



**In the
Missouri Court of Appeals
Western District**

STATE OF MISSOURI,	)	
	)	
Respondent,	)	WD83494
	)	
v.	)	OPINION FILED: March 2, 2021
	)	
RICHARD McNABB,	)	
	)	
Appellant.	)	

Appeal from the Circuit Court of Vernon County, Missouri
The Honorable David R. Munton, Judge

Before Division Three: Edward R. Ardini, Jr., Presiding Judge, Alok Ahuja, Judge and Gary D. Witt, Judge

Richard McNabb ("McNabb") appeals the judgment of the Circuit Court of Vernon County, Missouri ("trial court") finding him guilty, after a jury trial, of one count of tampering with a judicial officer pursuant to section 575.095.¹ On appeal, McNabb challenges the sufficiency of the evidence to support his conviction. We affirm the judgment of the trial court.

¹ All statutory references are to Revised Statutes of Missouri (2016) as updated, unless otherwise specified.

Factual and Procedural Background

We review the facts in the light most favorable to the jury's verdict. *State v. Hunt*, 451 S.W.3d 251, 257 (Mo. banc 2014). On January 3, 2017, McNabb was living with his mother and his step-father ("Step-father"). McNabb's half-sister Meladie ("Meladie"), his girlfriend, and his two children also lived in the home. McNabb had a third child, who previously passed away. The prosecuting attorney, Richard Shields ("Shields"), brought charges against McNabb in relation to his third child's death, which were still pending during the relevant timeframe. On the evening of January 3, 2017, when Step-father returned home for the evening, McNabb was upset about Shields and was complaining about him to Step-father. McNabb stormed out of the house.

After McNabb left the house, Meladie came out of her room and asked Step-father where McNabb was. McNabb had told her earlier in the day that he loved her, which struck her as odd at the time, because the two were not close. Step-father did not know where McNabb had gone.

Shortly thereafter, Meladie received a call from her sister Nicole, who lived in Pennsylvania. McNabb had called Nicole and told her that he was going to kill Shields and then kill himself. This worried Nicole, and she asked Meladie to call 911 from her phone because when she tried to dial it from Pennsylvania, it went to the wrong law enforcement agency. Meladie was worried that McNabb was in trouble and might hurt himself, so she called 911.

While Meladie was on the phone with 911, McNabb called Step-father. McNabb told Step-father that he was going to kill Shields, and Step-father told McNabb that

"would be the dumbest thing he could ever do." McNabb told Step-father that he had taken Step-father's rifle from the home, and Step-father confirmed that the gun was missing. Step-father noticed, however, that McNabb had failed to take the ammunition or the ammunition magazine for the rifle. McNabb told Step-father that he was going to Google Shields's address to find out where he lived. As Step-father spoke with McNabb, Meladie relayed the information to the 911 operator. The 911 operator told Meladie to call back if she heard anything else from McNabb. Police were dispatched to Shields's home and to McNabb's home.

McNabb's girlfriend was in the house and heard the 911 call and called McNabb to inform him that Meladie had called the police. McNabb returned home shortly thereafter and was angry. It was less than an hour from the time McNabb first left the house until he returned. When he returned, Meladie went into her room, closed the door, and hid in the closet. McNabb and Step-father argued. McNabb threatened to kill Step-father and Meladie, and Step-father hit McNabb, who returned the blow. Meladie called 911 again and told them that McNabb had returned home and he and Step-father were in a fight. It was just over eleven minutes between the end of Meladie's first 911 call and the 911 call where she reported McNabb had returned home. The 911 operator asked whether McNabb still had the rifle, and Meladie answered that McNabb said he had left it on his ex-girlfriend's back porch. The ex-girlfriend lived near Shields, and the ex-girlfriend's mother had not known that McNabb had been to her house, but she found the rifle on the porch when police informed her where McNabb said he had left it. She turned the gun over to police when they arrived; the gun was unloaded.

McNabb saw and heard police arrive at his home, and walked out of the garage. When police asked to speak with him, he responded, "F--- you, you m----- f-----," before going back into the house and locking the door. McNabb went into his bedroom and locked the door to that room and exited through a window. He ran to a neighbor's house. The neighbor called Meladie, and Meladie told police where to find McNabb. Police apprehended McNabb at the neighbor's house and placed him under arrest. While all of this was taking place, additional officers had responded to Shield's home and were in the process of having he and his family pack belongings to evacuate their home when they were notified that McNabb was in custody.

McNabb was charged with attempted murder and tampering with a judicial officer. The case was tried to a jury, and the jury found McNabb guilty of tampering with a judicial officer but was unable to reach a unanimous verdict on the charge of attempted murder. McNabb was sentenced to ten years in the Missouri Department of Corrections for tampering with a judicial officer. The State subsequently dismissed the charge of attempted murder. This appeal follows.

Standard of Review

When an appellant challenges the sufficiency of the evidence to support his conviction, we review the evidence in the light most favorable to the jury's verdict, giving the State the benefit of all reasonable inferences. *State v. Thompson*, 314 S.W.3d 407, 410 (Mo. App. W.D. 2010). We do not reweigh the evidence but determine only whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt. *Id.* We "may not supply missing evidence

or give the State the benefit of unreasonable, speculative, or forced inferences." *State v. Hunt*, 451 S.W.3d 251, 257 (Mo. banc 2014).

Analysis

McNabb's challenge to the sufficiency of the evidence to support his conviction is his only point on appeal. As relevant to this appeal, section 575.095.1(1)² declares that "[a] person commits the offense of tampering with a judicial officer if, with the purpose to harass, intimidate or influence a judicial officer in the performance of such officer's official duties, such person [t]hreatens or causes harm to such judicial officer" The parties agree that Shields is a judicial officer as defined by the statute. However, McNabb argues that the evidence failed to establish that he threatened or harmed Shields with the purpose to harass, intimidate, or influence Shields. We disagree.

Because Shields was not harmed, the State had to show that McNabb threatened Shields with the purpose to harass, intimidate, or influence him. To show that McNabb acted "with the purpose" of harassing, intimidating or influencing Shields's actions, the State had to show that it was McNabb's "conscious object . . . to cause" such harassment, intimidation or influence. § 562.016.2, RSMo. Showing that McNabb acted with such a purpose is equivalent to showing that he acted with "specific intent." *Bryant v. State*, 316

² Paragraph "Second" of the verdict director submitted to the jury for the offense of tampering with a judicial officer required the jury to find that McNabb committed three separate acts; it asked the jury to find that he: "[1] threatened to kill Richard Shields, [2] secured a rifle, and [3] transported the rifle to a location near Richard Shields[s] home." The second and third acts do not appear necessary to a determination of whether McNabb "threaten[ed] . . . [a] judicial officer" within the meaning of section 575.095.1(1). Instead, McNabb's acts of securing and transporting the rifle arguably implicate section 575.095.1(4), which proscribes "engag[ing] in conduct reasonably calculated to harass or alarm such judicial officer . . . , including stalking pursuant to section 565.225 or 565.227." The verdict directing instruction on this charge did not, however, ask the jury to find that McNabb's actions were "reasonably calculated to harass or alarm" Shields, which is an essential element for an offense under subsection (4).

S.W.3d 503, 509 (Mo. App. E.D. 2010) (citing *State v. Whalen*, 49 S.W.3d 181, 186–87 (Mo. banc 2001)). The fact that a defendant knows that his actions could or would cause a particular result "is not the requisite mental state of acting purposely." *State v. Keeler*, 856 S.W.2d 928, 931 (Mo. App. S.D. 1993). Instead, the State must show that the defendant desired to produce a particular outcome.

Because McNabb had no contact or communication with Shields regarding his plan to kill first Shields and then himself, the State's evidence would need to support a finding that McNabb intended to harass or intimidate Shields by telling his own family that he was going to kill Shields and then himself. See *State v. Jindra*, 504 S.W.3d 187, 190 (Mo. App. W.D. 2016).

A person can violate section 575.095.1(1) by relaying threats against a judicial officer to a third party. See *Jindra*, 504 S.W.3d at 190, *State v. Hamilton*, 130 S.W.3d 718, 719 (Mo. App. S.D. 2004). In *Hamilton*, threats intended to intimidate a judicial officer (a probation officer) were made in the presence of the judicial officer and later outside her presence to the judicial officer's supervisor and to law enforcement personnel, for whom it "would, arguably, have been [a] dereliction of duty" not to relay the information to the judicial officer so that she could take steps to protect herself. *Hamilton*, 130 S.W.3d at 720. In *Jindra*, the defendant violated the statute by relaying threats against a judge through a court clerk and through people who worked with the judge's husband.³ *Jindra*, 504 S.W.3d at 191. Jindra understood and intended that the

³ The defendant in *Jindra* was not charged under section 575.095.1(1) but was instead convicted of violating section 575.095.1(4).

threats would be communicated to the judge, and they were intended to intimidate or harass her. The *Jindra* opinion compared section 575.095 to the federal bank robbery statute, 18 U.S.C. § 2113(a), which prohibits taking "by intimidation." *Id.* The opinion noted that "by intimidation" had been interpreted as conduct "reasonably calculated to produce fear." *Id.* In both *Hamilton* and *Jindra* it was a reasonable inference from the evidence that the defendant was aware the threats made would be relayed to the judicial officer and it was the defendant's intent that the threats be relayed to accomplish the goal of intimidation or harassment of the judicial officer.

[The statute] does not restrict certain "speech" because of its message or content. Instead, it enjoins certain speech because of the impact it is intended to have on the person to whom it is directed. Under the statute, a defendant must engage in conduct reasonably calculated to harass or alarm a judicial officer, and the defendant must do so with the purpose to harass, intimidate or influence a judicial officer in a judicial proceeding.

State v. McGirk, 999 S.W.2d 298, 302 (Mo. App. W.D. 1999).

In the present case, McNabb never threatened Shields directly. He communicated his intent to harm Shields and then himself to his sister, who lived in Pennsylvania, but subsequently also to Step-father, with whom he lived. McNabb notably called Step-father, with whom he had just recently spoken at home, to tell him that he was going to kill Shields. He specifically informed Step-father that he had taken his rifle and that he was going to Google Shields's home address, even though there is no evidence that he actually did so. The evidence was that while McNabb was on the phone with Step-father, Meladie was on the phone in the same room relaying the information to authorities on the 911 call. A jury could reasonably have found that McNabb intended for Step-father to

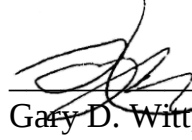
relay the threat to police, who would reasonably have notified Shields, with McNabb having the purpose that Shields would feel intimidated or harassed. While the jury could also have found that McNabb did not intend that either his sister or Step-father would relay his threats, this court

accepts as true all of the evidence favorable to the state, *including all favorable inferences drawn from the evidence and disregards all evidence and inferences to the contrary*. . . . In reviewing a challenge to the sufficiency of the evidence, appellate review is limited to a determination of whether there is sufficient evidence from which a reasonable juror might have found the defendant guilty beyond a reasonable doubt.

State v. Grim, 854 S.W.2d 403, 405 (Mo. banc 1993) (emphasis added). While the initial call to McNabb's sister in Pennsylvania, may not have been sufficient for a factfinder to determine that McNabb's intent was to have his threats communicated to law enforcement and subsequently to Shields, his repeated calls to family members stating his threats against Shields could be interpreted, by a fact finder, to have no other purpose than to ensure the threats were delivered to the victim. The evidence did establish that the threats were in fact communicated to Shields and the prosecutor and his family were evacuating their home due to concerns for their safety in response to the threats. We find that a reasonable juror could have concluded that McNabb's purpose in making the repeated threats against Shields was to cause the threats to be ultimately communicated to Shields and for him to be intimidated, harassed, or influenced.

Conclusion

For all of the above-stated reasons, we affirm the judgment of the trial court.

A handwritten signature in black ink, appearing to read 'Gary D. Witt', is written over a horizontal line.

Gary D. Witt, Judge

Ardini, Presiding Judge, joins in the majority
Ahuja, Judge, dissents in separate opinion

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WESTERN DISTRICT**

requiring that a defendant act with a particular purpose is equivalent to a showing that the defendant had “specific intent.” *Bryant v. State*, 316 S.W.3d 503, 509 (Mo. App. E.D. 2010) (citing *State v. Whalen*, 49 S.W.3d 181, 186–87 (Mo. 2001)). A defendant must affirmatively desire that his actions produce a particular result; it is not enough that the defendant was aware that his actions could, or would, cause a particular outcome. *State v. Keeler*, 856 S.W.2d 928, 931 (Mo. App. S.D. 1993).

Section 575.095.1 “enjoins certain speech because of the impact it is intended to have on the person to whom it is directed.” *State v. McGirk*, 999 S.W.2d 298, 302 (Mo. App. W.D. 1999). Therefore, to show that McNabb acted with the purpose to intimidate or influence Shields, the State had to prove, at a minimum, that McNabb “directed” his speech at Shields. In other words, the State had to prove that McNabb intended – and wanted – his threats to be communicated to Shields.

There was no basis in the evidence for the jury to find beyond a reasonable doubt that McNabb intended to communicate with Shields, either directly or indirectly through third parties. McNabb told a sister living in Pennsylvania, his step-father, and his girlfriend that he intended to kill Shields and then to kill himself. I fail to see how McNabb’s communications with his family members, and with his girlfriend, support the inference that McNabb acted with the purpose of communicating *with Shields*. I recognize that communications with third parties may be sufficient to support a conviction for tampering with a judicial officer. See *State v. Jindra*, 504 S.W.3d 187, 190-91 (Mo. App. W.D. 2016); *State v. Hamilton*, 130 S.W.3d 718, 719-20 (Mo. App. S.D. 2004). But in those cases, the defendant communicated with the judicial officer’s family members or co-workers, or with law enforcement officers who were duty-bound to inform the judicial officer of the defendant’s threats. Thus, in both *Hamilton* and *Jindra*, the evidence supported a reasonable inference that the defendant expected and intended that his threats would be relayed to the judicial officer. In this case, by contrast, the people with

whom McNabb communicated (his girlfriend and family members) had no relationship to prosecutor Shields, and were under no professional obligation to inform him of McNabb's threats.

McNabb's conviction cannot be sustained on the basis that, while he was speaking to his step-father, his sister Meladie was on the phone with a 9-1-1 dispatcher, relaying some of what McNabb was saying. The recording of Meladie's 9-1-1 call makes clear that McNabb had told his step-father his intentions before Meladie ever called 9-1-1. Moreover, there is no indication from the recording that McNabb was aware that Meladie was, or would be, speaking with law enforcement when he made any of his threatening statements. Notably, Meladie testified that McNabb became angry when he later learned that she had called 9-1-1. Far from showing that McNabb acted with the purpose of communicating with Shields, this indicates that he intended his threatening statements to go no further than his family.

As the majority recognizes, while we give the State the benefit of every reasonable inference from the evidence, we "may not supply missing evidence or give the State the benefit of unreasonable, speculative, or forced inferences." *State v. Hunt*, 451 S.W.3d 251, 257 (Mo. 2014). A finding that McNabb acted with the purpose of communicating threats to Shields, in order to harass or intimidate Shields or to influence his conduct, goes beyond permissible inferences supported by the evidence, into the realm of pure speculation. As the Eastern District has recently explained,

An "inference" is different from a "supposition," a supposition being a conjecture based on the possibility that a thing could have happened. It is an idea or a notion founded on the probability that a thing may have occurred, but without proof that it did occur. A criminal conviction cannot be based upon probabilities and speculation.

State v. Kinsella, 578 S.W.3d 802, 815 (Mo. App. E.D. 2019) (citations and internal quotation marks omitted).

State v. Keeler, 856 S.W.2d 928 (Mo. App. S.D. 1993), illustrates the fatal gap in the State's evidence in this case. In *Keeler*, a nine-year-old girl missed her school bus, and began walking to her school. *Id.* at 929. As she was doing so, the defendant drove by in his car. After passing the girl, the defendant "made a U-turn, pulled his car alongside her, and stopped"; he then "opened the passenger door, pointed to the passenger seat, and told her to get into the car." *Id.* The victim refused, and alerted authorities. *Id.* The defendant was convicted of attempted kidnapping. The offense required that the defendant have attempted to remove or confine the victim for certain specific purposes, such as to facilitate commission of a felony, inflict physical injury, or terrorize the victim. § 565.110.1, RSMo 1986.

The Southern District reversed the defendant's conviction. The Court acknowledged that the evidence was sufficient to establish that the defendant intended to confine or remove the victim. *Id.* at 930. But the Court found that the evidence was insufficient to establish the purpose for which he acted.

The state insists at oral argument that the defendant's purpose is "inferable" from his actions in attempting to get [the victim] into his car and from "a certain interest in little girls" as indicated by his waving "real big" to "other little girls" as he drove through Carthage. The question remains: For what purpose?

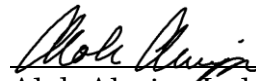
Based on the record before us, to say that the defendant's purpose in getting [the victim] into his car was to commit a felony, to inflict physical injury on her, or to terrorize her or another is nothing but sheer speculation. While it might be argued that the defendant, an adult unknown to [the victim], knew that a nine-year-old child's response, had she entered the defendant's vehicle, would have been one of terror, such knowledge, as defined in § 562.016.3, is not the requisite mental state of acting purposely, as defined in § 562.016.2.

While it is true that a defendant's purpose rarely is susceptible of direct proof, here there is no evidence from which a jury reasonably could infer the defendant's purpose.

856 S.W.2d at 931 (citation omitted).

The same is true here. The evidence establishes that McNabb was in an agitated state, and called multiple members of his family, and his girlfriend, to express what he was feeling and what he intended to do. But it is “nothing but sheer speculation” to suggest that McNabb acted with the purpose of influencing or causing alarm to prosecutor Shields when he reached out to his family at a time of deep emotional turmoil. Without *some* evidence that McNabb wanted his threats to be communicated to Shields, or even that he was aware that his statements were being relayed to law enforcement, there was no basis for the jury to find that he acted “with the purpose to harass, intimidate or influence” Shields. § 575.095.1(1).

“[I]t is the obligation of the State to prove a criminal case beyond a reasonable doubt. It is not the function of the court to ignore its failure.” *State v. Hatfield*, 351 S.W.3d 774, 782 (Mo. App. W.D. 2011) (citations and internal quotation marks omitted). Because the State failed to prove that McNabb acted with the purpose to harass, intimidate, or influence a judicial officer, his conviction for tampering with a judicial officer must be reversed.


Alok Ahuja, Judge