MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Danny Roger Kawzinski,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

February 7, 2022

Court of Appeals Case No. 21A-CR-1574

Appeal from the Lake Superior Court

The Honorable Samuel L. Cappas, Judge

Trial Court Cause No. 45G04-2103-F5-175

Tavitas, Judge.

Case Summary

[1] Danny Kawzinski appeals his conviction for intimidation, a Level 6 felony. The charge arose from a phone call made by Kawzinski from the Lake County Jail. Amidst obscenities and insults, Kawzinski repeatedly threatened multiple Lake County deputy prosecutors as well as a detective from the Sheriff's department. Moreover, Kawzinski indicated that he was well aware that his communications were being recorded and monitored. We find that sufficient evidence exists to sustain the conviction. Accordingly, we affirm the trial court.

Issue

[2] Kawzinski raises a single issue: whether there is sufficient evidence to sustain his conviction for intimidation.

Facts

[3] On March 5, 2021, Kawzinski attended—as the defendant—a hearing in an unrelated criminal case. At the hearing, Detective Michelle Dvorscak of the Lake County Sheriff's Department testified that she had listened to over a hundred hours of phone conversations involving Kawzinski. Those phone conversations were recorded by the Telmate system, utilized by the Lake County Jail to monitor inmates' communications. Kawzinski took umbrage to the Detective's testimony, which resulted in an "angry outburst" meant to

convey that Kawzinski "strongly disagree[d]" with the testimony. Tr. Vol. III pp. 2-3.[1]

[4] Later that day, Kawzinski initiated a telephone call from the jail to his two adult children. The call was lengthy, meandering, and profane. During the call, Kawzinski: (1) expressed, several times, that he was aware that the call was being listened to and recorded (Ex. 2 at 3:33; 4:24; 11:10; 11:39; 13:50)[2]; (2) repeatedly referred to Detective Dvorscak[3] (Ex. 2 at 2:02; 2:18; 9:22; 9:29; 31:27; 32:40); and (3) specifically asserted that he was going to contact a "junkie brigade," and relay the addresses of two deputy prosecutors and Detective Dvorscak so that the "junkie brigade" could, among other unsavory things, "target" the homes for "burglaries." Ex. 2 at 17:18, 17:47; 17:56; 18:18.

[5] On March 30, 2021, the State charged Kawzinski with six counts of intimidation, two of which were charged as Level 5 felonies, and four of which were charged as Level 6 felonies.[4] After a jury trial, Kawzinski was acquitted of

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[1] The precise substance of Kawzinski's disagreement is not entirely clear from the record. We are able to glean from the March 5, 2021, phone conversation, however, that Kawzinski believed that Detective Dvorscak had testified that Kawzinski stabbed, or attempted to stab, a former girlfriend. Kawzinski stated to his two children multiple times that he had done no such thing.

[2] Moreover, every time an inmate makes a call from the jail, a recording informs him or her that the call is subject to monitoring and recording. Tr. Vol. III p. 10.

[3] Kawzinski mentions that he never referred to the Detective by name during the March 5, 2021 phone call. Appellant's Br. p. 6. It is plain from the context, however, to whom Kawzinski is referring. He also mentions during the phone call that he cannot pronounce Detective Dvorscak's name, which may account for the fact that he did not use the name.

[4] The State amended the charging information on May 21, 2021, for purposes of clarifying the basis of the charges. We further note that the record includes additional phone conversations and text message forming

five of the charges and found guilty on Count III, which was a Level 6 felony and read as follows:

> Michelle Dvorscak upon oath, says that on March 5, 2021, in the County of Lake, State of Indiana, Danny Roger Kawzinski did communicate a threat to Michelle Dvorscak, with the intent that Michelle Dvorscak be placed in fear of retaliation for the prior lawful act for [sic] performing her duties as a Sheriff's detective and that threat was communicated to Michelle Dvorscak through the telephonic system at the jail and this threat was made in relation to or made in connection with her official duties as a detective with the Sheriff's department contrary to I.C. 35-45-2-1(a)(2) and I.C. 35-45-2-1(b)(1)(C) against the peace and dignity of the State of Indiana.

Appellant's App. Vol. II p. 38. This appeal ensued.

Analysis

[6] Kawzinski contends that there is insufficient evidence to sustain his intimidation conviction. Sufficiency of evidence claims "warrant a deferential standard, in which we neither reweigh the evidence nor judge witness credibility." *Powell v. State*, 151 N.E.3d 256, 262 (Ind. 2020) (citing *Perry v. State*, 638 N.E.2d 1236, 1242 (Ind. 1994)). We consider only the evidence supporting the judgment and any reasonable inferences drawn from that evidence. *Id.* (citing *Brantley v. State*, 91 N.E.3d 566, 570 (Ind. 2018), *cert. denied*). "We will affirm a conviction if there is substantial evidence of

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the basis for some of the charges. Given that Kawzinski was only convicted on Count III, however, we limit our discussion to the evidence pertinent to that Count only.

probative value that would lead a reasonable trier of fact to conclude that the defendant was guilty beyond a reasonable doubt." *Id.* We affirm the conviction "unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict." *Sutton v. State*, 167 N.E.3d 800, 801 (Ind. Ct. App. 2021) (quoting *Drane v. State*, 867 N.E.2d 144, 146-47 (Ind. 2007), *trans. denied*).

[7] > [T]he First Amendment permits a State to ban a "true threat"—that is, a statement where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The "intent" that matters is not whether the speaker really means to carry out the threat, but only whether he intends it to place the victim in fear of bodily harm or death.

Brewington v. State, 7 N.E.3d 946, 963 (Ind. 2014) (cleaned up), *cert. denied*.

[8] Indiana has proscribed such "true threats," via Indiana Code Section 35-45-2-1, which reads, in pertinent part: "A person who communicates a threat with the intent . . . that another person be placed in fear of retaliation for a prior lawful act . . . commits intimidation . . . ." The offense is a Level 6 felony if ". . . the threat is communicated because of the occupation, profession, employment status, or ownership status of a person or the threat relates to or is made in connection with the occupation, profession, employment status, or ownership

status of a person . . . ." Ind. Code 35-45-2-1(b)(1)(C).[5] The statute defines "threat" as follows: "'Threat' means an expression, by words or action, of an intention to: (1) unlawfully injure the person threatened or another person, or damage property; (2) unlawfully subject a person to physical confinement or restraint; [and] (3) commit a crime . . . ." I.C. § 35-45-2-1(d).

[9] In order to establish that a true threat has been issued, the State must prove that: (1) the defendant intended for the communication to put its targets in fear for their safety; and (2) the communication would be likely to actually cause fear in a reasonable person similarly situated to the target of that communication. *See, e.g.*, *McGuire v. State*, 132 N.E.3d 438, 444 (Ind. Ct. App. 2019) (quoting *Brewington*, 7 N.E.3d at 964), *trans. denied*.

[10] "Whether a statement is a threat is an objective question for the trier of fact." *Newell v. State,* 7 N.E.3d 367, 369 (Ind. Ct. App. 2014), *trans. denied*. "A defendant's intent may be proven by circumstantial evidence alone, and knowledge and intent may be inferred from the facts and circumstances of each case." *Chastain v. State*, 58 N.E.3d 235, 240 (Ind. Ct. App. 2016), *trans. denied* (citations omitted).

> It is well-established that a defendant need not speak directly with a victim to communicate a threat for purposes of Indiana Code section 35-45-2-1. *E.B. v. State*, 89 N.E.3d 1087, 1091 (Ind.

[5] Count III was charged as a Level 6 felony on the theory that Kawzinski's threats to Detective Dvorscak were in retaliation for Dvorscak's testimony, given during the course of her duties as a police officer, at the March 5, 2021, hearing.

> Ct. App. 2017). Indeed, to communicate a threat for purposes of the offense of intimidation, the statement must be transmitted in such a way that the defendant knows or has good reason to believe the statement will reach the victim. *Ajabu v. State*, 677 N.E.2d 1035, 1043 (Ind. Ct. App. 1997), *trans. denied. See also B.B. v. State*, 141 N.E.3d 856, 861, n.4 (Ind. Ct. App. 2020) (noting that "communication of a threat may be made directly to the victim, or indirectly, such as through a news reporter," (citing *Ajabu*, 677 N.E.2d at 1043)).

Peppers v. State, 152 N.E.3d 678, 683 (Ind. Ct. App. 2020).

[11] Kawzinski was convicted on Count II, which was limited to Detective Dvorscak and to the date of March 5, 2021. Charges of intimidation regarding the two deputy prosecutors also derived from the March 5 phone call; yet, Kawzinski was acquitted of those charges. Thus, he reasons, his conviction for intimidation regarding the Detective—based on the evidence from the same statements, wherein all three persons were discussed by Kawzinski—must have been based on insufficient evidence.

[12] To the contrary, "[a]lmost from the time of our state's founding, Indiana courts have overwhelmingly refused to interfere with jury verdicts alleged to be inconsistent or irreconcilable." *Beattie v. State*, 924 N.E.2d 643, 646 (Ind. 2010). "The evaluation of whether a conviction is supported by sufficient evidence is independent from and irrelevant to the assessment of whether two verdicts are contradictory and irreconcilable." *Id*. at 648. Juries may reach verdicts that are ostensibly inconsistent for a variety of reasons, including lenity, compromise amongst jurors, and avoidance of an all-or-nothing verdict. *Id*. at 648-49. Our

Supreme Court has clearly held that we will respect those verdicts: "Jury verdicts in criminal cases are not subject to appellate review on grounds that they are inconsistent, contradictory, or irreconcilable." *Id*. at 649.

[13] Kawzinski further argues that the comment evincing Kawzinski's intent to provide the addresses of the Detective to so-called "junkies," who could then burglarize her home, "was a general one. It was not addressed to Dvorscak in particular." Appellant's Br. p. 9. Kawzinski contends that "he was just having fun with whomever was listening." *Id*. at 10. Thus, he contends, there was insufficient evidence to establish his *mens rea*, namely, that the State did not prove that Kawzinski intended for his communications to put Detective Dvorscak in fear of harm.

[14] As our Supreme Court has noted, "assessing true threats is highly dependent on context." *Brewington*, 7 N.E.3d at 963. Based on the context, a reasonable factfinder could conclude that Kawzinski intended to put his audience in fear of harm. His threats were repeated, explicit, and clearly issued with the understanding that the targets of those threats were listening to them. The timing is important as well. The threats were issued the same day that: (1) Kawzinski learned that his calls were being actively monitored; and (2) Kawzinski reacted angrily to a perceived inaccurate accusation in the testimony of Detective Dvorscak. The jury was well within its province to conclude that the tone of the threats, therefore, was retaliatory. Kawzinski's argument is essentially, "I didn't mean it like that." The jury, however, is entitled to draw

its own conclusions with respect to what Kawzinski intended, and we will not reweigh the evidence in order to revise those conclusions.

[15] Finally, Kawzinski briefly asserts:

> . . . Dvorscak is a Detective Sergeant with the Lake County Sherriff[']s Department. She has been a police officer for twenty-two years. (Tr. Vol. 2 p. 207). She carries a badge and a gun. She testified that she heard him say that he was messing with them because he knew they were listening. (Tr. Vol. 3, p. 6). She was aware that Kawzinski was incarcerated in the Lake County Jail at the time he made the phone call. A reasonable person in her position would not have been placed in fear under these circumstances.

Appellant's Br. p. 10. We are unmoved by this argument. There is evidence in the record establishing that, despite her profession, the Detective took Kawzinski's threats particularly seriously. The fact that Kawzinski was incarcerated and, therefore, unable to harm the targets himself is irrelevant. Some of his threats explicitly involved engaging third parties to carry out the harm. Moreover, Kawzinski is unlikely to be in jail forever, and the statute does not require that the feared harm be imminent.

[16] We conclude that a reasonable fact finder "could find the elements of the crime proven beyond a reasonable doubt." *Sutton*, 167 N.E.3d at 801. The evidence supporting the conviction was, therefore, sufficient.

Conclusion

[17] Sufficient evidence was submitted to sustain Kawzinski's conviction. We affirm.

[18] Affirmed.

Bradford, C.J., and Crone, J., concur.