COURT OF APPEALS
DECISION
DATED AND FILED

November 16, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP1104-CR **Cir. Ct. No. 2009CM201**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

KURT DANIEL SCHMIDT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Kurt Schmidt appeals a judgment of conviction for unlawful use of a telephone, contrary to WIS. STAT. § 947.012(1)(c). Schmidt

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

argues there was insufficient evidence to prove that he made the call or that the call was abusive. Schmidt also argues the State violated the best evidence rule. We reject Schmidt's arguments and affirm.

BACKGROUND

¶2 Loretta Henson testified that she discovered two messages on her office answering machine the morning of May 2, 2009. Henson was a psychologist involved with custody issues in Schmidt's divorce action; the couple's three children were Henson's clients. The messages were left several minutes apart on Friday, May 1, around 8:30 p.m. There had been court proceedings in the divorce action earlier that day. Henson testified her caller identification showed the first message originated from a Henry Schmidt, who she knew to be Schmidt's[2] father. The caller identification did not provide any information for the second call.

¶3 Schmidt reported the messages to police, who responded and made a digital recording of the answering machine messages. Contrary to Henson's testimony, the investigating officer testified it was Eric Schmidt's name on the caller identification. However, Schmidt was residing in his parents' household, where both his father Henry and brother Eric lived. The police recording was played at trial. The first phone message was as follows:

> Welcome to the Kingdom of Satan. I'm so glad you have joined us in our wonderful journey to the lower dimensions. You have become one of the chosen people to represent me in my hell on [E]arth.

[2] All references to "Schmidt" are to the defendant, Kurt Schmidt.

> You have done some things that, for me, have been the worst things that I can ever imagine possible on [E]arth. I am so glad that you will join me very soon in my Kingdom of Hell. Thank you.

The second message, left four minutes later, stated:

> Yes, I am a person from Las Vegas, Nevada, and I'm looking for Loretta Lonsdorf. I'm not sure whether that she knows who I am, or where I'm calling from, or why, but what I'm trying to find out is whether she understands that there are some people in Nevada that are looking for her and would like to have a talk with her.
>
> I'm associated with a law firm called Smith & Smith, and what I'm looking for is to find out whether she was involved with a case here. If she could call me at (915) 212-3344, I would appreciate a call. Could you pass that along to her? Thank you.

¶4 Lonsdorf was Henson's previous married name. The investigating officer called the telephone number left in the second message, but it was inactive. Henson testified she recognized Schmidt's voice on both messages. Schmidt's ex-wife, Heather Landin, testified she also listened to the messages and recognized Schmidt's voice, with "absolutely" no doubt in her mind. Further, she was familiar with the other members of the Schmidt family and excluded them as the voice in the recordings.

¶5 Schmidt was charged with one count of unlawful use of a telephone for each of the two phone messages. A jury found Schmidt not guilty of violating WIS. STAT. § 947.012(1)(a) in connection with the first message, but found Schmidt guilty of violating § 947.012(1)(c) for the second message.

DISCUSSION

¶6 Schmidt argues there was insufficient evidence to convict him based on the second phone message. When reviewing the sufficiency of the evidence,

we may not substitute our judgment for that of the jury unless the evidence, viewed most favorably to the State and the conviction, is so lacking in probative value and force that no jury, acting reasonably, could have found guilt beyond a reasonable doubt. ***State v. Poellinger***, 153 Wis. 2d 493, 507, 451 N.W.2d 752 (1990).

¶7 WISCONSIN STAT. § 947.012(1)(a), which Schmidt was acquitted of regarding the first phone message, states a person is guilty if he or she: "With intent to frighten, intimidate, threaten, abuse or harass, makes a telephone call and threatens to inflict injury or physical harm to any person …." Paragraph (1)(c), which Schmidt was convicted of for the second phone message, states a person is guilty if he or she: "Makes a telephone call, whether or not conversation ensues, without disclosing his or her identity and with intent to abuse or threaten any person at the called number."

¶8 Schmidt challenges the sufficiency of the evidence demonstrating that (1) he was the caller and that (2) the call was made with the intent to abuse. Regarding Schmidt's challenge to his identity as the caller, Schmidt ignores the standard of review. He merely directs us to the evidence favorable to his position and asserts it should have created a reasonable doubt in the jurors' minds. That argument does not merit further comment.

¶9 Regarding Schmidt's second sufficiency of the evidence challenge, the circuit court instructed the jury that the State must prove "the defendant made the telephone call with the intent to abuse any person at the called number. 'With intent to abuse' means the defendant acted with the mental purpose to abuse

another person or was aware that his conduct was practically certain to cause that result."[3]

¶10 Schmidt argues nothing in the second message reasonably supports a finding that it was abusive. Because abuse is not defined in the unlawful use of a telephone statute, Schmidt proffers dictionary definitions relating to the disorderly conduct statute, WIS. STAT. § 947.01.[4] Schmidt notes our supreme court defined abusive conduct, in part, as conduct that is injurious, improper, hurtful, offensive, or reproachful, and defined abuse, in part, as insulting or coarse language. *See* ***State v. Douglas D.***, 2001 WI 47, ¶32, 243 Wis. 2d 204, 626 N.W.2d 725 (citing BLACK'S LAW DICTIONARY 11 (6th ed. 1990); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 8 (3d ed. 1992)).

¶11 Schmidt's argument, however, is off-track. The statute does not require that a call's content be abusive. Rather, it requires that the caller have the intent to abuse. Additionally, we do not find it particularly helpful to rely on partial definitions that were utilized in a different context. Instead, because a person cannot realistically intend to cause physical abuse via a telephone call, we conclude the statute must be interpreted as referring to emotional abuse. Further, the intended emotional harm must be more significant than that which would

[3] Although the alternative that the call be made with intent to "threaten" was excluded when the court individually recited the three elements, the court first instructed the jury with the complete language of the statute. The parties do not address this discrepancy, and focus almost exclusively on the "intent to abuse" option. Therefore, we do not discuss the "threaten" alternative.

[4] Schmidt's appellate counsel improperly cites an unpublished pre-July 2009 court of appeals decision, in violation of WIS. STAT. RULE 809.23(3)(a) (Sup. Ct. Order No. 08-02, 2009 Wis. 2d, 311 Wis. 2d xxv). Counsel is warned that future rules violations will likely result in sanctions. *See* WIS. STAT. RULE 809.83(2).

merely harass a person, because WIS. STAT. § 947.012(2)(d), which is otherwise identical to WIS. STAT. § 947.012(1)(c), provides a lesser penalty when the caller intends only to harass. We also reject any contention that a caller must use insulting or coarse language in order to be subject to § 947.012(1)(c). Not only does that paragraph lack any content requirement, but para. (1)(b) separately prohibits "[w]ith intent to … abuse, telephon[ing] another and us[ing] any obscene, lewd or profane language …."

¶12 Because Schmidt was acquitted of the charge relating to the first message, he strenuously objects to any consideration of it when reviewing the sufficiency of the evidence for the second message. In fact, Schmidt asserts in his reply brief that, "Any discussion of it is wholly inappropriate and should be struck [sic] from the record. … This is especially true considering Mr. Schmidt stated in his first brief to this Court that 'the first call and message is not at issue on appeal.'" Unfortunately for Schmidt, saying so does not make it so.

¶13 While Schmidt was acquitted of WIS. STAT. § 947.012(1)(a) for the first call, the jury might have reasonably concluded he made the call but that the message lacked a threat to inflict physical harm. Indeed, during deliberations, the jury asked the court, "[C]an the physical threat be implied or does it have to be specific words detailing a threat?" Moreover, given that the two messages were left only four minutes apart, if the jury believed the same person made both calls, then the content of the first message would be highly probative of the caller's state of mind, i.e., his intent, when making the second call. Considering the two messages together, there was ample evidence on which a jury could reasonably rely to conclude Schmidt intended to emotionally abuse Henson. In fact, Schmidt essentially concedes in his brief that the first message sufficiently demonstrates such an intent.

¶14 Schmidt also argues the State violated the best evidence rule by utilizing the police recording rather than the original answering machine messages at trial. WISCONSIN STAT. § 910.03 provides, "A duplicate is admissible to the same extent as an original unless … a genuine question is raised as to the authenticity of the original …." Schmidt argues he raised a genuine question as to authenticity at trial based on the following exchange between his trial counsel and the investigating officer:

> Q: The tape – You didn't check to see whether the – the accuracy of the tape? You didn't know whether that was an authentic tape; is that correct?
>
> A: It was digitally recorded.
>
> Q: It was digitally recorded, and you recorded the tape with your machine; is that correct?
>
> A: Yes. I recorded it with my digital recorder.
>
> Q: You looked at the caller ID, I presume?
>
> A: Yes, I did.
>
> Q: And the caller ID said Eric Schmidt; is that correct?
>
> A: Absolutely, it did.

We fail to see how the foregoing demonstrates a *genuine* question as to the authenticity of the original answering machine message. We therefore reject Schmidt's minimally developed argument.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.