STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORNELL MCCREARY, a/k/a MICHAEL GRIFFEN, CARNELL GRIFFEN, and CARNELL MCCREARY,

Defendant-Appellant.

UNPUBLISHED
June 22, 2004

No. 240822
Wayne Circuit Court
LC No. 01-002771-01

Before: Smolenski, P.J., and White and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of aggravated stalking predicated on the violation of a restraining order, MCL 750.411i(2)(a). He was sentenced as a habitual offender, fourth offense, MCL 769.12, to fifteen to twenty-five years' imprisonment. He appeals as of right. We affirm.

I. Appellate Counsel's Issues

A. 1998 PPO

Defendant argues that the trial court erroneously allowed the prosecutor to introduce evidence that the victim previously obtained a personal protection order against him in 1998. With regard to the victim's testimony on direct examination, defendant has waived his right to review. The only defense objection relative to the 1998 PPO on direct examination occurred when the victim, responding to a question about when she obtained a PPO, referred to the 1998 PPO, rather than the October 5, 2000, PPO that was the subject of the charged offense. The trial court sustained the objection and ordered that the testimony concerning the 1998 PPO be stricken. Defense counsel expressed approval of this remedy, thus waiving any claim that a mistrial should have been ordered instead. See *People v Riley*, 465 Mich 442; 636 NW2d 514 (2001). A waiver extinguishes any error. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). Indeed, notwithstanding the trial court's ruling, defense counsel later referred to the victim's stricken testimony (that the 1998 PPO was obtained in January 1998) during his closing argument to argue that inconsistencies in the victim's testimony about relevant dates affected her credibility.

Defendant also argues that the testimony elicited about the 1998 PPO during redirect examination of the victim was improperly admitted pursuant to MRE 404(b). Because defendant did not object to the prosecutor's questioning on redirect examination, we consider defendant's challenge to the victim's testimony on redirect under the plain error standards for unpreserved issues. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). We find that defendant's reliance on MRE 404(b).

Evidence may be relevant and admissible independent of MRE 404(b). *People v Hall*, 433 Mich 573, 580; 447 NW2d 580 (1989) (Boyle, J.). Here, the challenged testimony was responsive to issues raised by defense counsel during his cross-examination of the victim about the 1998 events. Thus, MRE 404(b) was not implicated. Cf. *People v Lukity*, 460 Mich 484, 499; 596 NW2d 607 (1999). Also, it is apparent that the prosecutor fairly responded to the issues raised by defense counsel's cross-examination regarding whether the victim had a motive to lie that developed beginning with her first encounter with defendant in 1998. A witness' bias toward or against a party may be induced by the witness' like, dislike, or fear of a party, or the witness' self-interest. *People v Layher*, 464 Mich 756, 762; 631 NW2d 281 (2001). We therefore conclude that defendant has not shown plain evidentiary error. *Carines, supra.*

B. Ear Biting Incident

Defendant next argues that the trial court erroneously allowed the prosecutor to question the victim, on redirect examination, about an incident in 1998 in which defendant allegedly bit off part of the ear of the victim's sister, Chalkney Perry. Defendant again argues that this evidence was inadmissible under MRE 404(b), and further contends that it was more prejudicial than probative. At trial, defense counsel objected to this testimony only on hearsay grounds. He did not argue that it was excluded by MRE 404(b) or unfairly prejudicial. Defense counsel's objection grounded on prejudice was directed only at the photographic evidence offered by the prosecutor, not the victim's testimony. "To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Therefore, defendant has failed to preserve this issue for appeal. Hence, defendant must show a plain error affecting his substantial rights. *Carines, supra* at 763. We conclude that defendant has failed to show any such error.

MRE 404(b) was not implicated because the prosecutor did not offer the victim's testimony to prove that defendant actually bit Perry's ear or to draw any intermediate inference from this act regarding the aggravated stalking charge. Rather, the prosecutor offered the evidence about what the victim was told by others about the ear-biting incident,[1] the victim's observation of Perry's injury, and her conclusion about defendant's role in causing the injury to

[1] Defendant does not argue that the information about what the victim was told by others was inadmissible hearsay. In passing, we note that a statement offered to show its effect on the hearer, rather than the truth of the matter asserted, is not precluded by the hearsay rule. *People v Fisher*, 449 Mich 441, 449; 537 NW2d 577 (1995). In the case at bar, the record indicates that the victim's testimony about what she was told was offered to show its affect on the victim's state of mind.

refute issues raised by defendant regarding whether the victim was truly fearful of defendant and her motivation to lie.

Additionally, the victim's state of mind was relevant because "stalking" requires proof of a defendant's wilful course of conduct of harassment that "actually causes the victim to feel terrorized, frightened, intimidated, harassed, or molested." MCL 750.411i(1)(e). Although the harassment must be directed at the victim, MCL 750.411i(1)(d), the victim's state of mind about defendant, when receiving his repeated telephone calls in the latter part of 2000, was probative of whether she actually felt frightened. Further, the probative value of the victim's testimony was not plainly outweighed by the danger of unfair prejudice. MRE 403; *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Lastly, defense counsel opened the door to the prosecutor's questions on re-direct examination about the 1998 events when he cross-examined the victim about the 1998 events in order to attack her credibility. *Lukity, supra* at 499. Hence, we find this unpreserved issue does not warrant reversal.

C. Photographs

Defendant also challenges the trial court's decision to admit photographs of Perry's ear during the prosecutor's cross-examination of defendant. Although defendant properly preserved his claim that the photographs were more prejudicial than probative, we conclude that the trial court did not abuse its discretion in admitting the photographs. MRE 403; *Lukity, supra* at 488, *Mills, supra* at 76. Defendant's direct testimony conflicted with the victim's testimony about what the photographs depicted concerning Perry's injury. If, as defendant testified, the photographs merely depicted an ear and earring, the jury might have questioned the victim's testimony regarding her state of mind. Under the circumstances, the trial court did not abuse its discretion in admitting the photographs in order to allow the jury to draw its own conclusions about the extent of Perry's injury.

D. Sentencing

Defendant further argues that the trial court abused its discretion by imposing a disproportionate sentence outside the sentencing guidelines' recommended range. A trial court may impose a sentence outside the guidelines' range only for substantial and compelling reasons. MCL 769.34(3); *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003). A substantial and compelling reason must be objective, verifiable, keenly or irresistibly grab the court's attention, and must be of considerable worth in deciding the length of a defendant's sentence. *Babcock, supra* at 272.

We review for clear error the existence of a particular sentencing factor. *Id*. at 273. Whether a factor is objective and verifiable is reviewed de novo. *Id*. And whether the factor constitutes a substantial and compelling reason to depart from the sentencing guidelines is reviewed for an abuse of discretion. *Id*. at 274.

The unenhanced guidelines' range for defendant's aggravated stalking conviction was ten to twenty-three months, but the upper limit of this range is increased by one hundred percent to

account for defendant's habitual offender fourth status. MCL 777.21(3). Therefore, defendant's guidelines' range was ten to forty-six months.[2] He was sentenced to fifteen to twenty-five years' imprisonment. The trial court justified this departure by noting defendant's violent past behavior, only some of which was taken into account by the guidelines, and his utter disrespect and contempt for the law and the court.

After an extensive review of the record, we conclude that the trial court enunciated objective and verifiable factors to support its departure, and that these factors constituted substantial and compelling reasons to depart.[3] First, we address defendant's violent nature. We recognize that the prior record variables take into consideration defendant's past convictions, but they do not adequately account for the frequency of a defendant's criminal behavior. Here, defendant's relationship with the criminal justice system began in early 1991 at age nineteen. He was twenty-nine when he committed the instant offense. During that time period defendant accumulated seven convictions, five felonies (not including the instant offense) and two misdemeanors. While on probation for his first offense, possession of under twenty-five grams of cocaine, defendant committed his second felony, felonious assault, sixteen months after his first. Defendant was charged with two counts of felonious assault, but pled guilty to one.

One year later, before being sentenced on this second felony, defendant was charged, and subsequently pled guilty to, his first misdemeanor offense, assault and battery. Less than two months after being released from jail, defendant committed his third felony, carrying a concealed weapon. He had also been charged with discharging a weapon in a building. Defendant was released from prison on December 26, 1997, and six months later was arrested for aggravated domestic violence. While awaiting sentencing on that charge, which did not occur until September 2000, defendant was charged with, and ultimately pled no contest to, two separate incidents of assault on a prison employee that occurred in December 1998 and May 1999, respectively. Defendant was eventually discharged on September 8, 2000, and was arrested on the instant offense exactly three months later. Notably, although defendant was not arrested until December 8, 2000, the evidence established that shortly after the victim obtained a personal protection order against defendant on October 7, 2000, the threatening phone calls began.

Additionally, defendant's prior convictions are only classified in terms of low or high severity for the felony convictions and no distinction is made as to the misdemeanor convictions. There are no other distinctions as to the type of offenses committed. In defendant's case, although his past felony convictions were all for "low severity" offenses,[4] three of the five convictions were for assaultive behavior.[5] And both his misdemeanor convictions were also for

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[2] Although the court did not specifically mention this point on the record, it is clear from the court's comments at sentencing that it was aware of the effect of defendant's habitual offender status.

[3] Defendant appears to concede this point, the thrust of his resentencing argument being that the extent of the departure was disproportional. Because the nature of these factors directly relates to our proportionality analysis, we list these factors in specific detail.

[4] MCL 777.52(2) states that low severity offenses are those listed in offense class E, F, G, or H.

[5] It is possible that defendant's felony conviction for CCW could be aptly characterized as

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assaultive behavior. There was also evidence of uncharged conduct demonstrating extreme violence. In 1998, defendant bit off the earlobe of his to-be wife, which required 350 stitches. Defendant was not prosecuted because the victim refused to cooperate.

Also demonstrative of defendant's violent nature and explosive personality are the incidents of his unruly courtroom behavior and disrespect for law enforcement. For instance, at nearly every court appearance defendant constantly interrupted the court, ignored the court's admonishments to cease talking, and severely disrupted the proceedings. At the final conference defendant initially refused to come out of his cell. When he did appear in court and was refused the opportunity to ramble, defendant stated that he would grieve the judge and concluded with "F**k with you all." The officer present told defendant to watch his mouth, to which defendant responded, "F**k you, man." Further, defendant had to be physically removed, i.e., carried, from a pretrial conference on June 19, 2001, because he refused to leave and shouted derogatory comments at the prosecutor. And he was nearly removed from a subsequent motion hearing because his continuous interruptions made it very difficult to move the proceeding forward. After returning to jail that day, defendant allegedly said, "I'll break all the laws, I just may kill a judge and a cop." The preparer of the memorandum, a jail officer, indicated that he heard similar statements by defendant on a daily basis.[6]

Defendant's trial was similarly laced with outbursts, combativeness, and general disruptions by him, despite the court's repeated admonishments, culminating in his removal from the trial on two separate occasions. In addition, following the trial, defendant's behavior in jail was so disruptive, assaultive, and threatening towards the law enforcement officers that defendant was sentenced from jail to avoid the increasingly difficult task of transporting him.[7]

We must, therefore, determine whether these factors justify the particular departure in this case, i.e., whether defendant's sentence is proportional in light of the offense committed and the reasons for departing from the sentencing guidelines. A trial court abuses its sentencing discretion with regard to the principle of proportionality when the resultant sentence falls outside the permissible range of outcomes. *Babcock, supra* at 274.

The court's main reasons for departing from the sentencing guidelines were that defendant demonstrated himself to be "dangerously assaultive and lack[ing] any measure of self-control." Defendant's frequency of criminal activity demonstrates his inability to conform to the

(…continued)

assaultive in nature given that defendant was also charged with discharging a weapon in a building; however, the particular circumstances of the offense are not known by this Court.

[6] Although the court alluded to many other instances of defendant's combative behavior outside the courtroom, few were preserved in the record for review save for the court's mention of them. Thus, we cannot consider these incidents in determining whether there were substantial and compelling reasons to justify the court's sentencing departure.

[7] Apparently, defendant threatened several officers with a writing instrument and spit on one officer while being transported to his cell. It appears that defendant also sent a threatening letter his wife while awaiting sentencing that was admitted into evidence at the sentencing hearing. However, a copy of the letter was not included in the lower court record and, therefore, is not subject to review.

rules of society or, for that matter, the rules of confinement. Notably, defendant did not successfully complete his two-year probation sentence for his first felony offense in 1991, committing an unknown probation violation in January 1992 and his second felony offense in June 1992. With regard to most of defendant's other convictions he served the maximum imposed sentence or nearly so. Even while incarcerated defendant could not conform his conduct to the law, committing two separate assaults on prison employees and abusing the officers in the jail where defendant was held pending trial on the instant offense.

Defendant's behavior towards the court and court personnel throughout the history of this case further support the notion that he is indeed a danger to society. Under these circumstances, we cannot say that the court's sentence fell outside the permissible range of outcomes. While the extent of the departure was extraordinary given defendant's guidelines range and the nature of the conduct involved (phone contact rather than physical contact), defendant's behavior, past and present, was equally extraordinary. Accordingly, we do not find that the trial court abused its discretion in sentencing defendant to fifteen to twenty-five years' imprisonment.

Moreover, defendant's due process challenge to his sentence is not properly before us because it is not set forth in the statement of the questions presented. MCR 7.215(C)(5); *People v Albers*, 258 Mich App 578, 585; 672 NW2d 336 (2003). Further, defendant did not present this specific claim to the trial court. Nevertheless, we note that defendant's reliance on *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), is misplaced. In *Apprendi, supra* at 490, the Supreme Court stated that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The relevant inquiry under *Apprendi* is not how the aggravating factor is designated in a statute, but rather its effect, i.e., "'does the required finding expose the defendant to a greater punishment than authorized by the jury's guilty verdict?'" *People v Mass,* 464 Mich 615, 635; 628 NW2d 540 (2001), quoting *Apprendi, supra* at 494. Here, defendant was not sentenced beyond the prescribed statutory maximum for a fourth habitual offender. MCL 769.12. Thus, the due process principles announced in *Apprendi* were not violated.

II. Defendant's Pro Se Issues

A. Appropriateness of Charged Offense

In his Standard 11 brief, defendant challenges the trial court's decision denying his motion to quash the information on the ground that he was overcharged and that the victim fabricated testimony. Because we find that defendant was fairly convicted at trial, we decline to consider his challenge to the sufficiency of the evidence at the preliminary examination. *People v Yost*, 468 Mich 122, 124 n 2; 659 NW2d 604 (2003); *People v Hall*, 435 Mich 599, 601-603; 460 NW2d 520 (1990).

And we find no merit to defendant's claim that the Legislature did not intend that a person be charged with aggravated stalking under MCL 750.411i(2)(a) unless he is first charged and convicted of stalking under MCL 750.411h. This argument runs counter to the plain language of the statute. Where a statute is unambiguous, judicial interpretation is neither necessary nor permitted. *People v Koonce,* 466 Mich 515, 518; 648 NW2d 153 (2002). Under MCL 750.411i(2)(d), a previous conviction under MCL 750.411h merely serves as another

possible aggravating circumstance; it is not a prerequisite to a conviction. Pursuant to MCL 750.411i(2), an individual who engages in stalking is guilty of aggravated stalking if the violation involves *any* of the four listed circumstances. *People v White*, 212 Mich App 298, 307-308; 536 NW2d 876 (1995).

We also reject defendant's claim that a person must be charged with contempt of a restraining order before being charged with aggravated stalking. MCL 750.411i(2)(a) does not require proof of a prior contempt finding. It only requires proof that at least one action by defendant violated a restraining order and that he received actual notice of that restraining order. Indeed, MCL 750.411i(6) states that "[a] criminal penalty provided for under this section may be imposed in addition to any penalty that may be imposed for any other criminal offense arising from the same conduct or for contempt of court arising from the same conduct." This demonstrates that the Legislature intended that the same conduct could be used for both contempt and aggravated stalking charges.

B. Discovery

Next, the record does not support defendant's claim that the prosecutor denied a discovery request for the 2000 PPO after the trial court entered its order allowing for additional discovery on December 20, 2001. As the appellant, defendant has the burden of furnishing a reviewing court with a record that verifies the factual basis of his claim. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000). Defendant has not done so. In any event, the record indicates that on the first scheduled trial date, January 7, 2002, defense counsel objected to the prosecutor introducing exhibit evidence of the 2000 PPO unless it was legible. Defense counsel later objected to the evidence on foundational grounds, which was overruled by the trial court because the prosecutor offered a certified copy of the 2000 PPO into evidence. A plain discovery violation is not apparent from the record. *Carines, supra* at 763. Even if there was error, a trial court has discretion in determining the appropriate remedy for a discovery violation, *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002), and defendant has not shown that suppression of the 2000 PPO was required here.

Defendant's reliance on *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), as support for his argument that evidence of the 2000 PPO should have been suppressed, is misplaced, because we find that the record does not reflect a *Brady* violation. *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998). Nor do we find that defendant was entitled to a *Franks*[8] hearing. The purpose of a *Franks* hearing is to ascertain if the affiant to a search warrant deliberately or recklessly provided false information or made material omissions. See *People v Ulman*, 244 Mich App 500, 510; 625 NW2d 429 (2001). The 2000 PPO is not the equivalent of a search warrant. Finally, defendant's reliance on *Pobursky v Gee*, 249 Mich App 44; 640 NW2d 597 (2001), is also misplaced because the instant case does not involve a direct appeal concerning a PPO. Rather, defendant is attempting to collaterally attack the 2000 PPO in a separate proceeding, which he cannot do. See *Jackson City Bank & Trust Co v Fredrick*, 271 Mich 538; 545-546; 260 NW 908 (1935).

[8] *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978).

C. Prosecutorial Misconduct

Defendant also seeks reversal of his conviction based on various claims of prosecutorial misconduct. We find no merit to these claims. First, defense counsel effectively waived any claim that the prosecutor knowingly used false testimony to obtain a conviction by expressly refuting defendant's pro se position on this issue when moving for a directed verdict at trial.[9] With the exception of certain fundamental rights, defense counsel may effectuate a waiver. *Carter, supra* at 218. A waiver extinguishes any error. *Id.* at 216. In any event, mere inconsistencies in a witness' testimony do not demonstrate that the prosecutor knowingly used false testimony to obtain a conviction. Rather, the inconsistencies provide a basis for impeaching the testimony. See *People v Cash,* 388 Mich 153, 162; 200 NW2d 83 (1972) (perjury is established by showing the truth of the contradiction; it is not enough simply to contradict it), and *People v Arntson,* 10 Mich App 718; 160 NW2d 386 (1968) (inconsistencies might inure to a defendant's benefit by affecting the credibility of witness, but do not establish perjury). Hence, defendant's claim that the prosecutor knowingly presented perjured testimony is without merit.

Second, defendant forfeited his claim that the prosecutor's opening statement constituted misconduct by not objecting to the opening statement at trial. A review of the opening statement fails to disclose plain error. *Carines, supra* at 763. And third, defendant's cursory claim regarding the evidence introduced by the prosecutor at trial is insufficient to invoke appellate review. *People v Kelly,* 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Lastly, a prosecutor has broad discretion in filing criminal charges. *People v Conat,* 238 Mich App 134, 148-149; 605 NW2d 49 (1999). If warranted by the facts, the prosecutor may charge a defendant under any applicable statute. *Id.* at 149. In this case, defendant has not established prosecutorial vindictiveness because the charge brought against him was supported by the facts and was within the prosecutor's discretion. *People v Ryan,* 451 Mich 30, 36; 545 NW2d 612 (1996).

D. Ineffective Assistance of Counsel

Next, defendant claims that he was denied the effective assistance of counsel and seeks a remand to the trial court for a *Ginther*[10] hearing. We note that both the trial court and this Court previously denied defendant's request for a *Ginther* hearing as unnecessary. See *People v McMillan,* 213 Mich App 134, 141-142; 539 NW2d 553 (1995) (remand is unnecessary if a defendant fails to show a factual dispute or an area in which further elucidation of facts might

[9] Although the record indicates that defendant was actively involved in his defense and was even permitted to introduce certain exhibits at trial, it does not reflect that the case involved the type of "hybrid representation" in which a defendant retains ultimate control over his defense strategy. See *People v Dennany,* 445 Mich 412, 440 n 17; 519 NW2d 128 (1994) (Griffin, J.) A defendant has a constitutional right to counsel or to proceed in propria persona, but not both. *People v Adkins (After Remand),* 452 Mich 702, 720; 551 NW2d 108 (1996). There is no constitutional right to "hybrid representation." *People v Kevorkian,* 248 Mich App 373, 420; 639 NW2d 291 (2001). Because the instant case involves a situation in which defendant was represented by counsel, we have evaluated defense counsel's performance in this context.

[10] *People v Ginther,* 390 Mich 436, 443; 212 NW2d 922 (1973).

advance his position). Limiting our review to errors apparent from the record, defendant has not established that trial counsel was ineffective. *Id*. at 141.

To establish ineffective assistance of counsel, a defendant must show

> that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). As for deficient performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). As for prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . ." *Id*. at 167. [*People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).]

We reject defendant's claim that defense counsel's failure to comply with each of defendant's requests to take certain actions demonstrates ineffective assistance of counsel. "A difference of opinion between defendant and defense counsel on trial tactics does not mean that there was ineffective assistance of counsel." *People v Cicotte*, 133 Mich App 630, 637; 349 NW2d 167 (1984). Having considered the specific matters raised by defendant in his Standard 11 brief, we find no basis for concluding that defense counsel was ineffective.

First, we find that defense counsel did not act deficiently by failing to move for a directed verdict until after the close of the prosecutor's proofs. Under MCR 6.419(A), a motion for a directed verdict is appropriate after the prosecution rests its case-in-chief and before the defendant presents his proofs. Counsel is not required to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Second, the record provides no support for defendant's claim that defense counsel's failure to ask all of the questions that defendant wanted asked amounted to either deficient performance or caused prejudice. *Toma*, *supra.* Although the record supports defendant's claim that a conflict with defense counsel occurred in the presence of the jury, it is plain from the record that the display was caused by defendant's own lack of self-control in the courtroom, rather than defense counsel's performance. Further, the record indicates that defendant was given wide latitude to provide testimony about his theory that the victim was falsely accusing him to protect Perry.

Third, defense counsel's failure to offer the victim's police statement into evidence does not provide a basis for finding ineffective assistance of counsel, given the trial court's decision to grant defendant's pro se offer to admit the statement and other exhibits, regardless of whether the evidence was admissible under the rules of evidence. We also note that defense counsel in fact used the statement when cross-examining the victim about whether she was afraid of defendant. Defendant has not shown that counsel's use of the statement fell below an objective standard of reasonableness. The questioning of witnesses is presumed to be a matter of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Fourth, we find that defendant was not prejudiced by defense counsel's failure to file a witness list because the trial court permitted defense counsel to make an offer of proof with regard to unlisted witnesses and defense counsel, in fact, succeeded in having defendant's brother called as a defense witness. Having considered the offer of proof made by defense counsel at trial with regard to the other proposed witnesses and evidence, we are not persuaded that defendant could develop any factual basis for concluding that, but for defense counsel's performance, there was a reasonable probability that the outcome of the proceedings would have been different. Contrary to defendant's argument on appeal, the record does not indicate that evidence regarding defendant's work schedule and phone records, or the testimony of assistant prosecuting attorneys, would have provided him with a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

E. Speedy Trial

Next, defendant argues that he was denied a speedy trial and that, during the delay, he should have been released on personal recognizance. We decline to address the latter issue because it is moot. *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998). With regard to the former issue, we conclude that defendant was not deprived of his right to speedy trial. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). The delay involved was less than the eighteen months necessary to trigger a presumption of prejudice. *Id.* Further, the delay was largely attributable to the need to repeatedly reschedule the trial in order to accommodate finding a new attorney to represent defendant. Indeed, three attorneys represented defendant and withdrew their representation within a six-month period in 2001. Additionally, although pretrial incarceration and emotional anxiety are cognizant forms of speedy trial prejudice, *People v Holland*, 179 Mich App 184, 196; 445 NW2d 206 (1989), the most serious inquiry is whether the delay impaired the defense, *People v Simpson*, 207 Mich App 560, 564; 526 NW2d 33 (1994). Here, there is no indication that defendant was prejudiced in his ability to defend the charge against him. After considering the relevant factors, we conclude that defendant's right to a speedy trial was not violated.

F. Motion to Disqualify Trial Judge

Next, defendant argues that his motion to disqualify Judge Michael Hathaway was erroneously denied. We review for an abuse of discretion the lower court's factual findings, but review de novo the application of the law to the facts. *Cain v Dep't of Corrections*, 451 Mich 470, 503; 548 NW2d 210 (1996). A party challenging a judge for bias must overcome a heavy presumption of judicial impartiality. *Id.* at 497. The defendant must prove either actual personal or prejudice. *Id*. at 503. Here, defendant did not establish any familial relationship that required disqualification under MCR 2.003(B), and he failed to demonstrate factual support for his claim of judicial bias. MCR 2.003(B)(1). A party's mere filing of a complaint with the Judicial Tenure Commission does not require disqualification. *People v Bero*, 168 Mich App 545, 552; 425 NW2d 138 (1988). Nor do a judge's repeated rulings against a party require disqualification. *People v Fox (After Remand)*, 232 Mich App 541, 559; 591 NW2d 384 (1998).

We also reject defendant's challenge to the chief judge's reassignment order under MCR 8.111. Chief judges are invested with authority to take measures with regard to case assignments that are not prohibited by the letter or spirit of the court rules. *Schell v Baker Furniture Co*, 461

Mich 502, 513; 607 NW2d 358 (2000). Defendant has not shown any basis for disturbing the reassignment order in this case.

G. Change of Venue

Defendant also argues that his request for a change of venue should have been granted. Having considered defendant's claim in the context of the argument he presented to the trial court regarding his lawsuit against the Wayne County Sheriff's Department, we disagree. The trial court did not abuse its discretion in denying the motion because we find there were no special circumstances to warrant a change of venue. *People v Jendrzejewski,* 455 Mich 495, 499-500; 566 NW2d 530 (1997).

H. Directed Verdict

Defendant next argues that the trial court should have directed a verdict in favor of defendant because the prosecutor's evidence was not strong. Again, we disagree. Viewed in a light most favorable to the prosecution, *People v Riley (After Remand),* 468 Mich 135, 139-140; 659 NW2d 611 (2003), the victim's testimony was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant repeatedly made phone calls to the victim's home and that both the reasonable person and actual causation elements of MCL 750.411i(1)(e) were proven. Although defendant argues that the victim was not credible, we are required to draw all reasonable inferences and make credibility choices in support of the jury's verdict. *People v Nowack,* 462 Mich 392, 400; 614 NW2d 78 (2000).

Further, viewed in a light most favorable to the prosecution, a rational trier of fact could find beyond a reasonable doubt that at least one action constituted the aggravating circumstance in MCL 750.411i(2)(a), violation of a PPO. Contrary to defendant's claim on appeal, actual notice is not equivalent to service under MCR 2.105. *People v Threatt,* 254 Mich App 504, 506-507; 657 NW2d 819 (2002). The process server's testimony about his encounter with defendant and how he left the 2000 PPO in the mail slot at defendant's location, viewed in conjunction with the victim's testimony that defendant telephoned her shortly thereafter and said, "You just got me served with this PPO," was sufficient to enable a rational trier of fact to infer beyond a reasonable doubt that defendant had actual notice of the 2000 PPO. We find that there was sufficient evidence to support defendant's conviction of aggravated stalking.

I. In-Court Identification

Next, defendant argues that the process server's in-court identification of him at trial was improper because it was tainted by his opportunity to view him at two earlier hearings. Because defendant did not challenge the identification testimony in the trial court, we review this unpreserved issue for plain error. *Carines, supra* at 763. Considering the process server's testimony at trial regarding his prior opportunities to observe defendant, we find no basis for relief. There is no per se rule that a prior one-on-one identification of a defendant, such as may occur at a trial or a preliminary examination, renders the situation inherently suggestive. *People v Fuqua,* 146 Mich App 133; 143-144; 379 NW2d 396 (1985), overruled in part on other grds *People v Heflin,* 434 Mich 482, 456 NW2d 10 (1990); see also *People v McElhaney,* 215 Mich App 269, 287; 545 NW2d 18 (1996).

Here, the process server testified at trial that he saw defendant in the courtroom on two prior occasions. In neither instance was the process server subjected to any pretrial identification procedure, let alone a procedure that was unduly suggestive. Further, there is no evidence that anyone in the courtroom identified defendant while the process server was present. Even if it could be said that the process server was subject to a suggestive pretrial identification procedure, it is not apparent that he lacked an independent basis for his in-court identification of defendant at trial, particularly given that he met defendant twice at defendant's home in his effort to serve the 2000 PPO. *People v Kachar*, 400 Mich 78, 95-96; 252 NW2d 807 (1977). Hence, we conclude that defendant has not shown that the process server's identification of him at trial was plain error.

J. Applicability of the Habitual Offender Statute

Additionally, defendant argues that the habitual offender fourth statute, MCL 769.12, does not apply to an aggravated stalking offense predicated on the violation of a restraining order. We review de novo this question of law. *Koonce*, *supra* at 518. Our goal in interpreting the statute is to ascertain and give effect to the intent of the Legislature. *Id.* The Legislature has demonstrated its ability to exclude particular categories of felonies from the sentence enhancement provision of the habitual offender act when it intends to do so. *People v Bewersdorf*, 438 Mich 55, 72; 475 NW2d 231 (1991). Neither MCL 769.12 nor MCL 750.411i exclude aggravated stalking predicated on a violation of a restraining order from the sentence enhancement provision of the habitual offender statute. Contrary to what defendant argues on appeal, the instant case does not involve a criminal statute that itself enhances punishment. Rather, MCL 750.411i(2) provides that the existence of a restraining order is a circumstance that will elevate a stalking offense to a felony. When the legislative scheme elevates the offense, courts have found a legislative intent to permit enhancement of the penalty under the habitual offender act. See generally *People v Fetterley*, 229 Mich App 511, 540-541; 583 NW2d 199 (1998). Hence, we reject defendant's argument that MCL 769.12 may not be applied to enhance his sentence for aggravated stalking.

Finally, defendant argues that MCL 769.13 is unconstitutional because it does not afford a right to a jury trial with regard to the habitual offender charge. We disagree. On de novo review of this constitutional issue, we conclude that the trial court correctly denied defendant's motion for resentencing on this ground. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Under MCL 769.13(5), the trial court determines the existence of the defendant's prior conviction or convictions. Pursuant to *Apprendi*, *supra* at 490, the existence of a prior conviction need not be submitted to a jury.

Affirmed.

/s/ Michael R. Smolenski
/s/ Helene N. White
/s/ Kirsten Frank Kelly