

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERIK BRYAN COLEMAN,

Defendant-Appellant.

UNPUBLISHED

December 19, 2000

No. 219681

Washtenaw Circuit Court

LC No. 98-010927-FH

Before: Murphy, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of aggravated stalking, MCL 750.411i; MSA 28.643(9), and sentenced to three to five years' imprisonment. Defendant appeals as of right. We affirm.

Defendant contends that there was insufficient evidence presented at trial to support his aggravated stalking conviction. Specifically, defendant argues that there was insufficient evidence to establish two willful, noncontinuous acts of unconsented contact with the complainant, a continuity of purpose by the contact, and contact by telephone without a legitimate purpose. We disagree. This Court reviews a challenge to the sufficiency of the evidence in criminal matters de novo. *People v Sherman-Huffman*, 241 Mich App 264, 265; ___ NW2d ___ (2000). When determining whether there was sufficient evidence to support a conviction, this Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the offense were proved beyond a reasonable doubt. *People v Cain*, 238 Mich App 95, 117; 605 NW2d 28 (1999). Circumstantial evidence and the reasonable inferences drawn therefrom can constitute satisfactory proof of the elements of a crime. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *Id.* This Court will not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992); *McRunels*, *supra*.

The statutory definition of stalking is as follows:

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).]¹

The statute defines “course of conduct” as follows:

a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose. [MCL 750.411i(1)(a); MSA 28.643(9)(1)(a).]

The term “harassment” is defined as follows:

conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose. [MCL 750.411i(1)(d); MSA 28.643(9)(1)(d).]

Finally, “unconsented contact” is defined as follows:

any contact with another individual that is initiated or continued without that individual’s consent or in disregard of that individual’s expressed desire that the contact be avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following:

- (i) Following or appearing within the sight of that individual.
- (ii) Approaching or confronting that individual in a public place or on private property.
- (iii) Appearing at the workplace or residence of that individual.
- (iv) Entering onto or remaining on property owned, leased, or occupied by that individual.
- (v) Contacting that individual by telephone.
- (vi) Sending mail or electronic communications to that individual.
- (vii) Placing an object on, or delivering an object to, property owned, leased, or occupied by that individual. [MCL 750.411i(1)(f); MSA 28.643(9)(1)(f).]

¹ Because there was a personal protective order prohibiting defendant from contacting the victim and he had previously been convicted of stalking, this stalking conviction was escalated to aggravated stalking. See MCL 750.411i(2); MSA 28.643(9)(2).

In the instant case, the victim testified, and her mother confirmed, that defendant contacted her by telephone on August 1, 1998, a few days after his release from jail, and then contacted the victim's mother by telephone, stating that the purpose of the phone call was to speak with his son.² Defendant claimed that he mistakenly dialed the victim's telephone number first because the telephone numbers have the same first three digits; however, the victim testified that within one week after defendant was released from jail, she received a total of eighteen unidentified calls on her caller ID unit. She testified that in the first few days after defendant was released, items were stolen from the glove compartment of her vehicle, nails were placed underneath the tires of her vehicle, a synthetic rose made of women's underwear was placed on her vehicle, and the lock on the front door of her residence was jammed with broken keys. The victim further testified that she observed defendant fleeing from her boyfriend's home after a brick was thrown through the kitchen window of her boyfriend's residence where she was spending the night. Contrary to defendant's contention, we find that a rational trier of fact could infer from this evidence that all of these actions, which occurred so soon after defendant's release from jail for his prior stalking conviction, implicate defendant as the perpetrator and fall within the statutory prohibition of repeated harassing and unconsented contact. See *People v Kieronski*, 214 Mich App 222, 232-233; 542 NW2d 339 (1996).

We also find that the evidence presented at trial was sufficient to allow a rational trier of fact to conclude that the conduct constituted a "continuity of purpose" under MCL 750.411I(1)(a); MSA 28.643(9)(1)(a). A rational trier of fact could find that these acts of unconsented contact, which occurred over several consecutive days following defendant's release from prison, demonstrate continuous and purposeful harassment of the victim.

Finally, we reject defendant's claim that his conduct of contacting the victim's mother by telephone did not constitute "harassment" because it was for the legitimate and constitutionally protected purpose of speaking with his son. In *People v Coones*, 216 Mich App 721, 725; 550 NW2d 600 (1996), this Court rejected a similar argument from the defendant that he did not harass the victim because he contacted his wife for the legitimate purpose of preserving his marriage. This Court held that because the defendant's conduct was "clearly in violation of the temporary restraining order and the conditions of defendant's bond, both of which forbade defendant from having contact with the victim[.]" his conduct was "illegitimate" and therefore not protected by the statute. *Id.* See *People v White*, 212 Mich App 298, 310; 536 NW2d 876 (1995) (the "legitimate" activity contemplated by the statute includes activities such as organized protests or labor picketing). Likewise, in the instant case, defendant's telephone calls to the victim and her family were in clear violation of a restraining order and his conduct cannot therefore be considered "legitimate" under the statute. *Coones, supra*. Viewing the evidence in the light most favorable to the prosecution, we find that there was sufficient evidence to allow a rational trier of fact to conclude beyond a reasonable doubt that defendant committed aggravated stalking.³

² Defendant and the victim have a son together who resides with the victim.

³ Although the Michigan stalking statute was recently found to be unconstitutional by a federal district court in the Western District of Michigan, see *Staley v Jones*, 108 F Supp 2d 777 (WD

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Next, defendant argues that the trial court deprived defendant of a fair trial by commenting that it was “meaningless” that there was no PPO preventing defendant from contacting his son and denying his request for a curative instruction. We disagree. A trial court has wide discretion in matter of trial conduct and a defendant’s conviction will not be reversed unless the trial court’s conduct pierces the veil of judicial impartiality. *People v Sharbnaw*, 174 Mich App 94, 99; 435 NW2d 772 (1989). The appropriate test to determine whether a trial court’s comments or conduct pierced the veil of judicial impartiality is whether the trial court’s conduct or comments “were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial.” *Id.*, quoting *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988).

During cross-examination of the victim’s mother, defense counsel inquired whether the PPO against defendant prevented him from contacting his son, who resided with the victim. The prosecutor offered to stipulate that the PPO could not award custody, to which defense counsel responded that he was not addressing the issue of custody; rather, he was attempting to establish that defendant did not have a PPO against him prohibiting him from seeing his son and, therefore, his telephone contact with the victim’s mother in order to contact his son was a “legitimate purpose” that cannot form the basis of a stalking charge. The trial court responded as follows:

Well, you’re both converting this to however you want it to look but the personal protection order was issued for Ms. Aldrich and it’s [sic] terms apply to her to the extent that any contact was made through her or to her. The fact that it [the contact] was about the child is meaningless. So, continue with your question.

Thereafter, defendant requested a curative instruction, arguing that the trial court’s statement “goes to the theory of the case” and biases the jury. The trial court denied the request.

As noted above, defendant may not rely on an attempt to contact his son as a “legitimate purpose” to defeat the PPO. *Coones, supra* at 725-726; *White, supra* at 310. Because defendant’s telephone contact with the victim was in clear violation of the PPO against him, the trial court’s comment regarding the PPO being meaningless as to the son was not improper and did not pierce the veil of judicial impartiality. *Sharbnaw, supra*. Having found nothing improper about the comment, we conclude that the trial court did not err in refusing to provide a curative instruction to the jury.

Next, defendant contends that he was denied a fair trial by an instance of prosecutorial misconduct. We disagree. We review claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Avant*, 235 Mich App 499, 508; 597

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MI 2000), we are bound by our own state’s decisions unless the United States Supreme Court has addressed a federal constitutional question. *People v Beasley*, 239 Mich App 548, 559; 609 NW2d 581 (2000). Accordingly, *People v White*, 212 Mich App 298; 536 NW2d 876 (1995), in which a panel of this Court rejected a constitutional challenge to the stalking statute on grounds that the statute was void for vagueness, remains binding precedent that we are obliged to follow.

NW2d 864 (1999). However, because defendant failed to object to the prosecutor's comment at trial, we will review the issue only if a curative instruction could not have eliminated the prejudicial effect of the prosecutor's comment or if failure to review the issue would result in a miscarriage of justice. *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999); *Avant*, *supra* at 512.

Defendant argues that the prosecutor engaged in misconduct by improperly shifting the burden of proof to defendant when he made the following remarks during closing argument:

Is it reasonable to think that, given the evidence that you have in front of you, that if you believe Susan Aldrich, that somebody else coincidentally did all these things, that it just so happened that on the day after this man got out of jail for stalking, that somebody else started putting nails behind her tires, somebody else started making repeated telephone calls to her house. Somebody else stole all the property out of her glove box and that somebody else put a brick through her window, *when there's absolutely no evidence before you that there was anybody else who had any sort of animosity toward her, any sort of motive to bother this woman.* [Emphasis added.]

A prosecutor is free to relate the facts adduced at trial to the prosecution's theory of the case and to argue the evidence and all reasonable inferences arising from it to the jury. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996); *Sharbnaw*, *supra* at 100-101. Moreover, there is no rule that the prosecutor state his inferences in the blandest possible terms. *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989). Here, the prosecutor's theory of the case was that although there was no direct evidence, all the circumstantial evidence presented at trial, in conjunction with the fact that each of these actions occurred immediately after defendant was released from jail for previously stalking the victim, permitted the jury to draw a reasonable inference that defendant committed the charged offense. In view of this theory, we find nothing improper with the prosecutor's statement advising the jury to consider the fact that there was no direct or circumstantial evidence indicating that someone other than defendant committed these acts. See *People v Fields*, 450 Mich 94, 116-117; 538 NW2d 356 (1995); *People v Guenther*, 188 Mich App 174, 181; 469 NW2d 59 (1991) (both holding that a prosecutor may discredit or note weaknesses in a defense theory by commenting on the evidence presented or the inferences created by the evidence).

Further, the jury was properly instructed that the defendant "was not required to prove his innocence or do anything" and that the prosecutor must prove every element of the offense beyond a reasonable doubt. The jury was also instructed that the jury could only consider properly admitted evidence during deliberations and the lawyers' statements and arguments are not evidence. Jurors are presumed to follow the instructions given. *People v Hana*, 447 Mich 325, 351; 524 NW2d 682 (1994). Accordingly, we find no error.

Last, defendant argues that the cumulative effect of errors committed during trial denied defendant a fair trial. "While it is possible that the cumulative effect of a number of errors may constitute error requiring reversal, *People v Dilling*, 222 Mich App 44, 56; 564 NW2d 56 (1997), 'only actual errors are aggregated to determine their cumulative effect.'" *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999) (quoting *People v Bahoda*, 448 Mich

261, 292, n 64; 531 NW2d 659 (1995)). Because we have concluded that no errors occurred at trial, we reject the argument that the cumulative impact of the alleged errors requires reversal. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999).

Affirmed.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder