

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVE RUSSELL,

Defendant-Appellant.

UNPUBLISHED

August 16, 2007

No. 268603

Isabella Circuit Court

LC No. 05-001355-FH

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

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for aggravated stalking, MCL 750.411i, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and possession of a firearm by a felon, MCL 750.224f. Defendant was sentenced to two years in prison with 177 days' credit for the felony-firearm conviction and a consecutive term of 40 to 60 months' imprisonment for the aggravated stalking conviction. Defendant was also sentenced to 177 days' imprisonment for the possession of a firearm by a felon conviction. We affirm.

In 2004, defendant pleaded no contest to charges of attempted felonious assault and two counts of domestic violence. As a result of the incident that led to this conviction, defendant's wife obtained a personal protection order (PPO), which precluded defendant from having any contact with her. Defendant was released from jail in 2005 and, as a condition of probation, was prohibited from having contact with his wife. However, shortly after his release, on July 3, 2005, defendant phoned his wife and reportedly threatened to kill her and her family. Defendant's wife took the threat seriously and left the marital home. When defendant's wife returned to the marital home on July 22, 2005, she observed that the home was in disarray and several items, including two rifles and ammunition, were missing. The following day, July 23, 2005, defendant's wife checked a vehicle belonging to defendant on the marital home property and located the missing guns and ammunition, along with other items taken from the marital home. A relative of defendant's wife reported that defendant verbally acknowledged having possession of the guns and that he could observe people enter and leave the marital home "through the rifle scope."

At sentencing, the trial court concluded that substantial and compelling reasons existed for deviating from the sentencing guideline range for defendant's aggravated stalking conviction.

Specifically, the court noted that shortly after being released from jail, defendant committed a new crime against the same person who had been the victim of a prior crime committed by defendant. The court also considered the fact that defendant acquired misconduct citations while in jail, leading the court to question defendant's potential for rehabilitation.

Defendant contends there was insufficient evidence to sustain his felony-firearm conviction because of the failure to demonstrate that he possessed a firearm during both acts used to constitute the predicate felony of aggravated stalking. Defendant argues that because the conduct or events used for the charge of aggravated stalking were committed on two separate dates, defendant had to possess a weapon on both dates to meet the requirement that he possessed a firearm when committing the felony. Specifically, defendant contends that because the prosecutor failed to demonstrate he possessed a firearm on July 3, 2005, the felony-firearm conviction should not be upheld. This Court reviews de novo a claim of insufficient evidence. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). Questions of statutory interpretation are also reviewed de novo. *People v Williams*, 226 Mich App 568, 570; 576 NW2d 390 (1997).

The crime of stalking is defined as a "willful course of conduct" comprised of repetitive and "unconsented" acts of harassment, which would cause a reasonable person to feel frightened or threatened, and the victim did actually feel intimidated, harassed or threatened. MCL 750.411i(1)(e); *People v Kieronski*, 214 Mich App 222, 231-234; 542 NW2d 339 (1995). A "course of conduct" is further defined as: "[A] pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose." MCL 750.411i(1)(a). The crime of aggravated stalking includes an aggravating or exacerbating factor, such as stalking a victim in violation of a protection order. MCL 750.411i(2)(a); *Kieronski, supra* at 233-234.

The felony-firearm statute, MCL 750.227b, focuses on the act of utilizing a firearm to facilitate the commission of a felony. *People v Sturgis*, 427 Mich 392, 408-409; 397 NW2d 783 (1986). Accordingly, "[t]o be guilty of felony-firearm, one must carry or possess the firearm, and must do so when committing or attempting to commit a felony." *People v Burgenmeyer*, 461 Mich 431, 438; 606 NW2d 645 (2000) (emphasis removed). "The evident purpose of the [felony-firearm] statute is to enhance the penalty for the carrying or possession of firearms during the commission of a felony and thus to deter the use of guns." *People v Moore*, 470 Mich 56, 62; 679 NW2d 41 (2004).

Witnesses testified that defendant admitted going to the marital home and removing the guns and that he observed people at that location through the scope of his rifle. When defendant took the guns he also went through the marital property, leaving the home in a state of disarray and then hid out in the home's well house. The entry onto the marital property and the threatening phone call were made in violation of both a personal protection order and the terms of defendant's probation. Because the felony of aggravated stalking was not completed until the second noncontinuous act of stalking occurred, defendant's possession of the firearm on that date was sufficient to sustain his conviction for felony-firearm.

Defendant next contends the trial court failed to provide substantial and compelling reasons for exceeding the sentencing guidelines. Defendant also claims the presentence information report (PSIR) inaccurately identifies the prison misconduct tickets he received as

being for “major misconduct.” However, at sentencing, defendant indicated the contents of the PSIR were accurate. Accordingly, defendant has waived review of the accuracy of the information contained in the PSIR. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001).

If a court has substantial and compelling reasons, it may depart from the appropriate sentence range established under the sentencing guidelines. MCL 769.34(3). The existence or nonexistence of a particular factor is reviewed for clear error. *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003). Whether a particular factor is objective and verifiable is reviewed as a matter of law, while the trial court’s determination that a sentence departure is supported by substantial and compelling reasons is reviewed for abuse of discretion. *Id.* at 264-265.

A trial court's determination that a defendant's lack of potential for rehabilitation comprises a substantial and compelling reason for deviation from the sentencing guidelines, if that determination is supported by objective and verifiable facts. *People v Daniel*, 462 Mich 1, 7 n 8; 609 NW2d 557 (2000). Defendant’s receipt of misconduct citations in prison was objective and verifiable and not merely a subjective characterization by the trial court. “Misbehavior after arrest is clearly a legitimate factor to consider at sentencing.” *People v Houston*, 448 Mich 312, 323; 532 NW2d508 (1995). In addition, the trial court considered the prior relationship that existed between defendant and his victim. Specifically the trial court expressed concern that defendant continued to target the same victim and that this factor was not adequately addressed by the guidelines. *Id.* As a result, the trial court's articulation regarding defendant's low potential for rehabilitation and relationship to the victim comprised substantial and compelling reasons meriting the upward departure from the sentencing guidelines.

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Brian K. Zahra