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STATE OF NEBRASKA, APPELLEE, V. PATRICK O. DOYLE II, APPELLANT.

787 N.W.2d 254

Filed July 27, 2010. No. A-09-712.

1. **Criminal Law: Convictions: Evidence.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.
3. **Evidence: Appeal and Error.** Any conflicts in the evidence or questions concerning the credibility of witnesses are for the finder of fact to resolve.
4. **Convictions: Evidence: Appeal and Error.** A conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
5. **Constitutional Law: Courts: Jurisdiction: Statutes.** The Nebraska Court of Appeals cannot determine the constitutionality of a statute, yet when necessary to a decision in the case before it, the court does have jurisdiction to determine whether a constitutional question has been properly raised.
6. **Constitutional Law: Rules of the Supreme Court: Statutes: Appeal and Error.** To properly raise a challenge to the constitutionality of a statute, a litigant is required to strictly comply with Neb. Ct. R. App. P. § 2-109(E) (rev. 2008) and to properly raise and preserve the issue before the trial court.
7. **Injunction.** The test in evaluating a content-neutral injunction that restricts speech is whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.

Appeal from the District Court for Lincoln County: DONALD E. ROWLANDS, Judge. Affirmed.

Charles R. Maser, of Truell, Murray & Maser, for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

MOORE and CASSEL, Judges.

CASSEL, Judge.

INTRODUCTION

Patrick O. Doyle II appeals from his conviction and sentence for intentionally violating the "no contact" prohibition

of a domestic abuse protection order obtained by Doyle's wife. Upon being admitted to a hospital, he surreptitiously requested a nurse to call his wife. Shortly thereafter, the nurse did so. Doyle argues both that the evidence was insufficient to sustain a conviction and that his speech was constitutionally protected. Finding no merit to his arguments, we affirm.

BACKGROUND

On August 30, 2007, the district court for Lincoln County, Nebraska, entered a domestic abuse protection order against Doyle at the request of Linda Doyle (Linda), his wife. Among other provisions, the order prohibited Doyle from "threatening, assaulting, molesting, attacking, or otherwise disturbing the peace of [Linda]" and from "telephoning, contacting, or otherwise communicating with [Linda]" for a period of 1 year. A copy of the protection order was personally served upon Doyle by a deputy sheriff on the same date.

Viewed in the light most favorable to the State, the evidence shows that on February 14, 2008, Doyle was escorted to a hospital in Lexington, Nebraska, by two law enforcement officers. Misty Johnson, a licensed practical nurse on duty at the hospital, gathered the "admission paperwork" and, during her initial contact with Doyle, inquired if he wanted anyone "contacted" on his behalf. When Johnson asked Doyle this question, law enforcement officers were in the room with him and he responded "no." When Johnson needed to perform a physical examination of Doyle, she explained to the law enforcement officials what she was going to do and they left the room. Only seconds after the door was shut, Doyle told Johnson, "I want you to call my wife" or "[p]lease call my wife." Doyle provided Johnson with his wife's name and a telephone number.

After Johnson completed the examination, she left the room and called the number Doyle had specified. Johnson asked if it was Linda, and the person answering said "yes." Johnson identified herself and stated that she was an employee of the hospital and that "[Doyle] had asked [Johnson] to call." Linda did not immediately respond. Johnson then asked if Doyle was her husband, and she "kind of got kind of a yeah,

a really slow response." Johnson then stated that Doyle had been admitted to the hospital for abdominal pain, but that he was "okay." Linda responded "okay" and then ended the call without asking any questions of Johnson or making any inquiries about Doyle.

Johnson testified that Doyle was obviously in pain but that he was alert, oriented, and could answer questions asked of him. Johnson had not administered any narcotics to Doyle or observed any other health care workers doing so. At the time, Johnson obtained a complete medical history from Doyle and he gave consent for medical treatment. According to Johnson, Doyle appeared coherent. Johnson testified that Doyle never gave a specific purpose for the call to Linda and never stated that he needed insurance information from her.

Linda testified that she experienced marital problems with Doyle, separated from him in September 2006, and obtained a protection order against him at approximately that same time. In August 2007, she obtained another protection order against him—the one he was convicted of violating in the instant case. Linda testified that on February 14, 2008, Doyle had a father and siblings, but that his mother was no longer living. Linda knew that on that date, Doyle was residing in the jail in Lexington. Approximately 1 day after Linda left Doyle, she obtained a cellular telephone with a number she believed was unknown to Doyle, "so he could not contact [her]." Linda did not give the number to Doyle, and to avoid his obtaining it, she "didn't give it out to hardly anybody." Linda was at work, eating a meal during a break, when she received the call from Johnson. Linda did not recognize the incoming telephone number. She testified to the content of the call, which corresponded with Johnson's testimony. Linda stated that at the completion of the call, the telephone showed the call's duration as 37 seconds. Linda testified that when she hung up the telephone, she was "shaken, scared, [and] physically sick." She claimed to have been shocked by the call because, as far as she knew, Doyle did not have her telephone number. She testified that she then called the police, although on cross-examination she admitted that she waited until she completed her shift before notifying authorities.

The State charged Doyle with violation of a protection order, second offense, pursuant to Neb. Rev. Stat. § 42-924(1) (Reissue 2008). Although Doyle's motion to quash is not in the record, the bill of exceptions shows that on October 6, 2008, the district court heard argument on the motion. At the hearing, Doyle argued that the protection order restricted his freedom of speech and freedom of religion, in violation of both the U.S. Constitution and the Nebraska Constitution. The court overruled the motion at some unknown time and on April 28, 2009, memorialized the earlier denial of the motion. On November 3, 2008, Doyle entered a plea of not guilty, and the case was tried to a jury on May 5, 2009.

At the conclusion of the State's case, Doyle moved for a directed verdict. The court overruled the motion. Doyle rested without presenting any additional evidence, and the jury returned a unanimous verdict finding Doyle guilty. After later determining that Doyle had previously been convicted of violation of a protection order and, thus, that the instant conviction was a second offense, the court sentenced Doyle to 1½ to 3 years' imprisonment, with credit for 486 days served in jail awaiting trial and sentencing, and to pay the costs of the action.

Doyle timely appeals.

ASSIGNMENTS OF ERROR

Doyle makes two assignments of error. First, he claims the district court erred in denying his motion for a directed verdict on the basis of insufficient evidence. Second, he asserts the court erred in overruling his motion to quash, claiming that the speech was protected under the U.S. Constitution and the Nebraska Constitution.

STANDARD OF REVIEW

[1-4] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Hudson*, 279 Neb. 6, 775

N.W.2d 429 (2009). Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. *Id*. Any conflicts in the evidence or questions concerning the credibility of witnesses are for the finder of fact to resolve. *Id*. A conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *Id*.

ANALYSIS

Sufficiency of Evidence.

In order to prove a violation of § 42-924, the State must prove only three elements: (1) entry of the protection order pursuant to subsection (1) or (2) of that section, (2) service of the order on the defendant, and (3) knowing violation of the order. *State v. Rubek*, 11 Neb. App. 489, 653 N.W.2d 861 (2002). Doyle's argument on appeal addresses only the third element, i.e., whether his conduct constituted a knowing violation of the order.

Doyle admits that he "requested . . . that the nurse contact his wife," but argues that his actions did not intimidate, harass, or frighten Linda. Brief for appellant at 7. However, Linda testified that as a result of the call, she was "shaken, scared, [and] physically sick." Doyle attacks Linda's credibility, citing her delay in calling the police until after her shift ended. But, as we noted above, this court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.

Doyle also argues that he "just wanted to get the message to his children that he was in the hospital and there was no need to worry." Brief for appellant at 7. As the State correctly responds, the protection order prohibited Doyle from telephoning, contacting, or otherwise communicating with Linda. Doyle's brief admits that he did so but attempts to justify the conduct. However, the order provides no exception for the circumstances in the instant case. The evidence was sufficient to establish a knowing violation of the order.

Free Speech Claim.

Doyle argues that the speech at issue is constitutionally protected because it was informational only. The First Amendment has never been treated as an absolute. See *Breard v. Alexandria*, 341 U.S. 622, 71 S. Ct. 920, 95 L. Ed. 1233 (1951), *overruled in part on other grounds, Schaumburg v. Citizens for Better Environ.*, 444 U.S. 620, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980). Freedom of speech does not mean that one can talk where, when, and how one chooses. See *id.*

[5,6] Doyle does not argue that § 42-924 is unconstitutional; rather, he asserts that the statute cannot be constitutionally applied to his speech, which he characterizes as merely communicating medical information to his wife. The Nebraska Court of Appeals cannot determine the constitutionality of a statute, yet when necessary to a decision in the case before it, the court does have jurisdiction to determine whether a constitutional question has been properly raised. *Clark v. Tyrrell*, 16 Neb. App. 692, 750 N.W.2d 364 (2008). And the Nebraska Supreme Court has held that the Court of Appeals has jurisdiction to determine, in limited circumstances, whether the constitutionality of a statute is implicated. See *State v. Nelson*, 274 Neb. 304, 739 N.W.2d 199 (2007). To properly raise a challenge to the constitutionality of a statute, a litigant is required to strictly comply with Neb. Ct. R. App. P. § 2-109(E) (rev. 2008) and to properly raise and preserve the issue before the trial court. *Clark, supra*. Doyle did not comply with § 2-109(E). Thus, he did not raise any question about the constitutionality of the statute, and our inquiry is focused solely on whether Doyle's conduct was constitutionally protected free speech.

Doyle relies solely on *State v. McKee*, 253 Neb. 100, 568 N.W.2d 559 (1997), to support his argument that his speech was protected. In *McKee*, the defendant was convicted for knowingly violating a protection order. On appeal, in determining whether § 42-924 was unconstitutional as applied, the Nebraska Supreme Court analyzed the defendant's speech separately from her conduct. The court determined as a matter of law that the defendant's speech was not threatening, intimidating, or terrifying; that it was thus protected by the First Amendment; that any application of the protection order which

would prohibit such speech would burden more speech than necessary to serve any relevant governmental interest; and that § 42-924 was applied to the defendant in an unconstitutional manner. Although the court found that the defendant's speech was protected, it found sufficient evidence to submit to the jury on the issue of whether defendant's conduct violated the protection order.

In the case before us, Linda, as the victim of domestic abuse, sought a protection order against Doyle. Before issuing the protection order, the court had to find that Linda stated facts showing that Doyle attempted to cause, or intentionally, knowingly, or recklessly caused, bodily injury to Linda or that Doyle, by physical menace, placed Linda in fear of imminent bodily injury. The court so found and, as authorized under § 42-924(1), issued a protection order prohibiting Doyle from, among other things, telephoning, contacting, or otherwise communicating with Linda. As the State points out, "the focus of [the] protection order is not the speech but the conduct of Doyle." Brief for appellee at 9. The subject of Doyle's communication is immaterial—he could violate the protection order by telephoning Linda and not saying anything at all.

[7] The test in evaluating a content-neutral injunction that restricts speech is "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 765, 114 S. Ct. 2516, 129 L. Ed. 2d 593 (1994). See *State v. McKee, supra*. The purpose of the protection order in this case—primarily to protect Linda from contact by Doyle—was completely unrelated to the suppression of ideas. The State has a compelling interest in protecting victims of domestic violence from continuing harassment and abuse. The protection order set forth what conduct was prohibited and did not sweep more broadly than necessary.

Other jurisdictions have upheld similar orders. In *State v. Hauge*, 547 N.W.2d 173 (S.D. 1996), a protection order instructed the defendant to not verbally contact his ex-wife in any manner, including telephone contact or contact through third parties and to not verbally abuse or threaten her. In determining that the State has a legitimate interest in shielding

victims of domestic violence from threats and intimidation, the Supreme Court of South Dakota stated that "[t]he cycle of violence so common to domestic abuse, includes attempts at reconciliation often amounting to nothing more than harassment" and that "[i]n the middle of domestic strife, preserving the mental and emotional health of the vulnerable must override other less compelling interests." 547 N.W.2d at 176. The court found that the protection order was not unconstitutionally overbroad or vague.

In *State v. Boyle*, 771 N.W.2d 604 (N.D. 2009), the Supreme Court of North Dakota considered whether a defendant engaged in constitutionally protected speech when he contacted his child's mother in violation of a restraining order. The court reasoned that the restraining order restricted the defendant's free speech rights by prohibiting contact with the child's mother except for the purpose of contacting the child and that only contact for the purpose of communicating with the child was protected activity. Because the defendant's contact at issue was not to communicate with the child, the court concluded that it was not constitutionally protected speech.

In *State v. Hardy*, 54 P.3d 645 (Utah App. 2002), the defendant's wife obtained a protective order which prohibited him from directly or indirectly contacting her. The defendant sent two letters to his wife's house which were addressed to their young children and was subsequently convicted by a jury of violating the protective order. The Court of Appeals of Utah reasoned that the State had a significant interest in protecting the health and well-being of its citizens, that the State created a procedure allowing victims of domestic violence to obtain protection orders against abusers, and that the court could prohibit the abuser from having any contact with the victims as part of that protection. The appellate court stated:

> Although [the statute at issue] appears to sweep broadly because it allows courts to prohibit all communication between two people, the statute is actually quite narrowly crafted. Before a protective order may issue, a court must first conclude that the parties to the protective order are cohabitants, and that a cohabitant has been "subjected to abuse or domestic violence, or . . . there is a substantial

> likelihood of immediate danger of abuse or domestic violence." [Citation omitted.] Without the particular relationship of "cohabitants" and without previous instances or the "substantial likelihood" of domestic violence or abuse, the court may not restrict the protective order respondent's right to speak and associate freely.

54 P.3d at 649.

A Massachusetts appellate court reasoned that a defendant convicted of violating an abuse prevention order would have been unsuccessful in his constitutional challenges on appeal, which he did not preserve, because

> [w]hile an abuser has a right to speak his mind freely in any number of forums, he has no right to seek out and contact the victim of his abuse, forcing that victim to endure his unwanted and destructive presence in her life—no matter how harmless or important the message he seeks to deliver.

Commonwealth v. Thompson, 45 Mass. App. 523, 525, 699 N.E.2d 847, 849 (1998).

We agree with the analysis of the numerous other courts considering this issue. Therefore, we hold that the domestic abuse protection order at issue in this case did not violate Doyle's First Amendment right to free speech or his similar rights under the Nebraska Constitution.

CONCLUSION

We conclude that the State adduced sufficient evidence to establish a knowing violation of the protection order by Doyle. Further, we conclude that Doyle's rights to free speech have not been infringed. His conduct in contacting Linda violated the protection order, and the protection order itself did not burden more speech than necessary to serve a significant government interest.

AFFIRMED.

INBODY, Chief Judge, participating on briefs.