IN THE COURT OF APPEALS OF IOWA

No. 3-641 / 12-1624
Filed August 7, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JAMES ROBERT DOYLE,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, John Bauercamper, Judge.

A defendant appeals his conviction for stalking. **AFFIRMED.**

Mark C. Meyer, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney General, Ralph Potter, County Attorney, and Laura Roan, Assistant Attorney General, for appellee.

Considered by Doyle, P.J., and Danilson and Mullins, JJ.

MULLINS, J.

James Doyle appeals from the judgment and sentence entered upon a jury verdict finding him guilty of stalking, in violation of Iowa Code sections 708.11(2) and 708.11(3)(c) (2011), an aggravated misdemeanor. Doyle argues, inter alia, that the evidence is insufficient to support his conviction and that the district court should have granted his motion for a new trial because the guilty verdict was contrary to the weight of the evidence. For the reasons stated below, we affirm Doyle's conviction.

I. BACKGROUND FACTS AND PROCEEDINGS.

Doyle and his wife, Tracy, were divorced in 2008. After the divorce Doyle and Tracy continued to maintain a non-marital relationship and were involved together in the lives of their children. In 2009, Tracy began dating Randy Hansen, though Doyle continued to be involved in her life. Tracy described her relationship with Hansen as on-again and off-again throughout 2010 and 2011. Beginning in about November 2010, Doyle began making phone calls to Hansen regarding Hansen's relationship with Tracy. In November 2010, the taillight on Hansen's pickup truck was smashed while it was parked in downtown Dubuque. The wires underneath the broken taillight were later torn out. Shortly after these incidents Hansen received a call from Doyle in which Doyle said, "You know that problem you had a little while ago? You're going to have problems like that the rest of your life." During this call Doyle also told Hansen, "I know good people, and I know bad people, and I know lots of bad people."

Over the next several months Doyle continued to make calls to Hansen, many of which Hansen would not answer. On some occasions Doyle would place the calls from his daughter's cell phone, ostensibly to avoid Hansen's screening efforts. During the calls that resulted in conversations, Doyle made numerous statements to Hansen. Doyle told Hansen in one call, "We're going to do things the easy way or we're going to do things the hard way." In another, Doyle cautioned Hansen "not to say something stupid." In yet another, Doyle told Hansen, "If you f--- with my family, I'll f--- with you." Hansen testified this last call made him concerned Doyle would try to hurt him or would try to have him killed.

In October 2011, Doyle began to call Hansen much more frequently. Doyle repeatedly asked Hansen when he last saw Tracy, when the two last had sexual relations, and what they talked about when they were together. Doyle told Hansen that Doyle would keep calling if Hansen refused to answer these questions. During another call in October 2011, Doyle told Hansen if he did not answer his questions, Doyle would be "a thorn in your side the rest of your life."

On October 21, 2011, Hansen returned to his house to find a wooden plank he kept outside placed lengthwise across the pedestrian door to his garage. The next day while he was working on the boat he kept in the garage, he noticed a deep gouge had been made down the length of the boat. He also noticed that the tires on his trailer had been slashed. The damage to the boat and trailer was investigated by Special Agent Jon Turbett of the Division of Criminal Investigation. Agent Turbett conducted two interviews of Doyle. In one interview, Doyle admitted he had driven by Hansen's house in the night on

October 21, but he denied ever setting foot on Hansen's property. Agent Turbett collected footage from traffic cameras and a private surveillance camera along the route between Doyle's and Hansen's houses for October 21. The footage revealed a truck matching the description of Doyle's vehicle driving a circuitous route toward the location of Hansen's house and making a return trip shortly thereafter. Doyle also told Agent Turbett he had driven by Hansen's house approximately twenty to twenty-five times during the time in which Tracy and Hansen were seeing each other, but there is no evidence Hansen ever saw Doyle as he drove by the house.

As a result of this investigation, Doyle was charged by trial information on March 6, 2012, with third-degree burglary, in violation of Iowa Code sections 713.1 and 713.6A and with stalking, in violation of Iowa Code sections 708.11(2) and 708.11(3)(c). A jury trial was held in June 2012. At the close of the State's case, Doyle moved for a judgment of acquittal, claiming the State had not produced sufficient evidence to support either count of the trial information. The district court denied this motion. After the close of all the evidence, the jury returned a verdict of not guilty on the charge of third-degree burglary and a verdict of guilty on the charge of stalking. Thereafter, Doyle filed alternative motions in arrest of judgment and for a new trial. In support of the motion in arrest of judgment, Doyle argued there was insufficient evidence to support a guilty verdict on the stalking charge. In support of the motion for new trial, Doyle argued the guilty verdict was contrary to the weight of the evidence. The district

court denied both motions and entered a suspended sixty-day sentence. This appeal followed.

II. ERROR PRESERVATION.

On appeal, Doyle has raised numerous legal and factual arguments, which we have organized as follows: (1) the State did not produce sufficient evidence to support a guilty verdict, (2) the verdict of guilty for the stalking charge is unconstitutionally inconsistent with the verdict of not guilty for the burglary charge, (3) the district court erroneously admitted evidence of Doyle's prior bad acts and did not give the jury a limiting instruction as to the use of that evidence, (4) the phone calls Doyle made to Hansen were protected under the First Amendment and cannot serve as a basis for his conviction, and (5) the guilty verdict on the stalking charge was contrary to the weight of the evidence so as to require a new trial. As a threshold matter, we must determine whether Doyle properly preserved error on each of these claims. "It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). If not preserved by a timely objection, error is waived. *State v. Rutledge*, 600 N.W.2d 324, 326 (Iowa 1999).

Doyle contends his conviction for stalking and acquittal for burglary constitute inconsistent verdicts. He argues the conduct underlying the burglary charge of which he was acquitted could not also be considered to find him guilty of stalking. We need not reach the merits of this claim, for Doyle has failed to preserve the issue for appellate review. Doyle's posttrial motion in arrest of

judgment and motion for new trial failed to make any mention of the inconsistency of the jury's two verdicts, and the issue was not raised elsewhere. The claim of inconsistent verdicts, therefore, is not properly before this court.

Doyle next contends the phone calls he made to Hansen were protected by the First Amendment of the United States Constitution. The record reveals that Doyle did not make this claim at any point before or during trial or in his posttrial motions. "Issues not raised before the district court, including constitutional issues, cannot be raised for the first time on appeal." *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997). Because he did not raise the First Amendment issue below, Doyle has failed to preserve error and has waived this claim.

Doyle also argues the district court erred by admitting evidence of his prior bad acts for an impermissible purpose and by failing to provide the jury with a limiting instruction on the permissible use of such evidence. *See* Iowa R. Evid. 5.404(b) (prohibiting the use of evidence of certain prior crimes, wrongs, or acts to show that a person acted in conformity with those acts, but permitting the use of such evidence for other purposes). This claim was similarly not preserved for appellate review. The record is devoid of any objection at trial to the introduction of the challenged evidence. Nor did Doyle properly object to the jury instructions regarding this evidence. *See* Iowa R. Civ. P. 1.924 ("[A]ll objections to giving or failing to give any instruction must be made in writing or dictated into the record, out of the jury's presence, specifying the matter objected to and on what grounds. No other grounds or objections shall be asserted thereafter, or

considered on appeal."). Thus, Doyle has waived any claim regarding the use of prior bad acts evidence.

Doyle's two remaining claims—that the evidence was insufficient to support a guilty verdict and that a new trial is required because the verdict was contrary to the weight of the evidence—were properly preserved for appellate review. Doyle raised the insufficient evidence claim in his motion for judgment of acquittal, and he raised both claims in his posttrial motions. The district court denied the motions each time. These two claims, therefore, are properly before this court. We turn now to the merits of each.

III. SUFFICIENCY OF THE EVIDENCE.

Doyle argues the district court erroneously denied his motion in arrest of judgment because there was not sufficient evidence upon which the court could enter judgment on the guilty verdict. *See* Iowa R. Crim. P. 2.24(3)(a). We review challenges to the sufficiency of evidence supporting a guilty verdict for correction of errors at law. *State v. Webb*, 648 N.W.2d 72, 75 (Iowa 2002). We will uphold a verdict if it supported by substantial evidence. *Id.* "Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." *Id.* at 75–76. We must view all the evidence in the light most favorable to the nonmoving party, taking into consideration all reasonable inferences that fairly could be made by the jury. *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012). "Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury was free to reject certain evidence, and credit other evidence." *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006).

To prove a defendant guilty of the crime of stalking, the State must prove each of three elements beyond a reasonable doubt:

> A person commits stalking when all of the following occur:
> a. The person purposefully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to, or the death of, that specific person or a member of the specific person's immediate family.
> b. The person has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury to, or the death of, that specific person or a member of the specific person's immediate family by the course of conduct.
> c. The person's course of conduct induces fear in the specific person of bodily injury to, or the death of, the specific person or a member of the specific person's immediate family.

Iowa Code § 708.11(2). "Course of conduct" is defined as "repeatedly maintaining a visual or physical proximity to a person without legitimate purpose or repeatedly conveying oral or written threats, threats implied by conduct, or a combination thereof, directed at or toward a person." *Id.* § 708.11(1)(b). "Repeatedly" is defined as "on two or more occasions." *Id.* § 708.11(1)(d).

As a part of his general sufficiency challenge, Doyle argues the district court erroneously allowed the State to rely on evidence of his acts prior to the October 2011 timeframe alleged in the trial information in order to establish a course of conduct.[1] The State contends Doyle failed to preserve error on this claim as well. However, we need not rest our resolution of this issue on the principles of error preservation insofar as we conclude that Doyle's argument fails on the merits.

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[1] The information initially recited a timeframe of November 2010 through October 2011 for when Doyle committed the alleged stalking crime. The prosecution amended this at the start of trial to limit the timeframe to only October 2011.

Our rules of criminal procedure provide that the rules governing indictments are applicable when construing a trial information. Iowa R. Crim. P. 2.5(5). The rules require an indictment to include a brief statement of the time of the offense where time is “a material ingredient of the offense.” Iowa R. Crim. P. 2.4(7)(c). It is well-established that “[t]he date or dates fixed in the indictment for the commission of a crime are not material, and a conviction can be returned upon any date within the limitation statute, if there is no fatal variance between the indictment allegations and the proof offered.” *State v. Bell*, 223 N.W.2d 181, 184 (Iowa 1974) (citing *State v. Hardesty*, 153 N.W.2d 464, 471 (Iowa 1967)).

We find nothing in this offense that renders material the exact time in which the alleged course of conduct occurred. Doyle has failed to establish any fatal variance between the allegations in the trial information and the proof offered at trial. The minutes of testimony appended to the trial information recited that Hansen would testify as to events that occurred as far back as September 2010. The trial information and minutes of testimony afforded Doyle adequate notice of the evidence the State intended to present against him. *See id.* at 185 (finding no fatal variance where the indictment listed a specific date range for the occurrence of assault but the minutes of testimony and evidence offered at trial showed assaults occurring prior to that range). Nothing in the record indicates that the introduction of evidence predating October 2011 misled Doyle or interfered with his trial preparation. *See id.* With no fatal variance between the October 2011 allegations in the trial information and the evidence of events prior to October 2011, time does not constitute “a material ingredient” of

the stalking offense. Because we conclude time is not a material element of the offense, the dates listed in the trial information do not preclude consideration of events outside that timeframe as evidence of a course of conduct.

Turning to Doyle's general sufficiency claim, our review of the record leads us to conclude there is substantial evidence to support the jury's guilty verdict. Doyle made incessant phone calls to Hansen for a period of more than a year, demanding information from Hansen and warning him about the potential consequences of continuing his relationship with Tracy. After Hansen's taillight had twice been damaged, he received a phone call from Doyle informing him that he would "have problems like that the rest of your life." During this call, Doyle also warned Hansen that he knew "lots of bad people." Doyle told Hansen that "if you f--- with my family, I'll f--- with you" and that if Hansen did not answer his questions about Hansen and Tracy's relationship, Doyle would be "a thorn in your side the rest of your life." Taken together, we find these acts and statements provide substantial evidence (1) that Doyle purposefully engaged in a course of conduct directed at Hansen that would instill in him a reasonable fear of bodily injury or death and (2) that Doyle knew or should have known Hansen would be placed in such fear. *See* Iowa Code § 708.11(2)(a)–(b).

Substantial evidence exists, moreover, to support a rational conclusion that Doyle's conduct did in fact induce fear of bodily injury or death in Hansen. *See id.* § 708.11(2)(c). Hansen testified that Doyle's repeated phone calls caused him to fear Doyle, especially in the context of the damage to the lights and wiring on his truck. Hansen also testified he felt it necessary to look out the

door before he left his home and was afraid Doyle might hire someone to kill him. Hansen told others he was going to buy a gun in the hope it would get back to Doyle and prevent Doyle from trying to harm him. The jury could credit Hansen's testimony and rationally could infer from this and other evidence that Hansen feared bodily injury or death by Doyle.

Viewing this evidence in the light most favorable to the prosecution, we find the State produced substantial evidence from which a jury reasonably could conclude the State proved all three statutory elements beyond a reasonable doubt. Accordingly, we reject Doyle's claim of insufficient evidence.

IV. WEIGHT OF THE EVIDENCE.

Doyle also contends the district court erroneously denied his motion for new trial. Our review of a denial of a motion for new trial is for correction of errors at law. Iowa R. App. P. 6.907. The standard of our review depends upon the grounds for new trial raised in the motion. *Weyerhauser Co. v. Thermogas Co.*, 620 N.W.2d 819, 823 (Iowa 2000). If the motion is based on discretionary grounds, we review the district court's ruling for an abuse of discretion. *Id.* If the motion is based on a legal question, our review is of the correctness of the district court's ruling on the legal question. *Id.* Where, as here, the ground alleged in the motion for new trial is that the verdict is contrary to the weight of the evidence, our review is for an abuse of discretion. *State v. Adney*, 639 N.W.2d 246, 250 (Iowa Ct. App. 2001). An abuse of discretion occurs only where the grounds for the district court's decision are clearly untenable or unreasonable. *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003).

Doyle moved for a new trial based on Iowa Rule of Criminal Procedure 2.24(2)(b)(6), which permits the court to grant a new trial "[w]hen the verdict is contrary to law or evidence." "Contrary to evidence" means "contrary to the weight of the evidence," rather than not supported by sufficient evidence. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). "The 'weight of the evidence' refers to 'a determination [by] the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other.'" *Id.* at 658 (quoting *Tibbs v. Florida*, 457 U.S. 31, 37–38 (1982)). Motions for new trial are directed to the district court's discretion, which should be exercised only where "'the evidence preponderates heavily against the verdict.'" *Id.* at 659 (quoting 3 Charles A. Wright, *Federal Practice and Procedure* § 553, at 245–48 (2d ed. 1982)).

The record reveals the witness testimony was not so lacking in credibility that it could not support a guilty verdict. Nor is the other circumstantial evidence so lacking that the jury's determination of guilt was contrary to the weight of the evidence. Hansen testified credibly as to the repetitive and threatening nature of Doyle's phone calls to him and the sense of fear he felt as a result. That these calls occurred in the context of damage to Hansen's truck, and that Doyle made reference to those incidents, supports a reasonable conclusion that Doyle was also responsible for the damage. For the same reasons we conclude there is sufficient evidence to support the jury's verdict, we cannot on this record find that the evidence preponderates heavily against the jury's findings that Doyle engaged in a course of conduct directed at Hansen that reasonably cause him to fear bodily injury or death, that Doyle knew or should have known Hansen would

be placed in such fear, and that Hansen was in fact placed in such fear. *See* Iowa Code § 708.11(2). Therefore, the district court did not abuse its discretion in denying Doyle's motion for new trial.

Because we conclude the record contains sufficient evidence to support a guilty verdict, the district court did not abuse its discretion in ruling that the guilty verdict was not contrary to the weight of the evidence, and Doyle's remaining claims were not properly preserved for our review, we affirm the judgment and sentence of the district court.

AFFIRMED.