STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES BRUCE LUKKARILA,

Defendant-Appellant.

UNPUBLISHED
February 4, 1997

No. 187014
Cass County
LC No. 94-008260-FH

Before: Hood, P.J., and Neff and M. A. Chrzanowski,* JJ.

PER CURIAM.

Defendant appeals as of right from his conviction for breaking and entering an occupied building, MCL 750.110; MSA 28.305, claiming error in the denial of his motion for a directed verdict and motion for new trial. Reluctantly, we reverse both this conviction and defendant's conviction for aggravated stalking. MCL 750.411i; MSA 28.643(9).

I

On the evening of August 25, 1994, defendant entered the home of the victim, his estranged wife, armed with a knife and wielding a baseball bat. Defendant grabbed the victim's arm and ordered her to come with him. When the victim refused, defendant dragged her outside by her hair and hit her on the head and in the stomach with the baseball bat.

Defendant had lived with the victim until August 10, 1994, when a restraining order apparently was issued which prohibited defendant from contacting the victim and going on the premises. Although the victim testified regarding the order's existence, no copy of the order was entered into evidence. Instead, admitted into evidence was a document entitled "Bond," which listed as a condition of release "do not go by residence." This document was signed by defendant but did not bear a judge's signature.

II

* Circuit judge, sitting on the Court of Appeals by assignment.

The elements of breaking and entering an occupied dwelling with intent to commit a felony are: (1) a breaking and entering; (2) of an occupied dwelling; and (3) with felonious intent. *People v Brownfield*, 216 Mich App 429, 431; 548 NW2d 248, 250 (1996). Defendant challenges only the first element, and insists that he could not be convicted of breaking and entering the home he shared with the victim.

A spouse may break and enter the marital home if a court order prohibits his presence there. *People v Szpara*, 196 Mich App 270, 273-274; 492 NW2d 804 (1992). Defendant acknowledges this general rule, but insists that plaintiff failed to present sufficient evidence to establish the existence of any such order. Specifically, defendant argues that because the document introduced by plaintiff did not bear a judge's signature, it was not a "court order." We agree.

MCR 2.602(A) requires that all orders be in writing and signed by the issuing judge. The document presented by plaintiff was unsigned. The victim's oral testimony regarding the order may be sufficient to raise an inference that the order existed, but not to establish, beyond a reasonable doubt, that it did. Cf. *People v Kieronski*, 214 Mich App 222, 231; 542 NW2d 339 (1995) (victim's testimony at preliminary examination that defendant's actions were in violation of an injunction or restraining order held sufficient to support bindover for aggravated stalking).

Plaintiff requested that the trial court take judicial notice of the order. A judge may, pursuant to MRE 201(b), take judicial notice of facts which are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." That a restraining order had been issued is a fact of which judicial notice could have been taken. However, the trial court did not take judicial notice because, despite the court's specific direction to the prosecutor, no effort was made to place the "fact" to be judicially noticed before the court.

We note that defendant testified in his own behalf and acknowledged that the order existed. However, our review of the trial court's denial of defendant's motion for a directed verdict is limited to the evidence presented in the plaintiff's case in chief. *People v Daniel*, 192 Mich App 658, 665; 482 NW2d 176 (1991). After carefully reviewing the record in this case, we conclude that the prosecutor failed to present sufficient evidence to submit the breaking and entering charge to the jury and that the trial court erred in denying defendant's motion for a directed verdict.

III

For the same reason, we are compelled to reverse defendant's conviction for aggravated stalking. MCL 750.411i: 28.643(9). The jury was instructed that to be guilty of aggravated stalking, the prosecutor must establish each of the following elements beyond a reasonable doubt:

> First, that the defendant committed two or more willful, separate and noncontinuous acts of unconsented contact with [the victim].
>
> Second, that the contact would cause a reasonable individual to suffer emotional distress.

Third, that the contact caused [the victim] to suffer emotional distress.

And fourth, that the contact would cause a reasonable individual to feel terrorized, frightened, intimidated, threatened, harassed, molested.

And six [sic], that the stalking was committed in violation of a court order. [emphasis added.]

Because plaintiff failed to present evidence at trial to prove, beyond a reasonable doubt, that defendant's stalking was committed in violation of a court order, his conviction for aggravated stalking must be reversed. However, our review of the record convinces us that sufficient evidence was presented to sustain a conviction for misdemeanor stalking, MCL 750.411h; MSA 843(8).

IV

Accordingly, we reverse defendant's convictions for breaking and entering and aggravated stalking, and remand this case to the Cass Circuit Court for entry of a directed verdict of not guilty of breaking and entering, and for entry of a judgment of conviction of misdemeanor stalking and for resentencing. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Janet T. Neff
/s/ Mary A. Chrzanowski