtroom during the entirety of trial was a violation of Ind. R. Evid. 615." (Appellant's Br. p. 20).

[19] In *Heeter*, Heeter's counsel requested a separation of witnesses. *Heeter*, 661 N.E.2d at 614. Though not being formally designated as the State's representative, a detective remained in the courtroom and was present during trial and the testimony of the witnesses. *Id*. After Heeter was convicted, he

appealed, arguing that the trial court had failed to enforce the separation-of-witnesses order. *Id*. We disagreed. Applying Indiana Evidence Rule 615, the *Heeter* court concluded that a detective assisting in the prosecution of the case was exempt from the separation-of-witnesses order. *Id*. at 614-15. Recognizing that Indiana had a long tradition of allowing a police officer to remain in the courtroom at counsel's table even though the officer may also be called as a witness, we affirmed the trial court even though we cautioned that the better practice would have been to have the detective designated as the State's representative prior to the presentation of the evidence but the State's failure to do so did not result in error. *Id*. at 615.

[20] Similarly, here, even though Officer Kimberlin was only recognized as the representative of the Berne Police Department, he remained in the courtroom after the separation-of-witnesses motion was granted. Officer Kimberlin was not formally acknowledged to be the representative of the State but the officer was called as a witness in the State's case-in-chief. The evidence does not reflect and Flick does not point us to any, that another officer was also seated at the State's counsel table. Accordingly, in light of Indiana's long tradition, it is clear that Officer Kimberlin was assisting in the prosecution of the case and was exempted from the separation-of-witnesses order pursuant to Indiana Evidence Rule 615. Therefore, the trial court did not commit error, let alone fundamental error, by allowing the officer to remain in the courtroom during the bench trial.

CONCLUSION

[21] Based on the foregoing, we hold that the State presented sufficient evidence beyond a reasonable doubt to support Flick's conviction for harassment; and the trial court did not err when it permitted a police officer to remain at the State's table despite a separation-of-witnesses order.

[22] Affirmed.

[23] Robb, J. and Molter, J. concur