

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE THOMAS HOLLAND,

Defendant-Appellant.

UNPUBLISHED

February 8, 2000

No. 197890

Recorder's Court

LC No. 95-001114

Before: White, P.J., and Sawyer and Griffin, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of aggravated stalking, MCL 750.411i; MSA 28.643(9), felonious assault, MCL 750.82; MSA 28.277, and malicious destruction of personal property over \$100, MCL 750.377a; MSA 28.609(1). The trial court sentenced defendant to one and one-half to five years' imprisonment for the aggravated stalking conviction and imposed concurrent terms of one and one-half to four years' imprisonment for the felonious assault and malicious destruction of personal property over \$100 convictions. Defendant now appeals as of right. We affirm.

Defendant first argues that the trial court erred in denying his motion for new trial because his conviction of felonious assault was against the great weight of the evidence. We disagree. Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). An abuse of discretion occurs when the decision was so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias, *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997), or when the reasons given by the trial court for its decision regarding a motion for new trial are inadequate or not legally recognized, *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997). A motion for new trial based on the weight of the evidence should be granted only if the "evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998).

In the present case, defendant was alleged to have used his vehicle to force his ex-wife's father's vehicle off the road. In order to prove the commission of a felonious assault, the prosecution

must prove the following elements: “(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.” *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Here, Raymond Salada was the only witness that testified regarding the assault. He claimed that, in the early morning on December 3, 1994, the day after his daughter’s and defendant’s divorce became final, defendant followed him as he left his house in Detroit. Raymond Salada initially testified that a red van followed him, paced his speed, cut in front of him and forced him off the road. Raymond Salada recognized defendant as the driver of the van. He testified that he was scared by the incident and that he narrowly missed hitting a street light when he was forced off the road. On cross-examination, Raymond Salada admitted that defendant was actually driving a blue Buick, not a red van, and claimed that he had referenced the van because he had confused a prior incident in which defendant engaged in similar conduct with the incident at issue. Despite Raymond Salada’s admission that there were bad feelings between he and defendant and despite his varying accounts of the assault, defendant’s conviction of felonious assault was not against the great weight of the evidence. Raymond Salada offered an explanation for his failure to initially identify the vehicle defendant was driving during the incident and there is no indication that he allowed his personal feelings for defendant to affect the veracity of his testimony. Questions of credibility and intent should be left to the trier of fact to resolve. MCR 2.613(C); *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997). Raymond Salada’s testimony was sufficient to prove the elements of felonious assault. Therefore, the trial court did not abuse its discretion in denying defendant’s motion for new trial based on the weight of the evidence supporting that conviction.

Defendant next argues that there was insufficient evidence supporting his conviction of aggravated stalking. We disagree. When reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985); *Avant, supra* at 505. MCL 750.411i; MSA 28.643(9) prohibits “stalking,” which is defined as

a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested, and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested. [MCL 750.411i(1)(e); MSA 28.643(9)(1)(e).]

Defendant was charged with aggravated stalking based on his violation of an injunction under MCL 750.411i(2)(a); MSA 28.643(9)(2)(a).

Here, defendant does not challenge the sufficiency of the evidence supporting a finding that he engaged in stalking his ex-wife, Christene Salada, but instead, claims that there was insufficient evidence that his conduct violated an injunction to allow a finding that he committed aggravated stalking. The prosecution did not introduce an injunction into evidence at trial. However, viewing the evidence in a light most favorable to the prosecution, Christene Salada’s and Raymond Salada’s testimony was sufficient to establish that a spouse abuse injunction was issued, prohibiting defendant from contacting

Christene Salada at her place of employment, her father's home in Grosse Pointe and the couple's former home in Detroit and that defendant's conduct of stalking his ex-wife violated the injunction. Christene Salada testified that the injunction was issued in August 1994 and that defendant contacted her "[q]uite a few times" in violation of the order. Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993); *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). Defendant claims that there was no evidence that he had knowledge that any injunction had been issued or knew of the terms of the injunction. MCL 750.411i(2)(a); MSA 28.643(9)(2)(a) does not require that a defendant have actual notice of the injunction. Moreover, Raymond Salada's testimony, that he referenced the injunction while speaking to defendant and that defendant indicated he did not care about any papers, is evidence upon which the jury could infer that defendant had knowledge of the injunction.

Defendant's argument that the trial court impermissibly amended the information to allow the jury to convict defendant of aggravated stalking on grounds not originally charged was not preserved by a proper objection to the instruction at trial. See *People v Sabin*, 223 Mich App 530, 531; 566 NW2d 677 (1997). There was compelling evidence supporting a finding that defendant committed aggravated stalking through violation of an injunction and it is speculative to suggest that the jury based its verdict on other grounds. Therefore, our refusal to review this issue will not result in manifest injustice. *Id.*

Defendant also failed to object to the trial court's instructions to the jury regarding the elements of aggravated stalking at trial and, thus, has failed to properly preserve that issue for our review. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737(1993); *People v Kelly*, 231 Mich App 627, 645; 588 NW2d 480 (1998). The instructions given fairly presented the issues to be tried and sufficiently protected defendant's rights. See *Davis, supra* at 54. Therefore, our refusal to review this issue will not result in manifest injustice. *Van Dorsten, supra* at 545; *Kelly, supra* at 646.

In regard to defendant's additional argument, that his convictions of felonious assault and malicious destruction of personal property over \$100, violated double jeopardy protections, we note that defendant failed to present the records of his prior conviction of misdemeanor stalking until the present appeal and, thus, has improperly expanded the record on appeal. MCR 7.210(A)(1). Therefore, there is no support for defendant's claim in the record before us.

Next, defendant argues that the cumulative effect of the foregoing alleged errors denied him a fair trial. We disagree. No error occurred with respect to the raised issues and, thus, there is no cumulative effect of errors that deprived defendant of a fair trial.

Defendant also argues that his trial counsel's failure to lodge certain objections at trial constituted ineffective assistance of counsel. We disagree. No record of the alleged ineffective assistance was made below and, thus, we review defendant's claims of ineffective assistance to the extent that alleged deficiencies in defendant's trial counsel's performance are apparent from the lower court record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997); *People v Oswald (After Remand)*, 188 Mich App 1, 13; 469 NW2d 306 (1991). To establish ineffective

assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the result of the proceedings was fundamentally unfair or unreliable. *United States v Cronin*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996).

Defendant has not established that trial counsel's failure to raise the double jeopardy issue affected the outcome of defendant's trial. Further, defendant's trial counsel's failure to object to the prosecution's questions to Christene Salada regarding defendant's interest in motorcycles and, specifically, the Vigilante Motorcycle Club, was not objectively unreasonable. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Moreover, defendant's trial counsel's failure to object to the prosecution's questions to Raymond Salada regarding an injunction on redirect examination did not constitute ineffective assistance of counsel. During the hearing on defendant's motion for new trial, the trial court stated that it would not have sustained an objection to the questions on the ground that they were outside of the scope of the prior cross-examination. A trial court has wide discretion to control trial proceedings and, specifically, the scope of redirect examination. MCL 768.29; MSA 28.1052; see *Gallaway v Chrysler Corp*, 105 Mich App 1, 8; 306 NW2d 368 (1981). Furthermore, it was not objectively unreasonable for defendant's trial counsel to fail to object to questions to Christene Salada or Raymond Salada regarding the several instances where they discovered their tires were slashed. Prior to trial, the trial court ruled that it would not allow testimony speculating as to who was responsible for the slashed tires. Neither Christene Salada nor Raymond Salada were asked who was responsible for slashing the tires and neither testified that defendant was, in fact, the culprit.

Defendant failed to object to an alleged improper comment by the prosecution to the jury during its closing argument. Therefore, that argument was not preserved for our review. See *Stanaway*, *supra* at 687. We refuse to review the unpreserved instance of alleged prosecutorial misconduct because the trial court could have cured any error through a cautionary instruction had defendant lodged an objection at trial. *Id.*

Defendant also failed to object below to the trial court's alleged failure to instruct the jury not to discuss the case at breaks in the proceedings. The jury instructions fairly apprised the jury of the issues to be tried and sufficiently protected defendant's rights. There is no indication that the jury discussed the case prior to deliberations. Therefore, our refusal to review this argument will not cause manifest injustice. *Van Dorsten*, *supra* at 545; *Kelly*, *supra* at 646.

Defendant's final argument that the trial court erred in scoring the sentencing guidelines and that his sentences were disproportionate were not preserved for our review. To preserve an issue challenging the accuracy of a presentence report or the scoring of sentencing guidelines, the issue must have been raised by the party asserting the challenge at or before sentencing or as soon as the inaccuracy should have been discovered. MCR 6.429(C). Here, defendant failed to argue at

sentencing or in connection with his motion for new trial that the sentencing guidelines were improperly scored or that his sentences were disproportionate. Moreover, defendant's arguments regarding his sentences are moot as he has already served his minimum sentence. *People v Bailey*, 218 Mich App 645, 648; 554 NW2d 391 (1996); *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995); *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

Affirmed.

/s/ David H. Sawyer

/s/ Richard Allen Griffin