

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN DIDOMENICO,

Defendant-Appellant.

UNPUBLISHED

June 3, 1997

No. 184937

Oakland Circuit Court

LC No. 94-135008

Before: Neff, P.J., and Wahls and Taylor, JJ.

PER CURIAM.

Defendant was convicted by a jury of aggravated stalking, MCL 750.411i; MSA 28.643(9), and was sentenced to forty to sixty months' imprisonment. He now appeals as of right. We affirm.

Defendant first argues that the trial judge committed error requiring reversal when she admonished defense counsel to approach the bench. We disagree.

A trial court has wide, but not unlimited, discretion and power in the matter of trial conduct. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). Portions of the record should not be taken out of context in order to show trial court bias against defendant; rather, the record should be reviewed as a whole. *Id.* A trial court's conduct pierces the veil of judicial impartiality where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial. *Id.*

Trial judges who berate, scold, and demean a lawyer so as to hold him up to contempt in the eye of the jury destroy the balance of judicial impartiality necessary to a fair hearing. *People v Wigfall*, 160 Mich App 765, 773; 408 NW2d 551 (1987). A jury trial demands the fact and appearance of judicial impartiality, neither of which should ever be compromised by comments that unfairly belittle defense counsel. *Id.* However, reversal is not required unless the court's conduct denied the defendant a fair and impartial trial by unduly influencing the jury. *Id.*

The record indicates that the trial judge interjected forcefully and asked counsel to approach the bench because she was afraid that the witness would comment on defendant's prior guilty plea. The

fact that the judge could have shown more restraint is not the question; rather, it is whether the court's participation denied defendant a fair and impartial trial by unduly influencing the jury. *Id.* at 774. In this context, the trial court's conduct was a proper attempt to control the conduct of the trial and, therefore, did not unduly influence the jury or deprive defendant of a fair and impartial trial. See *Paquette, supra* at 341.

Defendant next argues that the trial court abused its discretion in allowing the admission of evidence of defendant's telephone conversations. We disagree.

This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *Id.* Error in the admission of evidence is not a ground for reversal if it is harmless. *Id.* at 676. Evidence of a telephone conversation is admissible, unless otherwise objectionable, provided the identity of the person with whom the witness was speaking is satisfactorily established. MRE 901(b)(6); *People v Thompson*, 231 Mich 256, 258; 203 NW 863 (1925). A person may be recognized and identified by his voice if the witness is familiar with it. *Id.* In the present case, the witnesses testified that they were familiar with defendant's voice and that defendant had identified himself. On this record, the trial court did not abuse its discretion in admitting the testimony.

Defendant also objects to the admission of the telephone conversations as hearsay. However, because the statements were made by defendant, they were not hearsay. MRE 801(d)(2)(A).

Defendant next argues that the stalking statute is unconstitutional for three reasons: (1) it violates due process by shifting the burden of proof to defendant; (2) it is unconstitutionally vague; and (3) it invites double jeopardy. We disagree.

This Court reviews double jeopardy issues and the constitutionality of statutes de novo. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995). This Court has recently held that MCL 750.411i; MSA 28.643(9) does not violate due process by impermissibly shifting the burden of proof and is not unconstitutionally vague. *Id.* at 312-314. Therefore, defendant's first two grounds for arguing that the statute is unconstitutional are without merit.

Defendant next argues that the statute invites double jeopardy. In particular, he argues that his conviction for aggravated stalking violated the constitutional prohibition against double jeopardy because he was previously convicted of assault and battery on the basis of some of the same facts used to support his present conviction. We disagree.

The double jeopardy provision of the United States Constitution, US Const, Am V, and its Michigan counterpart, Const 1963, art 1, § 15, protect persons from suffering multiple punishments and successive prosecutions for the same offense. *People v Harding*, 443 Mich 693, 699; 506 NW2d 482 (1993); *White, supra* at 305. Under the Fifth Amendment, the test for whether two offenses are materially indistinguishable so as to prevent double punishment or successive prosecution, is whether each provision requires proof of a fact that the other does not. *Harding, supra* at 700, n 8. An

exception exists when the second conviction is based on facts that had not yet occurred at the time of the first conviction. *Diaz v United States*, 223 US 442; 32 S Ct 250; 56 L Ed 500 (1912); *Harding, supra* at 701. Under the Michigan Constitution, the prosecutor must join at one trial all the charges against a defendant arising out of a single criminal act, occurrence, or transaction. *People v White*, 390 Mich 245, 258-259; 212 NW2d 222 (1973); *White, supra*, 212 Mich App at 305-306. The *Diaz* exception applies under the Michigan Constitution. *Harding, supra* at 704; *White, supra* at 258, n 6.

Defendant was arrested on April 26, 1993, for fourth-degree criminal sexual conduct and assault and battery. He pleaded nolo contendere, and was sentenced on September 13, 1993. According to the information, the charge of aggravated stalking against defendant was based on a credible threat against the victim and the members of her household that defendant made on June 28, 1994. Therefore, because defendant's conviction of aggravated stalking was based on facts that had not yet occurred at the time of the first conviction, it does not violate the constitutional prohibition against double jeopardy. *Diaz, supra* at 442; *Harding, supra* at 701.

Defendant next argues that he was denied the effective assistance of counsel. We disagree.

To prove ineffective assistance of counsel, defendant must prove that trial counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the outcome of the trial would have been different. *People v Stanaway*, 446 Mich 643, 687-688 (1994). Trial counsel is presumed competent, and defendant has the burden of proving that the complained of conduct is not within sound trial strategy. *Id.* Because defendant did not move for a *Ginther*¹ hearing or a new trial on the basis of ineffective assistance of counsel, appellate review is limited to mistakes apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

Defendant argues that he was denied the effective assistance of counsel by trial counsel's stipulation to the amendment of the charge to conform to evidence presented at the preliminary examination. The original complaint against defendant provided that the charge was based on events that occurred on or about March 1994 through June 1994. At the preliminary examination, testimony was introduced concerning events that took place before March 1994, and defense counsel objected. The prosecution moved to amend the complaint to cover the period of March 1993 until June 1994, and defense counsel stipulated to the amendment.

The primary function of the preliminary examination is to determine whether a crime has been committed and, if so, whether there is probable cause to believe that the defendant committed it. *People v Hunt*, 442 Mich 359, 362; 501 NW2d 151 (1993). An examining magistrate may examine not only the truth of the charge in the complaint, but also other pertinent matters related to the charge. The magistrate is not bound by the limitations of the written complaint. *Id.* at 363. The information is not predicated on the complaint or the examination upon which the warrant issues, but rather is presumed to have been framed with reference to the facts disclosed at the examination. *Id.* Because the examining magistrate had the power to consider facts that were not in the original complaint, and to

base the information on those facts, trial counsel's stipulation to the amendment of the complaint to conform with testimony given at the preliminary hearing was reasonable.

Defendant next argues that he was denied the effective assistance of counsel by trial counsel's failure to object to hearsay evidence. Because the evidence in question was not hearsay under MRE 801(d)(2)(A), defense counsel was not ineffective for failing to object. Finally, defendant argues that he was denied the effective assistance of counsel because trial counsel failed to challenge a prosecution witness' inconsistent testimony. On review of the record, we find that the testimony was not inconsistent. Defendant further argues that the trial court abused its discretion in sentencing him to forty to sixty months' imprisonment. We disagree.

This Court reviews a sentencing court's decision under an abuse of discretion standard. *People v McCrady*, 213 Mich App 474, 483; 540 NW2d 718 (1995). A sentencing court abuses its discretion when it violates the principle of proportionality. *Id.* A sentence must be proportionate to the nature of the offense and the background of the offender. *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990); *McCrady*, *supra* at 483. Where a given case does not present a combination of circumstances placing the offender in either the most serious or least threatening class with respect to the particular crime, then the trial court is not justified in imposing the maximum or minimum penalty. *Milbourn*, *supra* at 654. To facilitate appellate review, a sentencing court must articulate on the record the criteria considered and the reasons for a sentence imposed. *People v Newcomb*, 190 Mich App 424, 427; 476 NW2d 749 (1991).

The record indicates that the trial court based its sentence on defendant's prior record and the severity of the offense, as well as the need for discipline and punishment, protection of society, potential for reformation, and deterrence. Because these are all appropriate factors to consider in determining sentence, we find no abuse of discretion. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995).

Affirmed.

/s/ Janet T. Neff
/s/ Myron H. Wahls
/s/ Clifford W. Taylor

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).