IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA 20-81

Filed: 15 December 2020

Wayne County, No. 17 CRS 53453

STATE OF NORTH CAROLINA

v.

SAMUEL KORSCHUN

Appeal by defendant from a final judgment entered 17 July 2019 by Judge Imelda J. Pate in Wayne County Superior Court. Heard in the Court of Appeals 3 November 2020.

Attorney General Joshua H. Stein, by Assistant Attorney General Andrew L. Hayes, for the State.

Kevin F. MacQueen for defendant-appellant

BRYANT, Judge.

Where there was substantial evidence to support the charge of stalking and submit the issue to the jury, we hold the trial court did not err by denying defendant's motion to dismiss. Where defendant failed to present his arguments before the trial court and now attempts to challenge the admissibility of evidence, defendant will not be heard to raise these arguments for the first time on appeal.

On 25 July 2017, a Wayne County magistrate issued a warrant for arrest for defendant Samuel Korshun for the offenses of misdemeanor stalking and misdemeanor cyberstalking. The matter was heard in Wayne County District Court on 16 July 2018 before the Honorable Louis F. Foy, Jr., Judge presiding. Judge Foy entered judgment against defendant as charged for offenses occurring between 26 May and 2 July 2017. Judge Foy sentenced defendant to an active term of 75 days in the custody of the Wayne County Sheriff, then suspended the sentence and placed defendant on supervised probation for a period of eighteen months with the special condition that he obtain a mental health evaluation and follow all recommendations of said evaluation. Defendant appealed his conviction to Wayne County Superior Court.

The matter was heard before a jury in Wayne County Superior Court beginning 16 July 2019 before the Honorable Imelda J. Pate, Judge presiding. The evidence presented at trial, tended to show the following. In November 2016, defendant met the complainant, Lisa Pate, hereinafter referred to as Pate, on the professional social media platform, LinkedIn. Pate and defendant went on a series of dates between December 2016 and May 2017. On 25 May 2017, they had a dinner date at defendant's home in Goldsboro, North Carolina. Pate excused herself to use the restroom; when she returned, defendant was in the den, completely nude. Pate asked defendant, "what the hell he was doing," and he responded that he thought if she saw

him nude, she would want him. Pate immediately ran to her car and tried to leave, asking defendant never to contact her again. Defendant chased after her and tried to block her from leaving. Pate testified, "I had asked him on the 25th before I left his home, don't text, don't call me, don't have anything – I don't want any contact with you at all . . . ." Pate testified that she was "[s]tunned" and "terrified" by the events.

Four days later, on 29 May 2020, when Pate returned from a weekend at the beach, she discovered defendant had mailed several letters to her home, which her daughter had opened. Her daughter knew about the altercation Pate had with defendant on 25 May. For the next month, defendant continued to send letters to Pate and to call and text her. Pate tried to ignore the communications and did not respond. Between late May and early July, defendant sent 16 pieces of mail, between five-and-ten text messages, a Pink Bible, and left a voicemail message. The correspondence contained Pate's name, address, and occupation. It also specifically mentioned men that defendant thought Pate had been with. The correspondence included random information of a sexual nature, downloaded material regarding abusive relationships, and copies of defendant's medical records regarding an injury to his left testicle. The correspondence discussed illnesses and diseases and listed people that were friends of Pate on Facebook. Defendant sent messages to Pate's Facebook friends; the nature of those messages were similar to the correspondence defendant sent to Pate. Pate testified that although she had told defendant she did

not want any contact with him, he continued to contact her. She said, "I [had] ignored all of his texts, I had ignored the mailings, and then on that July 2 when he text[ed] me I, again send a text . . . and said please do not text me, call me, contact me in any way via phone, mail, email, social media, et cetera, and sent it and he turned around and sent me another right behind it." After that, in the beginning of July, defendant stopped directly contacting Pate, but sent random messages of a sexual nature to her Facebook friends. Mr. Robert King, an acquaintance of Pate and friend on Facebook, testified that he received written correspondence from defendant on 21 July 2017. Mr. King testified that he did not know defendant and did not know why defendant had sent correspondence to him.

Pate testified that defendant's conduct was very difficult for her and caused her emotional stress. She testified that it was the closest she ever felt to being violated. Pate also testified that the conduct caused her daughter to be scared to return to Mt. Olive University because defendant had a foundation at the University.

Defendant presented three witnesses.

Following the close of the evidence, the jury found defendant guilty of stalking but not guilty of cyberstalking. The court entered judgment in accordance with the jury verdict and sentenced defendant to an active term of seventy-five days in the custody of the Wayne County Sheriff. The court then suspended the sentence and

placed defendant on supervised probation for a period of 36 months and ordered that defendant receive a mental health assessment.

Defendant appeals.

On appeal, defendant contends that the trial court erred by denying his motion to dismiss and by admitting evidence from a witness who was not the complainant and who testified to events which occurred outside the dates stated in the arrest warrant.

Motion to Dismiss

On appeal, defendant argues that the trial court erred by denying his motion to dismiss based upon the sufficiency of the evidence presented by the State. We disagree.

The standard of review for a denial of a motion to dismiss is *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). Under a *de novo* review, the court considers the matter anew and freely substitutes its judgment for that of the lower tribunal. *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008).

When ruling on a defendant's motion to dismiss, "the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) that the defendant is the perpetrator of the offense." *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33 (citation omitted). "Substantial evidence is

such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78–79, 265 S.E.2d 164, 169 (1980). When the evidence is sufficient only to raise suspicion or conjecture, then the motion to dismiss should be allowed. *State v. Poole*, 285 N.C. 108, 119, 203 S.E.2d 786, 793 (1974). The trial court considers all evidence in the light most favorable to the State giving the State the benefit of all reasonable inferences and allowing all contradictions and discrepancies in the evidence to be resolved by the jury. *State v. Thompson*, 157 N.C. App. 638, 642, 580 S.E.2d 9, 12 (2003).

Defendant argues that the State failed to provide sufficient evidence that his behavior rose to the level of harassment and that he acted without legal purpose. Defendant also contends that the evidence was insufficient to establish that defendant intended to place Pate in reasonable fear for her safety or the safety of her daughter. Defendant conceded that he was the perpetrator of the offense and that his actions were willful.

In 2008, the legislature enacted a law to address the serious problem of stalking, N.C. Gen. Stat. §14-277.3A (2019). The legislature expressed an "intent to encourage effective intervention by the criminal justice system before stalking escalates into behavior that has serious or lethal consequences." *Id.* §14-277.3A(a). For a defendant to be found guilty of stalking, he must willfully on more than one occasion harass another person without legal purpose. *Id.* §14-277.3A(c). A

defendant must know or should know that the behavior will cause a reasonable person to suffer severe emotional distress or place that person in fear for her safety or the safety of her immediate family or close personal associates. *Id.*

First, defendant contends that his behavior does not rise to the level of harassment. The statute defines harassment as knowing conduct, such as written or printed communication, voice mail message, or wireless telephone communication, directed at a specific person that torments, terrorizes, or terrifies the person and serves no legitimate purpose. *Id.* §14-277.3A(b)(2). This Court has defined "torment" in the context of this statute to include conduct that "annoy[s], pester[s], or harass[es]. *State v. Wooten*, 206 N.C. App. 494, 498, 696 S.E.2d 570, 573 (2010) (citation omitted).

The parties agree that the issues between defendant and Pate began on the evening of 25 May 2017, when defendant unexpectedly presented himself to Pate in the nude. Pate testified that she was "terrified" and "stunned" by his behavior. She immediately ended their date and told defendant never to contact her again.

After 25 May 2017, and after Pate had told defendant to not contact her again in any manner, defendant almost immediately began sending Pate written correspondence and texting her. Defendant acknowledges in his brief that he sent several batches of written correspondence over a period of thirty days. Defendant also acknowledges that he sent five-to-ten text messages, one pink Bible, and one

voicemail message. Defendant contends, however, that this correspondence would not cause a reasonable person to suffer severe emotional distress by placing her in fear of continued harassment.

The statute defines a reasonable person as a person in the victim's circumstances. N.C.G.S. §14-277.3A(b)(3). Pate testified that defendant's actions were the closest she ever felt to being violated. The State presented evidence that Pate considered the behavior to rise to the level of harassment because it caused her to feel both annoyance and terror. The State met its burden of providing sufficient evidence that rises above conjecture and suspicion such that it was proper that such evidence be presented to a jury to decide if a reasonable person would consider this behavior to constitute harassment.

Defendant also contends the State did not establish his correspondence and behavior were without legal purpose. Defendant argues that for the conduct to be without legal purpose, it must be illegal.

In *Thompson*, where the State's evidence showed that the defendant threatened the victim by telling her that she would "live to regret" speaking to him in her tone of voice, this Court held that the defendant's conduct of driving up and down the dead-end road on which the victim resided—which had no business establishments or other neighbors to whom the defendant was known—was sufficient

to establish that the defendant acted without legal purpose. *Thompson*, 157 N.C. App. at 642, 580 S.E.2d at 12.

Here, the State provided the jury with multiple exhibits of the actual correspondence sent by defendant to Pate. The jury had the opportunity to examine the correspondence to determine if there was a legitimate purpose for the correspondence. In response, defendant failed to provide any legal reason why he sent the correspondence to Pate or what legitimate purpose the correspondence served; he argued that the correspondence was unusual, ungentlemanly, but was not illegal. Unlike defendant would have us believe, the test is not whether the correspondence was *illegal*, but whether it was without legal purpose. We conclude the State provided sufficient evidence from which the jury could determine that defendant acted without legal purpose. *See id.*

Finally, defendant contends the State did not provide sufficient evidence to establish his intent to place Pate in immediate fear for her safety or the safety of her daughter. Defendant focuses his argument on whether the State established that Pate or Pate's daughter feared for their safety. However, it is well-established that "intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Brown*, 177 N.C. App. 177, 188, 628 S.E.2d 787, 794 (2006) (quoting *State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974)). The State provided the testimony of Pate that she was

"[s]tunned" and "terrified" when she saw defendant in front of her naked in May. At this time, she told defendant never to contact her again. The State provided evidence that defendant continued to attempt to correspond with Pate on numerous occasions over a thirty-day period after she told him to never contact her again. The State presented evidence that Pate had to request that defendant stop sending correspondence on 2 July 2017, but that he immediately contacted her again. Pate testified that Defendant's conduct was very difficult for her, that she was emotionally distressed as a result of defendant's actions, and that it was the closest she ever felt to being violated. Pate also testified that her daughter was afraid to return to Mt. Olive University because of defendant's connection to the school. This was sufficient evidence from which the jury could determine that defendant knew or should have known his behavior would cause a reasonable person in Pate's circumstance to fear for her safety or the potential safety of her daughter.

Because we hold there was sufficient evidence for the jury to find that defendant acted to harass Pate on more than one occasion without legal purpose and that defendant knew or should have known that his behavior would put her in fear for her safety, the trial court did not err in denying defendant's motion to dismiss. Accordingly, defendant's argument is overruled.

Evidence of Correspondence Other Than to Pate

Defendant further contends the trial court erred by allowing Robert King to introduce and testify about correspondence defendant sent King—who was not a complainant—outside of the time period set forth in the arrest warrant. Defendant contends that the purpose of King's testimony was only to establish defendant's pattern of conduct and that the State cannot offer evidence the accused committed another distinct or separate offense as evidence that he committed the crime for which he was charged. Defendant also argues the trial court erred by admitting the correspondence to King where King received the correspondence well outside of the dates of set forth in the warrant. We dismiss these arguments.

"In criminal cases, an issue that was not preserved by objection noted at trial, and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." N.C. R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007) (dismissing defendant's argument where it was not raised before the trial court and defendant failed to assign plain error on appeal).

Neither of defendant's arguments were presented before the trial court, and on appeal, defendant fails to request review for plain error. Thus, these arguments are not properly before us. N.C. R. App. P. 10(a)(4); *Goss*, 361 N.C. at 622, 651 S.E.2d at 875. Accordingly, we dismiss these arguments.

NO ERROR.

Judges STROUD and ARROWOOD concur.

Report per Rule 30(e).