Jury Instruction's Erroneous Definition Of "Harass" Results In Tossed Conviction

Republican Party official James Tobin was federally prosecuted and convicted in 2005 of two counts related to a telephone scheme intended to interfere with voting by New Hampshire democrats in the November 2002 election. The federal First Circuit Court of Appeals reversed Tobin's convictions, ruling that the trial judge improperly instructed the jury as to the definition of "harass," an element of the crime. The following are excerpts from the Court's decision.

James Tobin

United States v. Tobin
No. 06-1883 (1st Cir. 03/21/2007)

[1] United States Court of Appeals For the First Circuit

[3] 2007.C01.0000085 <http://www.versuslaw.com>

[4] March 21, 2007

[5] United States of America, Appellee,
v.
James Tobin, Defendant, Appellant

[11] A federal statute makes it a criminal offense to "make or cause the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number." 47 U.S.C. § 223(a)(1)(D) (2000). James Tobin was convicted by a federal jury in New Hampshire of conspiracy to commit this offense, and of aiding and abetting another to do so, and now appeals. The events leading to the conviction are as follows.

[12] In 2002, Tobin was New England Regional Director of the Republican National Committee. Prior to the November 2002 election, Tobin traveled to New Hampshire to coordinate VIP visits to the state. During the visit Tobin was approached by Charles McGee, Executive Director of the New Hampshire Republican State Committee. There ensued a conversation regarding a plan by McGee to disrupt the operations of the New Hampshire Democratic Party on election day.

[13] During this conversation McGee asked for the name of someone who might be able to assist in a plan of this sort. Tobin provided the name of Allen Raymond, a longtime acquaintance, who owned a business that coordinated and designed telephone services for candidates and campaigns. Tobin and McGee did not speak again, but Tobin made a telephone call to Raymond to alert Raymond to expect McGee's call.

[14] McGee and Raymond spoke together and e-mailed each other several more times and agreed upon the means of disruption—telemarketers would inundate specified numbers with hang-up calls—and the price for it. … None of these calls or any e-mails were made known to Tobin. McGee provided Raymond with six telephone numbers: five were for Democratic Party phones and one was for the firefighters union, which was offering rides to the polls.

[15] Just as the polls were opening on election day, … for approximately 85 minutes, the phones at the targeted numbers rang almost continuously and the six telephone lines were blocked by repeated hang-up phone calls made by the firm that Raymond had earlier retained.

[16] On May 18, 2005, a federal grand jury returned a superseding indictment charging Tobin with crimes stemming from the phone tie-up in New Hampshire.

[17] McGee and Raymond each pled guilty to a violation of 47 U.S.C. § 223(a)(1)(C). McGee served seven months and Raymond's sentence was reduced to three months after his cooperation at Tobin's trial. Tobin proceeded to trial, which began on December 6, 2005. At trial the government's principal witnesses were McGee and Raymond.

[18] On December 15, 2005, the jury … found Tobin guilty of conspiracy to violate and of aiding and abetting a violation of section 223(a)(1)(D). Tobin was sentenced on May 17, 2006, to 10 months' imprisonment, two years' supervised release, and a $10,000 fine.

[19] Tobin's first and most far-reaching claim of error relates to the proper meaning of section 223(a)(1)(D)'s "intent to harass" requirement. From the outset, the district judge was concerned that the government was seeking to extend the statute from one directed at harassment of the called party to one embracing the disruption of telecommunications systems.

[22] On appeal, Tobin argues that "harass," in the present context, means to cause emotional distress in persons at the called number, that the jury should have been so advised, and that the "good faith" and "unjustifiable motive" language [in the jury instructions] greatly broaden the statute beyond its permissible meaning. The government responds that the attack was not preserved in the district court and is also without merit.

[23] It is true that Tobin did not ask the district judge to use the emotional distress language now urged.

[24] This omission, arguably forfeits this claim – subject always to the plain error doctrine. Whether the plain error test could be met need not be decided because we agree with a companion objection to the instruction which Tobin fully preserved, namely, that (quoting his objection f.):

[25] The references to "an unjustifiable motive" and "reasons other than a good faith effort to communicate" dilute the intent requirement, which is a specific intent to harass, not just any unjustifiable motive or any reason other than a good faith effort to communicate.

[26] We side with Tobin on this single issue. The district judge made a creditable effort to make sense of the perplexing statute. But in the end, the district court's "unjustifiable motive" and "good faith" language, used virtually to define "intent to harass," broadens the statute unduly.

[33] In sum we think that to equate harassment with any repeat calling done in bad faith is to enlarge the scope of the statute. We read subsection (D) to require an intent to provoke adverse reactions in the called party and hold that a bad motive of some other kind standing alone, is not enough.

[34] On our reading, the instruction language was overbroad and clearly prejudicial to Tobin. The government does not and could not make a harmless error argument so a remand is required.

[65] We think it fair to add that despite the unattractive conduct, this statute is not a close fit for what Tobin did.

[66] The judgment of conviction and sentence is reversed; the case is remanded to the district court for further proceedings consistent with this opinion.