STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OLIVER EARL PLAIR,

Defendant-Appellant.

UNPUBLISHED
October 29, 1999

No. 210566
Chippewa Circuit Court
LC No. 97-006377 FH

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

PER CURIAM.

A jury convicted defendant of two counts of assaulting a prison employee, MCL 750.197c; MSA 28.394(3). The trial court sentenced him to three to fifteen years in prison on each count. Defendant appeals as of right. We affirm.

The evidence at trial showed that defendant hit two corrections officers working in his prison housing unit in an effort to make prison officials transfer him to a higher security facility where he would have more privacy than in the open, dormitory-style setting at the Chippewa Temporary Facility. Prior to the assault, defendant had asked to be transferred to a different facility approximately fourteen times, with officials at the prison denying each request. Defendant does not dispute that the prosecution proved every element of assaulting a prison employee, MCL 750.197c; MSA 28.394(3). Rather, he argues that he satisfied his burden of production on the affirmative defenses of duress and necessity. See *People v Sorscher*, 151 Mich App 122, 132; 391 NW2d 365 (1986). Therefore, he claims, the prosecutor had the additional burden of disproving those defenses beyond a reasonable doubt but failed to do so, requiring this Court to reverse his convictions.

A defendant must present some evidence on each element of the affirmative defenses of duress and necessity before the prosecutor has a burden of disproving the defenses beyond a reasonable doubt. *People v Lemons*, 454 Mich 234, 247; 562 NW2d 447 (1997); *People v Field*, 28 Mich App 476, 478; 184 NW2d 551 (1970). Consequently, this Court must first determine if defendant made a minimal showing on each element of duress or necessity before considering whether the prosecutor introduced sufficient evidence to disprove duress and necessity.

In *Lemons*, *supra* at 245, our Supreme Court explained that duress is a defense in cases where the criminal act avoids a greater harm. Relying on *People v Luther*, 394 Mich 619, 623; 232 NW2d 184 (1975), the *Lemons* Court established that a defendant satisfies his burden of production when there is "some" evidence from which the jury can conclude:

> A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
>
> B) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;
>
> C) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and
>
> D) The defendant committed the act to avoid the threatened harm. [*Id*. at 247 (footnote omitted).]

Further, the *Lemons* Court explained, the "threatening conduct or act of compulsion must be 'present, imminent, and impending[, that] [a] threat of future injury is not enough,' and that the threat 'must have arisen without the negligence or fault of the person who insists upon it as a defense.'" *Id*., quoting *People v Merhige*, 212 Mich 601, 610-611; 180 NW 418 (1920). Defendants do not satisfy their burden of production if they fail to present evidence on any one or more of these factors. *Id*. at 248.

We conclude that the first factor identified in *Luther*, *supra* at 623, disposes of defendant's claim that the prosecutor had to disprove duress. There is simply no evidence on the record regarding the nature of a threat or compelling conduct by any other inmate against defendant. A prison psychologist testified in the abstract that older prisoners may misinterpret younger prisoners' noisy or different behavior as threatening. He also said that defendant reported feeling "agitated" and "unsafe" around the other prisoners. Yet, he neither testified that defendant, who was thirty-four years old at the time of the offense, was an "older" inmate nor that defendant mentioned any particular threat to his personal safety from other prisoners.

There was ample evidence that defendant disliked the dormitory-style housing unit because he was uncomfortable and did not sleep well there; however, testimony did not establish that defendant was at risk for physical harm, much less serious bodily injury or death. Although defendant now argues that the open setting at the prison "provided younger inmates with ample opportunity to inflict harm" on defendant, there is no evidence that any of them had done so in the past or intended to do so in the future. See *People v Ramsdell*, 230 Mich App 386, 401; 585 NW2d 1 (1998); *People v Rau*, 174 Mich App 339, 341; 436 NW2d 409 (1989). None of the corrections officers or managers in defendant's housing unit described any incident between defendant and other inmates at any time, from which this Court might infer that defendant had reason to be afraid for his personal safety. Furthermore, defendant's failure to introduce evidence on the record describing the nature of the threat makes it impossible to assess the threat objectively to determine if a reasonable person would have been afraid of physical injury or death. See *People v Gimotty*, 216 Mich App 254, 257; 549 NW2d 39 (1996).

Therefore, we need not consider whether the prosecutor introduced sufficient evidence to disprove duress because defendant failed to provide any evidence of the alleged threat. *Lemons*, *supra* at 248.

Defendant asks this Court to extend the defense of necessity to the offense of assaulting a prison employee. We decline the invitation. In *People v Hocquard*, 64 Mich App 331, 337 n 3; 236 NW2d 72 (1975), this Court noted that "[t]he difference between the defenses of duress and necessity is that the source of compulsion for duress is the threatened conduct of another human being, while the source of compulsion for necessity is the presence of natural physical forces." Addressing the defense of necessity in that case, the Court explicitly limited the necessity defense in criminal cases to circumstances in which officials deny an inmate medical care. *Id*. at 337. In light of that limitation the Court stated the elements of a necessity defense:

> 1. The compulsion must be present, imminent and impending, and of such a nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done. A threat of future injury is not enough.
>
> 2. There is no time for a complaint to the authorities or there exists a history of futile complaints which make any result from such complaints illusory;
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> 3. There is no time or opportunity to resort to the courts;
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> 4. There is no evidence of force or violence used towards prison personnel or other "innocent" persons in the escape; and
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> 5. The prisoner immediately reports to the proper authorities when he has attained a position of safety from the immediate threat. [*Id*. at 337-338 (footnotes omitted).]

Since *Hocquard*, we have affirmed necessity as a defense for prison escape for medical reasons and extended the necessity defense to other crimes without changing the essential elements of the defense. See, e.g., *People v Hubbard*, 115 Mich App 73; 320 NW2d 294 (1982); *People v Martin*, 100 Mich App 447; 298 NW2d 900 (1980).

Even if we were willing to extend the defense of necessity to assaultive crimes, we would not relieve a defendant of the burden of showing that there was an actual and immediate threat of serious bodily injury or death underlying his actions. As in our analysis of the duress defense, we see no evidence of such a threat in this case. Therefore, the prosecutor did not have the burden of disproving the necessity of defendant's assaults.

Affirmed.

/s/ Richard Allen Griffin
/s/ David H. Sawyer
/s/ Michael R. Smolenski