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IN THE
COURT OF APPEALS OF INDIANA

Brian Keith Gates, Jr.,

Appellant-Defendant,

v.

State of Indiana,

Appellee-Plaintiff.

July 29, 2022

Court of Appeals Case No. 22A-CR-247

Appeal from the St. Joseph Superior Court

The Honorable John M. Marnocha, Judge

Trial Court Cause No. 71D02-2102-F6-120

Riley, Judge.

STATEMENT OF THE CASE

[1] Appellant-Defendant, Brian Gates (Gates), appeals his conviction for intimidation, a Level 6 felony, Ind. Code §§ 35-45-2-1(a)(4); (b)(1)(A).

[2] We affirm.

ISSUES

[3] Gates presents this court with two issues, which we restate as:

(1) Whether the intimidation statute is unconstitutionally vague; and
(2) Whether the State proved beyond a reasonable doubt that Gates committed the offense of intimidation.

FACTS AND PROCEDURAL HISTORY

[4] Karissa Holderbaum (Holderbaum) and Gates dated on and off for approximately six years. On January 20, 2021, Holderbaum drove to work at her job at a fast-food restaurant in Mishawaka, Indiana. Gates intended to begin drug rehabilitation that day and wanted some of his clothing that was in Holderbaum's possession. Gates and Holderbaum communicated that day through cell phone calls, text messages, and voice messages. Gates told Holderbaum that he wanted his clothing, and Holderbaum told Gates that she could not retrieve his clothes because she was at work. Gates texted Holderbaum:

> Idgaf, you had plenty of time last 3 days to get them to me but u wanted to run tf around, go get them or I come there and make a sceen [sic] . . . not playing

(Exh. Vol. p. 3). Holderbaum and Gates exchanged texts about where Holderbaum would do laundry. Gates cursed at Holderbaum and told her, "I'm not playing your bulshit [sic] anymore . . . And I'll figure out what to do with your body when I'm ready." (Exh. Vol. p. 4). Gates also left Holderbaum an angry voice message demanding that she return his clothes immediately and informing her, "Bitch, I'm gonna get my shit you're gonna fucking have it or I'm going to fucking blow up your fucking car!" (Exh. 3). Holderbaum thought that Gates was trying to scare her, and she was also concerned that he would follow through on his threats. Holderbaum called 9-1-1, reported Gates' conduct, and shared Gates' texts and his voice message in which he threatened to blow up Holderbaum's car.

[5] On February 3, 2021, the State filed an Information, charging Gates with Level 6 felony intimidation. On November 17, 2021, Gates waived his right to a trial by jury, and on November 29, 2021, the trial court held Gates' bench trial. Gates did not move for dismissal of the intimidation charge on the basis that it was unconstitutionally vague. Holderbaum and Gates both testified regarding the events of January 20, 2021. Gates maintained that he had been in a drug rehabilitation facility that day and denied texting Holderbaum or leaving her the voice message about blowing up her car.

[6] The trial court found Holderbaum to be more credible, noting that the evidence of the text and voice messages corroborated her testimony. The trial court found Gates guilty of intimidation. On January 5, 2022, the trial court held Gates' sentencing hearing and ordered him to serve two years in the Department of Correction.

[7] Gates now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

I. *Constitutionality of the Intimidation Statute*

[8] Gates argues that the Level 6 felony intimidation statute is unconstitutionally vague as it applies to him. However, a challenge that a criminal statute is void for vagueness must be raised prior to trial through a motion to dismiss, or else it is waived. *Rhinehardt v. State*, 477 N.E.2d 89, 93 (Ind. 1985). Gates did not raise his claim below in any manner, let alone via a timely motion to dismiss, and so we conclude that he has waived his claim. *See id*.

[9] His waiver of the issue notwithstanding, Gates has failed to show that the intimidation statute is unconstitutionally vague. We review such claims de novo. *Pittman v. State*, 45 N.E.3d 805, 816 (Ind. Ct. App. 2015). Our review is highly restrained and very deferential and begins with a presumption of constitutional validity. *Id*. Therefore, the party challenging the constitutionality of the statute bears a "heavy burden" to show that the statute is unconstitutionally vague. *Id*.

[10] Pursuant to due process principles, a penal statute is void for vagueness if it does not clearly define the conduct that it prohibits. *Brown v. State*, 868 N.E.2d 464, 467 (Ind. 2007). We may invalidate a criminal statute as unconstitutionally vague "(1) for failing to provide notice enabling ordinary people to understand the conduct it prohibits, and (2) for the possibility that it authorizes or encourages arbitrary or discriminatory enforcement." *Id*. A statute is not void for vagueness "if individuals of ordinary intelligence would comprehend it adequately to

inform them of the proscribed conduct." *State v. Lombardo*, 738 N.E.2d 653, 656 (Ind. 2000). The statute in question need not list each item of prohibited conduct; rather, it need only inform the individual of the generally proscribed conduct. *Id*. A statute is only void for vagueness if it is vague as applied to the precise circumstances of the case giving rise to the challenge, and the defendant does not meet his burden of showing unconstitutional vagueness by devising hypothetical situations which might demonstrate vagueness. *Baumgartner v. State*, 891 N.E.2d 1131, 1136 (Ind. Ct. App. 2008).

[11] The State charged Gates with Level 6 felony intimidation and supported the charge at trial in part with evidence that during an argument about his clothes, Gates left an angry voice message for Holderbaum informing her that he was going to blow up her car. The relevant statute provides that the offense is a Level 6 felony as follows:

> A person who communicates a threat with the intent . . . that another person be placed in fear that the threat will be carried out, [commits a Level 6 felony] if the threat is . . . to commit a forcible felony.

I.C. §§ 35-45-2-1(a)(4); (b)(1)(A) (2019). "Threat" is further defined as "an expression, by words or action, of an intention to . . . unlawfully injure the person threatened or another person, or damage property[.]" I.C. § 35-45-2-1(d)(1) (2019).

[12] Gates argues that the intimidation statute is unconstitutionally vague in his case because it "requires no additional evidence for a conviction other than proof [that] he made a threat. There is no line drawn between simply making a threat and making a threat 'with the intent' that the other person essentially believe that the threat is going to materialize." (Appellant's Br. p. 9). Gates contends that, as a result, the portion of the intimidation statute under which he was charged does not adequately convey what conduct is proscribed.

[13] We cannot agree. Contrary to Gates' assertions, the statute does not simply require that, in order for the State to obtain a conviction, it must merely show that a threat was made. By its clear and unambiguous terms, the statute also requires that the State show that the threat was made with the intent "that another person be placed in fear that the threat will be carried out[,]" thus creating a line between what is lawful (conduct or making a statement) and unlawful (conduct or making a statement with the intent to make another person afraid that it will be carried out). I.C. §§ 35-45-2-1(a)(4); (b)(1)(A). Although we agree with Gates that the statute does not require any additional action apart from the making of the threat, the statute

clearly proscribes the conduct it renders unlawful by detailing the intent when making the threat that is prohibited. In addition, "individuals of ordinary intelligence" would comprehend that, in the midst of an argument, angrily informing another person that you will blow up her car in order to make that person afraid that you will do it is conduct that falls within the prohibitions of the statute. *See Lombardo*, 738 N.E.2d at 656. Accordingly, we conclude that, even if Gates had preserved his argument, he has not met his "heavy burden" of showing that application of the intimidation statute to his conduct is unconstitutionally vague. *Pittman*, 45 N.E.3d at 816.

II. *Sufficiency of the Evidence*

[14] Gates also challenges the sufficiency of the evidence supporting his conviction. Our standard of review in such matters is well-established: We will consider only the probative evidence and reasonable inferences that support the judgment of the trier of fact. *Hall v. State*, 177 N.E.3d 1183, 1191 (Ind. 2021). We do not reweigh the evidence or judge the credibility of the witnesses. *Id*. Accordingly, "[w]e will affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Id*.

[15] Gates claims that there is a "complete absence of evidence" that he intended that "Holderbaum believe that he was going to carry out the threat to blow up her vehicle." (Appellant's Br. p. 11). Gates argues that Holderbaum's testimony at trial that she thought he was trying to scare her with the threat to blow up her car but that she also felt that he was going to make good on his threat was not enough to support the conviction because his victim's subjective reaction to the threat is not an element of the offense. Whether a statement constitutes a threat is an objective question for the trier of fact to determine. *B.B. v. State*, 141 N.E.3d 856, 860 (Ind. Ct. App. 2020). "Intent is a mental function and, absent a confession, usually must be proved by circumstantial evidence." *Merriweather v. State*, 128 N.E.3d 503, 515 (Ind. Ct. App. 2019), *trans. denied*. A defendant's intent may be proven by circumstantial evidence alone, with the fact-finder inferring intent from the facts and circumstances of the case. *B.B.,* 141 N.E.3d at 860.

[16] For purposes of the intimidation statute, our supreme court has observed that whether a statement constitutes a true threat under Indiana law depends on two necessary elements, namely "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." *Brewington v. State*, 7 N.E.3d 946, 964 (Ind. 2014). Gates

does not contend that his statement about blowing up Holderbaum's car would not cause fear in a reasonable, similarly situated target, and we cannot credit his argument that there was a dearth of evidence that he intended to place Holderbaum in fear. During an ongoing, heated argument in which Gates' efforts to retrieve his clothes from Holderbaum were being frustrated, Gates angrily told Holderbaum "I'm going to fucking blow up your fucking car!" (Exh. 3). Gates chose to testify on his own behalf but did not present any evidence regarding his intentions in making this statement, as his defense at trial was that it was not he who had communicated with Holderbaum. The trial court could have reasonably inferred from these circumstances and from the absence of any contrary evidence of intent, such as any attempts by Gates to soften, backtrack, or explain his statement about blowing up Holderbaum's car, that as further leverage in the dispute about his clothes, Gates intended to make Holderbaum afraid that he would, indeed, blow up her car. Therefore, sufficient evidence supported the intent element of the offense.

CONCLUSION

[17] Based on the foregoing, we conclude that, even if Gates had preserved his claim regarding the constitutionality of the intimidation statute, it was not void for vagueness under the facts and circumstances of his case. We further conclude that the State proved beyond a reasonable doubt that Gates committed the offense with the requisite intent.

[18] Affirmed.

[19] May, J. and Tavitas, J. concur