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IN THE
COURT OF APPEALS OF INDIANA

Darin M. Haberkorn,
Appellant-Defendant,

v.

State of Indiana
Appellee-Plaintiff

March 3, 2023

Court of Appeals Case No. 22A-CR-2150

Appeal from the Allen Superior Court

The Honorable Steven O. Godfrey, Judge

The Honorable John C. Bohdan, Magistrate

Trial Court Cause No. 02D04-2202-CM-551

Opinion by Judge Crone
Judges Robb and Kenworthy concur.

Crone, Judge.

Case Summary

[1] Darin M. Haberkorn appeals his conviction, following a jury trial, for class B misdemeanor harassment. He contends that the State presented insufficient evidence to support his conviction and that the trial court committed fundamental error in instructing the jury. Finding sufficient evidence, and no fundamental error, we affirm.

Facts and Procedural History

[2] On January 19, 2022, the Fort Wayne Clerk's Office received a complaint of a Chevrolet Impala with a flat tire parked on Clara Avenue in front of Haberkorn's house. A city ordinance prohibits leaving inoperable vehicles on city streets for more than twenty-four hours and requires that cars on city streets be moved every twenty-four hours. That afternoon, a city parking enforcement officer placed a red tag on the Impala and chalked its tires. The red tag alerts the owner that the car must be moved or it will be towed within seventy-two hours. Parking enforcement returns after twenty-four hours to begin ticketing the car if it is not moved. The Impala, which was a car used by Haberkorn but registered to his mother, was red-tagged on January 19, ticketed on January 20, and eventually towed.

[3] Haberkorn believed that his car was improperly tagged, ticketed, and towed. At around 4:00 p.m. on January 19, Haberkorn called the Violations Bureau in the Clerk's Office to complain that his car had been red-tagged. Over the next several days, Haberkorn called the Clerk's Office numerous times. The calls

came from several different phone numbers, many of which began with 427, which is the prefix for city government office numbers, so the calls appeared to be coming from another governmental office.

[4] In the calls, Haberkorn was extremely angry and rude. He would scream, yell, and curse at staff. He would interrupt them so that they were unable to answer questions, and he refused to give them the necessary information so that they could address his complaints. In one call on January 19, Haberkorn warned Deputy City Clerk Stacy Reed that she "had better understand that there are consequences" for what had been done to him. Tr. Vol. 2 at 71-73. He told Reed, "I am going to come down there." State's Ex. 3. When Reed asked him to stop threatening her and informed him that she perceived his tone as threatening, he replied, "I don't give a f**k," and asked her "whose mom" she was, seemingly referencing her children. *Id*. He also warned her that he was going to be on the phone with "Lana's son" in a few minutes and that he was "going to be talking to Lana on a personal level." *Id*. Lana Keesling is the city clerk. In a call answered by a staffer named Emily on January 20, Haberkorn yelled, "[Y]ou don't think I can find out who the f**k you are," and called her a "dumb c*nt." State's Ex. 2. That same day, Haberkorn yelled at a staffer named Denise about his dissatisfaction with the process and asked, "[D]o you need me to go to [Keesling's] house." State's Ex. 4. He later left a voicemail for Keesling stating that he was being told by the prosecutor's office that he was not allowed to go to that office and then asking Keesling, "What other course of action do I

have?" State's Ex. 6. He then warned Keesling that she should "start thinking about what [she was] doing." *Id*.

[5] Haberkorn also started posting Facebook messages about Keesling, and he messaged some of Keesling's friends asking for personal information about her. In one message to one of Keesling's friends, Haberkorn stated that he was going to "have her ass in the morning." Tr. Vol. 2 at 124. In another post, he sought out personal information about staffer Emily. Haberkorn tagged Keesling in each post so that he could be certain that she would be aware of them. He further tried to direct message her. Based upon Haberkorn's alarming behavior, Keesling printed out his picture to provide to her staff and to security so that they would be immediately aware and seek help if he came to the office. Emily was so fearful for her safety that she contacted one of her neighbors, who is retired from the military, to look out for her, and she also had police do routine checks on her house.

[6] The State subsequently charged Haberkorn with one count of class B misdemeanor harassment. A jury trial was held in August 2022. The jury found Haberkorn guilty as charged. The trial court sentenced Haberkorn to an 180-day fully suspended sentence, with sixty days to be served on home detention.[1]

[1] Haberkorn was subsequently found ineligible for home detention due to "an active warrant out of Laredo, Texas." Appellant's App. Vol. 2 at 96.

The trial court further imposed a fine of $100 and ordered Haberkorn to abide by five no-contact orders. This appeal ensued.

Discussion and Decision

Section 1 – Sufficient evidence supports Haberkorn's harassment conviction.

[7] Haberkorn challenges the sufficiency of the evidence to support his harassment conviction. Specifically, he claims that his communications were "legitimate communications protected by the First Amendment's Free Speech Clause."[2] Appellant's Br. at 30. We disagree.

[8] As a general matter, in reviewing a claim of insufficient evidence, we do not reweigh the evidence or judge the credibility of witnesses, and we consider only the evidence that supports the judgment and the reasonable inferences arising therefrom. *Bailey v. State*, 907 N.E.2d 1003, 1005 (Ind. 2009). It is "not necessary that the evidence 'overcome every reasonable hypothesis of innocence.'" *Drane v. State*, 867 N.E.2d 144, 147 (Ind. 2007) (quoting *Moore v. State*, 652 N.E.2d 53, 55 (Ind. 1995)). "We will affirm if there is substantial evidence of probative value such that a reasonable trier of fact could have

[2] The First Amendment to the U.S. Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

concluded the defendant was guilty beyond a reasonable doubt." *Bailey*, 907 N.E.2d at 1005.

[9] However, while we approach a typical sufficiency challenge with great deference to the factfinder, to the extent that the instant case implicates principles of freedom of speech, our supreme court has held that such "[d]eferential review ... creates an unacceptable risk of under-protecting speech." *Brewington v. State*, 7 N.E.3d 946, 955 (Ind. 2014). Accordingly, we have a "constitutional duty" to independently examine the record "to assure ourselves that the [conviction] does not constitute a forbidden intrusion on the field of free expression." *Id.* (quoting *Journal-Gazette Co. v. Bandido's, Inc.*, 712 N.E.2d 446, 455 (Ind. 1999)). This "rule of independent review 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. *Id.*

[10] To convict Haberkorn of class B misdemeanor harassment as charged, the State was required to prove that he communicated with Keesling and/or her staff by telephone, mail, or other form of written communication, "with intent to harass, annoy, or alarm another person but with no intent of legitimate

communication[.]" Ind. Code § 35-45-2-2(a).[3] Haberkorn's sole assertion on appeal is that the State failed to prove that he had no intent of legitimate communication.

[11] Haberkorn's challenge to the sufficiency of evidence regarding his intent to engage in "legitimate communication" essentially "collapses" into a constitutional challenge to his conviction. *McGuire v. State*, 132 N.E.3d 438, 444 (Ind. Ct. App. 2019), *trans. denied* (2020). "This is 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.'" *Id.* (quoting *Kinney v. State*, 404 N.E.2d 49, 51 (Ind. Ct. App. 1980)). The question becomes whether the evidence sufficiently demonstrates that Haberkorn engaged in proscribable speech.[4]

[12] Upon a First Amendment challenge to a conviction, we evaluate whether the speech fell within an "unprotected category." *Price v. State*, 622 N.E.2d 954, 965 (Ind. 1993). Indeed, certain content is "constitutionally proscribable." *R.A.V. v.*

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[3] The First Amendment reflects the "bedrock principle ... that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). This Court has determined that Indiana Code Section 35-45-2-2 is a valid content-neutral restriction on speech that does not itself violate the First Amendment. *Stone v. State*, 128 N.E.3d 475, 482 (Ind. Ct. App. 2019), *trans. denied*. Indeed, "the language of the harassment statute is readily justified without reference to the content of the regulated speech—the [S]tate's purpose for enacting the harassment statute was to prevent a person from using a telephone with the intent to harass, annoy, or alarm others and with no intent of a legitimate communication." *Id.*

[4] Haberkorn made no argument below or on appeal that his conviction violates Article 1, Section 9 of the Indiana Constitution.

City of St. Paul, Minn., 505 U.S. 377, 383 (1992) (emphasis removed). The State argued both below and on appeal that Haberkorn's communications included "true threats," which are not protected by the First Amendment. Appellee's Br. at 14. Haberkorn concedes that a true threat is not a legitimate communication and is exempted from First Amendment protections. *Brewington*, 7 N.E.3d at 955. A true threat requires "two necessary elements: that the speaker intend his communications to put his targets in fear for their safety, and that the communications were likely to actually cause such fear in a reasonable person similarly situated to the target." *Id.* at 964.

[13] Here, Haberkorn repeatedly telephoned the Violations Bureau of the Fort Wayne Clerk's Office. Indeed, the record reveals that he made at least sixteen such calls, and that his behavior during these calls was considered alarming and "highly extraordinary" to staff that was quite accustomed to dealing with upset and angry citizens. Tr. Vol. 2 at 76. Each time he called, Haberkorn refused to give any information to staffers or communicate such that they could help him with his parking issue. Instead, he simply repeatedly berated and threatened staffers with some sort of retaliation for how he believed he had been wronged. In one call he warned that there would be "consequences" for the staffer's actions. State's Ex. 3. He further angrily threatened, "I am going to come down there," indicating that he planned to personally confront the staffer. *Id.* When the staffer expressed that she felt threatened, Haberkorn responded, "I don't give a f**k," and then made a vague and troubling reference to her children. *Id*.

He warned that he planned to contact City Clerk Keesling's "son"[5] and that he was going to communicate with Keesling "on a personal level." *Id*.

[14] In another call, Haberkorn warned a different staffer that he could easily "find out" who she was, again indicating that he intended an in-person confrontation. State's Ex. 2. In yet another call, referring to Keesling, Haberkorn shouted at a staffer, "Do you need to me to go to her house?" State's Ex. 4. He also left a voicemail message for Keesling stating that he was "working on something" and threatened that she had better "start thinking about what [she was] doing." State's Ex. 6. Haberkorn further made several references about planning to find and confront staffers' family members with whom he would never have a reason to legitimately communicate regarding a parking issue. Haberkorn also sent direct messages to and sought personal information about some of his targets on Facebook, causing them additional fear that he planned to find and harm them. Indeed, he messaged one of Keesling's friends that he would "have [Keesling's] ass." Tr. Vol. 2 at 124.

[15] We conclude that this speech amounted to constitutionally proscribable true threats. *See Brewington*, 7 N.E.3d at 978 (noting 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"). Despite Haberkorn's claims that his communications

[5] Although Keesling does not have a son, she perceived this reference as intended to threaten her family.

were mere "inelegant expression[s] of frustration," Appellant's Br. at 35, when viewed in light of "all of the contextual factors[,]" *Brewington*, 7 N.E.3d at 964, we have little difficulty concluding that Haberkorn intended his communications to put his targets in fear for their safety, and that the communications were likely to actually cause such fear in reasonable persons similarly situated. In view of the true threats contained in the speech, the State presented sufficient evidence that Haberkorn had no intent to engage in legitimate communication. Sufficient evidence supports his harassment conviction.

Section 2 – The trial court did not commit fundamental error in instructing the jury.

[16] Haberkorn next asserts that the trial court committed fundamental error in instructing the jury. Specifically, he challenges final instruction number 4, which reads as follows:

> The term "harassment" is defined by law as meaning conduct directed toward a victim that includes but is not limited to repeated or continuing impermissible contact that would cause a reasonable person to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include statutorily or constitutionally protected activity, such as lawful picketing pursuant to labor disputes or lawful employer-related activities pursuant to labor disputes.

Appellant's App. Vol. 2 at 66.

[17] Haberkorn concedes that his counsel failed to object to the instruction. Therefore, he argues that fundamental error occurred. An error is fundamental, and thus reviewable on appeal, if it "made a fair trial impossible or constituted a clearly blatant violation of basic and elementary principles of due process presenting an undeniable and substantial potential for harm." *Durden v. State*, 99 N.E.3d 645, 652 (Ind. 2018) (citations omitted). These errors create an exception to the general rule that a party's failure to object at trial results in a waiver of the issue on appeal. *Id.* This exception, however, is "extremely narrow" and encompasses only errors so blatant that the trial judge should have acted independently to correct the situation. *Id.*

[18] Although final instruction 4 is taken verbatim from Indiana Code Section 35-45-10-2 and is a correct statement of the law, Haberkorn complains that it defines the term harassment as used in Indiana Code Chapter 35-45-10 regarding the crime of stalking, so it would be "at best irrelevant" to the crime of harassment, as charged here, based upon Indiana Code Chapter 35-45-2. Appellant's Br. at 38. He further complains that this instruction failed to mention the intent necessary to find him guilty of harassment. Thus, he suggests that the jury could have found him guilty "on less than" all of the elements the crime of harassment requires. *Id.* at 39. Haberkorn's claims miss the mark.

[19] First, we emphasize that it is well settled that we will consider jury instructions as a whole and in reference to each other, not in isolation. *Murray v. State*, 798 N.E.2d 895, 900 (Ind. Ct. App. 2003). It is undisputed here that the jury was

thoroughly and adequately instructed through multiple jury instructions regarding the elements of the crime of harassment as charged pursuant to Indiana Code Section 35-45-2-2. Specifically, the jury was repeatedly instructed that it was the State's burden to prove that Haberkorn acted with the specific "intent to harass, annoy, or alarm another person but with no intent of legitimate communication." Appellant's App. Vol. 2 at 54-55, 64-65.

[20] Moreover, as noted by the State, the challenged instruction did not purport to define the crime of harassment or its elements, including intent, that the State bore the burden to prove. It simply provided some meaning and context to what type of conduct is considered to be harassing under Indiana law. And, Haberkorn does not articulate any reason why the term "harassment" should mean something different in the context of the crime of harassment than it does in the crime of stalking,[6] nor does he persuasively explain how giving the jury this instruction would have caused the jury any confusion as to the required intent element of his crime. Under the circumstances, Haberkorn has not met his burden of demonstrating error in the instruction of the jury, fundamental or otherwise. We affirm his conviction.

[6] The statutory definition of "stalk" includes the term "harassment," as stalk is defined as a "a knowing or an intentional course of conduct involving repeated or continuing harassment of another person …." Ind. Code § 35-45-10-1.

[21] Affirmed.

Robb, J., and Kenworthy, J., concur.