

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP ALLEN LESTER,

Defendant-Appellant.

UNPUBLISHED

January 10, 2008

No. 273646

Oakland Circuit Court

LC No. 06-207823-FH

Before: Fitzgerald, P.J., and Markey and Smolenski, JJ.

PER CURIAM.

Defendant appeals by right his convictions following a jury trial of two counts of aggravated stalking. MCL 750.411i. He was sentenced as an habitual offender, fourth offense, MCL 769.13, to concurrent prison terms of 5 to 15 years. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the multiple counts of aggravated stalking involving the same victim violated constitutional protections against double jeopardy, US Const Am V; Const 1963, art 1 § 5. Although defendant failed to preserve this issue in the trial court, we are reviewing it for plain error because it involves a significant constitutional issue. *People v Matuszak*, 263 Mich App 42, 47 n1; 687 NW2d 342 (2004).

To determine whether a defendant received multiple punishments for the same offense, we apply the same elements test, set forth in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932). *People v Smith*, 478 Mich 292, 295-296; 733 NW2d 351 (2007). But when the same statute is involved, the same elements necessarily must be proven. Therefore, it must be determined from the language of the statute what unit of prosecution the Legislature intended. See *People v Wakeford*, 418 Mich 95, 106-107; 341 NW2d 68 (1983).

In *People v White*, 212 Mich App 298, 306-307; 536 NW2d 876 (1995), this Court held generally that stalking was not necessarily a continuous offense allowing only one prosecution. Stalking, by definition, requires a course of conduct, defined as “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) and (d). A course of conduct is the proper unit of prosecution. In the present case, the prosecution established that a new course of conduct began in November 2005 when defendant renewed his correspondence with a change in focus and tone. This new course of conduct created a second violation of MCL 750.411i. Defendant was not convicted and

punished twice for the same offense; rather, he committed two separate offenses under MCL 750.411i. His multiple convictions did not violate double jeopardy protections.

Defendant also argues that he was denied effective assistance of counsel because his attorney failed to raise the double jeopardy issue. The right to counsel, guaranteed by the United States Constitution, US Const, Am VI, and the Michigan Constitution, Const 1963, art 1, § 20, includes the right to effective assistance of counsel. *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To constitute ineffective assistance, the attorney's performance must fall below an objective level of reasonableness and the defendant must be denied a fair trial as a result. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Because defendant failed to move for a new trial or request an evidentiary hearing, review is limited to any mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Defendant observes correctly that although he was sentenced concurrently for the two offenses, the second offense changed a scoring variable; however, the multiple convictions did not constitute double jeopardy. His attorney did not have a duty to make a meritless argument, *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), and failure to make the argument did not deny defendant a fair trial, see *Toma*, *supra* at 302.

We affirm.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Michael R. Smolenski