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NO. A-08-0628

IN THE COURT OF APPEALS

FOR THE STATE OF NEBRASKA

STATE OF NEBRASKA,

Appellee,

v.

DARREN J. DRAHOTA,

Appellant.

APPEAL FROM THE COUNTY COURT
OF LANCASTER COUNTY, NEBRASKA
The Honorable Gale Pokorny, County Court Judge

APPEAL FROM THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA
The Honorable John A. Colborn, District Judge

BRIEF OF APPELLEE

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STATEMENT OF JURISDICTION

The district court entered an order on April 29, 2008, affirming the county court's finding of guilty of disturbing the peace. (T45). The notice of appeal and poverty affidavit were filed on May 29, 2008.

STATEMENT OF THE CASE

A. Nature of the Case

This is appeal from the district court's order affirming the County Court's finding that the evidence was sufficient to find Drahota guilty of disturbing the peace.

B. Issues Tried Below

Whether the evidence supports the finding of guilt.

C. How the Issues Were Decided:

The district court affirmed the county court's finding of guilt.

D. Standard of Review:

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. Muro,* 269 Neb. 703, 695 N.W.2d 425 (2005). In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. *State v. Jonusas,* 269 Neb. 644, 694 N.W.2d 651 (2005). Such matters are for the finder of fact, and 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.*

Upon appeal from a county court in a criminal case, a district court acts as an intermediate appellate court, rather than as a trial court, and its review is limited to an examination of the county court record for error or abuse of discretion. Both a district court and a higher appellate court generally review appeals from a county court for error appearing on the record. *State v. Schulte*, 12 Neb. App. 924, 928, 687 N.W.2d 411, 415 (Neb. Ct. App. 2004).

PROPOSITIONS OF LAW

I.

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. Muro, 269 Neb. 703, 695 N.W.2d 425 (2005).

STATEMENT OF FACTS

William Avery was a professor of political science and Darren Drahota was a student at the University of Nebraska at Lincoln. (3:1-25). Between January 27, 2005, and February 10, 2006, Drahota and Avery exchanged email messages. (E1, 1-12:10, 10). Eventually, Avery requested that Drahota stop sending him emails as he found Drahota's emails, "hateful, racist and vile." (4:7-13). At one point, Drahota threatened Avery with physical violence. (22:25; 23:1-10). After three requests by Avery to Drahota to stop sending emails, Drahota sent emails under a different domain address. (28:3-13; 5:17-25; 6:1-4)(E1, 1-12:10, 10). The domain

address was Averylovesalqueda@yahoo.com. (T45)(28:18-24). Avery stated that these emails disturb him. (11:15-20). Avery turned the emails over to the police. (30:2-8). Investigator Sexton traced the new domain address to Jennifer Schultz who lived with Darren Drahota. (36:15 - 38:). Drahota eventually admitted he was the one that sent the emails to Avery. (39:1-6).

The district court found there was sufficient evidence to sustain the trial court's finding that Drahota sent Avery unwanted emails after Avery had repeatedly asked him to stop contacting him. (T47). The emails sent by Drahota were meant to anger and incite Avery and often contained profane, indecent, and abusive remarks. (T48).

ARGUMENT

ASSIGNMENT OF ERROR # 1

Sufficiency of Evidence

A. Analysis

Drahota argues that his emails are protected speech and that because Avery had the option of simply deleting the emails, the evidence is insufficient to support the conviction. (Brief of Appellant, p. 2 & 7).

As to free speech, the Nebraska Supreme Court stated:

> The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others....
>
> ... One may, however, *be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order*, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, in practically all, *the provocative language*

> *which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer.* Resort to *epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument.*

State v. Broadstone, 233 Neb. 595, 600-601, 447 N.W.2d 30, 34 (1989)(emphasis added), citing, *Cantwell v. Connecticut,* 310 U.S. 296, 308-10, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

To contrast the point, in *Bachellar v. Maryland*, 397 U.S. 564 (1970), the defendants were carrying signs with antiwar slogans such as "Make Love not War," "Stop in the Name of Love," and "Why are We in Viet Nam." They were arrested, charged, and convicted of violating a state disorderly conduct statute. The Supreme Court reversed their convictions on the ground that the wording of the placards was not directed to a particular addressee nor was it personally abusive. Although the sentiments expressed by the defendants may have shocked certain individuals, the Court *found that a reaction by the audience was attributable to the content of the ideas expressed and not their personally insulting quality.*

Here, Exhibit 1 reflects the hateful, profane, and threatening language used by Drahota and directed at Avery personally. Avery's reaction to Drahota's invective communications is not attributable to the content of the ideas within the emails but to the *personally* threatening and insulting language of the communication used by Drahota. In no sense is that type of language protected speech.

As to the sufficiency of the evidence, in *State v. Coomes,* 170 Neb. 298, 301-02, 102 N.W.2d 454, 457 (1960), the Court stated:

> A breach of the peace is a violation of public order. It is the same as disturbing the peace. The definition of breach of the peace is broad enough to include the offense of disturbing the peace; it signifies the offense of disturbing the public peace or tranquility enjoyed by the citizens of a community. [Citations omitted.] Breach of the peace is a common law offense. The term "breach of the peace" is generic and includes all violations of public peace, order, decorum, or acts tending to the disturbance thereof.

(Id.).

In *State v. Sukovaty,* 178 Neb. 779, 135 N.W.2d 467 (1965), the defendant was charged with disturbing the peace by publicly cursing, swearing, and using profane, obscene, indecent, abusive, and offensive language against the complaining witness. The evidence showed that the defendant failed to leave after being requested to do so and used profane and abusive language against the complaining witness and disturbed his peace and quiet by disorderly conduct.

Drahota relies upon *State v. Hai Dang*, 220 Neb. 120, 368 N.W.2d 486 (1985), for the proposition the evidence is insufficient to support his conviction. (Brief of Appellant, p. 4). Drahota seems to argue that the *method* of communication somehow prevents his communications from rising to the level of disturbing the peace. *But see, State v. Veatch*, 16 Neb. App. 50, 61, 740 N.W.2d 817, 828 (Neb. Ct. App. 2007)(letter constituted terroristic threat); *State v. Powers,* 10 Neb. App. 256, 634 N.W.2d 1 (Neb. Ct. App. 2001)(letter evidence of

terroristic threat), *disapproved on other grounds*, *State v. Smith*, 267 Neb. 917, 678 N.W.2d 733 (2004).

State v. Hai Dang, dealt with the alleged disturbance of the peace of a former girl friend of the defendant, by use of the telephone. The victim alleged that she had broken up with the defendant, that he continued to call her, and that on the occasion of the last phone call informed her that he was bringing over a birthday card. She told him not to do so and called the police, and when the defendant arrived at her house he was arrested and charged with this offense. *State v. Hai Dang*, 220 Neb. 120, 121-122, 368 N.W.2d 486, 488-487 (1985).

The Court determined that the conviction for disturbing the peace should be reversed because the testimony of the complaining witness *completely lacked probative force.* The witnesses' testimony was inconsistent on dates of brake up; inconsistent on number and timing of calls made by defendant; she could not remember when calls by defendant were made; and inconsistent as to why defendant came to her residence. Furthermore, there was no evidence anyone was disturbed by the defendant's arrival outside the complaining witnesses residence. *State v. Hai Dang*, 220 Neb. 120, 121-122, 368 N.W.2d 486, 488-487 (1985).

In this case, the district court distinguished the case of *State v. Hai Dang*, 220 Neb. 120, 368 N.W.2d 486 (1985), relied upon by Drahota:

> "It was not the *method* of communication that led to the final result in *Hai Dang, rather it was a lack of evidence in relation to the content of the communications made between the parties.* There was little, if any, credible evidence that the Defendant in *Hai Dang* had made any threats; used abusive, profane, or indecent language; or acted violently towards his ex-

girlfriend. In the instant case, the court concludes that there was sufficient evidence for the trial court to find that the Defendant's acts constituted a disturbance of the peace."

(T49)(emphasis added).

The Court in *State v. Broadstone,* 233 Neb. 595, 601, 447 N.W.2d 30, 34 (1989), stated:

> One may, however, be guilty of the offense if he commit acts or make statements likely to provoke violence and disturbance of good order, *even though no such eventuality be intended.* Decisions to this effect are many, but examination discloses that, in practically all, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer.

(Id.)(emphasis added).

Avery requested that Drahota stop sending him emails as he found Drahota's emails, "hateful, racist and vile." Drahota threatened Avery with physical violence. After three requests by Avery to Drahota to stop sending emails, Drahota sent emails under a different domain address. The domain address was Averylovesalqueda@yahoo.com. The purpose of changing his domain name was to ensure Avery would not initially recognize the sender and to heighten the possibility Avery would open the emails. Avery stated that these emails disturbed him.

The evidence in the light most favorable to the prosecution, shows any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

CONCLUSION

For the foregoing reasons the Appellee respectfully requests this Court affirm the ruling by the District Court of Lancaster County affirming the county court's finding that the evidence was sufficient to support the conviction of disturbing the peace.

Respectfully submitted,

STATE OF NEBRASKA, Appellee,

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PROOF OF SERVICE

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

I, George R. Love, being first duly sworn, depose and state that two copies of the brief in the above entitled case were caused to be served upon the Appellant by depositing said copies in the United States Mail, postage prepaid, addressed to Appellant's last known address, Darren Drahota, 1100 West C Street, # 211, Lincoln, NE 68522, on this 20th day of January, 2009.

George R. Love, Affiant

Subscribed in my presence and sworn to before me this 20th day of January, 2009.

GENERAL NOTARY - State of Nebraska
KIMBERLY A. SCHWANINGER
My Comm. Exp. Sept. 28, 2010

Kimberly A. Schwaninger
Notary Public

GRL/kas