

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BERNARD OUSLEY, JR.,

Defendant-Appellant.

UNPUBLISHED

June 10, 2004

No. 246936

Wayne Circuit Court

LC No. 02-011800-01

Before: Saad, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant appeals his bench trial conviction of aggravated stalking. MCL 750.411i.¹ The trial court sentenced defendant to one to five years' imprisonment, with 124 days credit for time served. We affirm defendant's conviction, but remand for resentencing.

I

Defendant argues that there is insufficient evidence to support his conviction of aggravated stalking. Specifically, defendant says the prosecution failed to prove the essential elements of the crime of aggravated stalking beyond a reasonable doubt. We disagree. We review the sufficiency of evidence in a bench trial by considering the evidence in the light most favorable to the prosecution to determine if a rational factfinder could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000); *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985).

Defendant claims that the prosecution failed to demonstrate that he was involved in a course of conduct of repeated harassment or intimidation in violation of a Personal Protection Order (PPO). Defendant argues that the prosecution failed to present tangible evidence of defendant's presence at Andrea Ousley's home or telephone records of defendant's threatening

¹ Defendant appeals as of right and was originally charged with assault with intent to do great bodily harm less than murder, MCL 750.84, possession of a firearm during the commission of a felony, MCL 750.227b, and aggravated stalking, MCL 750.411i. Defendant was acquitted of the assault and felony-firearm charges.

phone calls to her. Defendant claims that inconsistencies in the testimony of Andrea and her son, Quortez Banforth, created a reasonable doubt regarding his guilt. Moreover, defendant argues that the prosecutor failed to show that defendant's contacts caused Andrea to feel threatened, intimidated or harassed.

The crime of stalking is defined as a "willful course of conduct" of repeated and "unconsented" acts of harassment that would cause a reasonable person to feel threatened or frightened, and the victim actually felt threatened, intimidated or harassed. MCL 750.411i(1)(e); *People v Kieronski*, 214 Mich App 222, 231-234; 542 NW2d 339 (1995). A "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 750.411i(1)(a). Aggravated stalking includes the aggravating or exacerbating factor, as here, of stalking a victim in violation of a restraining order, of which the defendant had actual notice. MCL 750.411i(2)(a); *Kieronski, supra* at 233-234. Pursuant to MCL 750.411i(5), the factfinder may apply a rebuttable presumption to find proof that the victim actually felt frightened, threatened or harassed by a defendant's contacts if evidence is presented that, despite the victim's request to cease, a defendant continued to engage in two or more separate, repeated and "unconsented" contacts with the victim. *People v White*, 212 Mich App 298, 314; 536 NW2d 876 (1995).

The duty of a factfinder is to weigh the evidence presented. In a bench trial, the trial court is required to hear and examine the evidence and to make findings of fact and conclusions of law based on the evidence. We give special deference to a trial court's findings when based on a witness' credibility. *People v Sherman-Huffman*, 241 Mich App 264, 267; 615 NW2d 776 (2000). Moreover, this court has upheld similar convictions of aggravated stalking where the prosecution has proven that a defendant made threatening telephone calls and unwanted contact in violation of a court order. See *People v Coones*, 216 Mich App 721, 724-726, 730; 550 NW2d 600 (1996); *Kieronski, supra* at 224-225, 233-234; *White, supra* at 301-304.

At trial, the prosecution presented evidence that defendant engaged in two or more separate and impermissible contacts with Andrea in violation of a PPO. Specifically, the prosecution presented Andrea's testimonial evidence that, after defendant moved out of her house and was served with a PPO, he drove down her street looking at her house. He also called Andrea's cellular phone on multiple occasions, made threatening remarks, and warned Andrea to "watch her back." Andrea also testified that she received a cellular call from defendant on the morning in question in which he referred to Andrea in a derogatory term and told her he had seen her turn the lights out in her house. Andrea testified that she saw defendant outside her house that morning and saw him move his arm upward while holding what appeared to be a gun in her direction as she was exiting her house. Andrea also testified that she was frightened when she saw the weapon "because he's always threatening me all the time." Both Andrea and Banforth testified to hearing two shots fired toward their house that morning.

The trial court weighed the credibility of the witnesses and examined the proofs, and correctly found sufficient evidence to support all elements of the aggravated stalking charge. Considering the evidence in the light most favorable to the prosecution, we conclude that a

rational factfinder could have found that the prosecution established the essential elements of aggravated stalking beyond a reasonable doubt.²

II

Defendant asserts that the trial court erred in sentencing defendant to imprisonment. If a sentence is within the legislative sentencing guidelines range, we must affirm the sentence unless the trial court erroneously scored the guidelines or utilized inaccurate information to determine a defendant's sentence. *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003).

Typed onto the Sentencing Information Report (SIR) is a minimum sentencing guidelines range of ten to twenty-three months. The Presentence Investigation Report (PSIR) also has a typed minimum sentencing guidelines range of ten to twenty-three months. Yet, the trial court indicated at sentencing that a range of ten to twenty-three months was incorrect.

At the conclusion of the trial, the prosecution stated that it agreed with defense counsel that defendant's prior record variables (PRV) should be scored at twenty points, and his offense variables (OV) should be scored at zero points. The prosecution then stated that, because aggravated stalking is a class E crime and defendant is a fourth habitual offender, the minimum sentencing guidelines range should be zero to eighteen months. Consistent with the prosecution's statement, above the typed guidelines range of ten to twenty-three months on defendant's SIR and handwritten in blue ink, is a minimum sentencing guidelines range of zero to eighteen months. We note that the trial judge's signature on defendant's SIR was also in blue ink. For a class E crime with a PRV at twenty points, level C, and an OV at zero points, level I, the enhanced minimum sentencing guidelines range is zero to eighteen months. However, we note that the trial court stated at sentencing that it did not enhance defendant's sentence as a fourth habitual offender. On appeal, the prosecution claims that defendant is not entitled to resentencing because his minimum sentence of one year in prison was within the minimum

² Defendant also claims that the trial court's verdict was inconsistent. We disagree. To determine if the trial court's verdict is inconsistent with the evidence, we review the trial court's findings of fact for clear error, giving deference to the trial court's findings when based on a witness' credibility. *People v Barrera*, 451 Mich 261, 269 n 7; 547 NW2d 280 (1996); *Sherman-Huffman*, *supra* at 267. If there is no factual inconsistency, we must not set aside a conviction where defendant was found guilty beyond a reasonable doubt. *People v Smith*, 231 Mich App 50, 53; 585 NW2d 755 (1998). Defendant contends that the trial court erroneously convicted him of aggravated stalking after acquitting him of assault with intent to do great bodily harm less than murder and felony-firearm. Defendant claims that, because all three charges were related to the same incident and same factual circumstances, the trial court should have found that the totality of the evidence presented at trial was either credible or not credible as to all charges. The trial court noted that it believed something occurred the morning in question, but it could not find sufficient evidence that defendant committed assault with intent to do great bodily harm less than murder and felony-firearm. However, the trial court found that defendant engaged in separate harassing contacts with Andrea and concluded that the evidence was sufficient to support a conviction of aggravated stalking. We conclude that the trial court's findings of fact were based on the evidence presented and were factually consistent with its verdict.

sentencing guidelines range of zero to eighteen months. However, where “the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines . . . is 18 months or less, the court *shall* impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections.” MCL 769.34(4)(a) (emphasis added). An intermediate sanction can include a jail term of not longer than twelve months or the upper limit of the recommended minimum sentence, whichever is less. *Id.* An intermediate sanction does *not*, however, include a prison sentence. *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002), citing MCL 777.1(d) and 769.31(c). A trial court that imposes a prison sentence of any length upon a defendant for whom the guidelines recommend an intermediate sanction must articulate substantial and compelling reasons for doing so, even if the minimum prison sentence falls within the guideline range. *Stauffer, supra* at 636. Here, it is not clear whether the trial court found substantial and compelling reasons to warrant the imposition of a prison sentence, which represents a departure from the sentencing guidelines’ recommendation that an intermediate sanction be imposed. Accordingly, we must remand for resentencing. On remand, if the trial court finds substantial and compelling reasons to warrant a prison sentence, those reasons must be placed on the record. If it does not, then the trial court must impose an intermediate sanction, which may include a jail sentence of not more than twelve months.

We affirm defendant’s conviction and remand for resentencing. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Michael J. Talbot

/s/ Stephen L. Borrello