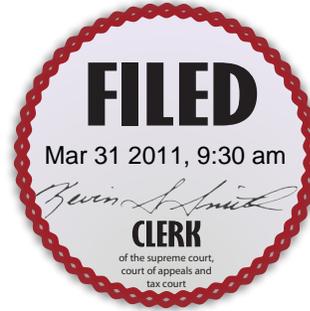


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ATTORNEY FOR APPELLANT:

CARA SCHAEFER WIENEKE
Special Assistant to the
State Public Defender
Wieneke Law Office, LLC
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

JAMES E. PORTER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

KEVIN R. ASH,)
)
Appellant-Defendant,)
)
vs.) No. 84A01-1009-CR-491
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE VIGO SUPERIOR COURT
The Honorable Michael R. Rader, Judge
Cause No. 84D05-0902-FD-519

March 31, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Kevin R. Ash (“Ash”) appeals his conviction for stalking as a Class D felony¹ raising the single issue of whether his conviction is supported by sufficient evidence. We affirm.

Facts and Procedural History

On February 14, 2009, between 7:00 pm and 8:00 pm, Sullivan County Chief Deputy Prosecutor John Springer (“Springer”) was driving into Terre Haute with plans to have dinner with his girlfriend. As he proceeded into town, he noticed a vehicle following very closely behind him, later determined to be a silver Dodge pickup driven by Ash. Springer accelerated slightly, and Ash responded accordingly, closing the distance and trailing Springer “probably as close as any vehicle as [sic] ever followed me before.” Tr. 36. Ash was following so closely that Springer thought Ash may have been a law enforcement officer initiating a traffic stop. When he realized it was not a traffic stop, Springer became concerned that his pursuer could be someone he had prosecuted or a family member of someone he had prosecuted.

Springer continued travelling north into town and pulled into the parking lot of a video store to test whether Ash was actually following him or just driving too closely. After parking his car, Springer quickly exited and walked into the store. While inside, Springer browsed through the videos, occasionally peering out the store’s windows to keep an eye on Ash’s vehicle, which had pulled into the parking lot. After about fifteen minutes in the store,

¹ Ind. Code § 35-45-10-5(a).

Springer walked to his car and peered through the windshield of Ash's truck, which was parked a few spots away, but could not see anyone.

As soon as Springer headed down the street, Ash continued to follow him, this time more aggressively. Springer described this driving behavior as "immediately right up close to my bumper again" with his lights on. Tr. 42. Springer accelerated quickly to try and get away, but Ash stayed lockstep with his vehicle. Springer turned down a side street and Ash followed. Springer then turned down an alley, and Ash followed, driving even more aggressively. At this point, Springer decided to stop his vehicle and confront his follower.

Feeling threatened and frightened, Springer picked up his handgun, exited his vehicle and said, "what the hell is going on?", "who are you?" Tr. 47-49. Springer showed him his weapon, Ash did not respond. Springer then said, "what the hell is the problem?" to which Ash responded "yah, we got a problem." Tr. 49. After Springer asked him what the problem was, Ash responded, "you're a cop, that's the problem." Tr. 49. Springer informed him he was not a police officer, and Ash replied "you're a cop. I know you're a cop." Tr. 49. After Springer then told Ash, "you had better get the hell out of here" Ash replied, "why don't you just go ahead and shoot me. You'll go to prison." Tr. 49. This time Springer responded with stronger language, and became worried that Ash might pull out a weapon because he could not see Ash's hands. Ash then drove away down the alley.

Springer called the police when he reached his girlfriend's house and, having "dealt with him earlier [that] evening" and being familiar with Ash's truck, the police arrested Ash and charged him with Class D felony stalking. Tr. 51-52; App. p. 9. A bench trial was held

on April 23, 2010, and on April 30, 2010, the trial court found Ash guilty as charged. Ash was sentenced to one year in jail, with all but four days actually served suspended, and placed on probation, a condition of which is his continuation of counseling at Hamilton Center. He now appeals.

Discussion and Decision

Standard of Review

In finding Ash guilty, the trial court entered findings of fact and conclusions of law. A judge is not required to make either findings of fact or conclusions of law to explain the mental processes he engaged in as trier of fact in a criminal case. Nation v. State, 445 N.E.2d 565, 570 (Ind. 1983). Thus, the focus of our inquiry is not upon the remarks the trial court makes in a bench trial after having reached the conclusion that a defendant is guilty. Dozier v. State, 709 N.E.2d 27, 30 (Ind. Ct. App. 1999). Instead we review whether the evidence presented to the trial court as fact-finder was sufficient to sustain the conviction. Id.

When reviewing the sufficiency of the evidence, we will affirm “if there is substantial evidence of probative value supporting each element of the crime from which a reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.” Wright v. State, 828 N.E.2d 904, 906 (Ind. 2005) (quoting Davis v. State, 813 N.E.2d 1176, 1178 (Ind. 2004)). We do not reweigh the evidence or assess the credibility of the witnesses. Id. It is the job of the trial court to determine whether the evidence sufficiently proves each element of an offense, and we consider conflicting evidence most favorably to the trial court’s ruling.

Id.

Sufficiency of the Evidence

In order to convict Ash of stalking as charged, the State was required to prove beyond a reasonable doubt that Ash (1) knowingly or intentionally (2) engaged in a course of conduct involving repeated or continuing harassment of the victim (3) that would cause a reasonable person to feel terrorized, frightened, intimidated or threatened, and (4) that actually caused the victim to feel terrorized, frightened, intimidated, or threatened. See I.C. § 35-45-10-1 (defining “stalk”). “Harassment” means “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.” I.C. § 35-45-10-2. “Impermissible contact” includes but is not limited to knowingly or intentionally following or pursuing the victim. I.C. § 35-45-10-3. Neither stalking nor harassment includes statutorily or constitutionally protected behavior. I.C. § 35-45-10-1; I.C. § 35-45-10-2.

Ash’s sufficiency argument has two parts: whether the State sufficiently proved that his conduct was “harassment,” and whether the state proved that his behavior was “repeated.” As to harassment, when Springer drove into town, Ash followed him very closely in his car, closer than any vehicle had ever followed him. Ash was following so closely that Springer thought Ash may have been a law enforcement officer initiating a traffic stop but became concerned that his pursuer could be someone or a family member of someone he had prosecuted. Essentially, Ash was “tailgating” Springer. After Springer left the video store,

Ash again tailgated Springer, even more aggressively the second time. He followed him down a side street, and then down an alley. From these facts, a reasonable fact finder could determine that Ash's tailgating behavior constituted harassment.

We do not agree with Ash that "his conduct throughout was constitutionally protected behavior." Appellant's Br. p. 8. In making this assertion, Ash relies on our opinion in VanHorn v. State, 889 N.E.2d 908 (Ind. Ct. App. 2008), trans. denied. In that case, we reversed VanHorn's stalking conviction when his alleged harassing behavior was parking on a public street in front of someone's house on four separate occasions and peering in with binoculars on two of those occasions. Id. at 911. We held that these actions were not "impermissible contact" and, thus, not harassment, because "[t]he freedom to be on a public street is one of the personal liberties guaranteed by the federal constitution." Id. at 912. Only if VanHorn had notice that his otherwise constitutional behavior was not permitted (through a restraining order, for example), might his conduct be considered "impermissible" and therefore harassment. Id. at 913. Ash argues that because he had no notice that his otherwise constitutional behavior was not permitted, it cannot be considered impermissible and therefore not harassment.

However, Ash does not have a constitutional right to tailgate other drivers. See I.C. § 9-21-8-14 ("A person who drives a motor vehicle may not follow another more closely than is reasonable and prudent, having due regard for the speed of both vehicles, the time interval between vehicles, and the condition of the highway"); also I.C. § 9-21-8-55 (defining "aggressive driving"); and I.C. § 35-42-2-2 (c)(1)(defining "criminal recklessness" with the

use of a vehicle). “[T]he right to travel cannot conceivably imply the right to travel whenever, wherever and however one pleases—even on roads specifically designed for public travel.” Lutz v. City of York, Pa., 899 F.2d 255, 269 (3rd Cir. 1990). Indeed, Ash concedes as much in his reply brief: “Springer was frightened by Ash’s allegedly aggressive driving. And the State has an interest in deterring behavior that causes fear.” Appellant’s Reply Br. p. 4. Thus, the facts of this case are easily distinguishable from VanHorn in that Ash was not engaging in constitutionally protected behavior such that he needed notice that his conduct was impermissible.

We also conclude that the State presented sufficient evidence that Ash engaged in “repeated” harassment of Springer. “[T]he term ‘repeated’ in Indiana’s anti-stalking laws means ‘more than once.’” Johnson v. State, 721 N.E.2d 327, 332-33 (Ind. Ct. App. 1999), trans. denied. Ash tailgated Springer into town, stopped when Springer went into the video store, and then tailgated him again. He went beyond merely following Springer on the roads and aggressively drove behind him on two separate occasions. This evidence is sufficient to conclude that Ash harassed Springer more than once, and, thus, “repeatedly.”

As to the other elements of stalking, Ash’s repeated harassment constituted a course of conduct that caused Springer to feel “threatened” and “frightened.” Tr. 47. Springer’s testimony is therefore sufficient to satisfy the subjective element of the offense. As to the objective element, the trial court concluded that Ash’s course of conduct would cause a reasonable person to feel terrorized, frightened, intimidated or threatened, and the evidence of Ash’s aggressive driving, close to Springer’s bumper on repeated occasions, including

down a side street and an alley, is sufficient to support this finding. In a bench trial, “the court is responsible for weighing the evidence and judging the credibility of witnesses as the trier of fact, and we do not interfere with this function on appeal.” Davidson v. State, 907 N.E.2d 612, 613-14 (Ind. Ct. App. 2009), trans. denied.

Conclusion

The State presented sufficient evidence that Ash harassed Springer, and did so repeatedly, which would cause a reasonable person to feel terrorized, frightened, intimidated or threatened, and caused Springer to feel threatened and frightened. We see no reason to disturb the trial court’s judgment.

Affirmed.

NAJAM, J., and DARDEN, J., concur.