

IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE
IN AND FOR KENT COUNTY

State of Delaware, : Cr.A. No. 07-09-1939 & 1940
 : Case No. 0709018638
 vs. :
 :
 David A. Russell, :
 :
 Defendant. :

Decision after Trial

Date of Hearing: November 27, 2007

Date Decided: December 3, 2007

Daniel Stevenson, Esquire, Department of Justice, 102 West Water Street, Dover, Delaware 19901, attorney for the State.

Kevin M. Howard, Esquire, Young, Malmberg & Howard, 30 The Green, Dover, Delaware 19901, attorney for Defendant.

Trader, J.

In these criminal cases, I find that the State has failed to establish beyond a reasonable doubt that the defendant, David A. Russell, is guilty of harassment, but I find that the State has established beyond a reasonable doubt that the defendant was careless in the operation of his boat.

The relevant facts are as follows: on July 14, 2007, David Dewey and other members of his family were fishing in a small boat at Reef Site #3 near Bowers Beach, Kent County, Delaware. He had anchored his boat on the south side of the reef and a larger boat called "Miss Shyanne" drifted toward him. The larger boat, operated by the defendant, drifted within six feet of the port side of his boat. It appeared that "Miss Shyanne" was going to hit the smaller boat. Dewey and the defendant exchanged comments with each other and the defendant stated to Dewey that the smaller boat should be drifting like all of the other boats. The larger boat drifted toward the smaller boat a second time and came very close to the stern. This time the defendant stated, "If you had not anchored, I would not have to come this close to your boat." The defendant's boat drifted close to the victim's boat three more times and on one occasion the defendant's boat was approximately three feet from the smaller boat. "Miss Shyanne" was so close that it extended over the small boat on several occasions. Dewey characterized the defendant's language as harsh and threatening and the defendant said that if he had any problem he would meet him on the wharf.

After Dewey operated his boat back to Bowers Beach, he called an officer of the Delaware Natural Resources Environmental Control and reported the incident. When the police officer interviewed the defendant, Russell admitted he may have been imprudent, but denied any intentional conduct. On September 18, 2007, the defendant was charged

with both harassment in violation of 11 *Del. C.* §1311(a)(1) and careless operation of a vessel in violation of 23 *Del. C.* §2116(b). Trial was held by this Court without a jury on November 27, 2007.

The finder of fact in a trial by court makes two distinct determinations: (1) he assesses the credibility of the witnesses, and (2) he assesses the weight to be given to the testimony of the witnesses. *See Barks v. Herzberg*, 8 Storey 162, 164, 206 A.2d 507, 508 (Del. 1965). In this case, the first determination to be made is whether the State's evidence is believable. The second determination is whether the State's evidence, if believable, is sufficient to convict the defendant beyond a reasonable doubt. As to the first determination, I find the State's evidence to be believable. Despite the testimony of the defendant and his first mate, I am not convinced that the State's witnesses were lying or mistaken. I accept the testimony of the State's witnesses and I reject the testimony of the defense witnesses. The question remains as to whether the State's evidence is sufficient to convict the defendant beyond a reasonable doubt on either of the charges.

The relevant portion of the statute relating to the harassment charge is found in 11 *Del. C.* §1311(a)(1) and provides as follows:

(a) A person is guilty of harassment when, with intent to harass, annoy or alarm another person: (1) he or she insults, taunts or challenges another person or engages in any other course of alarming or distressing conduct which serves no legitimate purpose and is in a manner which the person knows is likely to provoke a violent or disorderly response or causes a reasonable person to suffer substantial emotion distress.

Pursuant to this statute, the State filed an information charging the defendant, David A. Russell, with harassment. The information reads as follows: “[o]n or about the 14th day of July, 2007, in the County of Kent, State of Delaware, did with intent to harass, annoy or alarm DAVID W. DEWEY, did engage in any course of alarming or distressing

conduct in a manner which he knows is likely to provoke a violent or disorderly response.”

The essential elements of this crime as set forth in the state’s information are as follows: (1) the defendant engaged in a course of alarming or distressing conduct; (2) he did this with the intent to harass, annoy or alarm David W. Dewey; and (3) he knows this conduct is likely to provoke a violent or disorderly response.

The defendant’s conduct in operating a large boat within a few feet of the smaller boat constitutes an alarming or distressing course of conduct. The fact that his boat drifted very close to the smaller boat on a number of occasions establishes that this conduct was intentional and that he intended to annoy the victim. The question remains as to whether the defendant knew this conduct was likely to provoke a violent or disorderly response. Based on the different sizes of the two boats and their location in the open water, it is unlikely that the victim could have committed a violent act or a breach of the peace. A reasonable person would not have the direct tendency to react to this conduct by an act of violence or breach of the peace. Therefore, the State has failed to prove beyond a reasonable doubt that the defendant knew that his conduct would likely provoke a violent or disorderly response. Accordingly, I find him not guilty of the charge of harassment.

The defendant is also charged with operating a vessel in a careless or imprudent manner. The essential elements of this charge are: (1) that he was operating a vessel; and (2) he operated the vessel in a careless or imprudent manner. The defendant’s conduct in operating his vessel, in close proximity to the Dewey boat on a number of occasions, constitutes careless operation of a vessel. Additionally, the defendant admitted he may

have operated the vessel in an imprudent manner. I find that the State has proven the defendant guilty beyond a reasonable doubt of this charge and I return a verdict of guilty as to it. Sentencing is scheduled for December 14, 2007, at 9:00 A.M.

Merrill C. Trader
Judge