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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

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STATE OF NORTH DAKOTA

State of North Dakota, )  
)  
Plaintiff/Appellee, ) Supreme Court No. 20090020  
)  
vs. ) District Court No. 09-08-01016  
)  
Scott Thomas Boyle, )  
)  
Defendant/Appellant. )  
\_\_\_\_\_ )

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**Brief of Defendant/Appellant Scott Thomas Boyle**

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Appeal from Criminal Judgment entered  
January 7, 2009, in District Court, County of Cass,  
State of North Dakota, The Honorable Steven L. Marquart

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### **¶3 Statement of the Issues**

**Did The District Court Err as a Matter of Law when it ruled that the Conduct Constituting the Factual Basis for the Information—Boyle’s Telephone Calls to Carter on February 20 and 21, 2008—Was Not Constitutionally Protected?**

**Was the evidence was sufficient to sustain the conviction?**

### **¶4 Statement of the Case**

¶5 This is an appeal by Scott Thomas Boyle from the Criminal Judgment entered by the Honorable Steven L. Marquart, East Central Judicial District Court, on January 7, 2009. (Appendix 5; Docket No. 56).<sup>1</sup> Appellant Scott Thomas Boyle (hereinafter Mr. Boyle) was charged with Violation of a Disorderly Conduct Restraining Order pursuant to **N.D.C.C. § 12.1-31.2-01**, a Class A Misdemeanor, by Amended Information dated January 5, 2009. (App. 3; D. 1). The case was tried to a jury of six on January 6, 2009. (Transcript of proceedings). The jury returned a verdict of guilty. (D. 52). Sentencing occurred on January 6, 2009. The Court sentenced Mr. Boyle to one year in the custody in the Cass County Jail, all suspended for a period of one year of unsupervised probation following incarceration. Fines and fees totaling \$500.00 were ordered reduced to a civil judgment. (App. 7).

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In the brief, the Docket will be abbreviated D, the Appendix App, and the Trial Transcript T, and the Pretrial Conference Transcript PCT.

## ¶6 Statement of the Facts<sup>2</sup>

¶7 On November 15, 2007, after a hearing in Cass County District Court, Judge Cynthia Rothe-Seeger signed a Disorderly Conduct Restraining Order (hereinafter the Order) in favor of Jennifer S. Carter and against Mr. Boyle. The Order contained several provisions, including language directed to Mr. Boyle that: "You will be in violation of this order if you: Call, write, or have messages delivered to the Petitioner, Jennifer Carter through anyone other than your attorney, including via email." A redacted version of the Order was received in evidence as State's Exhibit 1. (T. 18-19; App. 4; D. 48)(The district court ordered that all language not applicable to the allegations in the case be redacted (PCT. 20-23)).

¶8 This case was distilled to the allegation that two voice mail messages left by Mr. Boyle violated the language in the Order quoted above. The messages were played for the jury, and a written version of the messages was received in evidence. The tape itself was received in evidence as State's Exhibit 2, and the "transcript" of the messages was received in evidence as State's Exhibit 3. (T. 21-24; App. 5; D. 49 & 50) See Amended Information, App. 3; D. 43.

¶9 This Court is somewhat familiar with the action which resulted in the issuance of the Order. On October 2, 2007, Jayne Hutchinson (Boyle's daughter's maternal grandmother) and Jennifer Carter each moved for a disorderly conduct restraining order against Boyle. ***Hutchinson v. Boyle*, 2008 ND 150, ¶ 2, 753**

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<sup>2</sup>

The record appears to support the proposition that the facts are not so much disputed by the parties, but the parties certainly have a different interpretation of the facts.

**N.W.2d 881.** Carter claimed she feared for her safety and the safety of their daughter. *Id.* Carter stated that Boyle made "harassing phone calls to her and her family, saying he was going to take his daughter away. She stated she has recorded phone messages in which Boyle is making disparaging remarks toward her." *Id.* Hutchinson's affidavit stated she observed Boyle make an obscene gesture towards her and climb up the balcony to her third-floor apartment. *Id.* On October 3, 2007, the district court issued a temporary restraining order based on Boyle's alleged conduct. *Id.*

¶10 Boyle responded to the Hutchinson and Carter affidavits by noting he made phone calls to Carter in an attempt to speak with his daughter. *Id.* at ¶ 3. The family court order in case number 09-04-R-00582 provided that Boyle could contact his daughter by telephone once per day. *See Id.* Boyle "stated the phone messages were constitutionally protected speech and did not threaten Carter's safety." *Id.* Boyle denied climbing Hutchinson's balcony and asserted that even if he did flip Hutchinson off, it was a constitutionally protected activity. *Id.*

¶11 Nevertheless, the district court entered a disorderly conduct restraining order after a hearing against Boyle, which prohibited him from:

- 1) having any physical contact with or coming within 100 feet of Hutchinson or Carter; 2) **calling, writing, or leaving messages for Hutchinson or Carter, except through an attorney**, and 3) coming within 100 feet of Hutchinson's or Carter's place of employment.

*Id.* at ¶ 4 (emphasis added). The Order did not address Boyle's rights to reasonable access to his daughter as set forth in the separate family court order, nor did it specifically address Boyle's claims that his conduct was constitutionally protected activity.

¶12 Boyle appealed, contending the district court erred in issuing the Order because it “failed to address his claims that his alleged actions are constitutionally permissible—specifically, the obscene gesture toward Hutchinson and the phone messages to Carter.” *Id.* at ¶ 6. The Order was not stayed pending the appeal. The appeal was argued on May 23, 2008, where counsel for the Appellees conceded that the Order should not interfere with Boyle's right to contact his daughter through contact with Jennifer Carter. *See Id.* at ¶ 10 n.1 (noting that “this case could have presented a potential conflict between the terms of the restraining order appearing to prohibit any contact with Carter, except through an attorney, and the visitation order providing for Boyle's right to contact with their child through Carter, Carter agreed that the order is not to interfere with Boyle's right to contact his child through her.”). On July 28, 2008, this Court issued its opinion, which reversed and remanded the matter to the district court for consideration of Boyle's constitutional claims. *Id.* at ¶ 11. The Court specifically admonished the district court and law enforcement that “if a restraining order is issued on remand, it should reflect Carter's acknowledgment that the order does not interfere with Boyle's right to contact their child through Carter.” *Id.* at ¶ 10 n.1.

¶13 Mr. Boyle's defense counsel filed a pre-trial Motion for a Bill of Particulars, which the district court granted. (D. 27 & 31). The State filed a Bill of Particulars and an Addendum to Bill of Particulars. (D. 33 & 35). In the original Information dated March 10, 2008, filed while Boyle's appeal of the Order was pending, the State charged Boyle with violating the Order between January 6, 2008 and January 14, 2008, and on February 21, 2008. (D. 1). In the Bill of Particulars,

dated December 26, 2008, the State disclosed that Boyle violated the Order by leaving two voicemail messages for Carter on February 20 and 21, 2008. Specifically, the State's Bill of Particulars alleged that Boyle violated the "[c]all, write or have messages delivered to the Petitioner, Jayne Hutchinson or the Petitioner, Jennifer Carter through anyone other than your attorney, including via email[.]" provision of the Order. **See** State's Bill of Particulars, at 1, (D. 33). In its Bill of Particulars, the State also alleged Boyle's "messages were directed at Jennifer Carter and that the extent and subject matter of the two messages demonstrate that the Defendant was not exercising his right to contact his daughter but, rather, was directing his comments at Carter and was criticizing and attempting to belittle Carter." *Id. at 2*.

¶14 Mr. Boyle has contended throughout that in making the calls, he was exercising his right to contact his daughter through Carter as allowed by the family court order and that his conduct was constitutionally protected. (**See** Defendant's Motion in Limine, D. 40). The district court declined to rule that Mr. Boyle's calls were constitutionally protected. (PCT. 15). However, the district court made a ruling and fashioned a jury instruction favorable to Mr. Boyle. (App. 6). Even though the Order did not contain any language which allowed Mr. Boyle to contact his daughter through Jennifer Carter at the time Mr. Boyle was alleged to have violated it, the district court ruled that this Court had created the law of the case in its opinion in *Hutchinson v. Boyle*, 2008 ND 150, ¶ 10 n.1, 753 N.W.2d 881. Thus, the district court fashioned and gave the instruction which stated: "Under the Disorderly Conduct Restraining Order, the Defendant has a right to have contact



with their child through Jennifer Carter. If you find that Defendant's contact with Jennifer Carter was for that purpose, the Defendant is not guilty of violating the Disorderly Conduct Restraining Order." (App. 6). Although the district court declined to rule that Mr. Boyle's messages were constitutionally protected and refused to dismiss the charge or grant the Defendant's Rule 29 Motion for a Judgment of Acquittal (PCT. 15 & T. 35), the district court allowed the jury the option of deciding that Mr. Boyle's conduct was "protected" by his right to have contact with his daughter.

¶15 As a result of the pretrial motions and rulings made outside the presence of the jury, the trial itself was abbreviated. Only two witnesses testified. Whether the Order had been issued, whether Mr. Boyle had knowledge of the Order, and whether the Order was in effect at the time the two calls at issue were made were not "contested issues." The jury was left with deciding whether the two voice mail messages and/or any of their content violated the narrow provision of the Order: "You will be in violation of this order if you: Call, write, or have messages delivered to the Petitioner, Jennifer Carter through anyone other than your attorney, including via email." Again, a redacted version of the Order was received in evidence as State's Exhibit 1. (T. 18-19; App. 4; D. 48).

¶16 Mrs. Jennifer Carter Osmundson (her surname changed in the interim) testified that the visitation arrangement between her and Mr. Boyle remained unchanged after the Order was issued. (T. 20). The Order was not meant to interfere with Mr. Boyle's phone contact with his daughter. (T. 21). Asked how she felt about receiving the messages, she stated "I'm not comfortable with his voice at

all." (T. 26). She conceded that Mr. Boyle and she had recently attended a school event together and had contact at that event, in accordance with the family court order. (T. 27). The child was provided a phone to allow Mr. Boyle to talk to his daughter, and it was on that phone that the messages at issue were left. (T. 27). She claimed that the phone has a unique ring for Mr. Boyle's calls, and that since she was three years old, the child was able to recognize the ring, answer the phone herself and shut the phone off herself. (T. 29).

¶17 Fargo Police Officer Daniel Hanson testified that he had a conversation with Mr. Boyle in January 2008. (T. 32). They discussed the Order, and he quoted Mr. Boyle as saying that he did not " 'care what the Order says,' and that he went on to say that he felt that the Court Order 'imposed on his parental rights.'" (T. 32). In addition, Mr. Boyle had stated to Officer Hanson that his only intent was to talk to his daughter, and he was frustrated by Carter because he felt she was telling his daughter to hang up on him and that she cuts off his calls to his daughter. (T. 33). Mr. Boyle also told the officer that Jennifer had called him three times over the past weekend and he had not returned the calls because he did not want to talk to her, and the only reason they have any contact is because they have a child together. (T. 33).

### ¶18 Argument<sup>3</sup>

**¶19 The District Court Erred as a Matter of Law when it ruled that the Conduct Constituting the Factual Basis for the Information—Boyle's Telephone Calls to Carter on February 20 and 21, 2008—Was Not Constitutionally Protected.**

¶20 Mr. Boyle filed a pre-trial Motion in Limine to preclude the State from introducing evidence of constitutionally protected activity, including the content of the telephone messages relied upon by the State. (D. 40). The district court declined to rule that the calls were constitutionally protected. (PCT. 15).

¶21 "Whether speech is constitutionally protected is a question of law and should not be submitted to the jury." *State v. Curtis*, 2008 ND 93, ¶ 7, 748 N.W.2d 709. In *Curtis*, the Supreme Court held:

Whether speech is constitutionally protected is a question of law and should not be submitted to the jury. *See Wren v. Spurlock*, 798 F.2d 1313, 1318 (10th Cir. 1986), *cert. denied*, 479 U.S. 1085 (1987); N.D.C.C. § 12.1-31-01(2) (In disorderly conduct cases, the court is charged with determining the validity of a constitutionally protected activity argument. Constitutionally protected evidence shall be excluded.). Generally, a defendant wanting to advance a "constitutionally protected activity" argument must raise it through a motion in limine. *State v. Barth*, 2005 ND 134, ¶ 10, 702 N.W.2d 1. Evidence found to be constitutionally protected by the court is inadmissible and should be held from the jury. *Id.* In *Barth*, a defendant was ultimately allowed to raise his constitutional argument through a **Rule 29, N.D.R.Crim.P.**, motion for judgment of acquittal. *Barth*, at ¶ 10. This Court, however, noted a motion in limine to exclude the evidence would have been "more effective." *Id.*

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<sup>3</sup> In filing this brief and making the arguments herein, the undersigned attorney is mindful of his obligations as a State Public Defender appointed to represent an indigent defendant on this appeal. *See State v. Vondal*, 1998 ND 188, ¶¶ 27-29, 585 N.W.2d 129, *citing State v. Lewis*, 291 N.W.2d 735 (N.D. 1980).

**2008 ND 93, ¶ 7, 748 N.W.2d 709.** When the issue has been preserved through a motion in limine, the district court's determination of whether speech is constitutionally protected is fully reviewable on appeal. *Id.* at ¶ 10.

¶22 Mr. Boyle believes the messages he left on Carter's answering machine are constitutionally protected free speech. Furthermore, Mr. Boyle has a right to the companionship, care, custody, and management of his child. *See Hoff v. Berg, 1999 ND 115, ¶ 8, 595 N.W.2d 285; see also Santosky v. Kramer, 455 U.S. 745, 753 (1982).* Absent a powerful countervailing interest, Mr. Boyle's desire for and right to the companionship, care, custody and management of his child is an important interest that warrants deference and protection. *See Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981); see also Washington v. Glucksberg, 521 U.S. 702, 720 (1997)* (The Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests" including the right "to direct the education and upbringing of one's children."); *Wisconsin v. Yoder, 406 U.S. 205, 232-33 (1972)* ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nature and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.").

¶23 In the messages Boyle left on Carter's answering machine on February 20 and 21, 2008, Boyle was merely attempting to contact his child through Carter and protect his fundamental Due Process rights to parent his child. (App. 5, D. 50). In his February 21, 2008, 7:53 p.m. voicemail, Mr. Boyle expresses concern in that

he cannot have meaningful access to his daughter by telephone. He specifically asks Carter to inform his daughter that he will see her the next day at 4:00 o'clock.

Mr. Boyle stated:

I'm telling you that tomorrow I will be at Rainbow Bridge at 4:00 o'clock. ***Why don't you tell her [Boyle's daughter] that.*** (Inaudible) leave her a message so that you can listen to it because this isn't for you [Carter]. I don't care if I ever talk to you [Carter] again. ***I have to speak with my daughter. That's who this call is for.*** And you keep interfering and keeping me from talking with her. ***Call me back so I can talk to my daughter.***

**See** State's Exhibit 3. (App. 5, D. 50) (emphasis added). This type of contact shows Boyle's concern with speaking with his daughter, not Carter. In essence, the messages in their entirety show Boyle's concern for protecting his fundamental right to parent his daughter. The State's position at trial was that in these messages, Mr. Boyle criticized, lectured and belittled Jennifer, and the comments were directed at Jennifer, not their daughter. (T. 42 & 43). The reality, however, is that Mr. Boyle's child is very young, and his telephone contact with her does depend upon the good faith efforts of the mother, Jennifer, who provides and has control over the telephone. (T. 27 & 29).

¶24 The context, content, and nature of the contact, in conjunction with the family law court order, this Court's previous acknowledgement of Boyle's rights to contact his child through Carter, and the re-issued restraining order allowing Boyle to contact his daughter through Carter, all lead to the conclusion that Mr. Boyle's messages were constitutionally protected. Accordingly, this Court should reverse the Judgment and remand to the district court with the directive that the charge be dismissed with prejudice.

**¶25 The evidence was insufficient to sustain the conviction.**

**¶26** Trial Counsel for Mr. Boyle made a Motion for a Judgment of Acquittal pursuant to **N.D.R.Crim.P. 29(a)** at the close of the State's case. (T. 100-101).

**¶27** This Court discussed the legal issue of the sufficiency of the evidence in **State v. Yineman, 2002 ND 145, 651 N.W.2d 648**. Mr. Boyle preserved this issue on appeal when he made his Motion for a Judgment of Acquittal pursuant to **N.D.R.Crim. P. 29(a)** at the close of the State's case. **Yineman at ¶14**. In **Yineman**, this Court stated the standard of review as follows:

Evidentiary sufficiency and evidentiary weight are distinct concepts. In **State v. Kringstad**, we explained:

A conviction rests upon insufficient evidence when, even after viewing the evidence in the light most favorable to the prosecution and giving the prosecution the benefit of all inferences reasonably to be drawn in its favor, no rational factfinder could have found the defendant guilty beyond a reasonable doubt. When a court, be it an appellate court or a trial court on motion for entry of a judgment of acquittal, concludes that evidence is legally insufficient to support a guilty verdict, it concludes that the prosecution has failed to produce sufficient evidence to prove its case. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution bars retrial in such a case.

**353 N.W.2d 302, 306 (N.D. 1984) (citations omitted).**

**¶28** Based upon this standard, Mr. Boyle believes that the State did not prove that he committed the charged offense. Mr. Boyle asserts that there are many significant problems with the proof and that, taken together, the evidence of record is insufficient as to that proof.

**¶29** The fact that Mr. Boyle made the calls and left the messages was not contested. The only issue was whether the messages constituted a violation of the

Order. Given the Court's "special" instruction, it was not rational on this record for the jury to find Mr. Boyle guilty. The entire subject of all of his statements had to do with his ongoing efforts to have meaningful contact with his daughter. Given the totality of the circumstances, the district court should have dismissed the charge.

**¶30 Conclusion**

¶31 The judgment of the district court should be reversed, and this Court should order that the charge against Mr. Boyle be dismissed, or in the alternative, order the entry of a Judgment of Acquittal.

Respectfully submitted this 20<sup>th</sup> day of April, 2009.



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