STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 14, 2004
v	No. 246797 Wayne Circuit Court
MELODIE AYCOX, Defendant-Appellant.	LC No. 02-007732-01

Before: Whitbeck, C.J., and Saad and Talbot, JJ.

PER CURIAM.

A jury convicted defendant Melodie Aycox of aggravated stalking[1] of a business associate and former boyfriend, Hermell Whouie. The trial court sentenced Aycox to a term of five years' probation. Aycox appeals as of right. We affirm.

I. Basic Facts And Procedural History

Hermell Whouie, the purported object of the stalking in this case, testified at trial that he had known Aycox for 3-1/2 years and that he first met her in a business capacity when she placed an order from his company, Bill's Door & Locks, for doors and glass blocks for a rental property that she owned. According to Whouie, a few months later he and Aycox began a personal relationship.

Whouie testified that, at the commencement of their relationship, he and Aycox "talked more business than [they] talked personal" because of their shared "interest in real estate and rental property." Whouie said that from the beginning of the relationship, Aycox aggressively pursued intimacy with him and at some point in 2000, approximately 2-1/2 years before the time of the trial, they became boyfriend and girlfriend for about two months. According to Whouie, he and Aycox never lived together during the period of their intimate relationship, but she did visit his home in Detroit. Whouie testified that he ended the intimate relationship because Aycox had raised the prospect of marriage too soon and had done other things, like behaving jealously, that made him afraid of her.

[1] MCL 750.411i.

Whouie testified that under the name "Omega Management," he and Aycox also engaged in business together, including during their brief intimate relationship. Whouie explained that he and Aycox agreed to fix up and try to rent real property but denied that he and Aycox had a partnership relationship or were employed by the same entity. Whouie believed that "[f]or the most part" he had satisfied his part of the bargain, but noted that "[s]ome things never got completed" "[b]ecause of [Aycox's] anger and her attacking me." According to Whouie, he and Aycox always contemplated breaking up their joint venture at some point. Whouie said that while he and Aycox conducted business together, they remained in contact, and saw each other either at their rental property or Aycox's house.

Whouie testified that early one morning in July 2001, Aycox parked in front of his residence and "created a nuisance in front of the home" when he attempted to leave for work. Whouie said that Aycox parked her car in his driveway to prevent him from pulling away. Whouie testified that got out of his truck and headed toward his back porch, but Aycox followed him and attacked him, ignoring efforts by his roommates to calm her down. Whouie said that he entered Aycox's car to back it out of his driveway, but she got inside the car and began hitting him, so he parked the car, went back inside, and called the police. The police arrested Aycox and she was charged with assault and battery.

On September 10, 2001, Whouie obtained a personal protection order (PPO) against Aycox that was effective through September 10, 2002; Aycox received service of the PPO later in September 2001. The PPO directed Aycox not to harass Whouie, threaten him, show up at his home or office, confront him in public, go onto his property, or contact him by telephone.

Whouie recounted that before the July 2001 attack by Aycox, she continuously called him to ask why they could not be together and to threaten him, that she came to his "place of business and threatened [him] with" two butcher knives, and that she also visited his separately owned property to threaten him there. According to Whouie, Aycox also called the home of his father and harassed his roommates.

Although Whouie testified that Aycox did not touch him between July 11, 2001 and February 28, 2002, he estimated that since the beginning of 2001, he had had more than twenty altercations with her. Whouie said that between September 10, 2001 and February 28, 2002, Aycox placed calls to him "literally every day," during which he usually hung up on her. Whouie said that on some occasions, he reminded Aycox of the existence of the PPO and pleaded with her to leave him alone, and that she would reply, "I don't care. Why are you leaving me? Why are you doing this to me?"

According to Whouie, on February 27, 2002, he testified in the 36th District Court regarding Aycox's July 2001 assault on him. Whouie said that about one hour after he left the courthouse, he received a call on his cellular phone from Aycox, who advised him, "I don't care what the Judge ordered me to do, I'm not going to stop calling you. I'm not going to stop harassing you." Whouie testified that Between February 28, 2002, and March 17, 2002, Aycox called him on his cell phone, at home, and at his office over one hundred times and that he almost always hung up. According to Whouie, several times he answered Aycox's calls, recognized her voice, told her she was "tying up [his] phone lines," and reminded her of the PPO. Whouie testified that Aycox replied that she did not care. Whouie said that on March 17, 2002, Aycox called his cell phone approximately one hundred times within several hours and

that between February 28, 2002, and March 17, 2002, Aycox parked her car outside his house late at night.

Whouie concluded that Aycox's many contacts with him had caused him to feel harassed and threatened. Whouie explained that he sometimes turned off his cell phone, but never altered the cell phone number "because it's a listed business number." Whouie said that he never changed his home phone number because he "was very rarely at [his] house, just early in the mornings, and it really wasn't a big bother at the house," and because he felt he should not have to suffer the inconvenience of getting a new home number.

Aycox testified that she met Whouie when she ordered doors for a rental property from him in May 1998, that she paid for but never received; that several weeks later she and Whouie signed four agreements establishing their Omega Management partnership and that, on Whouie's initiative, they started dating "sort of at the same time." According to Aycox, Whouie did nothing in furtherance of the partnership plan to purchase rental properties in Detroit, so she bought four parcels of real estate in her own name for this purpose, including an apartment building. Aycox denied that Whouie ever paid any money into the partnership or contributed anything toward rental property improvements. Aycox insisted that Whouie had stolen the money generated by the partnership, which funds all arose "from refinances on rental property that [she] owned."

Aycox testified that her personal relationship with Whouie ended several months after he assaulted her at a rental property on Gladstone in August 2000. Aycox stated that Whouie choked her and bruised her arm when she confronted him for stealing "$10,000 from the refinance" of the Gladstone property, that she filed a police report regarding Whouie's assault, and that the police issued a warrant for his arrest.

Aycox stated that although her personal relationship with Whouie had ended, their business relationship continued because they "were tied together through these four agreements where he promised to pay all the mortgages, fix up the properties, and just do all the things that he was paid money to do." According to Aycox, after the assault she began to actively participate in the activities of Omega Management, and discovered that Whouie had invested none of the money he had taken into enhancing the rental properties, some of which desperately needed repairs. Aycox testified that she learned that in addition to the $10,000 related to the Gladstone property, Whouie had stolen $4,500 designated for a rental property on Hazelwood, "breached a Bank One loan that purchased [the] apartment complex," and "stole $7,200 on Lothrop property." Aycox testified that all of the rental properties ended up in foreclosure, and estimated that Whouie had conned her out of her entire savings of $51,000.

According to Aycox, she knew of the September 2001 PPO that Whouie had obtained against her and its provisions, and unsuccessfully went to court to try to set it aside. Aycox testified that she had tried to call Whouie many times, including in March and April of 2002, to discuss the awful situation of their business partnership and acknowledged that she had continued to contact Whouie even after the issuance of the PPO because she "just had a problem with" its existence, and "[i]t just didn't seem fair." According to Aycox, Whouie never initiated contact with her, but had no problem speaking with her for hours through March 2002, told her she could call him, and even expressed his intent to drop the aggravated stalking charges against her. Aycox denied that she ever visited Whouie in violation of the PPO.

After approximately a half-hour of deliberation, the jury unanimously found Aycox guilty of aggravated stalking.

II. Directed Verdict

A. Standard Of Review

Aycox contends that the trial court erred by denying her motion for a directed verdict of acquittal. In reviewing a criminal defendant's challenge to the sufficiency of the evidence, or the trial court's denial of a motion for a directed verdict of acquittal, this Court considers all the evidence presented in the light most favorable to the prosecution to determine whether a reasonable juror could find the defendant's guilt proven beyond a reasonable doubt.[2] This Court must draw all reasonable inferences and make credibility choices in support of the jury's verdict; this Court should not interfere with the factfinder's role in determining witness credibility or the weight of the evidence.[3]

B. Elements Of Proof

While proof of aggravated stalking requires the prosecutor to establish several elements, Aycox raises a narrow challenge to the prosecutor's proof of the "stalking" definition requirement that her conduct must have caused "the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."[4] As noted above, Whouie testified that between the time he obtained a personal protection order (PPO) against Aycox on September 10, 2001, and February 28, 2002, she called him "literally every day." When Whouie occasionally reminded Aycox of the existence of the PPO and pleaded with her to leave him alone, she expressed disdain for the order and questioned why he had left her.

Notwithstanding that Aycox was physically smaller than Whouie, Whouie expressly testified that her many contacts caused him to feel harassed and threatened. The jury apparently credited Whouie's expression that he felt harassed and threatened, and this Court will not interfere with the jury's role in determining witness credibility or the weight of the evidence.[5] Even apart from Whouie's expression of feeling, in light of (1) Whouie's testimony that before September 2001, Aycox physically assaulted him on multiple occasions and frightened him by appearing at his workplace and threatening him with two butcher knives; (2) Whouie's description that after September 10, 2001, Aycox contacted him hundreds of times and tied up his phone lines, including one day on which she placed more than one hundred calls within several hours; and (3) Aycox's admission that she continued her efforts to contact Whouie despite her knowledge of the PPO entered on September 10, 2001, the jury reasonably could

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[2] *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003); *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

[3] *Nowack*, *supra* at 400; *People v Elkhoja*, 251 Mich App 417, 442; 651 NW2d 408 (2002), vacated in part on other grounds 467 Mich 916 (2003).

[4] MCL 750.411i(1)(e).

[5] *Nowack*, *supra* at 400; *Elkhoja*, *supra* at 442.

have concluded that her repeated contacts with Whouie after September 10, 2001, continued "a willful course of conduct . . . that actually cause[d Whouie] to feel terrorized, frightened, intimidated, threatened, harassed, or molested,"[6]

III. New Trial

A. Standard Of Review

Aycox raises several grounds in support of the proposition that the trial court erred by denying her motion for a new trial. This Court reviews for an abuse of discretion a trial court's decision whether to grant a new trial.[7]

B. Right to Attend Trial

Aycox argues that her constitutional and statutory right to attend her trial was violated because the trial court improperly permitted the trial to proceed in her absence, without first explaining the magnitude of the rights she would waive by not appearing at her trial and obtaining her knowing and intelligent waiver of the rights. This Court reviews de novo questions of constitutional law.[8]

"A criminal defendant has a statutory right to be present at trial,"[9] which also is "impliedly guaranteed by the federal and state constitutions and grounded in common law."[10] But "a defendant may waive both his statutory and constitutional right to be present during trial," including by engaging in "improper and disruptive behavior in the courtroom or through failure to appear for trial."[11] "A defendant's *voluntary* absence from the courtroom after trial has begun waives his right to be present and does not preclude the trial judge from proceeding with the trial to conclusion."[12]

Here, the record indicates that Aycox attended a case calendar conference in June 2002, a final pretrial conference in August 2002, and appeared for the commencement of the first day of trial on September 16, 2002, during which counsel represented her. Aycox remained in the courtroom for the first 1-1/2 hours of the trial proceedings while the trial court engaged in voir dire of potential jurors.

When the parties reappeared after a morning break in the proceedings, and before the trial court continued voir dire, the trial court requested that Aycox take her seat, to which she

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[6] MCL 750.411i(1)(e). *Riley*, *supra* at 139; *Nowack*, *supra* at 399-400.

[7] *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

[8] *People v Rodriguez*, 251 Mich App 10, 25; 650 NW2d 96 (2002).

[9] MCL 768.3.

[10] *People v Woods*, 172 Mich App 476, 478-479; 432 NW2d 736 (1988).

[11] *People v Gross*, 118 Mich App 161, 164; 324 NW2d 557 (1982).

[12] *People v Swan*, 394 Mich 451, 452; 231 NW2d 651 (1975) (emphasis added).

responded by inquiring, "If I look like a stalker, then why would I go through a trial?" The following colloquy then occurred between the trial court, Aycox, and her counsel:

> *The Court*: *You may come and be seated there, because we are going to trial, or you can go to jail. Which would you prefer to do*? *And you will be tried when you are not here*.
>
> When you put up a fuss and refuse to sit where you're to sit as the defendant, the Court has the right to try you anyway . . . .
>
> . . . [I]f you're going to continue like that, that's what will happen. So I suggest you take your seat.
>
> * * *
>
> *Defendant*: *I think I'll go to jail* because I don't feel I can get a fair trial.
>
> *The Court*: Okay. All right. Have a seat right there, and you're going to go to jail.
>
> We'll send her right on in.
>
> * * *
>
> Okay. Now, as I understand it, she said she'd rather go to jail? And see, we don't put up a fight with anybody in the courtroom. We don't do that. You can either follow the order of the Court or not follow the order of the Court.
>
> *Defendant*: Well, *I've already stated I don't feel like I can get a fair trial*. [Defense counsel]'s not representing me. He just made a comment that you said I looked like a stalker. So what's the use of going forward? *I might as well go to jail*.
>
> * * *
>
> *Defense counsel*: I told . . . defendant that she needed to improve her demeanor as she sat at the witness table. That if she didn't improve her demeanor, the way she looks to the jury, that the jury might find her guilty just the way she looks.
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> *Defendant*: That's not what he said. He said you told him; that you made a comment to him that I looked like a stalker.
>
> *The Court*: I didn't say that.
>
> * * *
>
> I will tell you what was said, ma'am.

* * *

It will not make a difference because the jury didn't hear that comment.

What was said by my staff and myself is that you are looking awfully evil at everybody. Your demeanor is such that if [sic] looks like you would do something to people, and that's the way you're looking right now. You're looking real mean, and you're talking real ugly.

Defendant: *Well, I accept jail, because I don't accept this*. This is not fair here. It's not fair.

The Court: Okay. Well, *we'll continue with the trial*. *If you don't want to stay here and hear what's said against you, you can do that*. Or you can go with the officer and he'll put you in the back and you'll go to jail, and *we'll continue the trial without you*; and we will do it.

Okay. If she wants to go with him, she can go. As soon as we get our jury panel down, we'll continue.

* * *

As soon as the officers are able to transfer her back downstairs . . . , we'll proceed with the jury selection. What we'll do is every few moments we'll stop so you can go back and talk to her and see if she wants to come out, with one of our natural breaks? Okay?

Defense counsel: Thank you, your Honor.

The Court: Okay. Tell the lawyers to get in here, and we'll rise for our jury panel.

You may go back and ask her and see if she wants to come and appear. If she doesn't, we'll proceed.

* * *

(Aycox refused to come out into the jury room.) [Emphasis added.]

On the completion of voir dire, the trial court permitted defense counsel a second opportunity to "confer with [Aycox] to see if she wants to come out and take a look at the jury and make a determination," but Aycox again refused to return to the courtroom. After the trial court read preliminary instructions to the jury, it mentioned that "at this point, . . . my officers tell me that [Aycox's] behavior is so bad, she's threatening the officers, guys with guns." Before defense counsel finished his initial cross-examination of Whouie, the first witness, the trial court afforded him another opportunity to confer with Aycox. Of her own volition, Aycox remained in jail through the remainder of Whouie's cross-examination and several reexaminations by the attorneys, and through the brief testimony of a police officer who confirmed the existence of the PPO against her. The prosecutor indicated he would rest his case if defense counsel waived the

production of other witnesses on the prosecutor's list, who could offer nothing but hearsay testimony. The trial court once more gave defense counsel and a member of Aycox's family a chance to speak with Aycox, after which she returned to the courtroom, offered testimony, and remained present through the conclusion of the trial.

We conclude that the discussions between the trial court and Aycox, and her several choices not to return to the trial after defense counsel was given opportunities to confer with her, plainly indicate that she voluntarily opted to relinquish her right to attend the trial. Because Aycox initially exercised her right to attend the trial before voluntarily giving up the right, her "voluntary absence from the courtroom after trial has begun waives h[er] right to be present and does not preclude the trial judge from proceeding with the trial . . . ."[13]

Aycox offers no authority in support of the proposition that she could not have waived her right to attend the trial because the statute providing the right does not expressly contemplate such a waiver.[14] Moreover, this argument lacks merit.[15] Aycox also fails to cite authority in support of her suggestion that, for a valid waiver to occur, the trial court had to offer her a thorough explanation of the right to be present at trial and the consequences of her disregard of the right.[16] We recognize that several decisions of this Court have observed that a valid waiver of the right to attend trial "consists of specific knowledge of the right and an intentional decision to abandon the protection of the right."[17] But the Supreme Court in *Swan* did not mention the specific knowledge component for a waiver of the right to attend trial by a defendant who initially had appeared for trial, presumably because the defendant's initial appearance demonstrates her knowledge or understanding of her right to attend the trial. Even assuming that for specific knowledge of the right to attend trial to exist the court must advise the defendant of the right on the record at the time of the waiver, the trial court in this case did not phrase its statements to Aycox in terms of her "right to be present at trial," but, rather, plainly advised her that she could stay for the proceedings, and thereafter gave defense counsel several opportunities to reappraise her of the right.

Because Aycox knew of her right to be present for trial and intentionally decided to temporarily abandon the right, we conclude that a valid waiver of the right occurred.

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[13] *Swan*, *supra* at 452.

[14] *People v Green*, 260 Mich App 392, 415; 677 NW2d 363 (2004).

[15] See *People v Miller*, 121 Mich App 691, 702-703; 329 NW2d 460 (1982) (recognizing that without statutory authorization, a defendant still may waive the right to be present at trial, as well as a multitude of other privileges that the constitution guarantees to an accused).

[16] *Green*, *supra* at 415.

[17] *People v Williams*, 196 Mich App 404, 407; 493 NW2d 277 (1992); *Woods*, *supra* at 479; *People v Travis*, 85 Mich App 297, 301; 271 NW2d 208 (1978).

C. Prosecutorial Misconduct

(1) Overview

Aycox maintains that several instances of prosecutorial misconduct entitle her to a new trial. Because Aycox did not timely object at trial to any allegedly improper questions or arguments by the prosecutor, she has failed to preserve these claims for appellate review.[18] This Court reviews properly preserved claims of prosecutorial misconduct according to the following standards:

> Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial.[19]

Alleged instances of prosecutorial misconduct are reviewed in context to determine whether the defendant received a fair and impartial trial.[20]

Appellate review of improper remarks by the prosecutor is generally precluded absent an objection by defense counsel because a failure to object deprives the trial court of an opportunity to cure the alleged error.[21] This Court reviews unpreserved claims of prosecutorial misconduct only for plain error that affected the defendant's substantial rights.[22]

(2) The Prosecutor's Arguments That Aycox Lied

Aycox challenges the prosecutor's comments in closing argument suggesting that she lied at trial when she stated that Whouie had fleeced her of $50,000. The record reflects Aycox's trial testimony that (1) initially failed to explain how she had acquired more than $50,000, with which she purchased real property for the partnership and which Whouie allegedly stole from her, before explaining that she earned the money working at a title company; (2) averred that over the course of her relationship with Whouie, he stole $600 she paid him for iron doors, $10,000 related to the Gladstone property, $20,000 from the purchase of an apartment building, more than $4,500 related to the Hazelwood property, $6,000 he had promised to pay to redeem a

[18] *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

[19] *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), criticized on other grounds in *Crawford v Washington*, ___ US ___; 124 S Ct 1354, 1371; 158 L Ed 2d 177 (2004).

[20] *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

[21] *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

[22] *Schutte, supra* at 720.

property from foreclosure, and $7,200 related to the Lothrop property; and (3) indicated that despite Whouie's assault of her and theft from her, of which she had knowledge, she dated him on and off for four years, and called him in March 2002, in anticipation that he might behave decently and resolve their disagreement. After reviewing the challenged remarks of the prosecutor, we conclude that they accurately summarize Aycox's proffered version of events, and permissibly characterized as incredible her suggestions that (1) she continued to date Whouie on and off for four years even though he allegedly conned her out of more than $50,000, and (2) she contacted Whouie in March 2002, in violation of the PPO, because she thought she could reach some sort of amicable understanding with Whouie, who still would spend hours talking to her on the phone.[23]

Aycox asserts that the prosecutor improperly characterized as untrue her testimony that her name appeared on a deed regarding the Grandville property. Whouie averred that he had lived in the Grandville property for eight years. Aycox testified during her direct examination that she owned the Grandville property because Whouie had defaulted on his written promise to pay the money necessary to prevent a foreclosure on the property. On cross-examination, Aycox recalled that her name "went on the deed of Grandville" around October 1998. Although Aycox maintained that she had the deed showing her name on the Grandville property, she did not introduce it into evidence, explaining that it was in the possession of the attorney handling her civil case against Whouie. Accordingly, we will not entertain Aycox's attempt to expand the trial record by attaching to her brief on appeal the 1998 deed to the Grandville property.[24] After reviewing the challenged portion of the prosecutor's argument, we find that it accurately restates the testimony regarding the Grandville property, and consists of proper argument on the basis of the evidence presented at trial and the reasonable inferences arising therefrom.[25]

(3) Injection of Inflammatory Facts Not In Evidence

Aycox maintains that the following portion of the prosecutor's closing argument refers to facts unsupported by the evidence presented at trial:

> What else do we know? She violated a court order on her assault and batter [sic] case in 36th District Court by not showing up for a trial. She got arrested a week ago and got handcuffed because she didn't show up for trial. That's another court order that she's violated. That case is still pending.

The testimony of Aycox and Whouie indicated that she attacked him in his driveway in July 2001, the police arrested her for assault and battery, a warrant issued charging her with assault and battery, Whouie appeared in the 36th District Court with respect to the assault and

[23] *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996) (explaining that a prosecutor may argue from the evidence presented that a witness, including the defendant, is unworthy of belief).

[24] *People v Warren,* 228 Mich App 336, 356; 578 NW2d 692 (1998), rev'd in part on other grounds 462 Mich 415 (2000).

[25] *Schutte, supra* at 721.

battery charge in February 2002, and at the time of trial, Aycox had not yet been convicted of the charge. Aycox acknowledged that during the week before her stalking trial, the police arrested and handcuffed her because of the "wrongful assault and battery charge." Aycox denied that she had missed a court date concerning the assault and battery charge, and insisted that she "should not have been arrested" because she "had been to court already five times on that . . . ." The prosecutor's closing argument accurately stated that the assault and battery charge against Aycox remained pending, and that the week before trial she was arrested because of the charge. Given the unresolved nature of the assault and battery charge and Aycox's admission that she was arrested the week before trial because of the charge, we conclude that the prosecutor reasonably inferred that she may not have shown up for trial.[26]

Aycox also challenges as unsupported by the evidence at trial the prosecutor's comment in closing argument that, "I believe that by . . . [Aycox's] own testimony, she has violated the Personal Protection Order over a hundred times between February 27th and March 17th of 2002." According to Whouie, Aycox called his cell phone, his home phone, and his office more than one hundred times between late February 2002 and March 17, 2002, and called his cell phone nearly one hundred times within several hours on March 17, 2002. During direct examination, Aycox acknowledged that she made "so many phone calls" to Whouie because he had taken advantage of her financially. Aycox acknowledged that she knew of the existence of the September 2001 PPO prohibiting her from contacting Whouie, but that she nonetheless called Whouie repeatedly in violation of the PPO. When questioned whether she called Whouie one hundred times in February and March 2002, Aycox replied, "I have no idea," and when the prosecutor asked if she had called Whouie more than fifty times within this period, she responded, "I cannot give you a number." Although Aycox did not affirmatively admit that she called Whouie at least one hundred times in violation of the PPO, she did not deny doing so.

In light of Whouie's testimony that Aycox called him over one hundred times in February and March 2002, and Aycox's acknowledgment that she called Whouie numerous times in violation of the PPO, we conclude that prosecutor accurately referred to more than one hundred as the number of calls Aycox made in violation of the PPO.[27] The prosecutor's attribution of the number one hundred to Aycox's own admission did not deprive her of a fair or impartial trial, especially given that the trial court instructed the jury that the attorneys' "statements and arguments are not evidence."[28]

(4) Misstatement Of Partnership Law

The parties offered conflicting accounts at trial regarding the existence of a partnership relationship between them. Whouie testified that while he and Aycox agreed to repair and rent real property, they did not have a legal partnership and never purchased property in both their names. During the prosecutor's cross-examination of Aycox, he inquired whether she and

[26] *Schutte, supra* at 721.

[27] *Id*.

[28] *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Whouie had filed a legal document formally declaring that they had formed a partnership. According to Aycox, she and Whouie prepared documents that established a partnership, but Whouie never filed the documents with the state. During the prosecutor's closing argument, he mentioned the alleged partnership as follows:

> And the other thing, not one shred of evidence, not one physical piece of evidence that shows—that backs up her contention that there was a partnership agreement, because there was no partnership agreement. You heard Mr. Whouie testify to that. There's no evidence [of] any of the deeds that she says her name is on at the same time as Mr. Whouie . . . .

Contrary to Aycox's argument on appeal, the challenged cross-examination question and the closing argument by the prosecutor do not necessarily suggest that for a partnership to exist under Michigan law, the partners must in every case file written documentation with the government. Furthermore, in light of Whouie's testimony and Aycox's failure to produce a written partnership agreement, the prosecutor properly argued that no formal partnership relationship existed between the parties, and that the parties never purchased real property together.[29]

(5) Attempt To Shift Burden Of Proof

Aycox contends that the prosecutor engaged in misconduct during his rebuttal argument by referring to her presumption of innocence as a mere technicality. Although the prosecutor did employ the term "technicalit[y]" when referring to Aycox's presumption of innocence, our review of the portion of the rebuttal argument surrounding the challenged statement reflects that the prosecutor accurately explained the operation of the presumption of innocence, specifically that the presumption applied until the jury found that he had satisfied his burden to "prove[] this case beyond a reasonable doubt."[30]

In summary, no conduct of the prosecutor occasioned plain error that infringed upon Aycox's substantial rights.[31]

D. Newly Discovered Evidence

"To merit a new trial on the basis of newly discovered evidence, a defendant must show that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) would probably have caused a different result, and (4) was not discoverable and producible at trial with reasonable diligence."[32] Aycox contends that her introduction at trial of the August 2002 quitclaim deed,

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[29] *Schutte, supra* at 721.

[30] See *People v DeFore*, 64 Mich 693, 701; 31 NW 585 (1887) (explaining that the presumption of innocence exists in every criminal case, and stands good until overcome by evidence that convinces the jury beyond a reasonable doubt of the defendant's guilt).

[31] *Schutte, supra* at 720.

[32] *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993).

pursuant to which she purportedly conveyed to Whouie her interest in the Grandville property, would have contradicted Whouie's assertions at trial that he felt afraid of her and that he had not had contact with her since March 2002. But Aycox ignores the fact that "[n]ewly discovered evidence is not ground for a new trial where it would merely be used for impeachment purposes."[33]

Further, even assuming that the allegedly forged deed (and Aycox introduces no expert substantiation of the fact that Whouie or anyone else forged her signature on the August 2002 deed) otherwise qualifies as newly discovered evidence, we cannot conclude that introduction of the deed at trial would probably have caused a different result in this aggravated stalking case, in which Aycox admitted the existence of the PPO barring her contact of Whouie, and that she nonetheless called him on numerous occasions in violation of the order. The newly discovered evidence relates only to Aycox's alleged motivation for repeatedly contacting Whouie, specifically that he swindled her, but motivation is not a required element of the charged crime.

E. Cumulative Error

Although Aycox suggests that the cumulative effect of these errors deprived her of a fair trial, in attempting to ascertain the impact of "cumulative error," an appellate court may consider only actual errors.[34] Because there were no actual errors at Aycox's trial, no cumulative error exists that might have deprived her of a fair trial.

We therefore cannot conclude that the circuit court abused its discretion by denying defendant's motion for a new trial.[35]

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Michael J. Talbot

[33] *Id*. at 516.

[34] *People v LeBlanc*, 465 Mich 575, 591 n 12; 640 NW2d 246 (2002).

[35] *Jones*, *supra* at 404.