STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF REDFORD TOWNSHIP,

Plaintiff-Appellee,

v

MICHAEL JOHN BAK,

Defendant-Appellant.

UNPUBLISHED
July 21, 2000

No. 212056
Wayne Circuit Court
LC No. 95-529988-AV

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

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of misdemeanor stalking in violation of the Redford Township anti-stalking ordinance Ch 58, Art III, § 58-60 (hereinafter "the ordinance"). We affirm.

While he was in his late thirties and early forties, defendant contacted the young female victim on several separate occasions. The contacts began when the girl was ten and continued until she was fourteen. Several years after the contacts began, plaintiff enacted the ordinance. When the contacts continued after the ordinance's enactment, defendant was arrested, tried, and convicted for misdemeanor stalking.

Defendant first argues that the trial court violated the Ex Post Facto Clauses of the federal and state constitutions, US Const, art I, § 9, cl 3; Const 1963, art 1, § 10, when it admitted evidence of contacts that occurred between defendant and the victim before the township stalking ordinance was enacted. We disagree. A law which affects the prosecution or disposition of criminal cases involving crimes committed before the law's effective date violates the constitutional prohibition against ex post facto laws if the law "(1) makes punishable that which was not, (2) makes an act a more serious criminal offense, (3) increases the punishment, or (4) allows the prosecution to convict on less evidence." *Riley v Parole Bd*, 216 Mich App 242, 244; 548 NW2d 686 (1996).

The ordinance was enacted on June 21, 1993. The following contacts occurred before the ordinance's enactment: (1) defendant's contacts with the victim at basketball games when she was ten years old; (2) defendant's walking or following the victim home from school when she was ten or twelve

years old; (3) defendant's requesting permission from the victim's mother to give the victim a stuffed animal; and (4) the victim's father warning that defendant should stay away from his daughter. The remaining contacts, see *infra* at 3, occurred after the ordinance was enacted.

The district court allowed the introduction of testimony regarding those contacts occurring before the ordinance's enactment, ruling that defendant had opened the door to such testimony on cross-examination. The circuit court affirmed, albeit on different grounds.[1] We agree with the district court that defendant opened the door to testimony about the prior contacts. In any event, we note that the jury was specifically instructed that only those contacts that occurred after the ordinance was enacted should be considered for purposes of the offense charged. "[T]he evidence must convince you beyond a reasonable doubt," the trial court instructed, "that the crime occurred between the dates of September, 1993, and September, 1994, within the Charter Township of Redford." A jury is generally presumed to follow the trial court's instructions, until the contrary is clearly shown. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). The contrary has not been shown in this case.

Defendant next contends that the township ordinance is unconstitutionally vague and overbroad. We disagree. The ordinance is almost identical to the state stalking statute, MCL 750.411h; MSA 28.643(8), which we upheld against the same challenges in *People v White*, 212 Mich App 298; 536 NW2d 876 (1995). For the same reasons set forth in *White*, we conclude that the ordinance here is neither unconstitutionally overbroad nor vague. *Id.* at 308-313.

Defendant also argues that the prosecution failed to present sufficient evidence at trial to support his conviction. We disagree. "In reviewing a sufficiency of the evidence question, this Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the crime were proved beyond a reasonable doubt." *People v Warren*, 228 Mich App 336, 343; 578 NW2d 692 (1998). In order to be convicted of the ordinance at issue, the prosecution is required to prove: (1) that the defendant willfully engaged in two or more separate, noncontinuous acts, evidencing a continuity of purpose; (2) that such contacts were initiated without the victim's consent, or in disregard of her expressed desire that such contact be avoided or discontinued; (3) that the unconsented to acts would cause a reasonable person to suffer emotional distress; and (4) that the victim actually suffered emotional distress due to these unconsented to contacts.

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[1] The circuit court relied on *United States v Poulos*, 895 F2d 1113, 1119-1120 (CA 6, 1990), abrogated on other grounds in *Horton v California*, 496 US 128; 110 S Ct 2301; 110 L Ed 2d 112 (1990), for the rule that a defendant may be convicted of an offense which begins before the law's enactment, but involves conduct continuing after the law's enactment. The circuit court held, "Appellant here is not being punished for his pre-enactment course of conduct of harassing complainant but for continuing this conduct even after the stalking ordinance came into existence." We do not believe that *Poulos*, which involved the possession of two gun silencer kits that were neither registered nor identified by serial numbers, applies, given the circumstances of the case at hand.

The prosecution presented testimony that defendant contacted the victim multiple times, over a long period of time. After the ordinance was enacted, defendant contacted the victim on six separate occasions: (1) in September 1993, defendant approached the victim at a church fair and offered her some stuffed animal toys; (2) between September 1993 and March 1994, defendant stared at the victim during several church services; (3) in March 1994, defendant tried to speak to the victim at her confirmation reception; (4) in March and June 1994, defendant mailed the victim two unsigned cards; (5) in September 1994, defendant drove slowly by her house; and (6) in September 1994, defendant approached her and tried to speak to her at a church fair, despite her repeated refusals on that occasion to speak to him. We believe on this evidence, a reasonable jury could have found that defendant willfully engaged in two or more separate, noncontinuous acts, evidencing a continuity of purpose.

We also believe sufficient evidence was presented to establish the second element of the offense. The township ordinance defines unconsented contact to include "following or appearing within sight of the individual;" "approaching or confronting that individual in a public place or on private property;" or "sending mail . . . to that individual." The evidence produced at trial showed that defendant engaged in each of these types of prohibited contact. Furthermore, the evidence showed that each time defendant attempted to speak to the victim, she either walked away or told him she did not want to speak with him. As for the two unsigned cards sent in March and June 1994, we believe a jury could have reasonably inferred that defendant concealed his identity because he knew that his contacts were unwelcome. Finally, we note that a police officer testified that in June 1994 he warned defendant to stay away from the victim or he would be criminally charged. On this evidence, a jury could have reasonably found that defendant engaged in unconsented contact.

Turning to the two final elements of the offense, we conclude that sufficient evidence was presented to establish both that the unconsented to acts would cause a reasonable person to suffer emotional distress, and that the victim actually suffered emotional distress due to these unconsented to contacts. Given defendant's age and the victim's age, defendant's repeated attempts to contact the victim, and the victim's knowledge that defendant was not supposed to do so, the jury could reasonably have concluded that a reasonable person in the victim's position would have experienced emotional distress. The evidence also supports a finding that the victim did experience emotional distress. Not only did the victim herself testify that she came to fear defendant's contacts, but the victim's neighbor testified that she was practically hysterical, shaking and trembling after defendant tried to speak with her in September 1994.

Finally, defendant next contends that his trial counsel was ineffective when he failed to include in his motion for directed verdict the argument that the victim's mother consented to defendant's contacts with the victim. We disagree. "To prove a claim of ineffective assistance of counsel . . . , a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Defendant must overcome the presumption that the challenged action constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521

NW2d 557 (1994). Because defendant failed to move for either a new trial or a *Ginther*[2] hearing, our review of his claim of ineffective assistance of counsel is limited to the existing record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

We first take issue with defendant's assertion that the victim's mother had actually consented to the continuing contacts. The record shows that the mother agreed to allow defendant to give her daughter some stuffed animals in 1990. We do not believe the mother's acquiescence to this specific request meant that the mother had granted defendant carte blanche to approach her daughter whenever he wanted. Furthermore, the victim's father testified that it occurred before he warned defendant to stay away from his daughter. Even if defendant's testimony as to the timing of this conversation were believed (defendant claimed the warning came after the conversation with the victim's mother), it should have been clear to defendant from the victim's responses to his contacts that regardless of how he interpreted the contact with the mother, the victim herself had not consented to any contact with defendant. Accordingly, we conclude that because any such motion would have been meritless, defendant has failed to establish that his counsel's assistance was ineffective. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly

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[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).