

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL RAY NEWLAND,

Defendant-Appellant.

UNPUBLISHED

March 9, 2001

No. 212993

Marquette Circuit Court

LC No. 97-033365-FH

Before: Gribbs, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of aggravated stalking, MCL 750.411i; MSA 28.643(9). The trial court sentenced him to twenty-four to sixty months' imprisonment. Defendant appeals by right. On appeal, defendant alleges three grounds for reversal of his conviction. Defendant maintains that the personal protection order (PPO) that prevented him from having contact with the victim was void or voidable; that the trial court's instructions on stalking were defective because they did not include definitions set out in the statute; and that he was denied effective assistance of counsel. We find defendant's claims to be without merit and therefore we affirm.

Before trial, defendant filed a motion to suppress the complaint. In the motion, defendant alleged that the PPO was void or voidable because the court failed to renote defendant's motion to rescind the PPO after the originally scheduled hearing date was adjourned at defendant's request. The reason defendant requested the adjournment is unclear from the record before us. Presumably, it was related to the fact that the judge assigned to hear defendant's motion to rescind was the same judge assigned to defendant's unresolved divorce case. In addition to the motion to rescind the PPO, defendant had pending in the divorce action a motion to disqualify the judge. Defendant maintains that the failure of the court clerk to renote the motion renders the PPO either void or voidable because it was the court clerk's obligation to reschedule, not defendant's (he was not represented by counsel at the time). Defendant fails to cite any authority in support of this claim, and "[t]his Court will not search for authority to sustain or reject a party's position." *Head v Phillips Camper Sales & Rental, Inc*, 234 Mich App 94, 116; 593 NW2d 595 (1999). Additionally, a review of the court rules lends no support to defendant's

contention that it is the court clerk's obligation to reschedule a motion adjourned by the party filing the motion, see MCR 2.503(E)(1), and the PPO statute is silent on the issue.¹ See MCL 600.2950a; MSA 27A.2950(1). Because defendant requested the adjournment and he was in the best position to know when the reason for which he needed an adjournment would be resolved, the onus for rescheduling logically belonged to defendant. Further, if defendant was sufficiently skilled to file the motion to rescind and to get the hearing on the motion adjourned, there is no reason to think that he was incapable of having the motion rescheduled. Consequently, the grounds for defendant's claim that the PPO was either void or voidable are without merit.

Considering next defendant's argument regarding the instructions to the jury, we note that the decision whether to give a requested jury instruction is reviewed by this Court for an abuse of discretion. *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993). "This Court reviews jury instructions in their entirety to determine if there is error requiring reversal." *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). "Jury instructions are to be read as a whole rather than extracted piecemeal to establish error." *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995). No error occurs even where the instructions are not perfect if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996); *Daniel*, *supra*.

Defendant contends on appeal that "stalking" and "harassment" were not defined for the jury. However, we find that the elements of stalking were adequately explained in the first, third, and fifth elements of the aggravated stalking instruction, and harassment was covered by the third, fourth, and fifth elements of the trial court's instructions. Further, because defendant violated a PPO, a definition of credible threat would not have been relevant. MCL 750.411i(2)(a); MSA 28.643(9)(2)(a). Also, we reject defendant's claim that the trial judge should have instructed the jury regarding the definition of unconsented contact. If contact is harassing, then it is unconsented to, and thus the term unconsented contact is self-explanatory. Taking the instructions as a whole, therefore, the trial court fairly presented the issues to the jury. Reversal on this basis is not required. Finally, we find no error in the court's failure to give a "legitimate purpose" instruction since defendant's child custody concerns did not involve the complainant, but rather, defendant's ex-wife.

In defendant's final argument, he maintains that the trial court erred when it held that defendant was not denied the effective assistance of trial counsel and denied his motion for new trial. This Court reviews a trial court's decision whether to grant a new trial for an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

To warrant a new trial based on a claim of ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced him that he was denied a fair trial. *People v Hoag*, 460

¹ This Court is aware that initially it is the trial court's burden to schedule a hearing on a motion to modify or rescind an ex parte PPO, see MCL 600.2950a(11); MSA 27A.2950(1)(11); however, the statute is silent as to who has the burden to reschedule when the hearing date scheduled by the trial court has been adjourned at the request of one of the parties.

Mich 1, 5; 594 NW2d 57 (1999); *People v Pickens*, 446 Mich 298, 303, 338; 521 NW2d 797 (1994); *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998). To demonstrate prejudice, defendant must establish a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *Hoag, supra* at 6; *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996); *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). We will not second-guess the presumption that a challenged action might be considered sound trial strategy. *Id.* at 331-332.

Here, defendant claims that his attorney's choice of which witnesses to call at trial, including whether defendant should testify, constituted ineffective assistance of counsel. However, the trial counsel's decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997); *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court will not substitute its judgment for that of defense counsel regarding matters of trial strategy, nor should it assess the competence of defense counsel with the benefit of hindsight. *Rockey, supra* at 76-77. In a related issue, defendant maintains that trial counsel was ineffective for failing to question the potential witnesses before the trial. Even assuming counsel erred in his preparation, the testimony of these witnesses at the *Ginther*² hearing revealed that their testimony would have, at best, been cumulative to evidence presented. Consequently, defendant did not establish prejudice resulting from counsel's failure to investigate.

Finally, defendant contends that his attorney should have moved to suppress evidence of an earlier incident between himself and the complainant. However, the record shows that the trial judge indicated in chambers that the evidence would be admitted because the evidence was part of a pattern that the prosecution needed to establish a felony stalking charge. Defense counsel is not required to make meritless or frivolous motions. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998); *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Consequently, defendant did not receive ineffective assistance of counsel.

Affirmed.

/s/ Roman S. Gribbs

/s/ Michael J. Kelly

/s/ Joel P. Hoekstra

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).