STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 8, 2008
v	No. 271739 Berrien Circuit Court
BARRY LARON DOOLITTLE, Defendant-Appellant.	LC No. 05-406717-FH

Before: Murphy, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of aggravated stalking, MCL 750.411i, and sentenced to 60 to 90 months' imprisonment. Defendant appeals as of right. We affirm.

Defendant argues that the trial court erred in refusing to allow him to represent himself at trial. We review a trial court's factual findings surrounding a defendant's request for self-representation for clear error. See *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004). A factual finding is clearly erroneous if, after a review of the record, we are left with a definite and firm conviction that a mistake was made. *People v Swirles (After Remand)*, 218 Mich App 133, 136; 553 NW2d 357 (1996). We review for an abuse of discretion the trial court's ultimate decision with regard to a motion for self-representation. *People v Hicks*, 259 Mich App 518, 521; 675 NW2d 599 (2003). A trial court abuses its discretion when it fails to select a principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

A defendant's right to self-representation, guaranteed by the United States Constitution, US Const, Am VI, and the Michigan Constitution, Const 1963, art 1, § 13, along with MCL 763.1, is not absolute. *People v Anderson*, 398 Mich 361, 366; 247 NW2d 857 (1976). Before a defendant may proceed in propria persona, a trial court must find, among other factors, that the defendant's self-representation will not unduly disrupt the court proceedings. *People v Russell*, 471 Mich 182, 190; 684 NW2d 745 (2004); *People v Ramsdell*, 230 Mich App 386, 405; 585 NW2d 1 (1998). In addition, a trial court has a duty to protect witnesses from harassing behavior. MRE 611(a). Thus, a trial court, in certain circumstances, may prohibit a defendant who is exercising his right to self-representation from personally questioning the victim. See *Fields v Murray*, 49 F3d 1024, 1036-1037 (CA 4, 1995), and *Partin v Commonwealth*, 168 SW3d 23, 27 (Ky, 2005).

A review of the record reveals that the trial court was concerned about allowing defendant to question the victim. In light of the specific facts of this case, we conclude that the trial court did not err in concluding that allowing defendant to do so would potentially be allowing him to "victimize this alleged victim again . . . ." At the time of the trial for the instant offense, defendant had been convicted twice of "window peeping" in connection with incidents in which he peered through the victim's bedroom window. He then allegedly engaged in the course of conduct on which the instant trial was based. This alleged conduct consisted of his (1) being in the victim's backyard at night in December 2004, (2) staring through the victim's bedroom window during morning hours in mid-September 2005, (3) again approaching the victim's backyard at night in mid-September 2005, and (4) yet again being in the victim's backyard during early morning hours in December 2005. The police, in connection with the last incident, found footprints that matched defendant "all along the back of [the victim's] house, going from the windows . . . ." The victim testified at the preliminary examination that she felt "violated" by defendant's alleged actions.

The trial court, after expressing its concerns regarding defendant's potential questioning of the victim, asked defendant if he would be willing to allow his attorney to question the victim. Defendant refused, and then trial court therefore denied his request to represent himself. After several witnesses had already testified, defendant's attorney stated, "Mr. Doolittle has indicated to me, that he wants to question the witnesses all except the victim." The trial court denied this request, stating:

> I previously -- Mr. Doolittle you do have [the] 6th [A]mendment right to represent yourself. And I'd previously ruled on that request. And I denied that request. . . .
>
> It's the [c]ourt's determination that your request to represent yourself is a subterfuge to cause distress to [the victim]. Now, you're changing your request but I still believe that it's your intent to disrupt these proceedings and to prevent the efficient and proper administration of justice. And to unduly burden the [c]ourt and the parties to this litigation.
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> So I am going to deny your request, and we're going to proceed.

Given defendant's two prior convictions for behavior involving the victim, and given the course of conduct that formed the basis for the instant charge, we cannot conclude that the trial court abused its discretion in deciding that defendant should not be allowed to question the victim and in further deciding that defendant should not be allowed to represent himself if defendant refused to allow his attorney to question the victim. Moreover, even though defendant eventually capitulated and indicated that he would allow his attorney to question the victim, this occurred after several witnesses had already testified. We believe that it was within the trial court's proper exercise of discretion to conclude that allowing defendant to begin representing himself mid-trial would be unduly disruptive. We discern no basis for reversal.

Defendant next argues that the trial court, in sentencing him to 60 to 90 months' imprisonment, erred in departing from the sentencing guidelines range of 12 to 30 months' imprisonment. Although defendant did not object below to his sentence, it is nonetheless appealable under the authority of *People v Kimble*, 470 Mich 305, 310; 684 NW2d 669 (2004).

Generally, a trial court is required to impose a minimum sentence that falls within the recommended minimum sentence range under the legislative guidelines. MCL 769.34(2); *Babcock*, *supra* at 255. A trial court may only depart from the recommended minimum sentence range if there is a "substantial and compelling reason" for doing so. MCL 769.34(3). Only factors that are objective and verifiable may be used to determine whether a substantial and compelling reason exists. *Babcock*, *supra* at 257. A substantial and compelling reason is one that "keenly" or "irresistibly" grabs a court's attention and one the court recognizes as being of "considerable worth" in deciding the defendant's sentence. *Id.* In addition, a departure from the recommended minimum sentence range may not be based on an offense or offender characteristic already taken into account in determining the recommended minimum sentence range unless the trial court finds that the characteristic was given inadequate weight. MCL 769.34(3)(b); *People v Thomas*, 263 Mich App 70, 79; 687 NW2d 598 (2004).

This Court reviews for clear error a trial court's determination that a particular departure factor exists. *Babcock*, *supra* at 264-265. Whether the factor is objective and verifiable is reviewed "as a matter of law." *Id.* Whether an objective and verifiable factor constitutes a substantial and compelling reason to depart from the recommended minimum sentence range is reviewed for an abuse of discretion. *Id.*

At defendant's sentencing hearing, the trial court provided the following reasons for departing from the recommended minimum sentence range:

> [The victim] asked me [to] sentence you to the fullest extent of the law. I'm going to go beyond the extent of the law in the sentencing guidelines because you are someone that we should fear. And that should go to prison for an extended period of time to protect the public, and that's where your [sic] going to go, Sir.
>
> The purpose of this sentence is punishment, protection of the community, deterrence, reformation, and restitution. I am going to vary exceeds [sic] sentencing guidelines in this case, Mr. Doolittle. Because I do see you as a serious menace to the community. I do not believe that [the] guidelines properly consider the psychological impact upon the victim without getting to [sic] personal into [the victim's] life. There is a December 15, 2005, letter contained within the Pre-sentence Investigation Report, from Dr. Saja [sic] that outlines the insomnia, depression, repeated trauma that [the victim] has faced as a result of your criminal behavior.
>
> I am also going to depart because I don't believe that the guidelines adequately addressed the length of time that the victim has suffered. The psychological injury and the window peeping. And other activity that you've been engaged in are also not properly considered by [the] sentencing guidelines.

Defendant contends that the reasons articulated by the trial court for departing from the recommended minimum sentence range were not objective and verifiable. An objective and verifiable reason is one that is "external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed." *People v Abramski*, 257 Mich

App 71, 74; 665 NW2d 501 (2003). The trial court articulated three reasons for its departure: (1) the guidelines did not adequately consider the psychological impact upon the victim; (2) the guidelines did not adequately consider the length of time the victim suffered as a result of defendant's actions; and (3) the guidelines did not adequately consider the "other activity" with which defendant was involved. In our opinion, each of the three reasons articulated by the trial court for its departure from the recommended minimum sentence range were objective and verifiable.

First, the psychological injury to the victim was external to the mind of the trial court. In his December 15, 2005 letter – the letter referenced by the trial court – Dr. Prasad S. Sajja, M.D., wrote the following:

> I have known [the victim] for the past fifteen years who works [sic] as a unit clerk at Lakeland Hospital on the unit that I see patients. I have daily contact with [the victim] and have heard her talk about the stalking acts from this stalker for many years. I had to provided [sic] counseling and suggestions on how to deal with this crisis. This caused her enough stress that I have been treating her privately at my office for depression, insomnia, and the repeated trauma that she perceives. Whatever help you can provide for her safety would greatly be appreciated.

Attached to Dr. Sajja's letter was a cover sheet, in which Dr. Sajja wrote the following: "I started seeing [the victim] for anxiety and depression related to the stress created by a window peeper. I saw her 1st time on 2/15/01. She had difficulty sleeping and was in fear."

In addition, at defendant's sentencing hearing, the victim informed the trial court that defendant "made an already difficult life, almost unbearable." According to the victim, the stress defendant caused her was worse than the combined stress she suffered from raising two autistic boys and divorcing her husband. Further, the officer who wrote the presentence investigation report (PSIR) spoke with victim, and, according to the officer, the victim described her life for the past eight years "as being a living hell." She was forced to cut trees down so that defendant could not hide in her yard. She told the officer that she planned to move out of the neighborhood because she could no longer stand the stress. Based on the statements of Dr. Sajja and the statements of the victim, the psychological injury the victim suffered was clearly external to the mind of the trial court, defendant, and others involved in the decision-making process. *Id.* Thus, the psychological injury suffered by the victim was objective and verifiable.

Second, the length of time the victim suffered was an external factor. Defendant pleaded guilty to peeping into the victim's window in March 1998. In addition, Dr. Sajja wrote in his February 15, 2005, letter that he began seeing the victim for the stress caused by defendant's window peeping in February 2001. Thus, it was external to the mind of the trial court, defendant, and others involved in the decision-making process that, at the time of defendant's sentencing in 2006, the victim had suffered psychological injury due to defendant's actions for at least a minimum of five years. *Id.* The length of time the victim suffered was objective and verifiable.

Third, defendant's "other activity" was an external factor and was capable of being confirmed. Included in the PSIR was a list of defendant's prior convictions. Defendant's prior

criminal history was external to the mind of the trial court, defendant, and others involved in the decision-making process. *Id.* It was objective and verifiable.

Defendant next claims that the three factors articulated by the trial court were based on offense characteristics that were already taken into account by the sentencing guidelines. According to defendant, the offense variables (OVs) adequately considered the victim's psychological injury because, pursuant to OV 4, MCL 777.34, the trial court scored ten points, the maximum allowed under that variable. A trial court may score ten points under OV 4 if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). However, before it based its departure on the victim's psychological injury, the trial court, as required by statute, MCL 769.34(3)(b), stated that the legislative guidelines did not adequately consider the psychological injury the victim suffered. In our opinion, the trial court did not abuse its discretion in determining that the ten points it scored for OV 4 failed to give adequate weight to the victim's psychological injury. The victim described her life as "a living hell." She further described the stress she suffered from defendant's acts as worse than the combined stress of raising two autistic boys and divorcing her husband. She planned to move out of her neighborhood to escape the stress. In addition, she suffered from insomnia and depression. Under these circumstances, we believe the trial court did not err in determining that OV 4 failed to give adequate weight to the victim's psychological injury.

Defendant claims that the trial court erred in concluding that the legislative guidelines did not adequately reflect the length of time the victim suffered and defendant's "other activity" because points addressing those factors could have been scored under OV 12, MCL 777.42, and OV 13, MCL 777.43.

A trial court may score points, from a minimum of one to a maximum of 25, for OV 12 if the defendant committed felonious criminal acts contemporaneously with the sentencing offense. MCL 777.42(1). A defendant commits a contemporaneous felonious criminal act if the act occurred within 24 hours of the sentencing offense and the act has not and will not result in a separate conviction. MCL 777.42(2)(a). Defendant's acts that made up the sentencing offense, aggravated stalking, occurred on December 3, 2004, September 3, 2005, September 14, 2005, and December 11, 2005. There is no evidence in the present case that defendant committed a felonious criminal act within 24 hours of any of these four dates. Accordingly, the trial court could not have scored any points under OV 12.

Similarly, we do not believe the trial court could have scored any points under OV 13, MCL 777.43. A trial court may score points, from a minimum of five to a maximum of 50, for OV 13 if the sentencing offense "was part of a pattern of *felonious* criminal activity involving three or more" crimes. MCL 777.43(1)(a)-(c), (e)-(f) (emphasis added). "For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted, regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). The five-year period must include the sentencing offense; no other period may be considered. *People v Francisco*, 474 Mich 82, 86-87; 711 NW2d 44 (2006) ("only those crimes committed during a five-year period that encompasses the sentencing offense can be considered"). Therefore, for the trial court to have been able to score points under OV 13, there must have been evidence that defendant committed at least three felonies within the five-year period that included the acts that led to his conviction for aggravated stalking. In the five years preceding December 11, 2005, the last date on which defendant engaged in conduct that led to

his conviction for aggravated stalking, there is no evidence that defendant committed any other felonies. Although defendant was convicted of disturbing the peace and using marijuana in this five-year period, neither is a felony. Using marijuana is a misdemeanor, MCL 333.7404(2)(d), and disturbing the peace is not a crime punished by the State of Michigan. Rather, it appears to be conduct made punishable by ordinances enacted by local units of government. See, e.g., *People v Barton*, 253 Mich App 601, 602; 659 NW2d 654 (2002). Accordingly, defendant has not demonstrated that the factors relied on by the trial court in departing from the recommended minimum sentence range were already taken into account by the offense variables. Moreover, defendant's two prior convictions for "window peeping" were not scored under the guidelines, and defendant does not argue on appeal that they should have been scored.

We conclude that the factors articulated by the trial court constituted substantial and compelling reasons for departing from the recommended minimum sentence range under the legislative guidelines. The evidence presented at trial established that, over a course of almost eight years, from March 1998 until December 2005, defendant subjected the victim to a life of fear. He repeatedly appeared at the victim's window in the night and early morning hours. As established, no offense or prior record variable took into account the length of time defendant victimized her. Further, as already noted, OV 4 did not adequately consider the psychological injury the victim suffered. Defendant's history, the length of time defendant victimized the victim, and the psychological injury the victim suffered keenly and irresistibly grab our attention. *Babcock*, *supra* at 257.

If substantial and compelling reasons exist for a departure, the extent of the departure must be reviewed for an abuse of discretion. *People v Lowery*, 258 Mich App 167, 172; 673 NW2d 107 (2003). "A given sentence constitutes an abuse of discretion if that sentence violates the principle of proportionality, which requires that the sentence be proportional to the seriousness of the circumstances surrounding the offense and the offender." *Id*. Here, the sentence was proportionate to the circumstances surrounding the offense and the offender. There was no abuse of discretion.

Defendant next argues that his conviction violated the constitutional provisions prohibiting ex post facto laws. See US Const, art I, § 10, and Const 1963, art 1, § 10. A defendant who engages in stalking is guilty of aggravated stalking if he has previously been convicted of stalking. MCL 750.411i(2)(d). Defendant claims that, because his prior stalking conviction occurred in 1995, three years before the Legislature enacted the aggravated stalking statute, MCL 750.411i, his conviction of aggravated stalking constituted an ex post facto violation. Defendant's argument is patently without merit because it is based on an incorrect factual premise. The Legislature did not enact the aggravated stalking statute in 1998. The Legislature added the aggravated stalking statute, MCL 750.411i, to the Michigan Criminal Code in 1992. See 1992 PA 262. The subsequent amendments did not materially change the provision under which defendant was convicted.

Defendant also argues that the admission of evidence of his 1995 stalking conviction violated MRE 609, which prohibits a party from impeaching a witness with evidence of a conviction if more than ten years have passed from the date of the conviction or from the date the witness was released from the confinement imposed for the conviction. See MRE 609(c). Defendant's argument is without merit. First, defendant has failed to properly preserve this issue because he failed to raise it in his statement of the issues presented. *People v Brown*, 239 Mich

App 735, 748; 610 NW2d 234 (2000). Second, defendant's 1995 conviction for stalking was not used to impeach defendant. Defendant did not even testify. Defendant's 1995 conviction was introduced to establish one of the elements of aggravated stalking: that he had a prior conviction for stalking. MCL 750.411i(2)(d).

Defendant next argues that his trial attorney rendered ineffective assistance of counsel. No evidentiary hearing took place below in connection with this issue. Accordingly, our review is limited to errors apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To demonstrate ineffective assistance of counsel, a defendant must show that: (1) his attorney's performance fell below an objective standard of reasonableness, (2) there is a reasonable probability that this performance affected the outcome of the proceedings, and (3) the proceedings were fundamentally unfair or unreliable. *People v Rogers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Counsel is presumed to have provided effective assistance, and "the defendant bears a heavy burden to prove otherwise." *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005).

Defendant first argues that he was denied the effective assistance of counsel when counsel failed to move to quash the information on the basis that an application of the aggravated stalking statute to his case violated the constitutional prohibitions against ex post facto laws. However, such a motion would have been futile, as discussed above. Because counsel is not ineffective for failing to make a futile motion, *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998), defendant's argument is meritless.

Defendant next argues that he was denied the effective assistance of counsel when counsel failed to impeach Officer Dave Krugh with his preliminary examination testimony after Krugh testified that, upon bringing defendant to the victim's house on December 11, 2005, he removed one of defendant's boots and placed it in a nearby footprint. This testimony did conflict with the testimony Krugh gave at defendant's preliminary examination. At the preliminary examination, Krugh testified that, after he brought defendant to the victims's house, he did not remove one of defendant's boots and place the boot in one of the fresh footprints. Rather, Krugh testified that he ordered defendant, who was sitting in the back of a vehicle, to stick out one of his feet. Krugh testified that he then compared the pattern on the bottom of the boot to the footprints, and the boot pattern and footprints were identical.

Decisions regarding how to cross-examine a witness are a matter of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999). "[T]his Court will not substitute its judgment for that of counsel regarding matters of trial strategy," *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002), nor will it assess counsel's competence with the benefit of hindsight, *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). Without the testimony of defense counsel, defendant is unable to overcome the strong presumption that counsel engaged in sound trial strategy while cross-examining Krugh. See *In re Ayres*, *supra* at 23 (without the testimony of defense counsel, the Court could not conclude that counsel's decisions regarding how to cross-examine witnesses were unreasonable). Defendant has failed to show that counsel's performance in cross-examining Krugh fell below an objective standard of reasonableness. *Rogers*, *supra* at 714. It is certainly possible that counsel felt that cross-

examining Krugh on the point in question would be of little worth, given that in either version, Krugh verified that the footprints matched defendant.

Defendant also argues that he was denied the effective assistance of counsel when defense counsel failed to exercise peremptory challenges against juror #4, who was an apparent stalking victim, and juror #33, who had a hearing problem. During jury selection, juror #4 stated that, 16 years earlier, she had received telephone calls at work, and subsequently at home, from a person who wanted to meet her. She did not know the caller. Juror #4 reported the telephone calls to the security staff at her workplace. She never informed the police of the telephone calls, and no one was ever charged with a crime. Juror #33 stated that he had a minor hearing problem. He did not wear a hearing aid. Jury #33 was "[h]opeful[]" that, if each witness spoke into the microphone, he would be able to adequately hear the testimony presented at trial. He believed that he had heard all the questions that were asked during jury selection.

"Jurors are presumed to be competent and impartial and the burden of proving otherwise is on the party seeking disqualification." *People v Walker*, 162 Mich App 60, 63; 412 NW2d 244 (1987). Defendant has utterly failed to demonstrate that juror #4's personal history rendered her unable to decide defendant's case solely on the facts presented or that juror #33's minor hearing problem rendered him unable to adequately hear the judicial proceedings. Accordingly, defendant has failed to establish that counsel's performance in not using peremptory strikes against jurors #4 and #33 fell below an objective standard of reasonableness. *Rogers*, *supra* at 714.

Affirmed.

/s/ Michael R. Smolenski
/s/ Patrick M. Meter