STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant/Cross-Appellee,	UNPUBLISHED May 27, 2004
v	No. 250231 Marquette Circuit Court
GEORGE VERNON GRAWN, Defendant-Appellee/Cross-Appellant.	LC No. 02-040185-AR

Before: Whitbeck, C.J., and Griffin and Borrello, JJ.

PER CURIAM.

Following a district court jury trial, defendant was convicted of misdemeanor stalking, MCL 750.411h. Defendant appealed his conviction to the Marquette Circuit Court, which reversed the conviction by concluding that the prosecution failed to prove that "defendant committed two or more willful, separate acts . . . which were such as would cause a *reasonable* person to feel terrorized, frightened, intimidated, threatened, harassed or molested" (emphasis in original). Shortly thereafter, this Court granted the prosecution's motion for leave to appeal. We reverse the ruling of the circuit court and reinstate defendant's conviction for the reasons set forth in this opinion.

It is uncontested that defendant and the complainant were coworkers at the Marquette County Friend of the Court office (FOC). They came to know each other through defendant's wife, who had worked with the complainant in the Marquette Circuit Court clerk's office before complainant transferred to the FOC. Sometime in 2001, defendant was hospitalized for major ailments, and the complainant came to visit him. Around this time, defendant's wife suggested that complainant and defendant begin taking walks together as part of defendant's rehabilitation. During one of these walks, either defendant attempted to kiss the complainant or the complainant attempted to kiss defendant. Despite this alleged activity, the two saw each other on numerous occasions, either during walks together, during work hours, at each other's homes, or when skinny-dipping in a lake together. During this time, defendant began to write love poems to the complainant, and she began receiving voice mail messages from defendant on her answering machine.

When complainant began dating other people in November of 2001, defendant began calling her house leaving long, rambling messages. She told him to stop. Right before Thanksgiving, she received a message with heavy breathing, and thinking it was defendant, she

called the police and filed a report. On November 21, 2001, the police went to defendant's house and advised him not to have any further contact with the complainant.

At work, the complainant met with her supervisors and told them of her concerns regarding defendant's behavior and asked that defendant not have any contact with her at the office. The parties agreed that defendant would stay on one side of the office, and the complainant would stay on the other side. This apparently worked until January 2, 2002, when defendant came into complainant's work area allegedly to talk to a coworker. The complainant testified that she became angry and upset and immediately informed her supervisors of the contact. Shortly thereafter, defendant wrote the county's FOC director and informed her he would no longer abide by the restrictions she imposed on him. Then, on January 29, 2002, the complainant testified that defendant met her in the hallway and handed her a note which stated:

> As I ponder this day and attempt to put thought to paper about my feelings about one certain person that has captured my mind, I take difficulty in doing so, but then thoughts present I [sic], that face, that smile, that touch, that warmth when near her, that void when I cannot see or hear her, that voice when she speaks to friends and myself, that walk, Oh! That walk when she walks away, I cannot put my eyes to rest.

The complainant testified that she began crying when she read the letter and that she went to her supervisor's office. The complainant and her supervisor both testified that while the complainant was in her supervisor's office, she nearly collapsed. The complainant telephoned the police who then interviewed defendant. Defendant denied giving the letter to complainant but admitted it looked like something he may have written. Defendant was charged with misdemeanor stalking.

On appeal the prosecution asserts that the circuit court erred in reversing defendant's conviction by finding there was insufficient evidence to prove stalking beyond a reasonable doubt. We agree.

We review claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). Evidence is viewed "in a light most favorable to the prosecution" to determine "whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). All conflicts must be resolved in the prosecution's favor. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

To prove a defendant guilty of stalking, the prosecutor must show that (1) the defendant "committed two or more willful, separate, and noncontinuous acts of unconsented contact" with the alleged victim; (2) the contact would cause a reasonable person to suffer emotional distress; (3) the contact actually caused the victim to suffer emotional distress; (4) the contact would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested; and (5) the contact caused the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested. CJI2d 17.25; MCL 750.411h(1)(d).

In addition, subsection (4) of the stalking statute states that:

> "evidence that the defendant continued to engage in a course of conduct involving repeated unconsented contact with the victim after having been requested by the victim to discontinue same or different form of unconsented contact, and to refrain from any further unconsented contact with the victim, gives rise to a rebuttable presumption that the continuation of the course of conduct caused the victim to feel terrorized, frightened, intimidated, threatened, harassed or molested." [MCL 750.411h(4).]

Looking at the evidence presented in a light most favorable to the prosecution, we find there was sufficient evidence supporting defendant's conviction, and the circuit court erred in reversing the jury's verdict. Defendant admitted writing the victim, and despite his assertion that his appearance in complainant's office on January 9, 2002 was not a "stalking incident," the statute expressly provides that "uncontested contact" includes "appearing within the sight of" the victim. MCL 750.411h(1)(e)(i). Further, any discrepancies involving testimony must be resolved in favor of the prosecution. *Terry*, *supra* at 452. Furthermore, no evidence contradicted the complainant's testimony that defendant's contacts with her on January 9, 2002 and January 29, 2002 were contrary to her express wishes and caused her to feel frightened, harassed and molested. Thus, defendant failed to rebut the presumption set forth in subsection (4) of the stalking statute. Further, we find that there was sufficient evidence that defendant's contact would cause a reasonable person to feel at least "harassed" and "molested" if not "terrorized, frightened, intimidated, [or] threatened."[1] Therefore, the circuit court erred when it reversed defendant's conviction of misdemeanor stalking.

Defendant argues in his cross-appeal that he received ineffective assistance of counsel. We disagree.

Defendant's failure to preserve this issue below limits our review to mistakes apparent on the record. *People v Armendarez*, 188 Mich App 61, 73-74; 468 NW2d 893 (1992), citing

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[1] Defendant requests that this Court apply the definition of "reasonable person" found in *Radtke v Everett*, 442 Mich 368, 389-391; 501 NW2d 155 (1993). But defendant fails to argue that the stalking statute's meaning is unclear, a finding that must be made before this Court may engage in judicial construction. *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002) (citations omitted). We decline to adopt a particular definition of "reasonable person" where it was not argued and where we cannot find that the statute's language is ambiguous on its face. *Id.*, citing *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 27; 528 NW2d 681 (1995).

People v Ginther, 390 Mich 436; 212 NW2d 922 (1973); *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

To show ineffective assistance of counsel, a defendant must show that his counsel's representation "fell below an objective standard of reasonableness" and that "'but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000), quoting *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). Defendant also has to show that the proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 Mich App 294 (2001). Defendant bears the burden of overcoming the strong presumption of effective assistance of counsel. *LeBlanc*, *supra* at 578, citing *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2502; 80 L Ed 2d 674 (1984). And we defer to an attorney's decisions regarding strategic matters. *Mitchell*, *supra* at 163; *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Here, defendant fails to overcome the strong presumption of effective assistance of counsel. He argues that his attorney should have objected to testimony that his employers determined he should be terminated because of the conduct underlying the stalking charge. First, we find that defendant has grossly misrepresented the character of the testimony on appeal. Despite defendant's assertion to the contrary, no witness testified that defendant was *guilty* of stalking. Second, defendant fails to show that "but for" the absence of this objection, the outcome of his trial would have been different. *Toma*, *supra* at 302-303. We have held that an attorney's decision to object – or not object – is a strategic decision to which we defer. *LeBlanc*, *supra* at 590; *Mitchell*, *supra* at 163. Consequently, we reject defendant's claim of ineffective assistance of counsel.

Defendant next argues that the district court considered improper factors in determining his sentence. We disagree.

We review sentencing issues for an abuse of discretion. *People v Coles*, 417 Mich 523, 537; 339 NW2d 440 (1983), overruled in part on other grounds *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990); *People v Sabin (On Second Remand)*, 242 Mich App 656, 661; 620 NW2d 19 (2000). Here, defendant was sentenced to 90 days in jail, and the statute under which defendant was convicted, MCL 750.411h(2)(a), provides for up to one year in jail. The district court properly considered the severity of the crime. *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999). It also properly considered defendant's lack of remorse in imposing this sentence. *People v Spanke*, 254 Mich App 642, 650; 658 NW2d 504 (2003), citing *People v Wesley*, 428 Mich 708; 411 NW2d 159 (1987).

In defendant's brief on cross-appeal, he infers that the trial court sentenced him based on his request for a jury trial. Again, defendant misrepresents the facts in this case. While denying defendant's motion to adjourn sentencing the trial court stated:

> I did, because of your concern, talk with [probation officer] Ms. Annala relative to the aspect of jail, and her expression to me was basically because of the seriousness of the offense, um, *the fact that there was a jury trial and a jury conviction*, and the victim's impact statement – were those matters that she

basically relied on in terms of offering the recommendation of ten days in jail. [Emphasis added.]

The district court sentenced defendant to a 90-day jail term with credit for one day served and eighty-five days suspended. In imposing the sentence, the court noted that it considered stalking "a serious offense." While remarking that defendant had "an impeccable record," the court stated that it "would have considered jail regardless [of the probation agent's recommendation] because of its impression of the seriousness of this offense." The severity of the crime is one factor the sentencing court can consider. *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999). Therefore, contrary to defendant's argument, the trial court did not state that it considered defendant's request for a jury trial at sentencing. Thus, the district court did not abuse its discretion in sentencing defendant.

Last, we do not consider defendant's claim of error regarding the court's failure to instruct on venue because defendant fails to support his argument on appeal with authority. See *Yee v Shiawassee County Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002); *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

We reverse the circuit court's order and remand for entry of an order reinstating defendant's conviction and sentence. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello