

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL JOHN WAGNER,

Defendant-Appellant.

UNPUBLISHED

February 26, 2004

No. 244064

Wayne Circuit Court

LC No. 01-013205

Before: Schuette, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from a nonjury conviction of aggravated stalking, MCL 750.411i, for which he was sentenced to five years' probation, with the first six months in jail. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole issue on appeal is that the evidence was insufficient to sustain the conviction because the prosecutor failed to prove that defendant made a credible threat against the complainant or contacted her in violation of a personal protection order (PPO).

A challenge to the sufficiency of the evidence in a bench trial is reviewed de novo on appeal. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000). This Court reviews the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that each element of the crime was proven beyond a reasonable doubt. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001). Circumstantial evidence and reasonable inferences drawn therefrom can be sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The trial court's factual findings are reviewed for clear error. *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991). A finding of fact is considered "clearly erroneous if, after review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *Id.*

The first element of the crime is that the defendant engaged in stalking. MCL 750.411i(2). Defendant does not challenge the sufficiency of the evidence with regard to this element and, after a review of the transcript, we find that the complainant's testimony was sufficient to establish that defendant engaged in stalking as defined by MCL 750.411i(1)(e). The second element of the crime is that (1) at least one of the acts constituting the offense is (a) in violation of a restraining order of which the defendant has notice, (b) in violation of an

injunction or preliminary injunction, or (c) in violation of a condition of probation, parole, pretrial release, or release on bond pending appeal, or (2) the course of conduct includes making one or more credible threats against the complainant or a member of her family or household, or (3) that the defendant has a prior conviction of stalking or aggravated stalking. MCL 750.411i(2).

Defendant was served with the PPO on the evening of August 3, 2001. The complainant testified that defendant appeared in her yard sometime in August 2001, but she did not specify on what day in August he appeared, and we cannot reasonably infer from her testimony that he appeared after being served with the PPO. The complainant's testimony did not prove beyond a reasonable doubt that defendant's appearance was in violation of the PPO. The complainant's sister testified that defendant called and drove by the complainant's house numerous times between September 2000 and August 2001. The sister then stated, "I can't give you exactly what date, but yes, in that period of time, yes it had been." Again, the testimony of this witness did not establish that defendant violated the PPO. If, for example, defendant's last contact with the complainant occurred on August 2, 2001, then the sister's testimony that he contacted the complainant "between September of 2000 and August of 2001" could still hold true. The prosecutor simply did not establish that defendant's conduct violated the PPO.

The other possible basis for a conviction under the circumstances of this case would be the existence of a "credible threat[.]" MCL 750.411i(2)(c). However, it is clear from the court's ruling that it rejected this basis for conviction. The court stated:

She was more afraid I think of what she was going to do to him that (sic) what he was going to do to her. Because you heard her say, listen, I don't want to kill him. She never responded that she was necessarily afraid. He scared them in that at night [sic], on the side of the window, in the backyard. But even the sister said, "No he didn't threaten them."

* * *

We heard [the process server] say that it was [defendant] who he served. And that kind of makes all the elements of this particular offense.

The court rejected the "credible threat" argument and instead rested its decision on the violation of the PPO. We cannot resurrect the "credible threat" argument when it has already been rejected by the trier of fact. The prosecutor did not present sufficient evidence to sustain defendant's conviction.

Reversed.

/s/ Patrick M. Meter
/s/ Donald S. Owens

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SCHUETTE, J. (*dissenting*).

I respectfully dissent from the majority's conclusion that there was insufficient evidence to sustain defendant's conviction. Defendant appeals as of right from a nonjury conviction of aggravated stalking, MCL 750.411i, for which he was sentenced to five years' probation with the first six months in jail. I would affirm.

Defendant's sole issue on appeal is that the evidence was insufficient to sustain the verdict because the prosecutor failed to prove that he made a credible threat against the victim or contacted her in violation of a personal protection order (PPO). It appears from the trial court's ruling that it found that defendant had not made any threats against the victim. We therefore consider only whether he acted in violation of a PPO.

A challenge to the sufficiency of the evidence in a bench trial is reviewed de novo on appeal. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000), aff'd 466 Mich 39; 642 NW2d 339 (2002). This Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that each element of the crime was proved beyond a reasonable doubt. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001). Circumstantial evidence and reasonable inferences drawn therefrom are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The trial court's factual findings are reviewed for clear error. A finding of fact is considered "clearly erroneous if, after review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991).

The first element of the crime is that defendant engaged in stalking. MCL 750.411i(2). Defendant does not challenge the sufficiency of the evidence regarding this element and, on review of the transcript, we find that the victim's testimony was sufficient to establish that

defendant engaged in stalking as defined by MCL 750.411i(1)(e). The second element is (1) that at least one of the acts constituting the offense is (a) in violation of a restraining order of which the defendant has notice, (b) in violation of an injunction or preliminary injunction, or (c) in violation of a condition of probation, parole, pretrial release, or release on bond pending appeal, or (2) that the course of conduct includes making one or more credible threats against the victim or a member of her family or household, or (3) that the defendant has a prior conviction of stalking or aggravated stalking. MCL 750.411i(2).

Defendant was served with the PPO on the evening of August 3, 2001. The victim testified that defendant appeared in her yard sometime in August 2001. The victim did not specifically testify as to the date after August 3, 2001 when defendant appeared in her yard. However, the victim's sister testified that defendant called and drove by the victim's house numerous times between September 1, 2000 and August 31, 2001. Taken in the light most favorable to the prosecutor and applying appropriate deference to the trial court's responsibility as the closest examiner of the facts of this case, I am not of the definite and firm conviction that a mistake has been made.

I would affirm.

/s/ Bill Schuette