

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOUIS K. PICKETT,

Defendant-Appellant.

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UNPUBLISHED

May 6, 2004

No. 246138

Wayne Circuit Court

LC No. 00-013472

Before: Cooper, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant Louis Pickett appeals by leave granted from the trial court's order sentencing him to 2 to 5 years' imprisonment for aggravated stalking, MCL 750.411i, and 2 to 5 years' imprisonment for third-degree home invasion, MCL 750.110a(4) after a jury trial. Defendant was sentenced under MCL 769.10, habitual offender second and was given 173 days credit for time served. Defendant was found not guilty of first-degree criminal sexual conduct, MCL 750.520(B)(1)(f). This case arose after defendant violated a personal protection order held by his girlfriend, entered her home, and allegedly raped her. We affirm the convictions, and remand the matter to the trial court to correct scoring errors and for resentencing.

Defendant first argues that the prosecution failed to prove an essential element of aggravated stalking because it did not show that defendant committed two or more separate noncontinuous acts as required by MCL 750.411i(1)(a). This Court reviews claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We reject defendant's claim.

Stalking 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). Harassment is "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." MCL 750.411i(1)(d).

Unconsented contact means:

[A]ny 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 that individual's workplace or residence.
- (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).]

A course of conduct is 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). Stalking is elevated to aggravated stalking where "at least 1 of the actions constituting the offense is in violation of a restraining order and the individual has received actual notice of that restraining order . . . ." MCL 750.411i(2)(a).

This Court construed the meaning of the phrase "separate noncontinuous acts" for the first time in *Pobursky v Gee*, 249 Mich App 44, 45, 47; 640 NW2d 597 (2001), before deciding that where the defendant "allegedly attacked the petitioner, hurled him over a bench into a wall or plate glass window, and then choked him while repeatedly threatening him," the series of acts was not separate or noncontinuous:

The word "separate," used as an adjective, means "detached; distinct." Random House Webster's New College Dictionary (1997). The word "noncontinuous" is a common compound word formed with non- that does not have a special meaning; it is to be understood as not continuous. Webster's New Twentieth Century Dictionary of the English Language: Unabridged Edition (2d ed, 1979). The word "continuous" is variously defined as "joined without intervening space; without cessation or interruption; unbroken; constant; connected," *id.*, or "uninterrupted in time; without cessation" or "being in immediate connection or spatial relationship." Random House Webster's New College Dictionary (1997). Thus, two or more separate noncontinuous acts are acts distinct from one another that are not connected in time and space. See, e.g., *People v Kieronski*, 214 Mich App 222, 232; 542 NW2d 339 (1995) (evidence that the defendant contacted the victim and threatened her on two different

occasions and approached her on a third occasion in such a manner that a police officer told him to leave was sufficient to show a course of conduct); *People v White*, 212 Mich App 298, 307; 536 NW2d 876 (1995) (evidence that the defendant made repeated threatening telephone calls to the victim was sufficient to establish a course of conduct). [*Pobursky, supra*, 249 Mich App at 47.]

As opposed to the fact pattern in *Pobursky, supra*, here, there were separate, noncontinuous acts in view of the plain meaning of those words. The evidence, viewed in the light most favorable to the prosecution, showed that defendant arrived at the victim's home, followed her to school and back, was locked in her basement by her for an extended period of time while the victim left the house. The statutory language does require us to find that separate acts were solely due to the actions of defendant, but rather a literal interpretation of the statute states that there must be separate, noncontinuous acts. After the victim had returned to her home, she let defendant out of the basement. The testimony in this matter is that defendant walked toward the door as if to leave, then turned back and attacked the victim. Hence, once the victim left the home for a period in excess of two hours, the acts of defendant became noncontinuous. Thus, defendant's actions, viewed in the light most favorable to the prosecution, demonstrate separate and noncontinuous acts.

Defendant next argues, with regard to both the aggravated stalking and the home invasion charges, that because the prosecutor did not offer the personal protection order (PPO) into evidence or apprise the jury of its contents, the jury could not have found that he violated the PPO order beyond a reasonable doubt.<sup>1</sup> Defendant stipulated that there was a PPO in place and that he had notice of it. The prosecutor asked the victim during direct examination whether by coming over to her house, defendant violated the PPO, and she said that he did. Defendant did not object.

This Court can conceive of no basis on which to find, given these facts that a reasonable jury could not find that defendant violated a PPO that he knew to be in existence. Although the prosecutor did not offer the PPO as evidence, the jury could have reasonably assumed that the PPO prohibited defendant from forcing his way into the victim's home and from assaulting her. Further, this Court has held that where a victim testified at a preliminary examination that the defendant violated a PPO prohibiting the defendant from contacting her, "an inference that defendant's actions were in violation of an injunction or restraining order of which defendant had actual notice arises . . . ." *People v Kieronski*, 214 Mich App 222, 231; 542 NW2d 339 (1995), citing MCL 750.411i(2)(a). While it is true that in *Kieronski* the plaintiff actually testified that the PPO prohibited the defendant from contacting her, we conclude that the same result must be reached here where defendant did not contest the existence of the PPO, his knowledge of it, or the victim's testimonial statement that by coming over, he violated it. Viewing this evidence in a light most favorable to the prosecution, *People v Harmon*, 248 Mich App 522, 524; 640 NW2d

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<sup>1</sup> Both charges required a finding that defendant violated a PPO. See MCL 750.411i(2)(a) and MCL 750.110a(4)(b)(iii).

314 (2001), we find there was sufficient evidence for a jury to find that defendant violated the PPO.

Defendant last argues that the trial court's assignment of points under several variables was incorrect. We agree with defendant regarding prior variable 7 and offense variable 13, but reject his arguments regarding the other variables.

Where construction of the statutory sentencing guidelines are at issue, the matter is one of law and is reviewed de novo. *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002), citing *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998).

MCL 777.57 states:

(1) Prior record variable 7 is subsequent or concurrent felony convictions. Score prior record variable 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) The offender has 2 or more subsequent or concurrent convictions: 20 points

(b) The offender has 1 subsequent or concurrent conviction: 10 points

(c) The offender has no subsequent or concurrent convictions: 0 points

(2) All of the following apply to scoring record variable 7:

(a) Score the appropriate point value if the offender was convicted of multiple felony counts or was convicted of a felony after the sentencing offense was committed.

(b) Do not score a felony firearm conviction in this variable.

(c) Do not score a concurrent felony conviction if a mandatory consecutive sentence will result from that conviction. [*Id.*]

The only two offenses at issue were the convictions of defendant in this case: third-degree home invasion and aggravated stalking. The prosecutor contends that the statute should be interpreted to mean that if a defendant is convicted of two crimes concurrently, then twenty points should be scored. Defendant contends that if the prosecutor's interpretation of the statute was accepted, no defendant would ever receive ten points. We reject the contention of the prosecution in this case. The statute clearly addresses assessing points for convictions *other* than the conviction for which the defendant is being sentenced. If a defendant has no other concurrent or subsequent convictions, the defendant receives no points under the variable. MCL 777.57(1)(c). But if the defendant has "one subsequent or concurrent conviction," he or she receives ten points. MCL 777.57(1)(b). Here, defendant had one conviction concurrent to his primary conviction, so he should have received ten points.

Last, with regard to OV 13, we note that the trial court clearly erred in assigning 25 points after determining defendant had a continuing pattern of criminal behavior because the prosecution failed to point to three or more crimes that occurred within a five-year period. Although the trial court counted a misdemeanor aggravated stalking along with the current two convictions, the misdemeanor aggravated stalking did not occur within five years of the sentencing offense. See MCL 777.43.

The convictions are affirmed and the matter is remanded for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper  
/s/ Richard Allen Griffin  
/s/ Stephen L. Borrello