

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYRONE DORSEY,

Defendant-Appellant.

UNPUBLISHED

October 25, 2007

No. 273181

Wayne Circuit Court

LC No. 05-011715-01

Before: Zahra, P.J., and White and O’Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of aggravated stalking, MCL 750.411i, and was sentenced, as an habitual offender, fourth offense, MCL 769.12, to a prison term of 15 to 30 years. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. Facts

Defendant was charged with several offenses arising from a shooting at the home of his former girlfriend. She identified him as the perpetrator by his voice, and a second complainant identified defendant in a photographic lineup. Defendant’s former girlfriend also testified that, before the shooting, she received threatening phone calls and text messages from defendant, in violation of a personal protection order. Defendant presented an alibi as a defense to the shooting. He also claimed that he did not receive notice of the personal protection order. He denied harassing his former girlfriend and denied contacting her after a police detective told him to stop text messaging her. The jury convicted defendant of aggravated stalking, but acquitted him of the remainder of the charges arising from the incident.

II. Analysis

Defendant argues that the trial court’s instructions concerning aggravated stalking were deficient and that his counsel was ineffective for failing to object to them. We address each issue separately.

A. Instructional Error

Because defendant did not object to the instructions, this Court reviews the alleged error for plain error in accordance with *People v Carines*, 460 Mich 750, 764-767; 597 NW2d 130 (1999), reh den 461 Mich 1205 (1999).

The aggravated-stalking statute proscribes stalking, which it defines in part as “a willful course of conduct involving repeated or continuing harassment of another individual.” MCL 750.411i(1)(e). *People v Coones*, 216 Mich App 721, 725; 550 NW2d 600 (1996). The terms “course of conduct,” “harassment,” and other terms are separately defined in the statute. Aggravated stalking is stalking that occurred under specified circumstances, including, as charged in the present case, “[a]t least 1 of the actions constituting the offense is in violation of a restraining order and the individual has received actual notice of that restraining order” MCL 750.411i(2)(a).

The trial court instructed the jury that, to establish the charge, the prosecutor must prove that the defendant,

[e]ngaged in a willful course of conduct involving repeated or continued harassment of Jecinda Jones, the conduct being such that would cause a reasonable person to feel terrorized, frightened or intimidated or threatened or harassed.

Second, that this contact would cause a reasonable person to suffer emotional distress. That is to say that it would cause Jecinda Jones to feel terrorized or frightened or intimidated or threatened or harassed.

And third, that at the time of the conduct that this was in violation of a restraining order that he had actual notice of.

The trial court then instructed the jury regarding actual notice.

Defendant contends that the trial court failed to provide the elements of aggravated stalking and failed to define “credible threat.” The making of one or more credible threats against the victim or the victim’s family or another individual in the household is another circumstance to support aggravated stalking. MCL 411i(2)(c). However, defendant was not charged with aggravated stalking on that basis, and accordingly an instruction on “credible threat” was unnecessary. The trial court’s instructions with respect to the basis of the aggravated assault that had been charged were adequate.

Defendant also contends that the trial court’s instruction concerning alibi was clear error. The instruction was essentially the same as CJI2d 7.4 except that where the standard instruction states, “If, after carefully considering all the evidence, you have a reasonable doubt about whether the defendant was actually present when the alleged crime was committed, *you must find [him / her] not guilty,*” the trial court stated, “If, after considering all the evidence, you have a reasonable doubt whether the defendant was actually present when the alleged crime was committed, *you would have a responsibility to find him not guilty.*” Contrary to defendant’s argument, we are not

persuaded that there is a meaningful difference in the instructions. The instruction was not “plain error” as described in *Carines, supra*, 460 Mich 764-767.

B. Ineffective Assistance of Counsel

Preliminarily, having concluded there is no merit to defendant’s claim of instructional error, we further conclude that trial counsel was not ineffective for failing to object to the instructions regarding the elements of aggravated stalking.

Defendant also claims that his trial counsel was ineffective in several other ways. Because defendant did not move for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), this Court’s review is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish ineffective assistance of counsel, a defendant must show that his counsel’s representation “fell below an objective standard of reasonableness” and “overcome the strong presumption that his counsel’s action constituted sound trial strategy under the circumstances.” *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant must also demonstrate that counsel’s deficient performance “was so prejudicial to him that he was denied a fair trial.” *Id.*

Defendant makes a number of broad arguments regarding ways in which he contends his trial counsel provided ineffective assistance without citing specific instances of alleged conduct or demonstrating serious mistakes. For example, defendant claims that counsel failed to adequately present a defense to the aggravated stalking charge because, in almost every instance, defense counsel did not object or the objection was overruled when evidence was offered concerning whether defendant had notice of the personal protection order. However, defendant does not show that any inadmissible evidence was admitted as a result of alleged mistakes by counsel. Next, defendant notes that the trial court “cut off” defense counsel “on numerous questions about how [defendant] was not actually given notice.” But again, defendant fails to note specific instances or demonstrate that trial counsel made serious mistakes that prejudiced the defense. Defendant also claims that counsel never presented a defense, other than alibi, to the aggravated stalking charge. However, defendant offers no argument as to what other defense should have been presented and why it would have changed the outcome of the proceeding. Defendant contends that trial counsel “did not explain to the jury that the aggravated stalking charge was related to the present offense only and not the culmination of prior issues.” However, defendant does not explain the legal basis for the assertion, which appears to conflict with the “course of conduct” element of aggravated stalking. Defendant contends that counsel failed to object to the admission of the prosecutor’s exhibits and his prior record. But, again, defendant does not offer any argument with regard to why the evidence was inadmissible. He argues that counsel was ineffective for “failing to object to the admission of other acts of evidence . . . evidence attempting to prove a pattern of harassment . . . incidents occurring prior to Defendant-Appellant’s receiving actual notice of the PPO.” However, defendant does not specify what evidence he claims was inadmissible nor does he explain on what basis it should have been excluded. “A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim.” *People v Harmon*, 248 Mich App 522, 533; 640 NW2d 314 (2001) (citation and internal quotation marks omitted). Further, defendant has not shown with these arguments that his counsel’s performance was constitutionally deficient and deprived him of a fair trial. *Toma, supra*, 462 Mich 302.

Defendant also claims that his trial counsel was ineffective because he permitted the prosecution to ask “hearsay questions” of the officer who allegedly informed defendant of the personal protection order. However, to the extent that the officer testified regarding out-of-court statements, they were not hearsay because they were not offered for the truth of the matter asserted, MRE 801(c), or were statements purportedly made by defendant, MRE 801(d)(2).

Finally, defendant claims that trial counsel was ineffective for failing to move for a directed verdict on the aggravated stalking charge; however, defendant does not offer any basis for this Court to conclude that the motion would have been granted. Trial counsel is not ineffective for failing to make futile motions. See *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001), lv den 465 Mich 934 (2001).

Affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Peter D. O’Connell