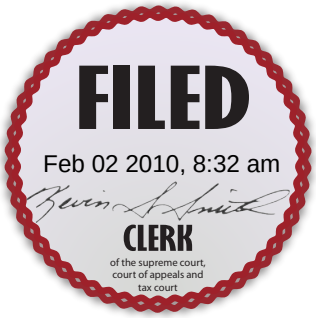

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IN THE
COURT OF APPEALS OF INDIANA

TODD ZURBUCHEN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A02-0907-CR-603
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Robert R. Altice, Judge
Cause No. 49G02-0812-FC-275232

February 2, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Todd Zurbuchen appeals his conviction for stalking, as a Class C felony, following a bench trial. Zurbuchen raises three issues for our review, which we restate as the following two issues:

1. Whether Zurbuchen preserved his objection to the State's admission of a postcard into evidence.

2. Whether the State presented sufficient evidence to support his conviction.

We affirm.

FACTS AND PROCEDURAL HISTORY

In August of 2007, after sixteen years of marriage, Sylvanie Zurbuchen filed for divorce from Zurbuchen. They had five children together between five and sixteen years of age. Zurbuchen had become abusive towards Sylvanie and their children, and, around the same time that she filed for divorce, the State charged Zurbuchen with criminal confinement of Sylvanie. During the pendency of the dissolution proceedings, Sylvanie had requested and received a protective order against Zurbuchen. However, the protective order was dissolved as part of the final dissolution agreement in December of 2007.

In January of 2008, Sylvanie requested a second protective order against Zurbuchen. Zurbuchen had been entering Sylvanie's home without permission and was acting strangely towards the children. He would tell the children that he was "the anti-Christ." Transcript at 19. On January 3, 2008, the trial court awarded Sylvanie a two-

year protective order against Zurbuchen, which prohibited Zurbuchen from contacting or threatening Sylvanie.

Undeterred, Zurbuchen continued to contact Sylvanie. According to Sylvanie:

> [H]e didn't want to believe that the marriage was over . . . . [W]hen it was his turn to see the kids he would just come in the house and, you know, just open up the door, w[a]nder around our house, try to take my things. He would try to stop the kids at church and try to, you know, get them alone there so he could talk to them. He would still call [and] say things that I didn't think were appropriate to the children and acted . . . inappropriately with them. He just wouldn't take no for an answer and I just felt threatened and scared and I just wanted to be left alone . . . . I was worried about myself and the children and their safety and my safety.

Id. at 20-21.

On November 16, 2008, shortly after Zurbuchen was released from jail and while the second protective order was in effect, Zurbuchen left a voice mail for Sylvanie. In that message, Zurbuchen stated that he was willing to do anything to have Sylvanie back. Zurbuchen referred to himself as Sylvanie's husband, stated that he would forgive her, and "rebuke[d]" the "evil holding her." Appellee's Brief at 4 (quoting State's Exh. 4). Zurbuchen concluded his message in "unintelligible gibberish." Id. Zurbuchen left a second, similar voice mail for Sylvanie on November 23, 2008.

Also in mid-November, Zurbuchen mailed a postcard to Sylvanie. The card was a form for a tuxedo rental. Zurbuchen had addressed the card to "My lovely Sylvanie Ann Ouset-Zurbuchen" and had written, among other things, "keep the covent [sic]"; "Just a couple [heart] more ple[a]se if its is [sic] Adonia Jesus will [sic]. Please write me a trueth [sic] love letter"; and "will you re[-]marry me?" State's Exh. 3. The form listed an "event date," for which Zurbuchen had handwritten "Dec 16, 2008 or wedding day or

come home." Id. Sylvanie submitted that postcard to the Beech Grove Police Department on November 18, 2008.

On December 3, 2008, the State charged Zurbuchen with stalking, as a Class C felony, and six counts of invasion of privacy, each as a Class A misdemeanor. Three of the six invasion of privacy charges were based on the November 16, 2008, voice mail, the mid-November postcard, and the November 23 voice mail. During the ensuing bench trial, the State asked Sylvanie how the phone calls and letters made her feel:

> A It made me scared and nervous because throughout the messages he would say that he knew what he was doing was wrong but he was still going to keep coming, he was still going, you know, he still had it in his mind that he was going to come home. And I guess what's especially scary is he thinks he has God behind him, he had God on his side . . . some kind of supernatural power[.] [T]hat[,] I think[,] makes him scary and more unpredictable.
>
> Q There was some times during those phone calls that Mr. Zurbuchen was speaking in a different language; I believe at one point in time he said that was Hebrew. [Y]ou studied in Israel, is that correct?
>
> A Yes.
>
> Q And do you know Hebrew?
>
> A Yes.
>
> Q And was what Todd was speaking[,] was that Hebrew?
>
> A Almost none of it was Hebrew . . . . No, he wasn't speaking in Hebrew.
>
> Q And did you figure out also that he . . . was coming home[,] that he . . . was on his way, what did that mean to you?
>
> A That he was going to be coming to my house and I didn't know what he was going to do, that the first time that he was arrested, you know, he held me down for hours and wouldn't let me back up again and I didn't know what he was going to do to try to make himself come home and get in

there. I was just scared that he would come inside and hurt me or hurt the kids.

Transcript at 29-30.

The State also sought to admit its Exhibit 3, the mid-November postcard, into the record along with its Exhibit 1 and Exhibit 2, which were two other postcards from Zurbuchen. Zurbuchen's counsel raised the following objections:

> MR. HAGENMAIER [for Zurbuchen]: Judge, I'm going to object to State's Exhibits One and Two on the grounds that these documents are not relevant, these items were not sent to the Defendant or to the alleged victim in this case and that's the only issues [sic] is the protective orders involving this victim. Apparently the . . . State's Exhibit Three is addressed to her and also the family; so for that reason I would object to State's Exhibits One and Two.
>
> THE COURT: All right. Let me ask a couple [of] preliminary questions, Ms. Martens [for the State]. Who are those written exactly to?
>
> MS. MARTENS: Judge, they are written to the children of Todd and . . .
>
> THE COURT: Which ones?
>
> MS. MARTENS: I'm sorry. State's Exhibit Two . . . is to [children G.Z. and I.Z.]; and State's Exhibit One is to [child S.Z.]
>
> * * *
>
> THE COURT: All right. So [S.Z.] is . . . what number?
>
> MS. MARTENS: One.
>
> THE COURT: Number One. And which one [was] to [G.Z.] and [I.Z.]?
>
> MS. MARTENS: Two.
>
> THE COURT: All right. And what about [Exhibit] Three?
>
> MS. MARTENS: Three is to Sylvanie.

THE COURT: Okay. I see that they are listed on the protective order that I just admitted into evidence. Let me take a look at them real quickly because your objection was relevance, is that correct?

MR. HAGENMAIER: Yes, Judge, and also, Judge, just in addition to that I don't think . . . [the State has] established a time element . . .

THE COURT: I'm sorry?

MR. HAGENMAIER: There's been no establishment yet of the time element about when these may have been received, so for that reason also they're not relevant.

THE COURT: Well, the document speaks for itself; it's December the 16th, of 2008, on [o]ne [State's Exhibit 3].

MS. MARTENS: Judge, I can lay more of a foundation for One and Two, if you'd like.

THE COURT: Yeah. Why don't you lay more on One and Two. Are you objecting to Three as well?

MR. HAGENMAIER: Judge, I did not object to Three. . . .

THE COURT: We'll go ahead and admit Three . . . .

MR. HAGENMAIER: Well, I've got my exhibits confused, as far as the one directed to the make of it (sic [noted in original]) I'm not objecting . . . .

THE COURT: All right. That's Number Three.

MR. HAGENMAIER: . . . so I guess the other . . .

THE COURT: So we'll show Three is offered and admitted into evidence without objection. And go and ahead and lay a little bit more foundation [on Exhibit 1 and Exhibit 2].

MS. MARTENS: Sure.

Id. at 21-24 (emphases added).

Following the trial, the court found Zurbuchen guilty of stalking and three counts of invasion of privacy. The court's findings on the invasion of privacy charges were based on the November 16 and 23 voice mails and the mid-November postcard, which was admitted as State's Exhibit 3. The court entered judgment of conviction only on the stalking charge, and the State subsequently dismissed each of the invasion of privacy charges against Zurbuchen. The court sentenced Zurbuchen to four years executed in the Department of Correction, and this appeal ensued.

DISCUSSION AND DECISION

Issue One: Admission of the Postcard

Zurbuchen first argues on appeal that the trial court erred in admitting State's Exhibit 3, the mid-November postcard, into evidence because the postcard did not bear "an authenticating date on its face." Appellant's Brief at 8. However, the "[f]ailure to object to the admission of evidence at trial normally results in waiver and precludes appellate review unless its admission constitutes fundamental error." Cutter v. State, 725 N.E.2d 401, 406 (Ind. 2000); see also Ind. Evidence Rule 103(a)(1). As correctly pointed out by the State and demonstrated above, Zurbuchen did not object to the State's request to admit its Exhibit 3. Indeed, he expressly did not object to that exhibit. See Transcript at 21-24. And Zurbuchen does not suggest in either his Appellant's Brief or his Reply Brief that the admission of the mid-November postcard constituted fundamental error. See Ind. Appellate Rule 46(A)(8)(a) ("The argument must contain the contentions of the appellant . . . supported by cogent reasoning."). Therefore, we must conclude that Zurbuchen has waived this issue for our review. See Cutter, 725 N.E.2d at 406.

Issue Two: Sufficient Evidence

Zurbuchen also argues that the State failed to present sufficient evidence that he stalked Sylvanie. When reviewing a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the judgment and the reasonable inferences that may be drawn from that evidence to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

The trial court found Zurbuchen guilty of stalking, as a Class C felony. As applied here, stalking is a Class C felony when a person violates a protective order through "a knowing or an intentional course of conduct involving repeated or continuing harassment of another person that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened and that actually causes the victim to feel terrorized, frightened, intimidated, or threatened." Ind. Code §§ 35-45-10-1, 35-45-10-5(b)(2). Zurbuchen raises two challenges to the State's evidence. First, Zurbuchen contends that the trial court impermissibly inferred that the "gibberish," as the State calls it, Appellee's Brief at 8, at the end of the November 16 and 23 voice mails would cause a reasonable person to feel frightened. And, second, Zurbuchen asserts that the State did not present any evidence that he intended for Sylvanie to feel terrorized, frightened, intimidated, or threatened. We cannot agree with either of Zurbuchen's assertions.

Regarding Zurbuchen's first argument, the trial court concluded that, "based on what he's told me about his religion, he was speaking in tongues and . . . I think that would cause a normal, reasonable person to fear [him]." Transcript at 83. In response, Zurbuchen states that there is no evidence that the combination of sounds in the voice mails was him speaking in tongues; rather, the evidence only shows that he was speaking neither English nor Hebrew. Zurbuchen further states: "Speaking in tongues is a common practice in some religions and involves no threatening element." Appellant's Brief at 13.

The State presented sufficient evidence that Zurbuchen's conduct would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened. The trial court heard the voice messages and was within its discretion to conclude that Zurbuchen was speaking in tongues; we will not reweigh the evidence to reconsider the court's conclusion. See Jones, 783 N.E.2d at 1139. And, as the State succinctly responds:

> While the practice [of speaking in tongues] is not threatening in a theological sense, it becomes threatening when the speaker has already directed violence at the listener; characterizes her as inhabited by an "evil spirit"; continually assures her that he will "come home" without regard to her own will . . . ; and repeatedly violates a protective order with each communication.

Appellee's Brief at 8 (citing to the transcript and exhibits). We agree and hold that the State presented sufficient evidence that Zurbuchen's conduct would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened.

Second, Zurbuchen asserts that the State failed to demonstrate that he intended to cause Sylvanie to feel terrorized, frightened, intimidated, or threatened. "[S]talking requires proof that the perpetrator entertained the intent to cause the other person to feel

terrorized, frightened, intimidated, or threatened." Burton v. State, 665 N.E.2d 924, 927 (Ind. Ct. App. 1996). "[T]he requirement of a knowing or intentional course of conduct involving repeated or continuing harassment directed toward the victim is a requirement of specific intent." Johnson v. State, 648 N.E.2d 666, 670 (Ind. Ct. App. 1995). "The State need not establish by direct evidence that an individual possessed a specific intent; circumstantial evidence will suffice." Johnson v. State, 605 N.E.2d 762, 765 (Ind. Ct. App. 1992), trans. denied.

Zurbuchen's argument on this issue is merely a request for this court to reweigh the evidence, which we will not do. See Jones, 783 N.E.2d at 1139. Zurbuchen knew of the protective order prohibiting him from contacting Sylvanie, yet he repeatedly directed his communications toward her. Further, Zurbuchen had acted violently towards Sylvanie in the past, his communications characterized her as possessed by an "evil . . . spirit" that he "rebuke[d]," he invoked "supernatural power" to justify his actions, and he repeatedly told Sylvanie that he would "come home" despite the existence of the protective order. See Transcript at 29-30; Appellee's Brief at 4 (quoting State's Exh. 4). Thus, the State presented sufficient evidence to demonstrate that Zurbuchen intended to cause Sylvanie to feel terrorized, frightened, intimidated, or threatened.

Affirmed.

FRIEDLANDER, J., and BRADFORD, J., concur.