

Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEY FOR APPELLANT:

ATTORNEY FOR APPELLEE:

MATTHEW D. ANGLEMEYER
Marion County Public Defender Agency
Indianapolis, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

KATHERINE M. COOPER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

DAVID MALONE,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-1010-CR-1226
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION COUNTY SUPERIOR COURT
The Honorable Charles A. Wiles, Judge
Cause No. 49G16-0909-FD-080490

September 7, 2011

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, David Malone (Malone), appeals his conviction after a jury trial for intimidation, a Class D felony, Ind. Code § 35-45-2-1.

We affirm.

ISSUE

Malone raises one issue on appeal, which we restate as follows: Whether the State presented sufficient evidence to prove beyond a reasonable doubt that he committed the crime of intimidation.

FACTS AND PROCEDURAL HISTORY

In March of 2009, Tiffany Woods (Woods), a sex crimes detective with the Indianapolis Metropolitan Police Department, met up with Malone for drinks one night. After that night, Woods and Malone continued to see each other, and sometime in June of 2009 their friendship evolved into a romantic relationship. During the course of their five-month relationship, Woods willingly posed nude for Malone while Malone took pictures of her flexing her muscles. Malone also videotaped Woods in the shower and took additional nude pictures of her without her knowledge or consent.

On August 19, 2009, Woods ended her relationship with Malone. At that time, Woods asked Malone to return her truck and keys, which Malone gave her on August 20, 2009. She also told Malone to collect his belongings from her house. When Malone came to get his belongings on August 22, he said that he was also going to take a lawnmower that he had previously given to Woods as a gift. Woods asked him why he would want a

lawnmower when he lived in an apartment, and Malone said that she could borrow it for the summer and he would send a friend to pick it up in the winter. Woods told him he could leave it or take it, and Malone responded that she could have it. At that point Malone left Woods' house.

Later that day, Malone left a voicemail message saying that he wanted to let her know that she was a "cold hearted bitch." (Transcript p. 69). Malone also left Woods a voicemail telling her that he could "cause some trouble" for her. (State's Exh. 2, 3rd voicemail message). Shortly thereafter, Woods left town to visit friends in Cincinnati for the weekend. While she was in Cincinnati, Woods' sister texted her to tell her that Malone had been contacting her, and she was worried for Woods. At one point, Malone texted Woods' sister the message: "I ended it, and tell her to stop, or it will get worse." (Tr. p. 65). Malone also directly texted Woods the message: "Include the lawn mower and [I will] give [you] the naked [pictures] and videos." (State's Exh. 3). About the same time, Malone texted Woods' sister, telling her that he needed the lawnmower by a specific time. Woods was worried Malone's text message meant that he might do something with the naked pictures and videos if she did not give him his lawnmower in time, so she returned home early from Cincinnati and put the lawnmower outside by her mailbox for Malone to pick up. Woods then went to her sister's house and stayed there for approximately eight hours so that she would not see Malone when he picked up the lawnmower. When she returned home, the lawnmower was gone and there was an empty pack of Marlboro Lights cigarettes in its place.

As a result of the incident with the lawnmower, Woods and her sister contacted the

police department and made a police report regarding Malone's messages. After the report, Malone continued to contact Woods with messages such as "[it is] on now. I can make this worse." (Tr. p. 78). Woods told Malone to cease contacting her, but he continued to send text and voicemail messages. In one, Malone threatened to contact the Internal Affairs Office of the Police Department in order to have Woods investigated.

On September 17, 2009, the State filed an Information charging Malone with Count I, stalking, a Class D felony, I.C. § 35-45-10-5; and Count II, intimidation, a Class D felony, I.C. § 35-45-2-1. A jury trial was conducted on September 9 and September 10, 2010. At the conclusion of the evidence, the jury found Malone guilty of intimidation but not guilty of stalking. Subsequently, on October 4, 2010, the trial court sentenced Malone to 545 days in the Department of Correction, with credit for 299 days. The trial court also sentenced Malone to 180 days of probation and ordered him to complete 26 weeks of domestic violence counseling.

Malone now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

On appeal, Malone argues that the State did not present sufficient evidence to prove beyond a reasonable doubt that he committed intimidation. When reviewing a sufficiency of evidence claim, this court does not reweigh the evidence or judge the credibility of the witnesses. *Perez v. State*, 872 N.E.2d 208, 213 (Ind. Ct. App. 2007), *trans. denied*. In addition, we only consider the evidence most favorable to the verdict and reasonable inferences stemming from that evidence. *Id.* We will only reverse a conviction when

reasonable persons would not be able to form inferences as to each material element of the offense. *Id.* at 212-13.

In order to establish that Malone committed intimidation as a Class D felony, the State was required to prove beyond a reasonable doubt that Malone

communicat[ed] a threat to another person, with the intent:

- (1) that the other person engage in conduct against the other person’s will; [or]
- (2) that the other person be placed in fear of retaliation for a prior lawful act. . . [and]

* * *

the person to whom the threat is communicated: (i) is a law enforcement officer.

I.C. §§ 35-45-2-1(a)(1)-(2); -(b)(1)(B)(i). Indiana Code section 35-45-2-1(c)(6) defines “threat” as “an expression, by words or action, of an intention to . . . expose the person threatened to hatred, contempt, disgrace, or ridicule.” We have adopted an objective view of whether a communication is a threat. *Owens v. State*, 659 N.E.2d 466, 474 (Ind. 1995), *reh’g denied*. Whether a defendant intended that someone engage in conduct against his or her will depends on the facts and circumstances of each case. *Id.*

Malone’s primary argument on appeal is that his text stating “include the lawnmower and [I will] give [you] the naked [pictures] and videos” was merely a statement requesting an exchange, not a threat. (State’s Exh. 3). We cannot address his argument, because to do so would be to reweigh the evidence to see if it supports a different interpretation, which we may not do on appeal. *Anglemeyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007), *clarified on reh’g*, 875 N.E.2d 218 (Ind. 2007). Instead, we must only consider the inferences stemming

from the evidence that support the trial court's verdict. *Perez*, 872 N.E.2d at 208.

The evidence presented at trial shows that Woods did not know about all of the nude pictures and videos that Malone had taken of her, and that some of them were taken without her consent. The evidence also shows that Malone repeatedly contacted Woods on August 22, calling her a "cold hearted bitch" and telling her that he could "make trouble for her." (Tr. p. 69; State's Exh. 2, 3rd voicemail message). In addition, Malone contacted Woods' sister, warning her to tell Woods to stop or "it will get worse." (Tr. p. 65). Within this context, it is possible that a jury could conclude that Malone intended to cause Woods to act against her will in giving him the lawnmower in order to avoid the "hatred, contempt, disgrace, or ridicule" Malone could cause her by releasing the nude pictures to others. *See* I.C. § 35-45-2-1(c)(6). It is apparent that Woods came to the same conclusion because she returned home from Cincinnati early in order to meet Malone's requests. When we interpret these facts in the light most favorable to the trial court, we conclude that the State presented sufficient evidence to prove beyond a reasonable doubt that Malone committed the crime of intimidation.

CONCLUSION

Based on the foregoing, we conclude that the State provided sufficient evidence to prove beyond a reasonable doubt that Malone committed the crime of intimidation.

Affirmed.

NAJAM, J. and MAY, J. concur