

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL JAMES ELLIOTT,

Defendant-Appellant.

UNPUBLISHED

June 18, 2009

No. 283910

Isabella Circuit Court

LC No. 07-001189-FH

Before: Fort Hood, P.J., and Cavanagh and K. F. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of aggravated stalking, MCL 750.411i. Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to serve two to five years' imprisonment. We affirm.

I. Background

Defendant was convicted of aggravated stalking of another woman in July 2006. The victim in the current case testified against defendant in that earlier prosecution. Shortly after, the victim in the instant matter sought and received a personal protection order against defendant in August 2006. Subsequently, on May 23, 2007, defendant was found on the grounds of a church at the same time that the victim was there. Defendant was arrested and charged with aggravated stalking. At trial, defendant's defense was that he was on the church grounds for a legitimate purpose and that his presence at the church was a "constitutionally protected activity." Defendant was convicted and this appeal followed.

II. Ineffective Assistance of Counsel

Defendant first argues that trial counsel was ineffective because he failed to object to jury instructions. According to defendant, the trial court erred by failing to instruct the jury that it had to find that defendant was not engaged in a constitutionally protected activity to be guilty of stalking. We cannot agree.

To show that trial counsel was ineffective, defendant must demonstrate that "(1) counsel's performance was below an objective standard of reasonableness under professional

norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). There is a strong presumption that counsel was effective and his or her actions based on sound trial strategy, which defendant must overcome if he is to prevail. *Id.* Further, because defendant did not move for a new trial or evidentiary hearing below, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Here, defendant was charged with aggravated stalking, which consists of the crime of "stalking," MCL 750.411h(1)(d), and the presence of an aggravating circumstance specified in MCL 750.411i(2).¹ *People v Threatt*, 254 Mich App 504, 505; 657 NW2d 819 (2002). To establish aggravating stalking the prosecutor has to show multiple acts of "unconsented contact that actually cause emotional distress to the victim and would also cause a reasonable person such distress" and the existence of one of the aggravating factors. See *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 723; 691 NW2d 1 (2005). By definition, "conduct that is constitutionally protected or serves a legitimate purpose cannot constitute harassment or, derivatively, stalking." *Id.*

In the instant matter, the trial court instructed the jury on both aggravated stalking and the lesser-included offense of stalking, as follows:

The Defendant is charged with aggravated stalking. To establish this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the Defendant committed two or more willful, separate and noncontinuous acts of unconsented contact with Elizabeth Pilling.

Second, that the contact would cause a reasonable individual to suffer emotional distress.

¹ The aggravating circumstances include:

(a) 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 or at least 1 of the actions is in violation of an injunction or preliminary injunction.

(b) At least 1 of the actions constituting the offense is in violation of a condition of probation, a condition of parole, a condition of pretrial release, or a condition of release on bond pending appeal.

(c) The course of conduct includes the making of 1 or more credible threats against the victim, a member of the victim's family, or another individual living in the same household as the victim.

(d) The individual has been previously convicted of a violation of this section or section 411h. [MCL 750.411i(2)(a)-(d).]

Third, that the contact caused Elizabeth Pilling to suffer emotional distress.

Fourth, that the contact would cause a reasonable individual to feel terrorized, frightened, intimidated, threatened, harassed and or molested.

Fifth, that the contact caused Elizabeth Pilling to feel terrorized, frightened, intimidated, threatened, harassed and or molested.

Sixth, the stalking was committed in violation of a court order or of a restraining order of which the Defendant had actual notice, or was a second or subsequent stalking offense. In considering whether the stalking was committed in violation of a court order or of a restraining order of which the Defendant had actual notice, the term unconsented contact is limited to following Ms. Pilling, which is the conduct prohibited in the restraining order.

You may consider . . . the lesser offense of stalking. To establish this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the Defendant committed two or more willful, separate and noncontinuous acts of unconsented contacts with Elizabeth Pilling.

Second, that the contact would cause a reasonable individual to suffer emotional distress.

Third, that the contact caused Elizabeth Pilling to suffer emotional distress.

Fourth, that the contact would cause a reasonable individual to feel terrorized, frightened, intimidated, threatened, harassed and or molested.

And, fifth, that the contact caused Elizabeth Pilling to feel terrorized, frightened, intimidated, threatened, harassed and or molested.

These instructions are consistent with CJI2d 17.25. In addition, the trial court provided the following statutory definition of harassment:

[H]arassment means 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. *Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose.* [See MCL 750.411h(1)(c) (emphasis added).]

Defendant complains that these instructions were insufficient because they did not instruct the jury that it had to find “harassment” to find all the offense’s elements proven beyond a reasonable doubt, and, in effect, prevented the jury from considering his defense that he was at the church to engage in a constitutionally protected activity. We are not of the same opinion. Rather, in our view, the trial court provided sufficient instructions to the jury that fairly apprised

it of the applicable law. It is true that “a defendant in a criminal trial is entitled to have a properly instructed jury consider the evidence against him or her.” *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007). Accordingly, a trial court is required to instruct the jury in the applicable law and fully and fairly present the case to the jury in an understandable manner. *People v Rodriguez*, 463 Mich 466, 472-473; 620 NW2d 13 (2000). This is necessary so that the factfinder can correctly and intelligently decide the case. *Id.* “Jury instructions must include all the elements of the offenses charged against the defendant and any material issues, defenses, and theories that are supported by the evidence.” *Dobek, supra* at 82. “Even if the instructions are somewhat imperfect, reversal is not required as long as they fairly presented the issues to be tried and sufficiently protected the defendant’s rights.” *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

Here, the trial court informed the jury of all the elements of the offense. The trial court then informed the jury that the definition of “harassment” does not include constitutionally protected activity or conduct that serves a legitimate purpose. These instructions fairly presented the issues and encompassed defendant’s theory of the case, thereby sufficiently protecting his rights. See *id.* Under the circumstances, the instructions were proper. As a result, any objection to these instructions would have been futile. Counsel cannot be ineffective for failing to raise a futile objection. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Accordingly, defendant’s ineffective assistance claim is unavailing.

III. Sentencing

Defendant next argues that because his prior conviction did not precede the current offense, it could not be used to enhance his sentence under MCL 769.10. We disagree. There is no merit to defendant’s contention because it is factually inaccurate. Our review of the record shows that defendant has a prior conviction, dated July 14, 2006, and was convicted of the underlying offense on January 15, 2008. The fact that his current conviction is premised on some events that preceded his prior conviction is immaterial under the habitual offender statute. See *People v Gardner*, 482 Mich 41, 44; 753 NW2d 78 (2008). The trial court’s decision to sentence defendant as a second habitual offender under MCL 769.10 was not erroneous.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Mark J. Cavanagh

/s/ Kirsten Frank Kelly