

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT QUARLES VARGAS,

Defendant-Appellant

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UNPUBLISHED

December 28, 2010

No. 292906

Jackson Circuit Court

LC No. 08-004610-FH

Before: BECKERING, P.J., and TALBOT and OWENS, JJ.

PER CURIAM.

Robert Quarles Vargas challenges his jury trial conviction of stalking.<sup>1</sup> We affirm.

Police officer Joseph Merritt investigated an alleged domestic assault involving Vargas. During this investigation, Merritt interviewed two women who claimed to have been involved in dating relationships with Vargas and later allegedly assaulted by him. Assault charges were brought against Vargas on behalf of one of the women. At that trial both women testified under oath to being assaulted by Vargas. Vargas was ultimately acquitted of the assault charge, but convicted of telephone harassment in that case. The instant case concerns contact between Vargas and Merritt after the conclusion of the assault trial.

In the early months of 2008, Merritt encountered Vargas at a local store while shopping. At this time, Merritt was accompanied by his wife. Vargas was staring at Merritt and following him around the store, but no words were exchanged. The second incident between Merritt and Vargas occurred in April 2008. Merritt received a telephone call from a restricted telephone number. Merritt answered the telephone and the caller said, “You’re probably gonna need an attorney.” Merritt replied “What,” and then “Oh yeah, why’s that?” The caller then stated, “You’re dead.” Merritt did not recognize the voice, which was disguised, but telephone records later indicated that the call was placed by Vargas. The final incident involving Vargas and Merritt occurred a few days later. Merritt received another telephone call from a restricted number, and when he answered his telephone the caller said, “Judgment day is coming Joe.”

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<sup>1</sup> MCL 750.411h. Vargas was sentenced to 365 days in jail, but the sentence was temporarily suspended and he was placed on probation for 60 months.

This time, Merritt immediately recognized Vargas as the caller. Merritt interpreted this telephone call as a threat to his physical safety. He contacted his family and instructed them to stay away from home and then made a formal criminal complaint. Merritt testified that once he recognized Vargas as the caller he was concerned because of his knowledge regarding Vargas' past violent behavior.

Vargas was charged with aggravated stalking<sup>2</sup> and malicious use of service provided by a telecommunications service provider,<sup>3</sup> but was convicted of the lesser crime of stalking.<sup>4</sup> During the trial, Merritt was permitted to testify about his investigation of Vargas' alleged assaults of the two women. The testimony was permitted as *res gestae* evidence to show that Merritt believed Vargas' threats to be credible, which is a required element to prove aggravated stalking.<sup>5</sup>

Vargas first contends that the testimony regarding the alleged past assaults was improperly admitted because the details of these incidents are not inextricably intertwined with the charges in the instant case and that there was insufficient evidence to show that Vargas actually assaulted either woman. The decision whether to admit evidence is reviewed for an abuse of discretion.<sup>6</sup> When the admissibility of evidence depends on whether the rules of evidence or a statute preclude admissibility, the preliminary question is one of law and is reviewed *de novo*.<sup>7</sup>

While evidence of prior bad acts is generally inadmissible to prove guilt of a charged offense<sup>8</sup>, relevant prior bad acts evidence is not precluded if the proffered evidence is not used to show acts in conformity with character or "mere propensity."<sup>9</sup> Specifically, the "res gestae" exception permits the admission of prior bad acts when "those acts are 'so blended or connected with the (charged offense) that proof of one incidentally involves the other or explains the circumstances of the crime.'"<sup>10</sup> The evidence of Vargas' prior alleged assaults was properly

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<sup>2</sup> MCL 750.411i.

<sup>3</sup> MCL 750.540e.

<sup>4</sup> MCL 750.411h.

<sup>5</sup> MCL 750.411i.

<sup>6</sup> *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

<sup>7</sup> *Id.*

<sup>8</sup> MRE 404(b)(1).

<sup>9</sup> *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

<sup>10</sup> *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983), quoting *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978).

admitted to prove a necessary element of the charged crime of aggravated stalking.<sup>11</sup> Aggravated stalking requires proof of a “credible threat,” which is statutorily defined as “a threat to kill another individual or a threat to inflict physical injury upon another individual that is made in any manner or in any context that causes the individual hearing or receiving the threat to reasonably fear for his or her safety.”<sup>12</sup> Merritt’s belief that Vargas had committed the previous assaults is relevant to whether the threats caused Merritt to reasonably fear for his safety. Because Merritt’s belief was premised on sworn testimony from two of Vargas’ prior alleged victims and Merritt’s own observations during his investigation of these incidents, there was sufficient evidence to support Merritt’s belief that Vargas posed a credible threat to his safety. We find that the evidence was properly admitted as *res gestae* evidence. In addition, we note that the trial court provided an extensive limiting instruction to the jury regarding the proper use of this evidence and that “[j]urors are presumed to follow their instructions.”<sup>13</sup>

Vargas also asserts that his right to confrontation was violated because Merritt was permitted to testify regarding the statements of the two alleged assault victims without an opportunity to cross-examine these individuals. This argument is unpreserved and we review only for plain error.<sup>14</sup>

“The Confrontation Clause of the Sixth Amendment bars the admission of ‘testimonial’ statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness.”<sup>15</sup> While statements are deemed to be testimonial when their “primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution,”<sup>16</sup> the Confrontation Clause “does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.”<sup>17</sup> The challenged statements did not violate Vargas’ right to confrontation because they were not being offered for their substance or truth. Because the statements were only offered to demonstrate their impact on Merritt’s state of mind, the Confrontation Clause was not violated.

Vargas next argues the jury’s verdicts were inconsistent and require reversal. Whether there was an inconsistent jury verdict requiring relief comprises a question of law that this Court

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<sup>11</sup> MCL 750.411i.

<sup>12</sup> MCL 750.411i(1)(b).

<sup>13</sup> *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

<sup>14</sup> *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999).

<sup>15</sup> *People v Walker (On Remand)*, 273 Mich App 56, 60-61; 728 NW2d 902 (2006), citing *Crawford v Washington*, 541 US 36, 59, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

<sup>16</sup> *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006).

<sup>17</sup> *People v McPherson*, 263 Mich App 124, 133; 687 NW2d 370 (2004), citing *Crawford*, 541 US at 59 n 9.

reviews de novo.<sup>18</sup> Vargas contends the verdict is inconsistent because the jury convicted him of stalking but acquitted him of malicious use of service provided by a telecommunications provider. While we do not necessarily concur with Vargas' argument, we note that even if he is correct that the verdicts are inconsistent, he is not entitled to relief. Michigan law permits inconsistent jury verdicts.<sup>19</sup> To obtain relief from an inconsistent verdict a defendant must show that the verdict was the result of an improper compromise or jury confusion.<sup>20</sup> Because there is nothing to suggest either confusion by the jury or improper compromise in this case, Vargas' claim is without merit.

Affirmed.

/s/ Jane M. Beckering

/s/ Michael J. Talbot

/s/ Donald S. Owens

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<sup>18</sup> *People v Artman*, 218 Mich App 236, 244; 553 NW2d 673 (1996).

<sup>19</sup> *People v Burgess*, 419 Mich 305, 308; 353 NW2d 444 (1984).

<sup>20</sup> *People v McKinley*, 168 Mich App 496, 510; 425 NW2d 460 (1988).