

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DON STAMFORD SOLOMON, JR.,

Defendant-Appellant.

UNPUBLISHED

December 17, 1996

Nos. 179833; 179834

LC Nos. 93-1426-FC

93-1427-FH

Before: Gribbs, P.J., and MacKenzie and Griffin, JJ.

PER CURIAM.

Following a jury trial in these consolidated cases, defendant was convicted of aggravated stalking, MCL 750.411i; MSA 28.643(9), felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). In No. 93-1427-FH, defendant was sentenced to three years, four months' to five years' imprisonment for the aggravated stalking conviction. In No. 93-1426-FC, he was sentenced two years, eight months' to four years' imprisonment for the felonious assault conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm but remand for the limited purpose of correcting a clerical error in defendant's judgment of sentence in No. 93-1427-FH.

Just after defendant left for Florida in May 1993, his wife, Paula Curtis, began divorce proceedings against him. At the same time, Curtis and defendant's good friend, Jeff Lominac, became sexually involved. On June 1, 1993, Curtis obtained a restraining order prohibiting defendant from having contact with her. When defendant returned to Michigan in mid-July, 1993, Curtis was living with her parents. Curtis testified that from the time of his return until the end of September, defendant harassed her by driving by the house and yelling obscenities and by telephoning her and threatening her life and the life of their daughter. Curtis' parents had to change their phone number five times to escape the harassing phone calls. Defendant testified that he was provoked by phone calls from Jeff Lominac.

On October 20, 1993, defendant went over to Lominac's apartment in a fit of anger and forced his way inside. He then fired a gun at Lominac and kicked open the door to the bathroom where Curtis

and Lominac's daughter, Kristin, were hiding. Defendant hit Curtis twice in the head and said, "You're dead bitch." Lominac eventually wrestled the gun away from defendant and held him until the police arrived.

On appeal in No. 93-1427-FH, defendant argues that there was insufficient evidence to sustain his conviction for aggravated stalking. We disagree. In reviewing the sufficiency of the evidence, this Court views the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Stalking is defined 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. [MCL 750.411i(1)(e); MSA 28.643(9)(1)(e).]

For aggravated stalking under MCL 750.411i(2); MSA 28.643(9)(2), there must also be a credible threat to kill another or inflict physical injury against the victim, a family member, or household member, a prior stalking conviction, or actions constituting the offense that are in violation of a restraining order, injunction, or probation order. See *People v White*, 212 Mich App 298, 310-311; 536 NW2d 876 (1995). In this case, in light of the evidence of the restraining order, the harassing and threatening phone calls, the threats yelled when defendant drove by Curtis' parents' house, and the physical attack at Lominac's apartment, we conclude that the evidence was sufficient to sustain defendant's conviction for aggravated stalking.

In No. 93-1426-FC, defendant argues that the trial judge abused his discretion by refusing to instruct the jury on reckless use of a firearm as a lesser included misdemeanor. We find no abuse of discretion. When properly requested, a trial court should instruct a jury on appropriate lesser included misdemeanors if a rational view of the evidence could support a verdict of guilty of the misdemeanor and not guilty of the felony. *People v Taylor*, 195 Mich App 57, 62; 489 NW2d 99 (1992). In this case, the evidence does not support the contention that defendant recklessly handled his gun. Defendant fired three shots in the apartment and threatened the lives of Lominac, Curtis, and Kristin, with a gun in his hand. He told Lominac at one point to sit down or he would shoot him, and then cocked his gun. Defendant also aimed his gun at Curtis and said, "You're dead bitch." This evidence showed that defendant acted purposely and intentionally and did not merely handle the gun recklessly. Accordingly, we find no instructional error.

Defendant next argues in both cases that the trial judge should have recused himself from the trial because of his inability to impartially hear the matter. However, defendant failed to preserve this issue for appellate review because he did not seek de novo review by the chief judge of Judge Wilder's refusal to disqualify himself. *People v Williams (After Remand)*, 198 Mich App 537, 544; 499 NW2d 404 (1993). Accordingly, we decline to address the issue.

Defendant's remaining claims in both cases go to the sentences he received. First, defendant asserts that Offense Variable 2 of the sentencing guidelines prepared for his felonious assault conviction was incorrectly scored. The claim is without merit. A scoring decision for which there is any evidence in support will be upheld. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993). Under OV 2, twenty-five points is allocated when the victim suffers bodily injury and/or is subjected to terrorism. Terrorism is conduct that is designed to increase substantially the fear and anxiety that the victim suffers during the offense. *People v Kreger*, 214 Mich App 549, 552; 543 NW2d 55 (1995). Based on the evidence of events which occurred at Lominac's apartment on October 20, 1993, there was ample evidence to support the scoring of OV 2 at twenty-five points.

Next, defendant asserts that his sentences were disproportionate. We disagree. Sentencing issues are reviewed for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). A given sentence constitutes an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* With regard to defendant's felonious assault conviction, the trial court departed from the sentencing guidelines' recommended minimum sentence range of one to two years and sentenced defendant to two years and eight months' imprisonment. In so doing, the judge specifically articulated the reasons for departing upward from the sentencing guidelines. *People v Fleming*, 428 Mich 408, 426; 410 NW2d 266 (1987). The judge found that defendant fired his gun not just once, but three times. The judge also noted that the incident on October 20, 1993 placed three lives in danger and that serious psychological trauma occurred as a result to the three victims. Defendant fired three shots in the direction of all three victims and threatened to kill all three of them. With regard to the stalking conviction, defendant admitted that his intent was to violate a court order and he also admitted that he went to the apartment to commit a parental kidnapping. Additionally, as noted by the trial court, defendant's comments at sentencing indicated that he did not feel responsible for his actions and placed the blame on Lominac and Curtis. The departure upward for the felonious assault sentence was justified based on reasons articulated by the trial judge and the sentence imposed for the stalking conviction was proportionate to the offense and the offender. We find no abuse of discretion.

Defendant's final claim is that this matter should be remanded for a correction of a clerical error in the judgment of sentence. We agree. The judgment of sentence in No. 93-1427-FH dated September 9, 1994 states that the sentence for the aggravated stalking conviction was to be concurrent with the sentence "in case #94-1426-FC," when the case number should read #93-1426-FC. We therefore remand for the limited purpose of correcting this clerical error.

Affirmed and remanded for correction of the judgment of sentence in No. 93-1427-FH. We retain no further jurisdiction.

/s/ Roman S. Gribbs
/s/ Barbara B. MacKenzie
/s/ Richard Allen Griffin