

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN SCOTT ANDERSON,

Defendant-Appellant.

UNPUBLISHED
October 29, 1999

No. 207780
Menominee Circuit Court
LC No. 97-002248 FH

Before: Griffin, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by jury of aggravated stalking, MCL 740.411i; MSA 28.643(9), and sentenced as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to a prison term of 4 to 7 1/2 years. We affirm.

Defendant first claims that the trial court erred in admitting as evidence the personal protection order (PPO) that the victim, defendant's then-wife, obtained against him prior to this offense, because the PPO is inadmissible hearsay. We disagree. Because defendant failed to object at trial to the admission of the PPO, this Court will review this claim of unpreserved nonconstitutional error only if defendant shows that a plain error occurred, which affected substantial rights. *People v Carines*, 460 Mich 750, 763-767, 774; 597 NW2d 130 (1999); *People v Grant*, 445 Mich 535, 547; 520 NW2d 123 (1994). Here, we find no error, because the PPO was not impermissible hearsay. "MCL 600.2106; MSA 27A.2106 expressly allows the introduction of a copy of an order of any court of record in this state as prima facie evidence of all facts recited therein." *People v Williams*, 134 Mich App 639, 641; 351 NW2d 878 (1985). Because no error occurred, we need not engage in further review of defendant's evidentiary claim.

Defendant next contends that he was denied the effective assistance of counsel. We disagree. We review such claims to determine whether the performance of counsel fell below an objective standard of reasonableness under prevailing professional norms. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1997). Defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy and must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 687-688.

Defendant first cites counsel's failure to object to the admission of the PPO. However, the PPO was properly admitted and any objection by counsel would therefore have been futile. Absent a showing of prejudice flowing from the alleged deficiency, defendant's claim fails on this ground. *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996).¹ Likewise, with regard to defendant's claim that counsel was deficient in failing to object to the prosecution's alleged misstatement of the law, we see no resulting prejudice. The trial court instructed the jury on the elements of stalking and further instructed the jury that the attorneys' statements were not evidence. These instructions sufficiently cured any confusion created by the prosecutor's alleged misstatement of the law.

Defendant also contends that the prosecution committed misconduct by intimating that defendant could have made a credible threat, one of the elements of aggravated stalking, by threatening to kill himself. Defendant again failed to object to this alleged misconduct. However, even if defendant had objected to the prosecutor's alleged misstatement of law, the trial court could have cured the alleged error with a proper jury instruction. See e.g., *People v Federico*, 146 Mich App 776, 798-799; 381 NW2d 819 (1985), in which this Court stated that a prosecutor's misstatement of law that the defendant's flight was evidence of guilt, though erroneous, could have been cured by an appropriate instruction. We therefore conclude that manifest injustice would not result from our failure to pass on this unpreserved issue.

Next, defendant contends that the cumulative effect of the errors which occurred throughout the trial denied him a fair trial. We disagree. Because no error occurred with respect to the raised issues, neither did the cumulative effect of the alleged errors deprive defendant of a fair trial.

Next, defendant contends that his sentence was disproportionate because the trial court failed to consider defendant's suicidal state at the time he committed the crimes. We review sentencing issues for an abuse of discretion to determine if the sentence is proportionate. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). Our review of the sentencing transcript indicates that defendant raised the issue of his suicidal state with the trial court. While defendant claims that his suicidal state should have been a mitigating factor, he fails to acknowledge the effect of the crime on his children, whom he threatened to set on fire while brandishing a gas can. Because sentencing requires consideration of a number of factors including the nature of the crime and the circumstances surrounding the criminal behavior, *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985), we conclude that the trial court did not abuse its discretion in considering defendant's suicidal state as an aggravating factor related to the danger that defendant posed to his children rather than a mitigating factor. In addition, the trial court properly noted defendant's inability to accept responsibility for his actions and that defendant committed the instant offenses while he was on probation for another violent crime. *Id.* Given these aggravating factors regarding the offense and the offender, the trial court did not abuse its discretion when it sentenced defendant as an habitual offender to a prison term of 4 to 7 1/2 years for aggravated stalking.

Finally, defendant contends that his sentence constitutes cruel and unusual punishment under both the United States and Michigan Constitutions. US Const, Am VIII; Const 1963, art 1, § 16. We disagree. A proportionate sentence constitutes neither cruel nor unusual punishment. *People v Terry*,

224 Mich App 447, 456; 569 NW2d 641 (1997); *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993).

Affirmed.

/s/ Richard Allen Griffin

/s/ David H. Sawyer

/s/ Michael R. Smolenski

¹ Defendant also contends that evidence of the PPO and the order's underlying affidavit "were used to impermissibly establish" defendant's character contrary to MRE 404(a). We decline to address defendant's contention because he has failed to adequately brief it. "A party may not merely announce a position and leave it to the Court of Appeals to discover and rationalize a basis for the claim." *Joerger v Gordon Food Svc, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997).