

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC.

SUPERIOR COURT

(FILED: September 12, 2014)

STATE OF RHODE ISLAND

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VS.

C.A. No. KC-2004-0711A

KATHLEEN THOMPSON

DECISION

RUBINE, J. Before the Court is Defendant Kathleen Thompson's motion for a new trial. A jury found Defendant guilty of violating a no-contact order in place with respect to Michael O'Sullivan in violation of G.L. 1956 §§ 12-29-4 and 12-29-5. Defendant filed a motion for a new trial contending the verdict is contrary to the clear weight of the evidence.

I

Facts

The facts proved at trial may be summarized as follows:

It is alleged that Defendant violated an outstanding no-contact order when she came to the front door of her former husband's home on or about October 5, 2004. The no-contact order in place that day was issued by the District Court on July 19, 2004 and prohibited the Defendant from having any contact with her former husband (Michael O'Sullivan). Because Defendant had previously been convicted twice for prior violations of no-contact orders, the State prosecuted this violation as the third offense, a felony under § 12-29-5c(ii). The parties stipulated to the prior convictions, and therefore, that aspect of the charge was deemed admitted and was not considered by the jury. There was no witness to the events of that day, and the State relied heavily on the testimony of Michael O'Sullivan.

II

Standard of Review

It is textbook law that when considering a motion for new trial, the Court acts as the hypothetical thirteenth juror and exercises independent judgment as to the credibility of witnesses and the weight to be given to any evidence. “If, after conducting this independent review, the trial justice agrees with the jury’s verdict or if the evidence is such that reasonable minds could differ as to the outcome, the motion for a new trial should be denied.” State v. Kelly, 20 A.3d 655, 659 (R.I. 2011). See also State v. Gomez, 848 A.2d 221, 234 (R.I. 2004). “If, however, ‘the trial justice finds that the state has failed to sustain its burden of proof, a new trial must be ordered.’” Id. (quoting State v. Clark, 603 A.2d 1094, 1096 (R.I. 1992)).

III

Analysis

Defendant contends in her motion that the jury’s verdict is contrary to the clear weight of the evidence.

The State’s case relied heavily on the testimony of the complaining witness, Michael O’Sullivan. Although Mr. O’Sullivan is elderly and often difficult to understand due to his Irish accent, the Court finds that he was an entirely credible witness. He was well aware that Defendant (his former wife) was subject to several no-contact orders over the years since they divorced. Although he showed some difficulty remembering which order was in effect at any particular time, he was clear and credible in his knowledge that the Defendant was subject to a no-contact order on the day of the incident which is the subject of this charge. His recollection was clear that on October 5, 2004, at approximately 3 p.m., he was at his home in Warwick when he heard the doorbell ring at his front door. At the time, he was resting due to his recovery from

orthopedic surgery. He specifically recalled responding to the door with the aid of his walker but not opening it. He was precise in his recollection of looking out the window and seeing Defendant walking off the steps of his front landing. He observed her walking down the front steps of his home and heading toward the driveway, where she had parked her car next to his wife's automobile. He also testified that his car was not in the driveway that day since his wife had taken his brown Toyota with a veteran's license plate to work.¹ He was home alone at the time the doorbell rang.

Under cross-examination, Mr. O'Sullivan admitted not having seen the Defendant actually ring the doorbell and that he had no conversation with Defendant. Defense counsel attempted to have him admit on cross-examination that she had "no contact" with him because she did not speak to him. The Court believes this line of questioning was a rather bold and inappropriate attempt to have Mr. O'Sullivan opine on the ultimate legal question in the case. The State did not object to this question asked on cross-examination, and therefore, the response was not stricken from the record.

In subsequent instructions to the jury, however, the Court made clear that the determination of the facts and the application of the facts to the law as instructed by the Court was solely the function of the jury. Mr. O'Sullivan's characterization of whether Defendant's actions constituted "any contact" as prohibited by the no-contact order was not conclusive. In rendering its guilty verdict, it is clear that the jury was not persuaded by Mr. O'Sullivan's

¹ Mr. O'Sullivan's credibility was enhanced by his ability to recall such details as the license plate numbers of his car and his wife's car. He also recalled in some detail an incident that occurred in a local pharmacy some years prior to the charge made herein, which resulted in Defendant's earlier conviction of violating a prior no-contact order. The jury could consider Mr. O'Sullivan's advanced age when he testified to the facts that occurred ten years earlier. His age and his ability to recall certain details despite his advanced age enhanced, rather than detracted from, his credibility. Also, his demeanor when he testified displayed no anger or agitation, despite having been subject to harassment over a period of years at the hands of the Defendant.

characterization of Defendant's action that day as not constituting contact. Based on the Court's instruction to follow the plain meaning of the words of the no-contact order, the jury properly concluded, in this Court's opinion, that Defendant's action of coming to Mr. O'Sullivan's home and ringing his doorbell in an effort to have him respond was, at the least, conduct constituting prohibited contact. These actions may also have constituted "interference" or "harassment" as prohibited by the order,² in that her action disrupted Mr. O'Sullivan's efforts to rest following surgery, thus interfering with his effort to recover from surgery. Mr. O'Sullivan was aware of the existence of the no-contact order that day, which is why he called the police. Once the police arrived, the officer testified that he verified the current no-contact order given to him by Mr. O'Sullivan. The police officer verified the no-contact order using a database available to the police. The Court believes that Mr. O'Sullivan's possession of a copy of the order and his awareness that the order was current on October 5, 2004, as well as the officer's verification of its validity, constitutes at least circumstantial evidence that the order was in effect on that day, and that Defendant was aware of the restrictions contained in the order. It is reasonable for the jury to view Mr. O'Sullivan's possession of the order as circumstantial evidence that all persons affected by the order were made aware of its existence and effect.

Mr. O'Sullivan called police when he observed Defendant on his front steps because he was aware that the no-contact order was in effect at the time. Defendant was not a stranger to no-contact orders and had been the subject of several such orders in the period after she and Mr. O'Sullivan were divorced. Mr. O'Sullivan testified to earlier incidents which led to the issuance

² The language of the order, which was admitted as a full exhibit, was as follows:

"The Defendant is hereby enjoined and restrained from any contact with the alleged victim Michael O'Sullivan; further the Defendant shall not harass, interfere with, molest or threaten the victim in any manner."

of no-contact orders. The evidence of these prior incidents was admitted over Defendant's objection, but the jury was explicitly cautioned that, in accordance with R.I. R. Evid. 404, such evidence of prior wrongdoing could not be considered as evidence of the Defendant's propensity to commit the offense which was the subject of the instant charge. The jury was further instructed that, if they considered such evidence at all, their consideration had to be limited to using the evidence only for the limited purpose of determining whether Defendant had the intent to violate the order and to consider such evidence to determine if Defendant acted knowingly or willfully, as opposed to acting by mistake or other innocent reason. In order to convict Defendant of the violation of a no-contact order, the jury was instructed that they had to find, beyond a reasonable doubt, that the State proved the following four facts:

1. That on or about October 5, 2004, a no-contact order was in effect;
2. That Defendant was aware of the restrictions on her behavior;
3. That Defendant willfully disobeyed the restrictions on her behavior, and;
4. That Michael O'Sullivan is the former spouse of the Defendant.

Based upon this Court's independent review of the testimony and exhibits, the State met its burden as to each of the elements.

1. As to whether on October 5, 2004 a no-contact order was in effect, the jury could consider the following evidence as to that point: the certified copy of court records indicating the issuance of a no-contact order on July 19, 2004, the copy of the order that the police obtained from Mr. O'Sullivan showing what appears to be Defendant's signature, and the verification by the police that the order was in effect at the time of his investigation.

2. As to Defendant's awareness of the restrictions on her behavior, it was reasonable for the jury to infer the issuance of a prior no-contact order as some evidence that she understood the meaning of a no-contact order. The jury could reasonably conclude that the name Kathleen Thompson appearing on the order was her signature, acknowledging her receipt. The jury could also reasonably consider Mr. O'Sullivan's testimony that Defendant was subject to prior no-contact orders as evidence that Defendant was aware of the restrictions contained in such an order. In accordance with the Court's cautionary instruction, Defendant's "awareness" goes to her state of mind at the time of the alleged incident. In accordance with the Court's instruction, Defendant's actual awareness of the restrictions is similar to the state of mind of "intent" and is not capable of proof by direct evidence. The jury was instructed that they could consider such testimony as circumstantial evidence to determine whether the State had proven beyond a reasonable doubt that the Defendant was aware of the restrictions on her conduct at the time she visited the house of her former husband on October 5, 2004. The Court believes that sufficient evidence was introduced by the State to establish Defendant's awareness of the restrictions contained in the no-contact order entered July 19, 2004.
3. As to acting willfully, the jury could again consider the fact that Defendant had a history of being subject to restraining orders as a permissible use of prior bad act testimony, consistent with the Court's cautionary instruction under R.I. R. Evid 404. Also, the jury could consider the testimony of Mr. O'Sullivan's awareness of the order as circumstantial evidence that the Defendant also was aware of the order. Although counsel for the Defendant referred in his closing argument to Defendant

having an innocent reason for being at the premises (to visit her children), a review of the record shows that, while such visits may have occurred at some prior time, there was no evidence on the day in question that she went to her former husband's home to visit with her children. Mr. O'Sullivan's testimony that he was home alone at the time of the incident was not shown by cross-examination to be evidence that was not credible or not worthy of belief.

4. Also, there was no reason for the jury to disbelieve Mr. O'Sullivan's testimony that he was formerly married to the Defendant, thus putting this conviction within the definition of a conviction under the Domestic Violence Protection Act and the sentencing enhancements contained therein. Sec. 12-29-5.

IV

Conclusion

In summary, the Court believes that the jury, based upon its consideration of credible evidence, correctly found all elements of the offense of violation of a no-contact order to have been proven by the State beyond a reasonable doubt. This Court finds that the jury afforded proper weight in its consideration of such credible evidence and the inferences to be drawn therefrom.³ Defendant argued this motion pro se as her former counsel was allowed to withdraw, as he was discharged by the Defendant. When asked to state the grounds for her motion, the Defendant responded by way of an angry diatribe blaming everyone but herself for

³ A different jury may have given less weight to the circumstantial evidence of awareness and intent. However, this only signifies that the evidence is such that reasonable minds could differ as to the outcome. If the Court finds that the evidence is reasonably susceptible to two different outcomes, then this Court is obligated to deny the motion for new trial. See Kelly, 20 A.3d at 659.

the conduct which led to her conviction. Accordingly, Defendant's motion for a new trial is **DENIED.**



RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE: State of Rhode Island v. Kathleen Thompson

CASE NO: KC-2004-0711A

COURT: Kent County Superior Court

DATE DECISION FILED: September 12, 2014

JUSTICE/MAGISTRATE: Rubine, J.

ATTORNEYS:

For Plaintiff: Meg McDonough, Esq.

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