STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 29, 2010
v	No. 290932 Oakland Circuit Court
FRANKIE LEE HAWKINS, Defendant-Appellant.	LC No. 2008-220730-FH

Before: ZAHRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for malicious destruction of property $1,000 or more but less than $20,000, MCL 750.377a(1)(b)(i), aggravated stalking, MCL 750.411i, and malicious destruction of property less than $200, MCL 750.377a(1)(d). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 2 to 20 years' imprisonment for the malicious of destruction of property $1,000 or more but less than $20,000 conviction, 2 to 20 years' imprisonment for the aggravated stalking conviction, and 93 days in jail for the malicious destruction of property less than $200 conviction. We affirm.

Defendant first argues that there is insufficient evidence to satisfy the cost of damage element for his conviction of malicious destruction of property $1,000 or more but less than $20,000 because the evidence shows that the victim's car was worth less than $1,000. We disagree.

We review a challenge to the sufficiency of evidence de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We must "'view the evidence in a light most favorable to the prosecution and determine if any rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.'" *Id.*, quoting *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

When reviewing a sufficiency of evidence claim, all conflicts in the evidence must be resolved in favor of the prosecution. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). It is solely the trier of fact's role to weigh the evidence and judge the credibility of witnesses. *Wolfe*, 440 Mich at 514. Moreover, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002).

The elements of malicious destruction of property $1,000 or more but less than $20,000 are: (1) that the property belonged to someone else; (2) that defendant destroyed or damaged the property; (3) that defendant committed the act knowing that it was wrong, without just cause or excuse, and with the intent to destroy or damage the property; and (4) that the extent of the damage was $1,000 or more but less than $20,000. 750.377a(1)(b)(i); *People v Hamblin*, 224 Mich App 87, 92; 568 NW2d 339 (1997); CJI2d 32.2.

In a case of malicious destruction of property where the property is repairable, the prosecutor may establish the amount of damage resulting from an injury by showing the reasonable cost of repairing or restoring the property. *Hamblin*, 224 Mich App at 96. Here, because the victim's automobile was repairable, the prosecutor properly presented evidence of the reasonable cost of repair in order to establish the amount of damage resulting from defendant paying someone to light her car on fire. Robert Strasser, who owned and operated a collision repair shop, examined photographs of the damage to defendant's vehicle and estimated the cost to be $5,176.92. Thus, there is sufficient evidence to support defendant's conviction because the cost of repair would be more than $1,000.

Next, defendant argues that there is insufficient evidence to support his conviction for aggravated stalking. Defendant contends that his conduct did not constitute stalking under the statute, but was merely malicious conduct. We disagree.

Aggravated stalking consists of the crime of stalking and one of the aggravating circumstances described in MCL 750.411i(2). *People v Threatt*, 254 Mich App 504, 505; 657 NW2d 819 (2002). MCL 750.411i(1)(e) defines "stalking" as "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." "Course of conduct" is defined 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); *Pobursky v Gee*, 249 Mich App 44, 47; 640 NW2d 597 (2001).

MCL 750.411i(1)(d) defines "harassment" as "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," but to exclude "constitutionally protected activity or conduct that serves a legitimate purpose." MCL 750.411i(1)(f) defines "unconsented contact" as "any contact with another individual that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued." Aggravating circumstances include a violation of a restraining order or injunction, a violation of probation, parole, pretrial release, or bond, the making of threats against the victim or his family, and a previous conviction pursuant to MCL 750.411h. MCL 750.411i(2)(a)-(d).

Viewing the evidence in the light most favorable to the prosecution, it shows that over the course of three days defendant engaged in repeated acts of willful, separate, and noncontinuous conduct, which reasonably caused the victim to feel harassed and terrorized. On April 25, 2008, defendant called the victim numerous times and left several threatening voicemails, in spite of the fact that the victim had told defendant she did not want to speak to him or see him after they had broken up. That night or the following morning, defendant slashed all four of the tires on the

victim's car and pulled off the utility meter from her home. The following night, defendant was responsible for having the victim's car lit on fire. Defendant's repeated and unconsented contact with the victim over these three days left her feeling harassed and terrorized, and it was reasonable for her to feel this way.

In addition, the circumstances were aggravated by defendant's credible threats in some of his voicemail messages in which defendant stated that he was going to show the victim what trouble is, he knew too much about her, that she had unleashed a monster, that he was on his way to her house, as well as threatening that "the fire" is next. Thus, based on the repeated and unconsented contacts over these three days, which left the victim harassed and terrorized, and defendant's credible threats, there is sufficient evidence to support defendant's conviction for aggravated stalking.

Defendant also argues that although his minimum sentences were within the sentencing guidelines range, when considering the quality of the evidence upon which his convictions are based, and his age, his sentences constitute cruel and unusual punishment. We disagree. An unpreserved claim of cruel and unusual punishment based upon proportionality is reviewed for plain error. *People v McLaughlin*, 258 Mich App 635, 669-670; 672 NW2d 860 (2003).

The minimum sentencing guidelines range for defendant's malicious destruction of property $1,000 or more but less than $20,000 conviction was 12 to 48 months, and the trial court sentenced defendant to a minimum of two years for that offense, which falls within the guidelines range. Defendant was also sentenced to concurrent minimum sentences of two years for his aggravated stalking conviction and 93 days in jail for the malicious destruction of property less than $200 conviction.

A minimum sentence that is within the sentencing guidelines range is presumptively proportionate. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). "[A] sentence that is proportionate is not cruel or unusual punishment." *Id*. Therefore, because defendant's sentence for malicious destruction of property $1,000 or more but less than $20,000 conviction falls within the minimum sentencing guidelines range, and defendant's other sentences resulted in the imposition of only concurrent terms, his claim that his sentences constitute cruel and unusual punishment is without merit.

Defendant also raises additional issues in his Standard 4 brief. Defendant first argues that the trial court improperly ordered him to pay fees for his court-appointed attorney from his prisoner account. Defendant contends that the trial court's order is improper because it was entered after the trial court had already entered a valid sentence for defendant and is in violation of the double jeopardy clause. We disagree. Statutory interpretation and constitutional issues present issues of law, which we review de novo. *People v Swafford*, 483 Mich 1, 7; 762 NW2d 902 (2009).

The record reflects that on July 23, 2008, the trial court ordered a court-appointed attorney for defendant. On May 1, 2008, the trial court entered an order, which defendant signed, that made defendant responsible for any costs for a court-appointed attorney and any costs incurred by the county in this case. Subsequently, two orders permitted payment to defense counsel of $485 and $1,735. The judgment of sentence also ordered defendant to pay $165 for state minimum costs and $60 for the crime victim rights fund. All totaled, these orders required

defendant to pay $2,445. Consequently, on February 11, 2009, the trial court entered an order that directed the Department of Corrections to collect 50 percent of all funds in defendant's prisoner account that exceeded $50 in order for defendant to pay his owed balance of $2,445.

Although "[a] trial judge has the authority to resentence a defendant only when the previously imposed sentence is invalid, *People v Moore*, 468 Mich 573, 579; 664 NW2d 700 (2003); MCR 6.429(A), the record reflects that the trial court had previously entered an order requiring defendant to pay the costs for his court-appointed attorney. Therefore, contrary to defendant's argument, his responsibility for the court-appointed attorney's fees was in place prior to sentencing. The trial court also ordered defendant to pay a crime victim assessment and state minimum costs pursuant to MCL 769.34(6), MCL 780.905(1)(a), and MCL 769.1k(1)(a). The total for these costs was accurately reflected in the trial court's remittance order.

Further, MCL 769.1k and MCL 769.1l give Michigan trial courts the power to both impose a fee for a court-appointed attorney as part of a defendant's sentence and to enforce that imposition against an imprisoned defendant. *People v Jackson*, 483 Mich 271, 283; 769 NW2d 630 (2009). Moreover, MCL 769.1l inherently calculates a prisoner's general ability to pay and, in effect, creates a statutory presumption of nonindigency. *Id*. at 295. Therefore, the trial court had the authority to enter its remittance order. Moreover, the order did not constitute an additional punishment for the same offense in violation of the double jeopardy clause, *People v Calloway*, 469 Mich 448, 450; 671 NW2d 733 (2003), because responsibility for the court-appointed attorney's fees was a part of the sentencing for defendant's convictions in this case. Thus, defendant's claim must fail.

Next, defendant argues that because some of the same prior convictions had been used to enhance a previous sentence in an unrelated case, his enhanced sentencing, as a fourth habitual offender, in the instant case violates the double jeopardy clause and constitutes cruel and unusual punishment. We disagree. We review an unpreserved double jeopardy challenge for plain error affecting substantial rights. *People v Meshell*, 265 Mich App 616, 638; 696 NW2d 754 (2005). We also review defendant's unpreserved claim that his sentence enhancements constitute cruel and unusual punishment for plain error affecting his substantial rights. *McLaughlin*, 258 Mich App at 670.

"The double jeopardy clauses of the United States and Michigan constitutions protect against governmental abuses for both (1) multiple prosecutions for the same offense after a conviction or acquittal and (2) multiple punishments for the same offense." *Calloway*, 469 Mich at 450. However, the habitual offender statutes do not offend the double jeopardy clause because they do not define substantive criminal offenses. Rather, they prescribe a means by which the trial court can enhance a defendant's sentence. *People v Zinn*, 217 Mich App 340, 347; 551 NW2d 704 (1996). Consequently, the additional time defendant received because of his habitual offender status did not result from additional substantive offenses, *People v Anderson*, 210 Mich App 295, 298; 532 NW2d 918 (1995), and the double jeopardy protection against multiple punishments for the same offense is not implicated.

Additionally, a minimum sentence that is within the sentencing guidelines range, as is the case here, is presumed proportionate and defendant has failed to establish otherwise. *Powell*, 278 Mich App at 323. Proportionate sentences do not constitute cruel and unusual punishment. *People v Drohan*, 264 Mich App 77, 92; 689 NW2d 750 (2004), aff'd 475 Mich 140 (2006).

Further, habitual offender enhancements do not violate constitutional prohibitions against cruel and unusual punishment. *People v Curry*, 142 Mich App 724, 732; 371 NW2d 854 (1985); *People v Potts*, 55 Mich App 622, 639; 223 NW2d 96 (1974). Therefore, defendant's claim is without merit.

Lastly, defendant argues that his statements to police following his warrantless arrest should have been suppressed because there was a nine-day delay between his arrest and arraignment. We disagree. Because defendant failed to preserve this issue, it is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 768; 597 NW2d 130 (1999).

As an initial matter, the record reflects that defendant was arrested pursuant to three outstanding warrants for unrelated offenses. Further, defendant incorrectly states that there was a nine-day delay between his arrest and his arraignment. Rather, defendant was arrested on the morning of April 27, 2008, and was arraigned on April 29, 2008.

Under MCL 764.13, when a person is arrested without a warrant, the police "shall without unnecessary delay take the person arrested before a magistrate of the judicial district in which the offense is charged to have been committed . . . ." However, contrary to defendant's argument, he was arrested pursuant to outstanding warrants. Thus, MCL 764.13 does not apply. Regardless, MCR 6.104(A) provides that "unless released beforehand, an arrested person must be taken without unnecessary delay before a court for arraignment . . . ." The United States Supreme Court has held that any delay of more than forty-eight hours must be presumed unreasonable. *County of Riverside v McLaughlin*, 500 US 44; 111 S Ct 1661; 114 L Ed 2d 49 (1991). However, a shorter delay may also be unreasonable if it was unnecessary. *Id*. at 56. Further, in evaluating whether a delay in a particular case is unreasonable, courts must allow a substantial degree of flexibility. *People v Manning*, 243 Mich App 615, 628; 624 NW2d 746 (2000).

In this case, the record reflects that defendant was arraigned within 48 hours of his arrest. Defendant has failed to present any evidence that this delay was unreasonable or unnecessary. Further, defendant has failed to show that his statements, which were made within a day of his arrest, were involuntary. Thus, defendant's claim is without merit.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald