ATTORNEY FOR APPELLANT:

BARBARA J. SIMMONS
Oldenburg, Indiana

ATTORNEYS FOR APPELLEE:

STEVE CARTER
Attorney General of Indiana

CYNTHIA L. PLOUGHE
Deputy Attorney General
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

WILLIAM MALONE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A05-0610-CR-600
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable John W. Hammel, Judge
Cause No. 49G21-0607-CM-137831

July 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

William Malone ("Malone") appeals his conviction of invasion of privacy as a Class A misdemeanor.[1] We reverse.

Issue

The issue presented is whether there is sufficient evidence to prove beyond a reasonable doubt that Malone knowingly violated an order of protection.

Facts and Procedural History

Malone and Dionne Taylor ("Taylor") were dating for approximately eighteen months prior to July 18, 2006, when Taylor petitioned for and obtained an Ex Parte Order For Protection against Malone. In relevant part, the protective order prohibited Malone from "harassing, annoying, telephoning, contacting, or directly or indirectly communicating with [Taylor]." Exh. 1, p. 2. Although Malone resided on Madiera Street in Indianapolis, for service of the order, Taylor gave his address as 3502 East Apple Street, the residence of his grandmother, Willie Franklin ("Franklin"). Taylor "knew that [Franklin] is always at home" and could sign for the order. (Tr. 15.)

That same day, after the order was issued, Taylor sent Malone a text message on his cell phone informing him that she had "filed a protective order" and "that he is not to contact [her] anymore and [she] wanted nothing else to do with him." (Tr. 7, 29.) Malone attempted to call Taylor and, when Taylor did not answer, Malone sent her a text message reading, "[C]all me now." (Tr. 13.) Malone sent other text messages on July 21, and on July 24,

[1] Ind. Code § 35-46-1-15.1.

2006. In the latter, he wrote, "Bitch, you ain't shit." (Tr. 9.)

Meanwhile, on July 19, 2006, Franklin left on an extended trip to an out-of-town casino. No one stayed in her home during her absence. When Franklin returned on July 24, 2006, between 5:00 and 6:30 p.m., she found a "paper" addressed to Malone. (Tr. 20). She called her grandson, who retrieved a copy of the protective order sometime after 6:00 p.m. Malone did not contact Taylor thereafter.[2]

The State charged Malone with invasion of privacy, alleging that, on or about July 24, 2006, Malone knowingly violated the order of protection by sending text messages on Taylor's cell phone. At his bench trial, Malone argued he had no knowledge of the order when he sent the messages, but the trial court found him guilty. The court elaborated:

> [T]he State has proved beyond a reasonable doubt that . . . [Malone] knew about the order at least on one parameter, and that parameter was no contact. He not only got the message, he responded to it on the 18th. . . . He may not have actually gotten the actual order itself until the 24th, after the last message was sent; that's irrelevant. The question is whether or not he had notice and knowledge of what the order forbade at the time he violated [it]. That contact on the 18th was a violation regardless of – well, it says on the 24th, but, regardless of the time. So, for those reasons, I find that the defendant is guilty of invasion of privacy, a Class A misdemeanor. I think there was something else. Well, I guess there were two follow-up messages on different days, but anyway, I find there was a violation, the State's proven beyond a reasonable doubt.

(Tr. 33-34.) Malone now appeals.

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[2] Malone picked up the protective order on July 24, 2006, the same day he sent the last text message. The State did not introduce evidence concerning the time of the July 24th message, but the State does not claim that the message was sent after Malone was served with the order. Indeed, the probable cause affidavit alleges that the text message was sent at "approximately 12:23 p.m." (App. 11.)

Discussion and Decision

Malone argues that there is insufficient evidence to sustain his invasion of privacy conviction. It is the task of the finder of fact to determine in the first instance whether the evidence in a particular case adequately proves the elements of an offense. Davis v. State, 813 N.E.2d 1176, 1178 (Ind. 2004). When on appeal a defendant contends the evidence was insufficient to sustain the conviction, the reviewing court neither reweighs the evidence nor judges the credibility of witnesses. Id. We affirm the conviction 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. Id.

Indiana Code section 35-46-1.15.1 provides:

> A person who knowingly or intentionally violates:
>
> (1) a protective order to prevent domestic or family violence issued under IC 34-26-5 . . . ; [or]
> (2) an ex parte protective order issued under IC 34-26-5 . . . .
>
> commits invasion of privacy, a Class A misdemeanor.

Here, Malone does not challenge the existence of a valid order of protection; nor does he dispute that his text messages violated that order. Instead, Malone argues that he did not have actual notice of the order and, thus, could not have knowingly violated it. The State concedes that Malone had not been served with the order before the time of the alleged offense, but insists that Taylor conveyed the essential information to Malone. The State supports its position solely with this Court's opinion in Hendricks v. State, 649 N.E.2d 1050 (Ind. Ct. App. 1995).

In that case, Bernadette Mercado was tutoring Michael Hendricks in her home when the family obtained an emergency protective order against Hendricks due, in part, to his behavior toward a teenage family member. Six days later, Hendricks called the Mercado home. Bernadette informed him of the protective order and told him he was not to have any contact with the family. Later that day, Hendricks again called the Mercados. This time, an officer with the Marion County Sheriff's Department was present, and he also informed Hendricks of the emergency protective order "and [of] the parameters of the order." Id. at 1052. The next day Hendricks violated the protective order by coming within 1000 feet of the teenager. He was charged with and convicted of invasion of privacy. As in this case, Hendricks argued on appeal that he did not have actual notice of the protective order. Our Court found sufficient evidence to prove that Hendricks had knowledge of the order and, thus, affirmed his conviction for invasion of privacy. Id.

We learn from Hendricks that service of a protective order is not required to support a conviction based upon its violation if, prior to the alleged violation, the defendant otherwise had knowledge of the order and of the relevant conduct it prohibits. In Hendricks, before the defendant violated the protective order, he had been informed of the order's existence by a two-way telephone conversation, first with a protected person and then with an official state actor. Here, Malone was informed of the order by a single text message from the protected person. The actual message is not in evidence, but Taylor testified that she wrote to Malone on July 18, 2006, telling him she had "filed" a protective order. (Tr. 7, 29.) That bare-bones message, however, failed to inform Malone that the trial court had entered a valid order that

was presently operational. Further, Taylor's text message was not confirmed by service of the protective order upon Malone at his residence, as would typically occur.[3]

An after-the-fact notice of a protective order is insufficient to meet the demands of due process. State v. Gentry, 936 S.W.2d 790, 793 (Mo. 1996), reh'g denied. We conclude that the State did not prove beyond a reasonable doubt that Malone had notice of the existence of a valid order of protection barring him from contacting Taylor. Accordingly, the evidence is insufficient to show he knowingly violated the protective order.

In arriving at our decision, we caution against interpreting this case too broadly. See id. The State may establish that a defendant was aware of a protective order in many ways, for example, where a defendant "agreed to the protective order, attended any hearing or in any way participated, that he was ever served with a copy of the protective order, or that he in any way received notice, formal or informal" of the issuance or existence of the court order prior to the alleged offense. Small v. Texas, 809 S.W.2d 253, 256-57 (Tex. App. 1991), petition for discretionary review refused; see also Ramos v. State, 923 S.W.2d 196, 198-99 (Tex. App. 1996) (finding sufficient evidence of knowledge where defendant had notice of an application for a temporary ex parte order and citation to appear for a show-

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[3] Of equal import, in Hendricks, the police officer explained the "parameters" of the order, i.e., the prohibited conduct, so that the defendant could conform his conduct thereto. A defendant need not have knowledge of the entire contents of the order of protection prior to being charged with violation of that order. People v. Ramos, 735 N.E.2d 1094, 1098 (Ill. App. Ct. 2000), appeal denied, 742 N.E.2d 333 (Ill. 2000). Rather, the defendant must have knowledge only of the provision of the order that he is charged with violating. Id. In this case, Taylor informed Malone that he was not "to contact" her anymore. Malone does not claim that Taylor's message inadequately apprised him of the proscribed conduct. See Wright v. State, 688 N.E.2d 224, 226 (Ind. Ct. App. 1997) ("Contact has been defined as 'establishing of communication with someone' or to get in communication with'" and "is not limited by the means in which it is made known to the other person.") (quoting Webster's Dictionary 249 (10th ed. 1993)).

cause hearing and where he had pled guilty to violating the same protective order). Whether the defendant knowingly violated a protective order is fact-specific. Here, however, there is a lack of service of the order prior to the conduct at issue, and Taylor's text message did not serve as a legally adequate substitute. Thus, we must reverse Malone's conviction for invasion of privacy.

Reversed.

SHARPNACK, J., and MAY, J., concur.