

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

KATHERINE DENISE BURNS,

Appellant,

-vs.-

THE STATE OF OKLAHOMA,

Appellee.

NOT FOR PUBLICATION

No. M-2010-341

**FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA**

NOV 18 2011

SUMMARY OPINION

C. JOHNSON, JUDGE:

**MICHAEL S. RICHIE
CLERK**

In a non-jury trial in the District Court of Seminole County, Case No. CM-2008-106, the Honorable Gary Snow, District Judge, found Appellant, Katherine Denise Burns, guilty of Harassment by Use of an Electronic Device in violation of 22 O.S.Supp.2005, § 1172(A)(4), and on June 10, 2009, sentenced Appellant to six (6) months in jail, suspended. Appellant appeals her conviction¹ and raises claims concerning the adequacy of the charging Information (Proposition I) and the sufficiency of the evidence for conviction (Proposition II) in addition to four other propositions of error. As the Court resolves this appeal under Propositions I and II, discussion of Appellant's remaining propositions of error is unnecessary.

The State's Information alleged Appellant

... did then and there unlawfully, willfully, knowingly and wrongfully commit the crime(s) of:

COUNT 1 21 O.S. § 1172(A)(1) ~ HARASSMENT BY USE OF AN ELECTRONIC DEVICE a MISDEMEANOR, on or about the 5th day of March, 2008, by text messaging Jennifer Johnson with the intent to annoy, abuse, threaten, and harass.

¹ This Court granted Appellant an out-of-time appeal of her Judgment and Sentence in Appellate Case No. PC-2009-598.

(O.R. 1.) At trial, the State offered evidence that during the morning of March 5, 2008, Appellant sent three text messages from her cell phone to the personal cell phone of Jennifer Johnson. The first of those message stated, "Do you recognize this number," and set out a nine-digit number that was Johnson's social security number. The second text message, sent several hours later after Johnson had called Appellant's cell phone and received a voice mail message that Johnson recognized as that of Appellant's, said, "I know more about you than you think." Appellant then sent a third text that set out Johnson's home address.

Subsection (A)(1) of Section 1172, of Title 21 of the Oklahoma Statutes, is the statutory provision the State's Information alleged Appellant violated. That particular subsection, prohibits an electronic communication that "[m]akes any comment, request, suggestion, or proposal which is obscene, lewd, lascivious, filthy, or indecent." 21 O.S.Supp.2005, § 1172(A)(1). The content of the above text messages cannot constitute a violation of that provision. In response to Appellant's Proposition I claiming that the Information was insufficient, the State argues that the Count 1 allegations "substantially tracked the language set forth in subsection (A)(4) of section 1172," and thus the State was alleging a violation of that provision. (Answer Br. at 6.)

Subsection (A)(4) of Section 1172 prohibits a person "by means of a telecommunication or other electronic communication device" from "[m]ak[ing] a telecommunication or other electronic communication, whether or not conversation ensues, without disclosing the identity of the person making the call or communication and with intent to annoy, abuse, threaten, or harass any person at the called number." 21 O.S.Supp.2005, § 1172(A)(4). Under this provision, a conviction requires proof that the identity of the person making the

call or communication is not disclosed. See Instruction No. 4-32A, OUI-CR (2d) (Supp. 2011).

In Appellant's matter, the evidence at trial revealed that Appellant's cell phone number was disclosed as part of each transmission of the text messages. No evidence was presented that Petitioner did anything to prohibit this disclosure of her cell phone number or otherwise acted to hide her identity from Johnson. To the contrary, the evidence revealed that Appellant's second and third text messages were in response to calls or messages that Johnson had intentionally made or sent to the cell phone of Appellant. The evidence further revealed that numerous cell phone calls and text messages between the cell phones of these two individuals had been exchanged beginning as far back as November of 2007. Appellant's cell phone number was no secret as concerned Johnson, a 911 operator, and was sufficient to disclose her identity to Johnson. After receiving the first text message, Johnson responded and promptly confirmed who had sent it and testified to being familiar with the sender of the messages. Because the State's evidence lacked proof sufficient to establish nondisclosure of the sender's identity, a rational trier of fact could not have found this essential element of the crime charged beyond a reasonable doubt.² Where evidence is insufficient to prove commission of the crime charged, the remedy is reversal with instructions to dismiss.³

DECISION

The Judgment and Sentence of the District Court of Seminole County, Case No. CM-2008-106, finding Appellant, Katherine Denise Burns, guilty of

² *Spuehler v. State*, 1985 OK CR 132, ¶ 7, 709 P.2d 202, 203-04.

³ *Mitchell v. State*, 2005 OK CR 15, ¶ 57, 120 P.3d 1196, 1210-11, *J.A.M. v. State*, 1988 OK CR 10, ¶ 10, 749 P.2d 116, 119. *Cummins v. State*, 6 Okl.Cr. 180, 183, 117 P. 1099, 1100 (1911).

Harassment by Use of an Electronic Device and sentencing her on June 10, 2009, to six (6) months in jail, suspended, is **REVERSED WITH INSTRUCTIONS TO DISMISS**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2011), **MANDATE IS ORDERED ISSUED** upon the filing of this decision.

AN APPEAL FROM DISTRICT COURT OF SEMINOLE COUNTY,
THE HONORABLE GARY SNOW, DISTRICT JUDGE

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**OPINION BY: C. JOHNSON, J.
A. JOHNSON, P.J.: CONCUR
LEWIS, V.P.J.: CONCUR
LUMPKIN, J.: CONCUR
SMITH, J.: CONCUR**

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