

[Cite as *Parma Hts. v. Barber*, 2010-Ohio-3309.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 93005

CITY OF PARMA HEIGHTS

PLAINTIFF-APPELLEE

vs.

CONWAY T. BARBER

DEFENDANT-APPELLANT

**JUDGMENT:
REVERSED AND REMANDED**

Criminal Appeal from the
Parma Municipal Court
Case No. 08-CRB-02873

BEFORE: Rocco, P.J., McMonagle, J., and Boyle, J.

RELEASED: July 15, 2010

JOURNALIZED:

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(C) unless a motion for reconsideration with supporting brief per App.R. 26(A), or a motion for consideration en banc with supporting brief per Loc.App.R. 25.1(B)(2), is filed within ten days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(C). See, also, S.Ct. Prac.R. 2.2(A)(1).

KENNETH A. ROCCO, P.J.:

{¶ 1} Defendant-appellant Conway T. Barber appeals from his conviction after the Parma Municipal Court found him guilty of telecommunications harassment in violation of R.C. 2917.21(B).

{¶ 2} Barber presents two assignments of error, claiming the trial court's finding is based upon insufficient evidence, and is against the manifest weight of the evidence. In its appellate brief, the city of Parma Heights answers Barber's claims with the following argument: "Rather than threaten the victim and risk prosecution or contempt, [Barber] opted to leave subtle and engaging messages with the victim in the hope of reconciliation."

{¶ 3} Upon a review of the record, this court finds merit to Barber's claim that such evidence as the city presented was insufficient to support his conviction. Therefore, his conviction is reversed and ordered vacated upon remand.

{¶ 4} Barber's conviction results from his efforts to contact his wife, Patricia, during the pendency of their divorce proceeding. The record reflects that Barber had been convicted of committing domestic violence in 2006, and that Patricia filed for divorce in February 2007. Patricia hired attorney Neal Lavelle to represent her in the divorce. In the meantime, Patricia continued to live in the marital residence, which was located in Parma Heights.

{¶ 5} By November 2007, Patricia had sought and obtained a restraining order against Barber. Moreover, his probationary status in the domestic violence case depended, in part, on a directive that he have no contact with Patricia.

{¶ 6} Barber nevertheless continued to telephone her. In January 2008, Patricia “specifically told him, [she didn’t] want to talk to” him. However, she “did have to meet him to get [her] support check.”

{¶ 7} Patricia began “screening” her calls, so that when she observed Barber’s name on her “caller ID,” she refused to answer. Undeterred, Barber left messages for her.

{¶ 8} In April 2008, feeling “upset,” “trapped,” and “angry,” Patricia asked Lavelle to send a letter to Barber’s attorney concerning the calls. Lavelle complied; on April 24, 2008, he sent a letter to Barber’s attorney in which he made a formal request on Patricia’s behalf that Barber cease his telephone calls to her. Lavelle admitted he did not know if Barber’s attorney notified his client of the letter.

{¶ 9} Beginning in late April 2008, Patricia also sought assistance from the Parma Heights police. She had a “trace” placed on her line. Patricia stated that she did not have caller identification for a time, but kept a written “log” of calls made to her telephone, and began to record them.

{¶ 10} The evidence produced at trial demonstrated that, in the two month period between April 23 (the day prior to the date of Lavelle’s letter) and June 24,

2008, Barber made 35 telephone calls to Patricia; mathematically, this was less than one per day. Patricia indicated that many of the times her telephone rang, she did not know who was calling; she assumed it was Barber.

{¶ 11} In many of the recordings Patricia made of Barber's calls, he reminisced about the good times he and Patricia had shared during their marriage, recited poetry, indicated he missed her in a "desperate" manner, and told her not to let others influence her decisions. Patricia testified that his calls often reminded her of times during the marriage when he had either abused her or sought to "control" her. However, she admitted that she herself initiated contact with Barber on at least two occasions, and went to dinner with him only a few months prior to trial.

{¶ 12} Barber testified his attorney did not inform him of Lavelle's letter. He further testified that, during the time in question, Patricia never filed in the divorce court a "show cause motion" asking for him to be held in contempt for violating the restraining order. He stated that Patricia's protective order did not go into effect until July 2008.

{¶ 13} Barber testified that his intention in contacting Patricia between late April and June 2008 was to express his love; he stated that, if he had "known she thought so ill of [him], [he] would have stopped. Because [he did not] want to make this woman unhappy, she's the love of [his] life." He also stated that, "without feedback exactly what's going on," he was "hopeful that she was

listening, * * * and that it was doing some good for us.”

{¶ 14} On June 24, 2008, Parma Heights police detective Steve Scharschmidt filed a complaint against Barber in Parma Municipal Court that charged him with telecommunications harassment in violation of R.C. 2917.21(B).

The offense was alleged to have occurred between November 23, 2007 and June 24, 2008. Barber additionally was charged with the offense of menacing by stalking.

{¶ 15} Barber’s case proceeded to trial in early 2009. After considering the testimony and the evidence, the trial court found Barber not guilty of menacing by stalking, but guilty of telecommunications harassment.

{¶ 16} Barber appeals from his conviction with the following assignments of error.

{¶ 17} “I. It was legally inconsistent, and plain error, for the trial court to, first, find that the appellant’s intent in telephoning the complaining witness was ‘to try and reconcile’, that the overriding purpose for his acts was the ‘reconciliation factor’; and then, to find, beyond a reasonable doubt, that the appellant had had [sic] a ‘purpose to harass’, in order to convict appellant of the offense of telecommunications harassment, as the court found no ‘criminal purpose’ from the evidence, and ‘reckless’ conduct is not an element of this offense.

{¶ 18} “II. The verdict and judgment of the trial court finding

appellant ‘guilty’ of the offense of telecommunications harassment, R.C. 2917.21(B), was against the manifest weight of evidence, as the trial court specifically found appellant had no purpose to abuse, threaten or harass, and therefore, a necessary element for a finding of guilt as to telecommunications harassment was lacking in the trial court’s determination.”

{¶ 19} Simply put, Barber argues in his assignments of error that his conviction is unsupported by either sufficient evidence or by the manifest weight of the evidence presented at trial. This court has reviewed the record, and finds the city presented insufficient evidence to prove the offense. Barber’s second assignment of error, therefore, is moot.

{¶ 20} The sufficiency of evidence is a question of law, and is essentially, “a test of adequacy.” *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52, 678 N.E. 541. The evidence must be viewed in a light most favorable to the prosecution to determine if reasonable minds can reach different conclusions as to whether the material elements of an offense are proven beyond a reasonable doubt. *State v. Dennis*, 79 Ohio St.3d 421, 1997-Ohio-372, 683 N.E.2d 1096; *State v. Martin* (1983), 20 Ohio App.3d 172, 485 N.E.2d 717.

{¶ 21} Barber contends the evidence failed to prove his “purpose” in making the calls to Patricia was “to abuse, threaten, or harass” as required by R.C. 2917.21(B). He asserts that the trial court conceded this when it analyzed the

evidence, therefore, it misapplied the law.

{¶ 22} The record demonstrates that in evaluating the evidence with respect to the charge of menacing and stalking, the trial court stated that, rather than to cause Patricia mental distress, the court was “satisfied it was [Barber’s] intention and his desire to try and reconcile” with her. The trial court went on to discuss its finding on that particular charge that Barber’s intent in his pattern of conduct toward Patricia was merely “reckless,” not “knowing.”

{¶ 23} The trial court then turned to the charge of telecommunications harassment. The court correctly commented that this statute required “purpose”; i.e., the state was required to prove Barber made the calls to Patricia with “purpose to abuse, threaten or harass.”

{¶ 24} The trial court stated in pertinent part as follows:

{¶ 25} “ * * * First off, I am satisfied there is not threaten [sic] here so we’re down to abuse or harass and he acts with purpose. * * * [D]id he make these calls with purpose to abuse or purpose to harass. * * * There’s no abuse in the language [Barber used]. * * * [T]hen we get bottom line to harassment. Harassing is to trouble, worry or torment as with cares, debts, repeated questions, etc. To trouble by repeated raids or attacks. Attacks. Now, I will extend that to saying by *repeated contacts*. * * * [Barber is] *pretty well aware, I don’t think* she wants to talk to me. * * * [But he thinks], if I push her long enough she will collapse and cave in, okay. * * * I am satisfied that [Barber] did make

communications with purpose. * * * I am satisfied that these calls got to the point where [Barber] wanted it so bad [he wasn't] going to stop. And that becomes harassment.* * *.” (Emphasis added.)

{¶ 26} In so stating, the trial court thus ignored evidence besides Barber’s own testimony that indicated, prior to the time in question, Barber had not been informed that he was not permitted to telephone his wife. The evidence showed, moreover, he called approximately every other day; this frequency did not rise to the level of proving he made “repeated attacks.” Cf., *State v. Baron*, Cuyahoga App. No. 81914, 2003-Ohio-5376.

{¶ 27} Patricia’s testimony demonstrated she merely assumed Barber lacked a legitimate purpose in making the calls. She held a double standard; when she telephoned Barber, she asserted she had good reason. For example, she admitted she called him in December 2008, only a few months prior to the trial in this case, to ask him to pay for a new “boiler” for the home. She indicated this expense at between \$10,000 to \$14,000. Patricia also admitted she accepted his invitation to dinner at a restaurant.

{¶ 28} On the record presented, therefore, without proof that Patricia made it clear to Barber that she wanted no contact at all from him, the trial court incorrectly determined in this case that “repeated contact” equated with “harassment” for purposes of the sufficiency of the evidence. *State v. Bonifas* (1993), 91 Ohio App.3d 208, 632 N.E.2d 531; *State v. Davidson*, Preble App. No.

CA2009-05-014, 2009-Ohio-6750; cf., *State v. Peppard*, Portage App. No. 2008-P-0058, 2009-Ohio-1648; *State v. Stanley*, Franklin App. No. 06AP-65, 2006-Ohio-4632. The facts as presented in this case suggest that, in light of the vicissitudes that attend a marital relationship, some matters are best handled by the domestic relations court.

{¶ 29} Accordingly, Barber's first assignment of error is sustained. This necessarily renders his second assignment of error moot. App.R. 12(A)(1)(c).

{¶ 30} Barber's conviction is reversed and the case is remanded to the trial court with orders to vacate his conviction.

It is ordered that appellant recover from appellee costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Parma Municipal Court to carry this judgment into execution. Case remanded to the trial court with an order to vacate the conviction and sentence.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

KENNETH A. ROCCO, PRESIDING JUDGE

**CHRISTINE T. McMONAGLE, J., and
MARY J. BOYLE, J., CONCUR**

