STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 19, 2008
v	No. 270660 Eaton Circuit Court
SCOTTIE RAY KEATON, Defendant-Appellant.	LC No. 05-001477-PH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v	No. 270661 Eaton County Circuit Court
SCOTTIE RAY KEATON, Defendant-Appellant.	LC No. 05-001480-PP

Before: Donofrio, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

In each of these consolidated cases, defendant appeals by right from a criminal contempt order sentencing him to a concurrent 93 days in jail for violating a personal protection order (PPO). In LC No. 05-001477-PH, the PPO violation concerned Patricia Purol. In LC No. 05-001480-PP, the PPO violation concerned Kristin Damico. We affirm.

I. Validity of the PPO in LC No. 05-001477-PH (Purol)

Defendant first argues that the trial court erred by issuing an ex parte non-domestic PPO against him because his alleged conduct toward Purol did not justify its issuance. Defendant did not challenge the issuance of the PPO in the trial court. Therefore, this issue is not preserved,

and we review this claim for plain error affecting defendant's substantial rights.[1] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

If an individual has been stalked as defined in MCL 750.411h, the individual may petition the court for a PPO to restrain the stalker from continuing the harassing conduct. MCL 600.2950a(1).[2] A PPO is an injunctive order and granting relief is within the trial court's discretion. *Pickering v Pickering*, 253 Mich App, 700; 659 NW2d 649 (2002). But "[r]elief shall not be granted unless the petition alleges facts that constitute stalking." MCL 600.2950a(1). Also, an ex parte PPO shall be issued if the petitioner shows that "immediate and irreparable injury, loss, or damage will result" if the issuance of the PPO is delayed for the purpose of giving the respondent notice or that the notice will precipitate adverse action because a PPO was issued. MCL 600.2950a(9).

Under MCL 750.411h(1)(d), stalking is defined as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested." The phrase "course of conduct" means "a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose." MCL 750.411h(1)(a). "Harassment" is "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." MCL 750.411h(1)(c). "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 expressed desire that the contact be avoided or discontinued." MCL 750.411h(1)(e). It 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 that individual's workplace or residence.
>
> (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 that individual.

[1] Paragraph 9 of the PPO notified defendant that he had the right to move to terminate the PPO within 14 days of being served with or receiving actual notice of the PPO.

[2] MCL 600.2950 addresses obtaining a PPO in a domestic situation.

(vii) Placing an object on, or delivering an object to, property owned, leased, or occupied by that individual. [MCL 750.411h(1)(e)(i)-(vii).]

In her petition, Purol alleged that in September and October 2005 defendant repeatedly called, left messages, and sent mail after being told by Purol, Damico, and the state police to cease all contact. Purol recorded defendant's phone calls. Purol alleged that messages were left in a "threatening tone." She also alleged that defendant entered her garage and placed items on her car. After she heard defendant say, "Ok, Let's go," defendant fled in a vehicle that was hidden behind some bushes. Purol further alleged that in mid-September 2005, defendant appeared in her "yard at night, under windows." Purol also alleged she later found a chair under Damico's bedroom window; the outer screens were pushed up, and smoking paraphernalia was nearby. Purol also indicated in the petition that defendant carries a knife.

Considering the allegations in Purol's petition, the trial court's decision to issue the ex parte PPO was not plain error. The petition alleged sufficient facts to show that defendant's conduct constituted stalking. Also, contrary to defendant's argument, Purol could be considered a victim where defendant targeted Purol's telephone, mail, car, and property. MCL 750.411h(1)(f). We agree with plaintiff that these consolidated cases involving Purol and her daughter, Damico, who reside in the same home and share the same telephone number, should not be viewed autonomously.[3] Also, with regard to emotional distress, Purol alleged that she felt "frustrated, afraid, angry." Consequently, the trial court did not plainly err by concluding defendant's alleged actions threatened Purol with immediate and irreparable injury, damage, or loss; thus, issuing an ex parte PPO was justified. MCL 600.2950a(9).

II. Finding of Criminal Contempt in LC No. 05-001477-PH (Purol)

Defendant further argues that there was insufficient evidence to support his conviction of criminal contempt because the evidence did not establish a violation of the PPO. We disagree.

Under MCL 600.2950a(20), a person who fails to comply with a PPO is subject to the criminal contempt powers of the court. Criminal contempt must be proved beyond a reasonable doubt. MCR 3.708(H)(3); *People v Little*, 115 Mich App 662, 665; 321 NW2d 763 (1982). When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find 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). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime, including the identity of the perpetrator. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000); *People v Kern*, 6 Mich App 406, 409-410; 149 NW2d 216 (1967). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Wolfe, supra* at 514-

[3] Defendant's counsel concurred with the prosecution's motion for consolidation because one telephone number was being called.

515. Rather, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Nowack, supra* at 400.

Identity is an essential element in a criminal prosecution which the prosecution must prove beyond a reasonable doubt. *Kern, supra* at 409. Testimony identifying a person's voice may be sufficient to identify the person. *People v Bozzi*, 36 Mich App 15, 19-22; 193 NW2d 373 (1971). Voice identification testimony is sufficient evidence to prove identity if it is "reasonably positive and certain," and is based on sufficient knowledge by the witness about the voice. *People v Hayes*, 126 Mich App 721, 725; 337 NW2d 905 (1983), citing *Bozzi*, *supra*. The credibility of identification testimony is a question for the trier of fact that this Court will not resolve anew. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

We conclude the evidence, viewed in a light most favorable to the prosecution, was sufficient to permit a rational trier of fact to find beyond a reasonable doubt that defendant violated the PPO. The PPO prohibited defendant from taking several specifically enumerated actions, including "contacting the petitioner by telephone." Nonetheless, there was evidence that defendant continued to call Purol's home numerous times. Purol testified that, as the police suggested, she purchased a device to record defendant's telephone calls. Purol identified the taping device at the hearing, and a four-minute tape recording was played. The recording contained several different messages. Both Purol and Damico positively identified the voice on the recording as defendant's. Both witnesses were familiar with defendant's voice because as Damico had had a relationship with defendant. In addition, the trial court, as the trier of fact, listened to the tape recording and opined that, having heard defendant testify, he concluded the voice on the recording sounded like defendant. Although defendant denied any wrongdoing, it was up to the trier of fact to determine what account was credible. *Wolfe, supra* at 514-515.

III. Notice

Next, defendant argues that he was denied his due process right to adequate notice of the charges and an opportunity to defend against them. See MCR 3.708(D), (H). Because defendant did not raise this issue in the trial court, he must show plain error affecting his substantial rights. *Carines, supra* at 763-764.

The record discloses that defendant was clearly aware of the conduct alleged to constitute violations of the PPO, his right to an attorney, and his right to contest the charges. Defendant testified that he was aware of the two PPOs in January 2006. Moreover, defendant appeared at the contempt hearing to contest the charges, was represented by an attorney who argued the facts and law regarding the particular charges and presented a witness who testified on defendant's behalf. In addition, defendant contested the charges by claiming that they were fabricated and by categorically denying any wrongdoing. Consequently, it is not clear, nor does defendant explain, how providing more specific dates for the alleged violations would have affected his defense. For these reasons, defendant has not shown his substantial rights were affected.

IV. Finding of Criminal Contempt in LC No. 05-001480-PH (Damico)

Defendant argues that there was insufficient evidence to support his conviction of criminal contempt because the evidence did not establish a violation of the PPO. We disagree.

The evidence, viewed in a light most favorable to the prosecution, was sufficient to permit a rational trier of fact to find beyond a reasonable doubt that defendant violated the PPO concerning Damico. The PPO prohibited defendant from taking several specifically enumerated actions, including "contacting the petitioner by telephone" and "interfering with petitioner at [her] place of employment." The evidence showed that defendant continued to call Damico's home. Also, defendant's voice was identified on a tape recording that contained several messages. Damico also testified that on February 20, 2006, at 10:37 a.m., defendant called her job, and said, "I love you, girl." Damico was "positive" that the caller was defendant.

From this evidence, the trier of fact could conclude that defendant violated the PPO by calling Damico numerous times at her home and at her workplace on February 20, 2006. Although defendant denied any wrongdoing, it was up to the trier of fact to determine the credibility of the testimony. *Wolfe, supra* at 514-515. The evidence was sufficient to sustain defendant's conviction of criminal contempt in LC No. 05-001480-PH.

Defendant asserts that his conviction was improperly based on the trial court's finding that he called Damico's workplace and made "phone threats." We acknowledge that Damico's testimony concerning alleged "threats to kill" made to Damico's supervisor's, not to Damico personally, constituted hearsay.[4] In addition, Damico's supervisors, who answered the telephone calls in which the alleged threats were made, did not testify and identify defendant as the caller. However, this claim does not change the outcome. Apart from finding that defendant made telephone calls that contained threats, the trial court also found that defendant violated the PPO by calling Damico's home numerous times and calling her while she was at work on the occasion when she actually spoke to him. Thus, the additional hearsay testimony was harmless. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

V. Evidence of Phone Threats

Defendant further argues that the trial court erred in admitting evidence of the alleged "phone threats" where the testimony constituted inadmissible hearsay and violated his right of confrontation. Because defendant did not object to the testimony, we review this claim for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764. Defendant has the burden of persuasion with respect to prejudice. *Id*. at 763.

We disagree that Damico's testimony that defendant called Damico's workplace and directed threats toward her through her supervisors who answered the phone was inadmissible hearsay. The testimony was not offered to prove the truth of the matter asserted, ie, that defendant intended to physically harm Damico. Nor has defendant demonstrated that this evidence affected the outcome of the proceedings. The trial court found that defendant engaged in other conduct unrelated to the challenged threats that in and of itself violated the PPO. As indicated previously, defendant called and spoke to Damico personally at her workplace once

[4] Hearsay is a statement other than one made by the declarant while testifying at a trial or hearing that is offered to prove the truth of the matter asserted. MRE 801(c). Hearsay is generally inadmissible unless there is a specific exception allowing its introduction. MRE 802.

and called her home many other times and left messages. This evidence is enough to establish the offense; consequently, under these facts, defendant cannot demonstrate a plain error affecting his substantial rights.

VI. Authentication

Defendant next argues that the trial court erred in allowing the tape recording because it was not properly authenticated. We disagree. Because defendant did not object to the admissibility of this evidence at trial, we review this claim for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763-764.

MRE 901, which governs the admissibility of voice recordings, provides in pertinent part:

> (a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.
>
> (b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:
>
> * * *
>
> (5) *Voice Identification.* Identification of a voice, whether heard first hand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

In *People v Berkey*, 437 Mich 40, 50; 467 NW2d 6 (1991), our Supreme Court addressed the authentication requirement of a voice recording and stated, "a tape ordinarily may be authenticated by having a knowledgeable witness identify the voices on the tape. MRE 901 requires no more."

In this case, both Damico and Purol positively and unequivocally identified defendant's voice on the tape recording. The evidence showed that Damico and Purol were both familiar with defendant. It was undisputed that Damico and defendant previously dated, and Purol testified that because of Damico's relationship with defendant, she knew him, saw him when he visited, and talked to him "[m]any times" on the telephone. Because the evidence showed that Damico and Purol were both sufficiently familiar with defendant's voice to enable them to identify it, a proper foundation was established under MRE 901.

VII. Effective Assistance of Counsel

Defendant also argues that his convictions should be reversed because he was denied the effective assistance of counsel at the contempt hearing. We disagree. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Defendant claims that defense counsel was ineffective for failing to challenge the unpreserved claims of errors discussed in parts I, III, V, and VI. In light of our conclusion that there was no error affecting defendant's substantial rights or that was prejudicial, defendant cannot demonstrate that there is a reasonable probability that but for counsel's inaction, the result of the proceeding would have been different.

Defendant further argues that defense counsel was ineffective when, after failing to object to the questioning regarding phone threats, he asked additional questions on the matter during cross-examination. Decisions about what questions to ask are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant has not overcome the presumption that defense counsel's decision to cross-examine Damico about the alleged phone threats was a matter of sound strategy. The defense theory was that Damico and Purol fabricated the allegations against defendant and that there was no evidence to support their claims. One of defense counsel's apparent strategies was to counteract the testimony that defendant threatened Damico by reiterating that Damico did not directly hear any alleged threats. Rather, she talked to defendant only once while at work and that call did not involve a threat. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Id.* at 76-77. "The fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Additionally, as previously indicated, irrespective of the evidence concerning the phone threats, sufficient evidence existed to support a finding that defendant violated the PPO. Consequently, defendant has failed to demonstrate a reasonable probability that but for counsel's action, the result of the proceeding would have been different. Therefore, he has not established a claim of ineffective assistance of counsel.

VIII. Trial Court's Findings of Fact

Defendant also argues that the trial court's findings of fact were insufficient; therefore, his convictions must be reversed. We disagree. We review the trial court's factual findings for clear error. *Brandt v Brandt*, 250 Mich App 68, 72; 645 NW2d 327 (2002).

Following the hearing, the trial court made the following findings of fact on the record:

> Well these two PPO files were two of four that were issued on November 2nd. The one that protected Ms. Purol precludes defendant from - - I checked every box, including contacting the petitioner by telephone.

> The one that protects Ms. Damico was a domestic and I checked various boxes including stalking, contacting the petitioner by telephone, including threatening to kill or physically injure her, interfering with her at her place of employment.
>
> I heard the testimony from the defendant. I'm not a voice expert and I don't think you have to be to conclude that it's the defendant.
>
> We had testimony from both petitioners indicating that they talked to him on numerous occasions and that they recognized his voice and that's his voice on the tape.
>
> I also, not being a voice expert, having heard the defendant testify, there were more than one of those calls where I could draw a connection frankly between his voice and what was on those tapes, even though a lot was illegible [sic]. But it sounded like him to me, to tell you the truth.
>
> He's in violation of the one PPO in multiple ways, threats, interfering with, arguably with the petitioner at her place of employment by calling there and threatening her and making numerous calls to her residence . . . That's file 05-1480-PP.
>
> We also had a violation with numerous phone calls to Ms. Purol's telephone, a 622 number in file number 05-1477-PH.
>
> Given the nature of the calls, the number and the overall situation here - - and I reviewed all four files during the hearing. The two that are at issue today I reviewed them at length before the hearing today.
>
> I'm going to find the defendant in contempt, impose ninety-three days in jail in each file, [sic] run concurrent.

MCR 3.708(H)(4) provides that "[a]t the conclusion of the hearing, the court must find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment. The court must state its findings and conclusions on the record or in a written opinion made a part of the record." It is apparent that the trial court summarized the facts of the case, stated its conclusions of law, and directed entry of an appropriate judgment, as required by the court rule. Consequently, defendant is not entitled to appellate relief on this basis.

IX. Cumulative Effect of Errors

Finally, we reject defendant's argument that the cumulative effect of several errors deprived him of a fair trial. The only possible error at trial involved the evidence of the phone threats, which we have determined was harmless. Because no other errors have been identified,

there can be no cumulative effect of several errors and reversal under a cumulative error theory is unwarranted. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

We affirm.

/s/ Patrick M. Donofrio
/s/ Joel P. Hoekstra
/s/ Jane E. Markey