STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACK EDWARD BURTON, SR.,

Defendant-Appellant.

UNPUBLISHED
October 17, 1997

No. 171213
Van Buren Circuit Court
LC Nos. 93-008602-FH;
93-008603-FH

Before: Cavanagh, P.J., and Holbrook, Jr., and Jansen, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of carrying a concealed weapon, MCL 750.227; MSA 28.424, possession of burglar's tools, MC: 750.116; MSA 28.311, and aggravated stalking, MCL 750.411i; MSA 28.643(9). Defendant was sentenced to concurrent terms of six months' imprisonment for the convictions of carrying a concealed weapon and possession of burglar's tools, and twenty-one months' to sixty months' imprisonment for aggravated stalking. Defendant appeals as of right. We affirm his conviction of aggravated stalking, reverse his convictions of carrying a concealed weapon and remand for a new trial, and vacate his conviction of possession of burglar's tools because of insufficient evidence.

This case arises out of the conduct of defendant toward his wife while the two were still married, although estranged. The information with respect to the aggravated stalking offense alleged that defendant's conduct included the making of one or more credible threats against the complainant on November 20, 1992 and April 25, 1993. With respect to the convictions of carrying a concealed weapon and possession of burglar's tools, the incident occurred on August 2, 1993. During the afternoon, Paw Paw police officer Kevin Davis saw a car with California license plates parked on the street. Defendant informed the police officer that he was waiting for his wife to appear at the post office, but could not tell the officer where she lived or her telephone number. The officer then ordered defendant to move on, and the officer ran a check on defendant to determine the existence of any existing warrants. Davis ultimately learned that an arrest warrant existed for "harassing, nuisance and telephone calls." Later in the evening, Davis and police officer Russell Reynnells saw defendant sitting in his car in a McDonald's parking lot. As the officers pulled up, defendant left his vehicle and was

arrested on the outstanding warrant. The officers searched defendant's car and found a .380-caliber handgun in a bag behind the driver's seat, a double-edged knife between the car's front split seats, an ESP lock-pick set, two military bayonets with sheaths, and two stun guns in a bag in the rear seat behind the driver's seat.

On appeal, defendant raises five issues. He claims that the stalking statutes are unconstitutionally vague as they relate to conduct within a martial relationship, that the Legislature did not intend stalking to include contacts with a spouse who has taken no action to end the relationship, that the trial court abused its discretion in permitting evidence of conduct over the twenty-year marriage and preventing the children from being called as witnesses, that the search of his car was illegal, and that there was insufficient evidence to support his conviction of possession of burglar's tools.

I

We first address defendant's claim that the stalking statutes are unconstitutionally vague as they relate to conduct within the context of a marital relationship. Although defendant did not raise this issue in the trial court, we will address it because it involves an important constitutional claim. *People v Artman*, 218 Mich App 236, 244; 553 NW2d 673 (1996).

In *People v White*, 212 Mich App 298, 308-314; 536 NW2d 876 (1995), this Court held that § 411h and § 411i of the stalking statutes are not unconstitutionally vague. Notwithstanding this holding, defendant still argues that the stalking statutes are unconstitutionally vague as they relate to conduct within the context of a marital relationship. Defendant also argues that (1) the definition of harassment in the statutes is unconstitutionally vague because it fails to adequately define "legitimate purpose"; (2) the term "unconsented contact" is unconstitutionally vague; and (3) the term "course of conduct" is unconstitutionally vague, and, combined with the rebuttable presumptions in the statutes, intrude into the marital relationship.

There are at least three ways in which a penal statute may be found to be unconstitutionally vague: (1) failure to provide fair notice of what conduct is prohibited; (2) encouragement of arbitrary and discriminatory enforcement; or (3) being overbroad and impinging on First Amendment freedoms. *People v Lino*, 447 Mich 567, 576; 527 NW2d 434 (1994); *White, supra*, p 309. Vagueness challenges that do not implicate First Amendment freedoms are examined in light of the facts of each particular case. *Lino, supra*, p 575. When making a vagueness determination, a court must also take into consideration any judicial constructions of the statute. *Id.*

We reject defendant's claim of vagueness because he has failed to argue, or to prove, that the stalking statutes are unconstitutionally vague as they apply to his conduct. In other words, defendant does not claim that the stalking statutes implicate his First Amendment freedoms. Rather, he argues that the statues are unconstitutionally vague as they relate to conduct within the context of a marital relationship. However, as our Supreme Court held in *Lino*, vagueness challenges that do not implicate First Amendment freedoms are examined in light of the facts of each particular case. Defendant has failed to show that the stalking statutes are vague in light of the facts of his case.

In this case, defendant focuses on the terms "harassment," "legitimate purpose," "unconsented contact," and "course of conduct." However, those terms are defined in the statute[1] in the following manner:

> (a) "Course of conduct" means a pattern of conduct composed of a series of 2 or more separate noncontinuous acts, evidencing a continuity of purpose.
>
> * * *
>
> (d) "Harassment" 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.
>
> * * *
>
> (f) "Unconsented contact" means any contact with another individual that is initiated or continued without that individual's consent, or in disregard of that individual's express desire that the contact be avoided or discontinued. Unconsented contact includes, but is not limited to, any of the following:
>
> (*i*) Following or appearing within the sight of that individual.
>
> (*ii*) Approaching or confronting that individual in a public place or on private property.
>
> (*iii*) Appearing at the workplace or residence of that individual.
>
> (*iv*) Entering onto or remaining on property owned, leased, or occupied by that individual.
>
> (*v*) Contacting that individual by telephone.
>
> (*vi*) Sending mail or electronic communications to the individual.
>
> (*vii*) Placing an object on, or delivering an object to, property owned, leased, or occupied by that individual. [MCL 750.411i; MSA 28.643(9)].

We do not find the above statutory provisions to be vague as applied to defendant's conduct. The record is replete with testimony by the complainant and her brother regarding numerous telephone calls from defendant in which he explicitly and graphically threatened to kill her. These telephone calls occurred after the complainant left the marital home and moved to Michigan (defendant was in California at the time). These telephone calls also occurred after defendant rejected the possibility of reconciliation. Defendant's activities clearly fall within the definition of course of conduct, harassment,

and unconsented contact as defined in the statute. We specifically reject defendant's contention that a marriage certificate could in any way authorize such behavior. The aggravated stalking statute clearly defines the offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory conduct. *Lino, supra*, p 575.

Accordingly, we reject defendant's claim that the statute is unconstitutionally vague as applied to the facts of this case.

II

Defendant next argues that the Legislature did not intend that the stalking statutes apply to a spouse who has taken no action to abrogate the legal relationship. Specifically, defendant argues that the statute is not intended or written to regulate the degree of contact desired in an ongoing marital relationship and that the statute should be interpreted to find a legislative intention to include all contacts with a spouse to have a legitimate purpose in the absence of a protective order or filing of divorce.

Defendant's argument is absurd. The Legislature could not have possibly intended that conduct such as defendant's to have some sort of "legitimate purpose" merely because of the existence of a marriage license. Moreover, we note that the complainant in this case had moved out of the marital home and to a different state. The parties were clearly estranged. The statute does not require that there be a protective order or the filing of a divorce in order for it to apply to married couples and we refuse to read the statute in such a manner. We are unable to glean any legislative intent that the stalking statutes not apply to married couples in the absence of a divorce proceeding or protective order, especially where defendant's conduct in this case clearly meets the offense of aggravated stalking.

Additionally, the stalking statutes were enacted for exactly the type of behavior exhibited by defendant in this case. See, e.g., *White, supra*, p 311 ("the stalking statutes specifically prohibit defendant's unconsented contact with his victim that was aimed at threatening, intimidating, harassing, and frightening her regardless of his alleged romantic inclinations"). Further, the House Legislative Analysis noted that "[s]talking often involves a former spouse, boyfriend or girlfriend who harasses and intimidates the ex-partner, and sometimes even members of the victim's family." The Legislature clearly intended that the type of harassing and threatening behavior conducted by defendant be subject to the stalking statutes.

III

Defendant next raises an evidentiary issue. He contends that the trial court abused its discretion in allowing evidence of defendant's conduct over the twenty-year marriage and in preventing him from calling the children as witnesses at trial.

The trial court allowed evidence regarding defendant's conduct in California before the complainant moved to Michigan. We find no abuse of discretion on the part of the trial court in the regard because: (1) defendant's conduct toward the complainant did not occur in a vacuum

and the jury was entitled to understand the background explaining the charge of aggravated 20, 1992; and (3) defense counsel elicited from the complainant that it was her belief that the harassment did not begin until April 1993. Therefore, we do not find that this evidence was either irrelevant or unduly prejudicial, confusing to the jury, or a waste of time. MRE 401, 403.

We also find no abuse of discretion with regard to the trial court's decision to not allow defendant to call his children as witnesses. There is no showing that the children could have given relevant testimony with respect to the aggravated stalking charge. Further, it is unclear how the children's testimony regarding the parties' conduct in California would have been relevant. This is especially so in light of the fact that defendant requested that all evidence of the parties' conduct in California not be admitted at trial. We find that the children's testimony was properly excluded pursuant to MRE 402.

Defendant also contends that the trial court abused its discretion when it allowed a police officer to testify to his "dire suspicions" of defendant's intended use of the weapons and lock-pick set found in his car. In considering the number of weapons and the lock-pick set found in defendant's car, we can perceive no error under MRE 701 because the opinion was rationally based on the officer's perception and was helpful to a clear understanding of a fact in issue.

IV

Defendant next argues that the trial court erred in failing to suppress evidence found in his automobile because the police officers' search of his automobile without a warrant cannot be justified under the search incident to an arrest exception. This issue relates to his convictions of carrying a concealed weapon and possession of burglar's tools only.

We consider only the testimony from the preliminary examination because that is the only evidence that was before the trial court at the time it ruled on defendant's pretrial motion to suppress. As previously stated in this opinion, police officer Kevin Davis had contact with defendant in the afternoon of August 2, 1993. Davis ultimately learned of defendant's outstanding warrant when Davis ran a LEIN check of defendant. Later in the day, Davis and Reynnells saw defendant sitting in his automobile in the parking lot of a McDonald's restaurant. Davis testified that defendant exited the automobile as the officers approached it. Defendant was out of his automobile when Reynnells informed defendant that he was under arrest. Defendant was then handcuffed and placed in the rear seat of the patrol vehicle. Davis testified that they did not search defendant's automobile until after defendant had been placed in the patrol vehicle. Further, Reynnells testified that the weapons found in the automobile were not in plain view.

We agree with defendant that the search of his automobile without a warrant was illegal pursuant to this Court's recent decision in *People v Fernengel,* 216 Mich App 420; 549 NW2d 361 (1996). In *New York v Belton,* 453 US 454, 460; 101 S Ct 2860; 69 L Ed 2d 768 (1981), the Supreme Court held that when a police officer has made a lawful custodial arrest of the occupant of an automobile, the officer may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile. However, in this case, as in *Fernengel,* defendant was not arrested

while he was an occupant of his vehicle. According to Davis, defendant exited his vehicle as the officers approached it, and informed him that he was under arrest when he was outside of the vehicle.

In *Fernengel,* this Court adopted the holding of *United States v Hudgins,* 52 F3d 115, 119 (CA 6, 1995), where it was held that where the defendant has voluntarily exited the automobile and begun walking away from the automobile before the officer has initiated contact with him, the case does not fall under *Belton's* bright-line rule and a case by case analysis of the reasonableness of the search under *Chimel v California,* 395 US 752; 89 S Ct 2034; 23 L Ed 2d 685 (1969) is necessary. In *Chimel,* the Supreme Court held that under the search incident to an arrest exception to the warrant requirement, the police may search the accused's person and the area within the accused's immediate control without a warrant. *Id.,* p 763.

The present case does not fall under *Belton's* rule because the police did not arrest defendant when he was an occupant in his automobile. Moreover, defendant did not exit his automobile at the behest of the police officers. Defendant voluntarily exited his automobile and began walking away when the officers arrested him. Further, the exception in *Chimel* does not apply because the automobile was not in defendant's immediate control at the time of the search. Defendant had been arrested, handcuffed, and placed in a patrol car before the officers began to search the automobile. Therefore, we conclude that the warrantless search of defendant's automobile was improper. See *Fernengel, supra*.

The trial court erred in denying defendant's motion to suppress the evidence seized in his automobile because the search incident to an arrest exception does not apply. We reverse defendant's convictions of carrying a concealed weapon and remand for further proceedings.

V

Lastly, defendant argues that there was insufficient evidence presented at trial to sustain his conviction of possession of burglar's tools because there was no evidence of an intent to steal.

When determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found 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).

The statute, MCL 750.116; MSA 28.311, provides:

> Any person who shall knowingly have in his possession any nitroglycerine, or other explosive, thermite, engine, machine, tool or implement, device, chemical or substance, adapted and designed for cutting or burning through, forcing or breaking open any building, room, vault, safe or other depository, in order to steal therefrom any money or other property, knowing the same to be adapted and designed for the purpose of aforesaid, with intent to use or employ the same for the purpose aforesaid,

> shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years.

Defendant argues that the statute requires a specific intent "to use or employ the same for the purpose aforesaid"; the aforesaid purpose being "in order to steal therefrom any money or other property." Defendant argues that there was no evidence produced at trial proving an intent to steal.

While not a model of clarity, a plain reading of the statute supports defendant's position.[2] The phrase "with intent to use or employ the same for the purpose aforesaid" sets forth an intent to steal in the statute. Although defendant did have a lock-pick set in his automobile, defendant maintained that he used the set while working as an apartment complex manager. Even the police at trial conceded that these kits have legitimate, innocent uses. There was no evidence produced at trial to show that defendant intended to use the lock-pick set to break and enter anything. Therefore, because an essential element of the crime is lacking, defendant's conviction of possession of burglar's tools must be vacated.

Defendant's conviction of aggravated stalking is affirmed. His convictions of carrying a concealed weapon is reversed and the evidence seized from defendant's automobile must be suppressed. We remand for further proceedings with respect to the convictions of carrying a concealed weapon. Defendant's conviction of possession of burglar's tools is vacated because of insufficient evidence. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Donald E. Holbrook, Jr.
/s/ Kathleen Jansen

[1] Because defendant was convicted of aggravated stalking, we will consider only those terms found in MCL 750.411i; MSA 28.643(9).

[2] To the extent that previous cases in this Court and CJI2d 25.5 rely on *People v Dorrington*, 221 Mich 571; 191 NW 831 (1923), for the elements of possession of burglar's tools, we caution that their reliance on *Dorrington* is misplaced because the statute was revised by the Legislature after the opinion in *Dorrington* to include the phrase "with intent to use or employ the same for the purpose aforesaid." Therefore, we believe that, under a plain reading of the statute, it must be read to include an intent to use to a tool described in the statute for the purpose of stealing money or property.