

STATE OF LOUISIANA

*

NO. 2001-KA-0333

VERSUS

*

COURT OF APPEAL

PATRICK D. HENRY

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

*

*

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 418-060, SECTION "J"
Honorable Leon Cannizzaro, Judge

Judge Steven R. Plotkin

(Court composed of Chief Judge William H. Byrnes III, Judge Steven R. Plotkin, Judge Miriam G. Waltzer)

Harry F. Connick
District Attorney
Leslie Parker Tullier
Assistant District Attorney
619 South White Street
New Orleans, LA 70119

COUNSEL FOR PLAINTIFF/APPELLEE

William R. Campbell, Jr.
LOUISIANA APPELLATE PROJECT
700 Camp Street
New Orleans, LA 70130

COUNSEL FOR DEFENDANT/APPELLANT

REVERSED AND REMANDED.

The issues in this appeal are whether the State produced sufficient evidence to sustain the defendant's conviction of attempted stalking and whether the trial court jury instructions were incorrect and confusing.

PROCEDURAL HISTORY

The defendant, Patrick Henry, was charged by bill of information with stalking Jeane Glen in violation of La. R.S. 14:40.2. The defendant pled not guilty at his arraignment. After a jury trial the defendant was found guilty of attempted stalking. The defendant waived legal delays and the trial court sentenced him to serve six months in parish prison. Defendant's motion for reconsideration of sentence was denied.

STATEMENT OF FACTS

On July 6, 2000, Officer John Netto was patrolling the 700 block of Royal Street when he was flagged down by Ely Kohan and Jeane Glen. Officer Netto observed that Ms. Glen was shaking and trembling. As the officer spoke with Ms. Glen and Mr. Kohan, he saw the defendant leaving an apartment building. Ms. Glen pointed at the defendant when she saw him. The officer had been informed that the defendant did not live in the building.

The officer approached the defendant and stopped him for further investigation. The officer asked the defendant what was he doing in the building. The defendant stated that he had gone to the apartment complex to retrieve his belongings. However, the defendant only had a plate lunch in his hands. The officer searched the building and found no property that belonged to the defendant. The officer then placed the defendant under arrest. The defendant indicated that he lived at 910 Royal Street. The apartment building where he was found was located at 711 Royal Street.

Ely Kohan testified that he and his girlfriend, Jeane Glen, lived at 711 Royal Street in the only apartment on the third floor. There were three other apartments on the second floor but those apartments were vacant. On July 6, 2000, Mr. Kohan and Ms. Glen were arriving home at approximately 6:00 p.m. when they saw the defendant walking down the stairs from the third floor. They went inside the apartment and noticed that the shower was wet. They had not been home all day. Mr. Kohan called for the police and then they went downstairs to wait for the police.

Mr. Kohan further stated that for three months, the defendant passed in front of his business, Great Expectations, three to four times a day. Ms. Glen worked in the store, which was located in the 600 block of Royal Street. Each time the defendant would pass the store, he would stop, look

into the store and grin at Ms. Glen. Ms. Glen did not know what to do to stop the defendant from looking at her. Mr. Kohan told Ms. Glen to tell the defendant to stop coming around. Ms. Glen was allegedly frustrated, scared and upset. One day, Mr. Kohan confronted the defendant. After watching the defendant stop, look into the store and grin at Ms. Glen, Mr. Kohan went outside and told the defendant to leave them alone. The defendant did not say anything and had a dead look on his face. However, the defendant continued to pass the store and grin at Ms. Glen. On several occasions, the defendant would stand across the street from the store and stare at Ms. Glen. Mr. Kohan testified that Ms. Glen was very uncomfortable. According to Kohan, she would always look up at who was passing the store and who was coming into the store. Mr. Kohan stated that they moved from the apartment on Royal Street because Ms. Glen was afraid that the defendant would come into the apartment and kill them. In fact, two days prior to the defendant's arrest, Mr. Kohan and Ms. Glen allegedly saw the defendant coming out of their apartment building. When Mr. Kohan asked the defendant what was he doing in the building, the defendant replied that he was visiting friends. Mr. Kohan thought the defendant was lying because the upstairs apartments were vacant.

ERRORS PATENT

A review of the record shows no errors patent.

ASSIGNMENT OF ERROR NUMBER 1

In his first assignment of error, the defendant contends that the State failed to produce sufficient evidence to sustain his conviction for attempted stalking.

Stalking is the willful, malicious, and repeated following or harassing of another person with the intent to place that person in fear of death or bodily injury. Any person who commits the offense of stalking and who is found by the trier of fact, whether the jury at a jury trial, the judge in a bench trial, or the judge at a sentencing hearing following a jury trial, beyond a reasonable doubt to have placed the victim of the stalking in fear of death or bodily injury by the actual use of or the defendant's having in his possession during the instances which make up the crime of stalking, a dangerous weapon or is found beyond a reasonable doubt to have placed the victim in reasonable fear of death or bodily injury, shall be fined one thousand dollars or imprisoned with or without hard labor for one year, or both.

La. R.S. 14:40.2. La. R.S. 14:40.2 defines stalking as “the willful, malicious, and repeated following or harassing of another person with the intent to place that person in fear of death or bodily injury.” The statute defines “harassing” as “engaging in a knowing and willful pattern of conduct directed at a specific person which seriously alarms, annoys, or distresses the person, and which serves no legitimate purpose. The conduct must be such as would cause a reasonable person to suffer substantial emotional distress and must actually cause substantial emotional distress to the person.” La.

R.S. 14:40.2 (C)(1). “Pattern of conduct” is defined as “a series of acts over a period of time, however short, evidencing an intent to inflict a continuity of emotional distress upon the person.” La. R.S. 14:40.2(C)(2). “Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose.” La. R.S. 14:27. Specific intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act. La. R.S. 14:10(1). Intent, absent an admission of such by a defendant, must necessarily be proven by inferences from surrounding facts and circumstances. State v. Hicks, 554 So.2d 1298, 1302 (La. App. 1 Cir.1989).

When assessing the sufficiency of evidence to support a conviction, the appellate court must determine whether, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found proof beyond a reasonable doubt of each of the essential elements of the crime charged. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct.2781, 61 L.Ed.2d 560 (1979); State v. Jacobs, 504 So.2d 817 (La. 1987).

In addition, when circumstantial evidence forms the basis of the

conviction, such evidence must consist of proof of collateral facts and circumstances from which the existence of the main fact may be inferred according to reason and common experience. State v. Shapiro, 431 So.2d 372 (La. 1982). The elements must be proven such that every reasonable hypothesis of innocence is excluded. La. R.S. 15:438. La. R.S. 15:438 is not a separate test from Jackson v. Virginia, but rather is an evidentiary guideline to facilitate appellate review of whether a rational juror could have found a defendant guilty beyond a reasonable doubt. State v. Wright, 445 So.2d 1198 (La. 1984). All evidence, direct and circumstantial, must meet the Jackson reasonable doubt standard. See State v. Jacobs.

In this case the victim Ms. Jeane Glen did not testify. Mr. Kohan, her boyfriend and employer, testified that the defendant harassed the victim by passing in front of his business three to four times a day and would look in and grin at Glen. On occasion he would stand across the street and stare into the store. On one occasion he was arrested for being on their residential premises. Both Mr. Kohan and Officer Netto testified that Ms. Glen was emotionally distressed by the defendant's behavior and that they changed their residence.

Although the defendant engaged in a pattern of activity that brought him into contact, at a distance, with the victim, the record does not support

that this behavior caused the victim to be placed in fear of death or bodily injury. The defendant's conduct is frightening and inappropriate. We cannot conclude, beyond a reasonable doubt that the defendant's conduct would cause a reasonable person to suffer "substantial emotional distress and must actually cause substantial emotional distress to the person." The testimony of her boyfriend/employer and the police officer are insufficient to prove this essential element of the offense of stalking. Thus, for this reason the conviction and sentence must be vacated.

ASSIGNMENT OF ERROR NUMBER 2

In this assignment, the defendant contends that the trial court gave confusing and erroneous jury instructions on the issue of intent. The trial court charged the jury on the elements of the crime of stalking:

With regard to stalking, stalking is defined by the legislature as the willful, malicious, and repeated following or harassing of another person with the intent to place that person in fear of death or bodily injury. Again, stalking is defined as the willful, malicious, and repeated following or harassing of another person with the intent to place that person in fear of death or bodily injury.

The legislature goes on to define what is meant by harassing. Harassing is defined as, it means engaging in a knowing and willful pattern of conduct directed at a specific person which seriously alarms, annoys, or distresses the person and which serves no legitimate person - - no legitimate purpose. Excuse me. Serves no legitimate purpose. The conduct must be such as would cause a reasonable person to suffer substantial emotional distress and must actually cause substantial emotional distress to the person.

The law goes on to describe what is meant by a pattern of conduct. A pattern of conduct means a series of acts over a period of time, however short, evidencing an intent to inflict a continuity of

emotional distress upon the person. That is the definition of stalking and the terms contained within that definition.

Essentially, you must find that the defendant did two things: That he willfully, maliciously, and repeatedly followed or harassed another person. And secondly, that it was his intent to place that person in fear of death or bodily injury. Those are the two essential elements. Again, the term “harassing” and “pattern of conduct” have also been defined for you. That is the law with regard to stalking.

Subsequently, the jury sent a notice to the trial court that it needed additional instructions. The trial court then provided the jury with the following instructions. The following colloquy occurred between the court and a member of the jury.

THE COURT:

Let the record reflect the jury is back in court. The record should also reflect the defendant is present in court with his attorney. The jury has indicated to me that they have a question. And it is written on a - - we didn't supply you all with any paper? I apologize for that. We will see to it that there is a tablet in the future. I apologize. I know this is the second note that came down on this brown paper bag, I think.

The question is - - and it is in writing - - “Is legal intent restricted to the defendant desiring to cause fear of physical injury or does it also include intending to do things which reasonably result in fear of physical injury?”

I'm not quite sure I understand the second part of the question. But I think to answer the first part of your question: “Is legal intent restricted to the defendant desiring to cause fear of physical injury?” Yes, he does have to do that.

And the second part of your question is: “Does it also include intending to do things which reasonably result in fear of physical injury?” I think I'm going to try to explain to you what the law is, and I hope this answers your question. If it does not, anyone has the right to speak up or ask me another question, if I can assist you with this.

With regard to the defendant's intent, the defendant has to intend - - it has to be his intention or his desire to cause - - it has to be his intention or desire to place the victim in fear of death or bodily

injury. He has to do something that causes her to believe she will die or receive bodily injury from this person.

Do you have any questions or anything? Please comment. I'll try to help you. If that clarifies or it does not? Or if it confuses you more, let me know.

JUROR:

So you're saying that the mind or he has to physically do those things?

THE COURT:

He does not have to physically harm her. It is not a requirement that he physically harm her. The stalking law can be violated by no one actually touching any other - - you don't have to touch. There need not be any physical contact between the parties.

Again, the definition is: "It is the willful, malicious, and repeated following or harassing of another person." It's the willful and malicious and repeated following or harassment of another person when the offender has the intent to place the person, the victim in this case, in fear of death or of bodily injury. His intention is to make her think that she's going to get bodily injury or to die.

JUROR:

That has to be his intent in his mind?

THE COURT:

His intent to put that in her mind, yes, sir.

JUROR:

And if it's not his intent to do that, but he repeatedly does something that results in her being afraid, even if that was not his intent, that does not violate the law?

MR. MEYER:

That's correct.

THE COURT:

I have to answer your question, that's correct. If he does something that - - it's not his intention to cause her to believe that she's going to die or receive bodily injury, then you're right. He does not violate that statute.

JUROR:

Is it intent to - - is intent present when there is a disregarding of the consequences of the actions that he takes and that being that he knows it may result - - he knows it may result in an individual being in fear of bodily harm but disregards that natural consequence and yet goes on with his actions?

THE COURT:

You're talking about a general criminal intent which talks in terms of there being such a disregard of the interest of others that we would say he alluded to the prescribed consequences to follow his act.

This statute seems to require a specific intent, an active desire on his part. It requires a desire, an active desire, on his part to place the victim in fear. He has to desire. It has to be his intention or his desire to place the victim in fear of death or bodily injury.

JUROR:

Without ever touching her or harming her? He has to put it in her mind?

THE COURT:

That's correct. The law does not require that there be a touching here of any sort. It does not require that.

JUROR:

So looking and winking, that could put something in somebody's mind?

THE COURT:

You have to consider that from the victim's point of view.

MR. MEYER:

Judge, I'm going to object to that. It's not her intent and what she interprets.

THE COURT:

Mr. Meyer, whoa. Whoa. I'll let you talk outside the presence of the jury, right now, if you want to do something. But I don't - - this is not argument right now.

MR. MEYER:

Yes, sir. But then I'm going to object to that charge because - -

THE COURT:

Like I said, we're not going to discuss it. I'll let you do it outside the presence of the jury in one moment if you would like to do that.

MR. MEYER:

Yes, sir.

THE COURT:

Yes, your question?

JUROR:

So the key is, he has to have an intent.

THE COURT:

Yes, sir. Totally.

JUROR:

His intent is to place in her mind fear that she will be subject to bodily harm.

THE COURT:

Correct.

JUROR:

That has to be his intent.

THE COURT:

Yes, sir. That is correct.

JUROR:

If I can get a little more clarification. Awareness that - - awareness of an individual that what he's doing does result in the alleged victim being in fear of bodily harm, that awareness - - and he knows that that person is going to be in fear of bodily injury, is that intent?

THE COURT:

In other words, are you saying does he have to - - does he have to - -

JUROR:

He's aware.

THE COURT:

Be successful?

JUROR:

No. He is aware that what he's doing is causing to the other individual fear of bodily injury. He's aware of that. Is that awareness - - and going forward and continuing to do something, is that awareness and the going forward and continuing to do the acts which he knows will cause the fear of bodily injury is that sufficient intent?

MR. MEYER:

That's a fact question, I think.

THE COURT:

I think - - Again, I have to go back to just restating the law. The law says he has to intend, it has to be his desire to place her in fear of bodily injury. It's, again, the following, the harassing of her, with the intent to and it says, "with the intent to place her in fear of bodily injury or death."

JUROR:

And it doesn't have to be the sole or only intent?

THE COURT:

His intent has to be to place her in fear of receiving bodily injury or death. That is his only - - that is the law. That's the state of mind that he has to have in order to violate this law. That's - - it has to be his state of mind. The physical act or the physical conduct on his part is obviously the willful and malicious and repeated following or harassing. That would be the physical activity, something that he would do and then he does that with an intent to cause her to fear a bodily injury or death.

JUROR:

My question is: He could have other intentions beside that as

well, though, could he not, to draw attraction or develop a relationship or there could be other intentions other than that as well?

THE COURT:

I guess if what you're saying is that if he is going through this willful, malicious, and repeated following or harassing her with the intent, from his point of view, of involving - - engaging in a relationship, if it is his desire to engage in a relationship with her; however, if as a result of his conduct she fears, she fears bodily harm or death from him, then I think that would satisfy this statute.

MR. MEYER:

Judge, I object to that, too.

THE COURT:

I'll note that.

MR. MEYER:

Yes, sir.

THE COURT:

I'll give my reasons outside the presence of the jury. But you have to keep in mind there has to be - - there has to be some desire on his part - - and this is coming right out of the statute. There has to be some desire on his part to place her in fear of bodily injury or death.

* * * * *

THE COURT:

All right. I'm going to - - again, in going over this intent element, this state of mind, I'm going to say it's going to have to be - - it is from his perspective, from the defendant's perspective, from the defendant's point of view. The defendant has to have the desire to place her in fear of some bodily harm or death. The defendant has got to intend to do that. His conduct, his actions, have got to be designed with the intent to place her in fear of receiving bodily harm or of death. It's from what he thinks. He does this for this desired effect. It's what he's got to do. He's got to desire or intend to place her in fear of bodily harm or death.

MR. MEYER:

Judge - -

THE COURT:

I'm going to have to stand corrected to some extent. It cannot be how she perceives it. If - - let's say they have different interpretations. If it's a different interpretation. She perceives it one way; he perceives it another way. It's from his intent, his point of view.

JUROR:

Then I'll get back to the other question I asked. Let's talk about purely what he perceives and he understands. Suppose he absolutely understands that his actions are causing fear of bodily injury. He fully is aware that his actions are causing fear of bodily injury. Is that sufficient intent?

THE COURT:

I'm going to say it's not. I'm going to have to say from my appreciation of this that he - - again, if his desire or his intention is not what we would say evil or not of an ill will, if his desire is not to cause her to be in fear of receiving a bodily injury or death, I think that that is - - it's not again from her perspective, from her point of view. It's what he's thinking.

JUROR:

And I'm talking about what he's thinking. Forget about her, whether she thinks she's in danger or not.

THE COURT:

Again, but if he is doing that and he is doing it with the intent of causing her to believe she could suffer bodily injury, then, yes, he would be guilty. But he's got to intend to cause her bodily injury. He's got to intend to cause her to believe that she could receive bodily injury. He's got to desire that, not her.

JUROR:

Right. And I'm talking again about him. He knows what he's doing is causing her - - he fully know what he's doing is causing her fear of being bodily injured. Let's assume that.

THE COURT:

That would satisfy the elements. If he is intending as a result of his following or harassing, if he is doing this physical action with the intent to causing her to fear bodily injury, then he would be guilty.

MR. MEYER:

Judge, I think the juror is not asking that. He's saying let's assume that he does not intend her bodily harm, but she perceives it. And then the feedback comes to him. That's the way she perceives it. Is he now governed by the way she perceives it?

JUROR:

I need to clarify it more than that. His actions, he knows either by just what he's doing and/or her reaction to it, he knows what he is doing, continues to do it, and knows that he's causing fear of her having bodily injury.

THE COURT:

He's got to intend, though. He's got to desire to cause her fear of bodily injury. He's got to desire to cause her fear of bodily injury.

JUROR:

Knowing that he's causing her fear of bodily injury again that's

--

THE COURT:

He's got to do it. Again, he's got to do the following or the harassing. I keep referring back to that because it's got to be the physical actions on his part. And he's got to do it with the intent of causing her fear of bodily injury. He's got to do it for that - - that's got to be the reason he does it, to cause her to fear bodily injury or death.

JUROR:

He does the action, and he knows that he's causing her fear of bodily injury.

THE COURT:

He does the action, and he knows he's causing her fear? Is he doing it with the intention of causing her fear of bodily injury? Or is this just a reaction on her part from her point of view? Again, he's got to do it with the intention of causing her fear of bodily injury. That's

key. Those two elements have got to be satisfied. He's got to commit the act. He's got to do it with the intention of causing her fear of bodily injury.

La. C.Cr.P. article 802 provides that “[t]he court shall charge the jury . . . as to the law applicable to the case.” A jury charge must be considered as a whole, and particular expressions in a charge must be construed in context with the entire charge. A conviction will not be reversed on the ground of an erroneous jury charge unless the disputed portion, when considered in connection with the remainder of the charge, is erroneous and prejudicial. State v. Motton, 395 So.2d 1337 (La. 1981). This Court held in Jackson v. CSX Transp., Inc., 97-0109 (La.App. 4 Cir. 12/23/97), 712 So.2d 514, that “when reviewing jury instructions, an appellate court is under a mandate to consider the jury instructions as a whole when trying to determine whether those instructions were so incorrect or deficient as to constitute reversible error. Brown v. White, 405 So.2d 555, 558 (La.App. 4th Cir.1981), aff'd, 430 So.2d 16 (La.1982).”

In the present case, it is self evident that the trial court gave a confusing and erroneous jury charge during jury deliberations. The jury had questions on the issue of intent to place the victim in fear of death or bodily injury. The jury wondered whose intent was relevant, the defendant's intent or the victim's perceptions. After a lengthy discussion on the defendant's

intent and the victim's perceptions, the trial court attempted to clarify for the jury what was the relevant issue. In response to juror questions about placing the victim in fear of death or bodily injury the trial judge tells the jury "you have to consider that from the victim's point of view." The stalking statute focuses on the intent of the stalker, not that of the victim. Thus, the trial judge was incorrect when he told the jury that the statute is satisfied if as a result of defendant's conduct the victim fears bodily harm or death. We cannot say beyond a reasonable doubt that the jury understood the applicable law governing intent in this case. Obviously the jury was very concerned about whether the victim feared death or bodily injury as a result of the defendant's conduct. The law charges did not eliminate the jury's confusion on this issue. This constitutes reversible error.

We note that defense counsel may have provided ineffective assistance of counsel in failing to move for a directed verdict based on the fact that the alleged victim did not testify at trial and in failing to object to classic hearsay testimony of Mr. Kohan and Officer Netto. Given that the stalking statute addresses the victim's fear of death or bodily injury, it is important to know the state of mind of the victim from the victim. The only way to properly ascertain Ms. Glen's state of mind is to have her testify. It was improper to allow Mr. Kohan or any third party to testify as to how Ms.

Glen felt subsequently and defense counsel should have objected to this inadmissible hearsay testimony. Ms. Glen's failure to testify at trial further confused the jury in regard to how the defendant's actions affected Ms. Glen as reflected by their notes and discussion with the judge. This prevented the jury from determining whether or not the stalking statute had been violated.

CONCLUSION

The State failed to produce sufficient evidence to sustain the conviction for attempted stalking. Further, the trial court gave confusing and erroneous jury instructions that precluded the jury from reaching a verdict based on the law and facts of the case.

Accordingly, the defendant's conviction and sentence are reversed and the case is remanded for a new trial.

REVERSED AND REMANDED.