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ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

STEPHENIE K. GOOKINS
Campbell Kyle Proffitt LLP
Noblesville, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

GARY R. ROM
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

ELIZABETH NOLL,)
)
Appellant- Defendant,)
)
vs.) No. 29A04-1010-CR-651
)
STATE OF INDIANA,)
)
Appellee- Plaintiff,)

APPEAL FROM THE HAMILTON SUPERIOR COURT
The Honorable Wayne A. Sturtevant, Judge
Cause No. 29D05-1002-CM-554

June 14, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Chief Judge

Case Summary and Issue

Following a bench trial, Elizabeth Noll appeals her conviction of intimidation as a Class A misdemeanor. Noll raises the sole issue of whether sufficient evidence was presented to support her conviction. Concluding that sufficient evidence was presented, we affirm.

Facts and Procedural History

In October 2009, Noll began housing Austin Neville (“Austin”), who is her nineteen-year-old nephew and the son of her sister, Donna Neville (“Neville”). Upon Austin moving into Noll’s home, Noll presented Neville with a sealed manila envelope that included a handwritten note on the outside and contained a photograph. The note reads: “OPEN PRIVATELY! Inside is the negotiations for Austin’s phone, health insurance, dresser, desk & computer and the dog. I never shut off your phone or Austin’s even though you only paid 5 months out of 18. Also send out Keys to mom’s apartment and garage.” Exhibits at 81 (emphasis in original). The photograph was of Neville in a sexually suggestive posture while holding an adult sexual device.

Neville recognized the photograph in the envelope as one of several similar photographs taken of her with her consent approximately five years earlier while on a boat cruise with Noll, their mother, and Tom Haynes, who was Noll’s boyfriend. Upon returning from the cruise Neville posted these photographs of herself on adult-oriented internet websites.

Beginning later on the day Noll handed Neville the envelope, Noll sent Neville several text messages via cellular phone, the first of which stated: “I expect to hear from

you that ‘negotiations’ are completed by noon tomorrow.” Id. at 85-87. Another stated: “You will not fuck with Austin or I will begin mailing packages.” Id. at 89.

Neville reported to the police having received the manila envelope, photograph, and text messages, and Noll was charged with intimidation as a Class A misdemeanor. At the bench trial, Neville, Detective Todd Bough, Noll, and Haynes testified. In part, when asked what “negotiations” referred to, Neville testified: “I understood that if I did not do those things [written on the envelope] then additional photos would be sent to my husband and/or my place of employment.” Transcript at 19. The trial court found Noll guilty and sentenced her to 365 days in the Hamilton County Jail all suspended while on probation for 180 days, forty hours of community service, and payment of fees and costs. Noll now appeals her conviction.

Discussion and Decision

I. Standard of Review

Our standard of reviewing a sufficiency claim is well-settled: we do not assess witness credibility or weigh the evidence, and “we consider only the evidence that is favorable to the judgment along with the reasonable inferences to be drawn therefrom to determine whether there was sufficient evidence of probative value to support a conviction.” Staten v. State, 844 N.E.2d 186, 187 (Ind. Ct. App. 2006), trans. denied. “We will affirm the conviction if there is substantial evidence of probative value from which a reasonable trier of fact could have drawn the conclusion that the defendant was guilty of the crime charged beyond a reasonable doubt.” Id.

II. Intimidation

To convict Noll of intimidation the State was required to prove beyond a reasonable doubt that Noll “communicate[d] 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” Ind. Code § 35-45-2-1(a). “Threat” is defined as “an expression, by words or action, of an intention to . . . (6) expose the person threatened to hatred, contempt, disgrace, or ridicule.”¹ Ind. Code § 35-45-2-1(c).

At the outset, we agree with the State that Noll was charged and convicted of intimidation for communicating a threat to Neville with the intention that Neville engage in conduct against her will, under sub-paragraph (a)(1) of the statute quoted above. See Appellant’s Appendix at 7 (charging information alleging Noll’s intent that Neville “engage in conduct against the will of [Neville]”); id. at 10 (summons, citing Ind. Code § 35-45-2-1(a)(1)). Although neither the trial court order finding Noll guilty nor the trial court sentencing order indicate the particular sub-paragraph under which Noll was convicted, the charging information and summons make the record clear and provided sufficient notice to Noll that she was prosecuted under sub-paragraph (a)(1), not (a)(2). Further, Noll cites no part of the record that would suggest she was prosecuted under sub-paragraph (a)(2). Therefore, contrary to much of Noll’s appellate argument, no evidence that Neville was specifically placed in fear of retaliation for a prior lawful act (pursuant to sub-paragraph (a)(2)) is required to sustain Noll’s conviction.

¹ Noll, the State, and the trial court agree that sub-paragraph (6) is the pertinent definition for this case.

Rather, the issue is whether sufficient evidence was presented that Noll communicated a message to Neville with the intent that Neville engage in conduct against her will, and that if Neville did not do so she would be exposed to hatred, contempt, disgrace, or ridicule. See Ind. Code § 35-45-2-1(a)(1), (c)(6).

Noll begins her appellate argument with a discussion of J.T. v. State, 718 N.E.2d 1119 (Ind. Ct. App. 1999), which addressed the “communication” element of the intimidation offense. J.T. stated that, to constitute “communication,” the defendant “must have known or had reason to believe that the document would reach” the other person. Id. at 1123. Here, Noll personally handed the envelope and included photograph to Neville and sent text messages directly to Neville’s cellular phone. To the extent Noll argues evidence regarding her “communication” was insufficient, we disagree.

Noll asserts the message communicated does not constitute evidence that Noll intended Neville take actions against her will. Generally, in determining whether the defendant intended the other person act against his or her will, we look to the particular facts and circumstances of the case. See Owens v. State, 659 N.E.2d 466, 474 (Ind. 1995). The note was not completely clear; it concerned “Austin’s phone, health insurance, dresser, desk & computer and the dog,” and also commented on Neville’s phone. Ex. at 81. But although this portion of the note does not expressly articulate Noll’s demand of Neville’s payment or permission as to these subjects, the note’s last statement is an express demand that Neville “[a]lso send out Keys to mom’s apartment and garage.” Id. This is sufficient to show Noll intended Neville act against her will.

Noll next argues that even if she demanded Neville take actions against her will, this was not supported by a threat that would expose Neville to hatred, contempt,

disgrace, or ridicule. This is because, Noll asserts, the evidence does not indicate what “negotiations” referred to. However, the record does not indicate that Neville was at all unsure about what the term “negotiations” referred to. Neville testified: “I understood that if I did not do those things [written on the envelope] then additional photos would be sent to my husband and/or my place of employment.” Tr. at 19. In determining whether the communication constitutes a threat, we take an objective view. Owens, 659 N.E.2d at 474; see U.S. v. Stewart, 411 F.3d 825 (7th Cir. 2005) (explaining that an objective view of the evidence means that guilt under federal law of transmitting threatening communications “is not dependent upon what the defendant intended, but whether the recipient could reasonably have regarded the defendant’s statement as a threat.”) (quotation and citation omitted). Therefore, the next question is whether Neville’s understanding of the “negotiations” is consistent with an objective view of the evidence. See Owens, 659 N.E.2d at 474.

In determining whether Neville’s understanding was objectively reasonable, we pause to consider Noll’s argument that Neville could not expect hatred, contempt, disgrace, or ridicule for Noll publicizing the photographs because Neville already made them public by posting them on an adult-oriented website five years earlier. The fact that Neville already publicized the material herself certainly merits consideration, but is not alone determinative because publicizing material to a particular audience does not necessarily mean that further, targeted, publication would not lead to hatred, contempt, disgrace, or ridicule. In other words, we consider Neville’s posting of these photographs online in the past as it might mitigate reputational consequences of Noll mailing the photographs to others. Although internet websites are of an unusually public and long-

lasting nature, we also recognize that making an obscure set of photographs available online is qualitatively different in nature from directly mailing the same photographs as hard-copies addressed to a particular individual or company. Neville's husband or employer could have discovered Neville's prior internet posting of the photographs, but a direct mailing is certain to reach them.

Along the same lines, Noll argues that Neville did not have a reasonable "expectation of privacy" in the photographs after posting them online herself, and therefore Noll could not be convicted of intimidation for re-publicizing the photographs to certain individuals. Appellant's Brief at 7 (analogizing Fourth Amendment jurisprudence). We disagree with this express analogy to criminal Fourth Amendment search and seizure jurisprudence because Neville is not the accused, and therefore an evaluation of whether she may reasonably expect privacy would misdirect us from the determinative issue of whether she would be exposed to reputational consequences. As mentioned above, though, whether Neville would be exposed to reputational consequences naturally involves consideration of how private were the materials that may be publicized.

Neville's testimony that she understood Noll would send the photographs to her employer or husband leads to a reasonable inference that Neville did not believe either to have seen the photographs or the website, and that a direct mailing to either would expose Neville to at least contempt, disgrace, or ridicule. We conclude that an objective view of all of the evidence leads to a reasonable inference that if Noll mailed sexually suggestive photographs of Neville to Neville's husband or employer, Neville would be exposed to at least contempt, disgrace, or ridicule.

Similarly, in the context of the note, photograph, and the first text message, Noll's second text message to Neville – "You will not fuck with Austin or I will begin mailing packages," ex. at 89 – leads to a reasonable inference that Noll would begin mailing sexually suggestive photographs to specific individuals if Neville did not do as Noll demanded.

Consequently, sufficient evidence was presented that Noll communicated a message to Neville with the intent that Neville engage in conduct against her will, and that if Neville did not do so she would be exposed to hatred, contempt, disgrace, or ridicule.

Conclusion

Sufficient evidence was presented to support Noll's conviction of intimidation as a Class A misdemeanor, and as a result we affirm her conviction.

Affirmed.

NAJAM, J., and CRONE, J., concur.