Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2004-511

SEPTEMBER TERM, 2005

State of Vermont	}	APPEALED FROM:
	}	
	}	
v.	}	District Court of Vermont,
	}	Unit No. 1, Windham Circuit
Ember S. Tilton	}	
	}	DOCKET NO. 245-2-04 Wmcr

Trial Judge: John P. Wesley

In the above-entitled cause, the Clerk will enter:

Defendant appeals his jury conviction of disturbing the peace by telephone, in violation of 13 V.S.A. ' 1027(a)(ii). We affirm.

Apparently unhappy that complainantChis girlfriend=s fatherChad contacted her against her wishes, defendant called complainant several times late one night and warned him not to contact her again. As the result of those phone calls, defendant was charged with using a telephone with the intent to threaten physical harm to complainant. A jury convicted defendant of the charge, and the court sentenced him to two-to-three months, all suspended. On appeal, defendant argues that the trial court erred by allowing the State to introduce other bad act evidence during the trial, and by denying his motion for judgment of acquittal.

We first consider defendant=s argument that the State presented insufficient evidence for the jury to conclude beyond a reasonable doubt that he intended to intimidate complainant when he telephoned him. We find no merit to this argument. On review of a motion for judgment of acquittal under Rule 29 of the Vermont Rules of Criminal Procedure, we determine Awhether the evidence, when viewed in the light most favorable to the State and excluding any modifying evidence, fairly and reasonably tends to convince a reasonable trier of fact that the defendant is guilty beyond a reasonable doubt.@ State v. Prior, 174 Vt. 49, 53 (2002) (quotations omitted). The information required the State to prove beyond a reasonable doubt that defendant intended to intimidate the complainant by threatening physical harm. 13 V.S.A. ' 1027(a); see State v. Wilcox, 160 Vt. 271, 275 (1993) (holding that intent element of ' 1027(a) is measured at time call was placed). AIntent is usually inferred from circumstances rather than shown by direct proof.@ Wilcox, 160 Vt. at 275. Thus, in a case like this one, A[t]he intent to make a threatening phone call can be inferred from the actions, conduct or words of the defendant.@ Id.

Here, complainant testified that defendant telephoned him after midnight, saying A[Y]ou fat bastard, you [f------] pervert, don=t you ever call my house again.@ Complainant further testified that defendant hung up and called back almost immediately, breathing into the telephone for a minute or two without saying anything. Complainant then called his ex-wife, who informed him that defendant had called her and stated that he was going to gouge complainant=s eyes out and kill him. Complainant also testified that, right after speaking to his ex-wife, he received another telephone call from defendant, during which defendant stated:

> Don=t you ever call my [f------] home again, you fat pervert, you will die. I will cut out your eyes. I will eat your eyes, you [f------] fat pervert, don=t ever call my [f------] home again.

The investigating officer testified that defendant admitted to telephoning complainant and calling him a pervert Ato annoy him so he wouldn=t call my house.@ The officer testified that defendant admitted telling complainant that Ahe was going to die, but everybody is going to die some time.@ The officer further testified that defendant admitting telling complainant that Ahe would eat his eyeballs, but he said that was to be more facetious than anything.@ Defendant testified that he telephoned complainant after midnight and called him Aa fat bastard@ and Aa [f------] pervert.@ When asked if he told complainant that Ahe was going to die and you were going to kill him,@ defendant answered, AI would deny that I said that I was going to kill him.@ In short, there was overwhelming evidence that defendant called complainant to intimidate him with the threat of physical harm.

Defendant also argues that the district court committed prejudicial error by permitting the State to introduce other bad act evidence during trial. This argument stems from the following facts. In response to defendant=s pretrial motion to strike the State=s use of evidence of other bad acts, the trial court preliminarily ruled that the State would not be allowed to introduce evidence of defendant=s bad acts that occurred after the telephone incident. At trial, defendant=s final witness, his aunt, testified that she had spoken to defendant and his girlfriend following the telephone incident, and that they had put together a plan aimed at helping the couple to turn their lives around. She testified that she had gotten defendant Aon the right foot@ and had done some things to create a path that would hopefully lead to positive changes in the couple=s lives. At a bench conference following the aunt=s direct testimony, the State argued that, by eliciting testimony from his aunt that he was Aon the straight and narrow,@ defendant had opened the door to allow the State to cross-examine her regarding bad acts defendant had committed after the telephone incident. The court agreed that, in having his aunt attempt to elicit sympathy from the jury by suggesting that defendant had turned his life around, defendant had opened the door for the State to question her regarding defendant=s actions following the telephone incident. Accordingly, the court allowed the State to ask defendant=s aunt on cross-examination whether she knew that, since the telephone incident, defendant (1) had violated his conditions of release by harassing complainant=s son, and (2) had been charged with simple assault for taking a swing at a man who had begun a relationship with complainant=s daughter. The aunt responded that she was aware of the simple assault charge, but not the violation of defendant=s conditions of release.

Defendant argues that his aunt was not put on the stand to elicit sympathy from the jury, and that the evidence of the other bad acts was relevant only to show his propensity toward violent and threatening behavior. See V.R.E. 404(b) (AEvidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith.@). Further, he argues that even if the evidence had some other probative value, the court failed to weigh its prejudicial impact, which was significant. The State responds that defendant failed to properly preserve at trial an objection to admission of the impeachment evidence, and fails to demonstrate plain error on appeal.

Because we conclude that any error was harmless, we need not consider whether the impeachment evidence was properly admitted or whether defendant properly objected to its admission. See V.R.Cr.P. 52(a) (AAny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.@).

> Harmless error analysis requires the reviewing court to inquire if, absent the alleged error, it is clear beyond a reasonable doubt that the jury would have returned a guilty verdict regardless of the error. Thus, analysis under the harmless error doctrine focuses on the evidence of guilt present in the record.

State v. Wright, 154 Vt. 512, 519-20 (1989) (quotations omitted). In this case, the testimony of several witnessesCincluding complainant, complainant=s ex-wife, the investigating police officer, and defendant himselfCconfirmed that defendant made the statements quoted above during the course of several telephone calls on the night in question. Defendant acknowledged that he made the statements to make sure that complainant did not ever again attempt to contact complainant=s daughter at defendant=s home. As noted above, the statements overwhelmingly demonstrate that defendant telephoned complainant with the intent to intimidate him with the threat of physical violence, in violation of 13 V.S.A. ' 1027(a)(ii). That the jury heard that defendant was charged with two violations after the telephone call seems hardly more prejudicial than the jury hearing defendant testify that just prior to making the calls he had returned from Maryland where he had been incarcerated in solitary confinement. Accordingly, any error on the part of the trial court in admitting the State=s impeachment evidence did not affect defendant=s substantial rights and thus was harmless.

Affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

_____
Marilyn S. Skoglund, Associate Justice

_____
Brian L. Burgess, Associate Justice