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**IN THE
COURT OF APPEALS OF INDIANA**

THOMAS PICA,)
)
 Appellant-Defendant,)
)
 vs.) No. 71A04-0904-CR-229
)
 STATE OF INDIANA,)
)
 Appellee-Plaintiff.)

APPEAL FROM THE ST. JOSEPH CIRCUIT COURT
The Honorable Michael G. Gotsch, Judge
The Honorable Larry J. Ambler, Magistrate
Cause No. 71C01-0011-DF-29

October 21, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Thomas Pica appeals his convictions for nonsupport of a dependent child, intimidation, and harassment. Specifically, he contends that the evidence is insufficient to support his convictions and that his trial counsel was ineffective for failing to elicit testimony regarding his ability to pay child support. Concluding that the evidence is sufficient to support his convictions and that there is no evidence in this record of his inability to provide support to his son (and therefore we cannot evaluate his ineffectiveness claim), we affirm the trial court.

Facts and Procedural History

B.W.D. was born on November 17, 1986. A petition to establish paternity was filed on November 21, 1994. State's Ex. 2. On March 24, 2000, the St. Joseph Probate Court issued a paternity order declaring Pica to be the father of B.W.D. The court entered this order as a default judgment.¹ Pica was ordered to pay child support in the amount of \$42.00 per week retroactive to November 17, 1986, together with \$84.00 per week on the arrearage. State's Ex. 3. In May 2000 Pica, who was living and working in Japan, received a letter from St. Joseph County Deputy Prosecuting Attorney James O'Brien advising him of the default judgment. DPA O'Brien spoke with Pica several times while he was in Japan, and Pica left several voicemails for DPA O'Brien. In a voicemail left on April 21, 2000, Pica identified himself, referenced possible felony charges, and then told DPA O'Brien that he was going to have him

snipped out, snooped out anything I possibly can with the people who are capable of doing it, because I want your face pushed in the mud, you

¹ Pica retained an attorney in connection with the paternity proceedings, but the attorney withdrew his representation of Pica in August 1999 at Pica's request.

fuc*ing dic*. You don't like the language? You wanna put that on tape play it for the judge? You go ahead. Because you have turned people's lives upside down, and you have been wrong. Because you are on money trails and on quota seeking. You don't give a shi* about kids. Give me a break you little yahoo counselor in little South Bend, Indiana. Fuc* you.

State's Ex. 1 (CD); *see also* Appellant's App. p. 27 (transcript).

On May 31, 2000, the State charged Pica with Class D felony intimidation and Class B misdemeanor harassment under Cause No. 71G02-0005-DF-110 stemming from the April 21, 2000, voicemail. On November 2, 2000, the State charged Pica with Class D felony nonsupport of a dependent child under Cause No. 71C01-0011-DF-29. The two cause numbers were eventually consolidated under Cause No. 71C01-0011-DF-29.

Meanwhile, Pica continued to live and work in Japan until he was detained in 2007. In August 2008 the Superior Court of Guam entered an order extraditing Pica to the United States. In October 2008 the State moved to amend the charge of nonsupport of a dependent child to a Class C felony (which requires at least \$15,000 in unpaid support), and the trial court granted that motion.

A bench trial was held in February 2009. At trial Pica testified in his own defense that he was employed in Japan from 1999 to 2007. Feb. 2, 2009, Tr. p. 37, 42. Pica testified that he worked as a high school English teacher and also worked for a private language school. *Id.* at 38. The State presented evidence that at the time of B.W.D.'s eighteenth birthday on November 17, 2004, Pica had accumulated \$39,193.00 in unpaid support. *Id.* at 34. DPA O'Brien testified regarding the April 21, 2000, voicemail Pica had left for him. Specifically, DPA O'Brien testified that Pica threatened "to sniff me out or snuff me out or something like that." *Id.* at 13. The voicemail was also played for the

court. Pica was found guilty of all three counts. The trial court sentenced Pica to six years with five years suspended for nonsupport of a dependent child, 180 days with 90 days suspended to probation for intimidation, and 180 days with 90 days suspended to probation for harassment. The court ordered the intimidation and harassment sentences to be served concurrent to each other but consecutive to the nonsupport of a dependent child sentence. Pica now appeals.

Discussion and Decision

Pica raises two main issues on appeal. First, he contends that the evidence is insufficient to support his convictions. Second, he contends that his trial counsel was ineffective for failing to elicit testimony regarding his ability to pay child support.

I. Sufficiency of the Evidence

Pica contends that the evidence is insufficient to support his convictions. When reviewing the sufficiency of the evidence, appellate courts must only consider the probative evidence and reasonable inferences supporting the judgment. *Drane v. State*, 867 N.E.2d 144, 146 (Ind. 2007). It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient. *Id.* To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it "most favorably to the trial court's ruling." *Id.* Appellate courts affirm the conviction unless "no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt." *Id.* at 146-47 (quotation omitted). It is therefore not necessary that the evidence "overcome every reasonable hypothesis of

innocence.” *Id.* at 147 (quotation omitted). “[T]he evidence is sufficient if an inference may reasonably be drawn from it to support the [judgment].” *Id.* (quotation omitted).

A. Nonsupport of a Dependent Child

Pica first argues that the evidence is insufficient to support his conviction for Class C felony nonsupport of a dependent child. In order to convict Pica as charged here, the State had to prove that he knowingly or intentionally failed to provide support for his dependent child, B.W.D., and the total amount of unpaid support that is due and owing is at least \$15,000.00. Ind. Code § 35-46-1-5(a); Appellant’s App. p. 51 (amended charging information). It is a defense that the defendant was unable to provide support. I.C. § 35-46-1-5(d).

Pica argues that for the period of time from B.W.D.’s date of birth on November 17, 1986, to the probate court’s paternity order on March 24, 2000, he “was not under an obligation to pay support for” him. Appellant’s Br. p. 4. Therefore, “he was unable or incapable of providing support for [B.W.D.] because he was under no obligation to do so and he, by his legal actions, disputed paternity.” *Id.* Therefore, he asserts that the total amount of unpaid support that is due and owing should be calculated by using the difference between the date that his paternity was established, March 24, 2000, and B.W.D.’s eighteenth birthday, November 17, 2004, which equals \$10,164.00. Because this amount is less than \$15,000.00, he claims the evidence is insufficient to convict him of the Class C felony.

As Pica himself acknowledges on appeal, he is collaterally estopped from challenging the probate court’s March 2000 order which established his paternity and set

forth his child support obligation. *See Stephens v. State*, 874 N.E.2d 1027, 1033 (Ind. Ct. App. 2007), *trans denied*. That is, if Pica took issue with his paternity establishment or child support obligation, then he should have sought modification with the issuing court or appealed that order, which he did not do. *See id.* He cannot do so now years later in a criminal proceeding. *See id.* In addition, a trial court's support order "(1) *may include the period dating from the birth of the child*; and (2) must include the period dating from the filing of the paternity action." Ind. Code § 31-14-11-5 (emphasis added). Because the probate court's March 2000 paternity order made Pica's child support retroactive to B.W.D.'s date of birth, which it had the discretion to do, Pica cannot now challenge that aspect of the probate court's order in this case. Indiana Code section 35-46-1-5(a) requires the "*total amount of unpaid support that is due and owing*" be at least \$15,000.00, I.C. § 35-46-1-5(a) (emphasis added), and the State presented evidence that the total amount of unpaid support due and owing was \$39,193.00. Nevertheless, Pica was entitled to a defense that he was unable to pay this amount. However, Pica presented no evidence of his inability to pay. Pica himself testified that he was employed in Japan from 1999 to 2007, and the record shows that he only paid \$245 in child support in 1997. His insufficiency argument fails.

B. Intimidation

Pica next argues that the evidence is insufficient to support his conviction for Class D felony intimidation. In order to convict Pica as charged here, the State had to prove that he communicated a threat to another person with the intent that the other person be placed in fear of retaliation for a prior lawful act and that the person to whom

the threat was communicated was a law enforcement officer, to wit, Pica threatened DPA O'Brien by stating that he was going to have him "snipped out, snooped out, anything I possibly can with the people who are capable of doing it" because DPA O'Brien successfully and lawfully obtained a paternity order against Pica and engaged in other lawful conduct, and DPA O'Brien was placed in fear. Ind. Code § 35-45-2-1(a)(2), (b)(1)(i); Appellant's App. p. 25 (charging information). Pica concedes that DPA O'Brien is a law enforcement officer. *See Ajabu v. State*, 677 N.E.2d 1035, 1041 (Ind. Ct. App. 1997), *trans. denied*.

Pica first alleges that the voicemail left by him "does not specify the [prior lawful] act by Mr. O'Brien which led to the threats." Appellant's Br. p. 5. To the contrary, Pica's voicemail clearly references DPA O'Brien's prosecutorial acts with regard to Pica by mentioning the fact that DPA O'Brien is contemplating felony charges against him. Pica also tells DPA O'Brien that he is on "money trails" and "quota seeking" and does not "give a shi* about kids." These comments reference the paternity order and the contemplated prosecution for nonsupport of a dependent child. The State thus proved that Pica threatened DPA O'Brien in retaliation for his prior lawful acts of obtaining a paternity order against Pica and contemplating criminal charges for Pica's nonpayment of child support.

Pica next alleges that his statement to have DPA O'Brien "snipped out, snooped out" is "not a specific threat to do anything" and his statement that he was going to have DPA O'Brien's face "pushed in the mud" is "likewise unspecific." *Id.* Indiana Code section 35-45-2-1(c), which Pica does not cite, provides:

“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;
- (3) commit a crime;

* * * * *

- (6) expose the person threatened to hatred, contempt, disgrace, or ridicule;

Contrary to Pica’s argument, his statement to have DPA O’Brien “snipped out, snooped out anything I possibly can with the people who are capable of doing it, because I want your face pushed in the mud, you fuc*ing dic*” qualifies as a threat under Indiana Code § 35-45-2-1(c). At the very least, Pica was expressing an intention to expose DPA O’Brien to disgrace or ridicule. Most likely, though, Pica was expressing an intention to unlawfully injure him through his connections in the United States. The evidence is sufficient to support Pica’s conviction for intimidation.²

C. Harassment

Pica finally argues that the evidence is insufficient to support his conviction for Class B misdemeanor harassment. In order to convict Pica as charged here, the State had to prove that Pica, with intent to harass, annoy, or alarm another person but with no intent of legitimate communication, made a telephone call, to wit: Pica called and left a message for DPA O’Brien in which Pica threatened DPA O’Brien. Ind. Code § 35-45-2-2(a)(1); Appellant’s App. p. 25 (charging information). On appeal, Pica argues that “[i]t is apparent from defendant’s statement that he was commenting on the actions of the prosecuting attorney. Defendant was exercising his right of free speech by commenting

² Pica argues that the remainder of the voicemail should be considered constitutionally protected speech since he was voicing his opinion regarding the conduct of DPA O’Brien. Because the above quoted portion of the voicemail is sufficient to support his conviction, we need not address this argument.

on government action.” Appellant’s Br. p. 6. Pica, however, provides no citation to authority for his claim of free speech and offers no analysis beyond the one sentence quoted above. Pica has thus waived this argument. Ind. Appellate Rule 46(A)(8)(a). We therefore affirm this conviction.³

II. Ineffective Assistance of Counsel

Pica next contends that his trial counsel was ineffective for failing to elicit testimony regarding his ability to pay child support. We review the effectiveness of trial counsel under the two-part test provided by *Strickland v. Washington*, 466 U.S. 668 (1984). *Bieghler v. State*, 690 N.E.2d 188, 192-93 (Ind. 1997), *reh’g denied*. A claimant must demonstrate that counsel’s performance fell below an objective level of reasonableness based upon prevailing professional norms and that the deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687-88. “Prejudice occurs when the defendant demonstrates that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694). We presume that counsel rendered effective performance, and a defendant must offer strong and convincing evidence to overcome this presumption. *Loveless v. State*, 896 N.E.2d 918, 922 (Ind. Ct. App. 2008) (citing *Overstreet v. State*, 877 N.E.2d 144, 152 (Ind. 2007), *reh’g denied*), *trans. denied*. “[A] court need not determine whether counsel’s performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.” *Strickland*, 466 U.S. at 697. “If it is

³ Pica raises no double jeopardy argument on appeal.

easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.” *Id.*

Here, Pica has presented no evidence of his inability to provide support to his son. In fact, the only evidence in this record is that he *was* employed in Japan from 1999 to 2007. Thus, Pica has failed to show prejudice. Pica’s ineffective assistance of counsel claim fails.

Affirmed.

BAILEY, J., and BRADFORD, J., concur.