

IN DISTRICT COURT, BARNES COUNTY, NORTH DAKOTA

State of North Dakota,                     )  
  )  
                  Plaintiff,                 ) **MEMORANDUM OPINION AND ORDER**  
          vs.                                 )  
  ) 02-2015-CR-391  
Brian Mindt,                                 )  
  )  
                  Defendant.                )

[¶1] A bench trial was held on April 11, 2016. Defendant Brian Mindt appeared with his attorney, Brian Nelson. Barnes County Assistant State's Attorney Lilie Schoenack appeared on behalf of the State. The defendant was charged with Disorderly Conduct in violation of Subsections 1(a) or 1(c) of NDCC §12.1-31-01. [Amended Information, Docket #34]. I find the State has proven beyond a reasonable doubt that the defendant violated Subsection 1(a) by engaging in tumultuous or threatening behavior with intent to harass, annoy, or alarm Sergio Hidalgo.

[¶2] Sergio Hidalgo testified that he stopped in the alley behind Mindt's business, Iron Stallion, to make a delivery in the late morning of September 29, 2015. The video collected from the Iron Stallion's surveillance camera (State's Exh. 2) shows Hidalgo's Fed Ex van arriving at approximately 11:25 a.m. Hidalgo said he knocked on the back door; the defendant's son opened the door and told Hidalgo that his dad (the defendant) had to sign for the package. Hidalgo testified that Mindt met him at the front counter of the store. Hidalgo had been told to use a "special knock" at the back door so the Mindts would know he was a delivery driver. Hidalgo testified that he did not use the "special knock" because his supervisor had told him that he (Hidalgo) was not required to do so. Hidalgo testified that his Fed Ex van was clearly visible on the video surveillance monitors located in the shop area and at the front counter of the Iron Stallion.

[¶3] Hidalgo testified that the defendant was angry about Hidalgo's failure (or refusal) to use the "special knock." Hidalgo testified that Mindt told him, "You're going to listen to me [about using the special knock], you [REDACTED]." Hidalgo said he told Mindt "this conversation is over," and turned to leave; Mindt tried to block his path, still shouting that Hidalgo had to listen to him. Hidalgo continued out the back door, with the defendant following and yelling. The video shows Hidalgo was in the store for 45 seconds (11:25:43 to 11:26:28), and that Mindt came out two seconds after Hidalgo (11:26:30). [See State's Exh. 2].

[¶4] Hidalgo proceeded to the rear of his van with the defendant right behind him. Hidalgo testified that he closed the left (driver side) rear door, but was unable to close the right rear door because Mindt was in the way. Hidalgo testified that Mindt was "chest to chest" with him, and tried to "corner" Hidalgo against the open door. Hidalgo managed to slip away, at which point Mindt sat down in the rear cargo area. Hidalgo testified that Mindt was shouting and using obscenities throughout the confrontation. The video shows the left rear door was closed at 11:26:31; the right door remained open.

[¶5] Hidalgo testified he told Mindt that he (Hidalgo) was going to take Mindt with him to his next stop if Mindt wouldn't get out of the van; Mindt refused to get out, so Hidalgo walked toward the front of the van. The video shows Hidalgo emerging from behind the Fed Ex van at 11:26:55; the defendant emerges two seconds later. Hidalgo testified he opened the driver's door, at which point Mindt stepped into the open door area. The defendant reached into the van and "punched" the radio knob, shouting "stop listening to this nigger fucking music." Hidalgo testified he told Mindt, "I'm calling the cops now," to which Mindt replied, "The [REDACTED] you are." The video shows Hidalgo opened the door at 11:27:06; at 11:27:12 the defendant stepped into the open door; at 11:27:16 the defendant is reaching inside the van. [See State's Exh. 3]. Hidalgo did call 911. At 11:27:49, the video shows Mindt stepping away from the driver's door and

Hidalgo closing the door. Hidalgo then walked to the back of the van and closed the right rear door (11:27:59). At 11:28:25 a police car arrives at the scene.

[¶6] Hidalgo testified that he was not going to be provoked into fighting with Mindt because Hidalgo did not want to lose his job. Hidalgo said he was not scared of Mindt, but testified that he “felt threatened” when Mindt tried to “corner” him against the rear door of the Fed Ex van.

[¶7] Lisa Peltier testified that she witnessed the events in the alley while waiting at the drive-up window of Valley Drug. Peltier’s vehicle is visible in the video; she stopped at the drive-up window approximately 45 seconds before Hidalgo went in the back door of Mindt’s business. Peltier testified she had her window down and could hear Mindt yelling at Hidalgo, and that she heard the “F-word” many times. She saw Mindt try to corner Hidalgo against the rear door of the van. Peltier testified that the scene “made me very nervous for the Fed Ex man” and that she “couldn’t imagine what he (Hidalgo) had done” to make the defendant so angry. Peltier’s account of the incident differed from Hidalgo’s testimony and the video evidence in various details, but the thrust of her testimony was consistent with Hidalgo’s, i.e., Mindt was angry, yelling, cursing, and physically aggressive toward Hidalgo.

[¶8] Mindt’s testimony directly contradicted that of Hidalgo and Peltier. Mindt testified that he never yelled at Hidalgo, either in the store or in the alley; he said the incident started when he politely asked Hidalgo to “please” use the secret knock; Hidalgo replied, “I’m not ~~hitting~~ doing that” and headed for the back door. Mindt testified that he never used the “F-word,” the “N-word”; he denied yelling or using obscenities, and said he was calmly trying to talk to Hidalgo outside but Hidalgo refused to listen. Mindt testified that he never interfered with Hidalgo’s freedom of movement. He said he never tried to block Hidalgo’s path but did follow Hidalgo out of the store; Mindt admitted to reaching inside the van to shut off the radio, but claimed he did so only because the music was so loud that he couldn’t hear what Hidalgo was saying.

[¶9] I find Hidalgo's testimony more credible than the defendant's. Hidalgo's version of the confrontation is consistent with Peltier's testimony; Mindt's version requires the court to believe that Peltier fabricated her story out of whole cloth, and there is no evidence that Peltier had a motive to commit perjury on Hidalgo's behalf. The defendant contends that Peltier's credibility is suspect because she was taking prescription oxycodone pills; however, the investigating officer, Dana Rustebakke, testified he talked to Peltier that morning, and did not see any signs that her perception or cognition was impaired. The video is consistent with Hidalgo's testimony; the only plausible explanation for why Hidalgo closed the left rear door of the van but the right rear door remained open is that Mindt was preventing Hidalgo from closing it. Mindt did not move out of the driver's door area until Hidalgo had called the police, and in general Mindt's movements are consistent with someone who was trying to force Hidalgo to listen to him, not calmly trying to engage in a conversation.

[¶10] I find the evidence proves beyond a reasonable doubt that Brian Mindt intended to harass, annoy, or alarm Sergio Hidalgo, by interfering with Hidalgo's freedom of movement at the rear of the van and preventing Hidalgo from entering the driver's compartment, while shouting obscenities and epithets at Hidalgo. I find beyond a reasonable doubt that Mindt's conduct in physically interfering with Hidalgo's freedom of movement, while shouting obscenities and racial epithets at Hidalgo, constituted tumultuous and threatening behavior. I therefore find Mindt guilty of disorderly conduct.

[¶11] Mindt contends that his words constituted constitutionally-protected speech which cannot be considered as evidence of disorderly conduct under the decision in City of Bismarck v. Schoppert, 469 N.W.2d 808 (N.D. 1991). In Schoppert, the Supreme Court held "it is not a crime to be a boor, absent resort to fighting words. [F]ighting words are 'personally abusive epithets which, when addressed to an ordinary citizen are, as a matter of common knowledge, inherently likely to provoke violent reaction'." Id. at 811-812. I will assume without deciding that Mindt had a constitutional


right to stand in a public alley and yell boorish and offensive comments at Hidalgo. But he did not have a First Amendment right to shout those comments directly into Hidalgo's face, so loudly that Lisa Peltier could hear them inside her car approximately 100 feet away, while physically obstructing Hidalgo's freedom of movement on a public right of way. Hidalgo testified he was not going to let Mindt provoke him into a fight and cost Hidalgo his job. Nonetheless, Mindt's words constituted fighting words, as both their content and their manner of delivery were inherently likely to provoke a reaction from an ordinary citizen. Mindt's verbal conduct, in combination with his physical aggressiveness, was tumultuous and threatening, and it constituted disorderly conduct beyond a reasonable doubt.

[¶12] THEREFORE, IT IS HEREBY ORDERED that a judgment shall enter finding the defendant, Brian Mindt, GUILTY of the offense of disorderly conduct.

[¶13] IT IS FURTHER ORDERED that the parties shall advise the court whether they want a sentencing hearing in this matter, or will submit written sentencing recommendations for the court's consideration.

Dated: April 27, 2016.

BY THE COURT:



Jay Schmitz, Judge of the District Court