# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>January 5, 2010 |
| v | No. 287087<br>Ionia Circuit Court |
| RAYMOND CHARLES FAIRFIELD, JR.,<br><br>Defendant-Appellant. | LC No. 07-013625-FH |

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of stalking a minor, MCL 750.411h(2)(b). The trial court sentenced defendant as a second habitual offender, MCL 769.11, to two to 7-1/2 years in prison. We affirm.

Defendant insists that the trial court should have granted his motion for a directed verdict because insufficient evidence supported his conviction. In response to the directed verdict motion, the trial court expressed in strong terms that if it were the trier of fact, it would find defendant not guilty given the numerous inconsistencies in the testimony of the prosecution witnesses. However, the court ultimately determined that, in light of the liberal standard applied to directed verdict motions, enough evidence justified submission of the case to the jury. Defendant now asserts that the trial court should not have considered the falsehood-tainted evidence.

> In ruling on a motion for a directed verdict, the trial court must consider in the light most favorable to the prosecutor the evidence presented by the prosecutor up to the time the motion is made and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. Circumstantial evidence and reasonable inferences arising therefrom can sufficiently establish the elements of a crime. However, it is not permissible for a trial court to determine the credibility of witnesses in deciding a motion for directed verdict of acquittal, *no matter how inconsistent or vague that testimony might be*. [*People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001) (internal quotation omitted, emphasis added).]

Questions regarding witness credibility belong to the trier of fact. *People v Peña*, 224 Mich App 650, 659; 569 NW2d 871 (1997), mod in part on other grounds 457 Mich 885 (1998). The same

standards govern review of a sufficiency of the evidence challenge. *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007).

To establish stalking of a minor under MCL 750.411h(2), the prosecutor had to prove that the victim was younger than 18 years of age, and that a person at least five years older than the victim undertook

> a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested. [MCL 750.411h(1)(d).]

Pursuant to MCL 750.411h(4),

> In a prosecution for a violation of this section, 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 the same or a 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.

The statute defines a "course of conduct" as "a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose." MCL 750.411h(1)(a).

In this case, the parties agree that the victim was 17 years of age and that defendant, who was more than 20 years older than the victim, received service of a personal protection order (PPO) on December 21, 2006. Defendant thus undisputedly had notice that any further contact would contravene the victim's desires or wishes. Our review of the record reveals that while cross-examining the prosecution witnesses, defense counsel successfully unearthed discrepancies among the trial accounts of the primary prosecution witnesses and within the prior statements and testimonies by these primary witnesses, especially with respect to the occurrence or timing of various alleged contacts of the victim by defendant. But the record also reflects the testimony of several prosecution witnesses similarly describing that (1) on January 30, 2007 or January 31, 2007, the victim or her father's girlfriend discovered inside a console in the victim's car a plastic bag containing an audiocassette recorded by defendant together with a handwritten letter, and (2) defendant came to the victim's residence in April 2007. Defendant testified that he had placed the audiotape in the victim's car well before he learned of the PPO and disputed ever visiting the victim's house in April 2007. However, viewing in the light most favorable to the prosecution the evidence concerning defendant's January 2007 placement of the audiocassette and letter in the victim's car and his April 2007 visit to the victim's residence, and resolving the relevant "credibility choices in support of the jury verdict," this evidence supports the jury's finding beyond a reasonable doubt that defendant had repeated and unconsented contact with the victim notwithstanding his receipt of notice that she did not consent to these contacts. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Consequently, the trial court correctly denied defendant's motion for a directed verdict.

Defendant next maintains that the prosecutor engaged in misconduct. "[T]he test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the defendant's guilt or innocence." *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007). "Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice." *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008) (internal quotation omitted). Absent a contemporaneous objection or request for a curative instruction, appellate review of claims of prosecutorial misconduct is limited to ascertaining whether plain error affected the defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Reversal is warranted only when plain error resulted in the conviction of an actually innocent person or seriously affected the fairness, integrity, or public reputation of the proceedings. *Unger*, 278 Mich App at 235.

Defendant first takes issue with the prosecutor's opening statement reference to the fact that he was in jail before he appeared at the victim's residence in April 2007, and that a condition of his bond mandated that he stay away from Lyons, where the victim lived. Defendant offered no objection at trial to the prosecutor's comment, but now asserts that no evidence at trial supported the statement.

> It is a rule that where in an opening statement the prosecutor makes statements which may not be substantiated at trial by the evidence, we will not reverse for that fact alone in the absence of a showing of bad faith on the part of the prosecutor or prejudice to the defendant. [*People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997), quoting *People v Davis*, 343 Mich 348, 357; 72 NW2d 269 (1955)].

Before the final prosecution witness testified, the prosecutor sought to introduce the bond to show that defendant knew that he had to stay away from the victim and out of Lyons entirely. The trial court ruled the bond inadmissible. Notably, though, by this point a deputy had already testified without objection that a jail release bond condition in place forbade defendant from contacting the victim. Therefore, contrary to defendant's contention, the prosecutor did elicit evidence supporting her opening statement comments concerning his bond on release from jail. And we detect no support for defendant's related appellate contention that the prosecutor "improperly led the jury to believe that the defendant was already convicted of some [unrelated] crimes," especially given that the prosecutor subsequently elicited at trial, again without objection, testimony from a deputy regarding his arrest of defendant on January 30, 2007 or January 31, 2007 for allegedly violating the PPO, for which the deputy placed defendant in jail. In conclusion, we find nothing in the prosecutor's opening statement for which she failed to present an evidentiary foundation at trial, and no impropriety relating to the bond reference that rises to the level of plain error affecting defendant's substantial rights.

Defendant next complains that the prosecutor improperly questioned the victim with respect to whether she knew defendant "was in jail after" February 16, 2007. The record shows that the prosecutor established that the victim knew defendant was in jail at the time of a February 16, 2007 PPO violation hearing, and then inquired if she knew whether he had remained in jail after this hearing, to which the victim responded negatively. Although

defendant failed to object to this questioning at trial, he now posits that these questions amounted to an unwarranted attempt to substantiate the opening statement remark that he had been incarcerated. But given the victim's negative response, the additional evidence admitted without objection regarding defendant's late January 2007 arrest and incarceration, and the other properly admitted evidence establishing defendant's guilt of stalking the victim, we find no prejudice, let alone any plain error affecting a substantial right, arising from the prosecutor's brief disputed questioning of the victim.

Defendant additionally suggests that the prosecutor failed "to make reasonable efforts to preserve material evidence that could have been inferred by the jury to be favorable to the defendant." In support of defendant's position, he quotes a portion of the prosecutor's examination of an officer about why he had not brought to court a letter allegedly left on the victim's windshield; the officer replied that defendant had been charged with misdemeanor stalking and that once "there was no appeal," the evidence was destroyed. Without any defense objection, the trial court sua sponte immediately instructed the jury at some length to disregard the officer's improper remark:

> Members of the jury . . . . [w]hat the officer said was completely wrong. He should not have said it and I would expect much more from someone who's been on the force for ten years. There was no conviction. There was nothing that involved any type of appeal. Mr. Fairfield has not been convicted of any type of misdemeanor stalking. I don't know how else to say that to you but you should disregard everything the officer said in that regard[]. And, in fact, if you want to use that in some way against the People, you certainly can. I can't indicate how wrong that was. We've talked before, everyone is presumed innocent. The People have the burden of proof. And it is completely improper to imply to you that somebody has been convicted of something when it is not even true. It's not even close to being true. So again, please disregard everything he said there. Know that it was wrong and if you want to hold that against the People for the unsatisfactory nature of this evidence then you may do that. Again, I want you please to understand all of you that there was no conviction, nothing involving any type of appeal. If the officer has lost evidence then that is not an explanation for that.

Even were we to assume that the prosecutor failed to preserve evidence, we ascertain no plain error affecting defendant's substantial rights with respect to this prosecutorial misconduct contention given (1) defendant's failure to elaborate the manner in which the letter had materiality to his defense, (2) the trial court's extensive and correct instructions that the jury should disregard the officer's proffered explanation of the letter's disappearance and that the jury could draw an inference favorable to defendant from the prosecutor's failure to present the letter, and (3) the substantial properly admitted evidence of defendant's guilt. *People v Watson*, 245 Mich App 572, 591-592; 629 NW2d 411 (2001).

Defendant's last claim of misconduct pertains to a closing argument reference about him having resided in jail.[1] Contrary to defendant's assertion that this statement referred to his incarceration after the April 2007 PPO violation, our reading of the prosecutor's remark plainly reflects that she was referring to the trial testimony concerning an arrest of defendant and incarceration that took place before April 2007. We detect nothing in the challenged portion of the prosecutor's closing argument unsupported by the trial evidence. Even assuming some impropriety or inaccuracy in the prosecutor's challenged statements, we find no substantial prejudice to defendant in light of (1) the trial court's final instructions that the arguments or statements by the attorneys did not constitute evidence, and (2) the substantial properly admitted evidence supporting the stalking a minor conviction.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder

[1] The prosecutor's remark identified by defendant states the following:

> The fact is the man who had been sitting in jail all that time [before his April 2007 visit to the victim's residence], the man whose [sic] been told by numerous people to stay away from her, who have had contact with the police, had a PPO served on him, got released from jail, as you heard Officer Thome say, and had a bond put on him saying stay away from her has now showed up on her doorstep [i]n April . . . 2007 because he is just not getting it.