

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

RAYMOND BERNARD FERGUSON,

Defendant-Appellee.

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UNPUBLISHED

January 28, 2000

No. 214342

Newaygo Circuit Court

LC No. 97-006601-FC

Before: Sawyer, P.J., and Gribbs and McDonald, JJ.

PER CURIAM.

Defendant was tried by a jury for extortion in violation of MCL 750.213; MSA 28.410, and for assault with a dangerous weapon in violation of MCL 750.82; MSA 28.277, as well as being an habitual offender, fourth offense. Defendant was found guilty as charged and sentenced to imprisonment of 20 to 40 years for the extortion offense and 10 to 15 years for the assault offense, to be served consecutively to another conviction for which he was on parole at the time of the alleged instant offenses. Defendant appeals as of right from his convictions and sentences. We affirm.

Defendant first argues that he was denied effective assistance of counsel when his attorney failed to request a jury instruction on the defense of claim of right to the extortion charge. Defendant did not move for a *Ginther*<sup>1</sup> hearing. When there is no *Ginther* hearing in an ineffective assistance of counsel claim, this Court's review is limited to mistakes apparent on record. *People v Williams*, 223 Mich App 409; 566 NW2d 649 (1997).

In order to prove ineffective assistance of counsel, the defendant must prove that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that but for the unprofessional errors the result of the proceeding would have been different. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997). "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 156. Defendant argues that he had a good-faith claim of right to the brown car to which he demanded the title because, although the title was in his wife's name, it was really his car and he had a right to the title. Defendant further argues that if the jury had been instructed regarding a good-faith claim of right, it might not have convicted defendant of extortion. Defendant also argues that he did

not ask for title to the van, as that was his wife's vehicle, but that he just wanted to know where the title to the van was located. MCL 750.213; MSA 28.410, which prohibits extortion, provides:

Any person who shall, either orally or by a written or printed communication, . . . maliciously threaten any injury to the person or property or mother, father, husband, wife or child of another with intent hereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do or refrain from doing any act against his will, shall be guilty of a felony.

Claim of right, however, is not a valid defense to the crime of extortion. *People v Maranian*, 359 Mich 361; 102 NW2d 568 (1960). "The collection of a valid, enforceable debt does not permit malicious threats of injury to one's person, loved ones, or property if payment is not made. Such acts, if proven, would constitute extortion within the framework of the statute under which defendant was charged." *Id.* at 369. Because defendant used threats to try to obtain titles to the two vehicles and to obtain money, he had no valid defense to the crime of extortion. Therefore, defendant's claim of ineffective assistance of counsel is meritless because defendant did not show that counsel committed any error. Similarly, defendant's contention that the court should have sua sponte instructed the jury on the defense of claim of right to the extortion charge is without merit because claim of right to the money or property at issue is not a defense to extortion.

Next, defendant argues that the elements of assault with a dangerous weapon were not met because defendant's threat to break the jaw of his handicapped daughter was a figure of speech intended to silence her but not intended to harm her. In reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). However, this Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992). A prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Quinn*, 219 Mich App 571, 574; 557 NW2d 151 (1996). "The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999), MCL 750.82; MSA 28.277. The term "assault" is defined as "an intentional, unlawful offer of corporal injury to another by force, or force unlawfully directed toward person of another, under such circumstances as create well-founded fear of imminent peril, coupled with apparent present ability to execute attempt, if not prevented." Black's Law Dictionary (4<sup>th</sup> ed), p 147. In this case, after defendant had "smashed up" the house with the baseball bat, his daughter, while holding her three-year-old child, tried to get up from her chair. However, defendant, while holding the baseball bat in his hand, pushed her back down into the chair and told her that if she moved again, he would break her jaw with the bat. There is no dispute that a baseball bat is a dangerous weapon. The victim testified that she was scared and believed that defendant would really break her jaw. Therefore, in viewing the evidence in a light most favorable to the prosecutor, the jury could have rationally

concluded that defendant's guilt of assault with a dangerous weapon had been proven beyond a reasonable doubt.

Finally, defendant argues that his sentence of ten to fifteen years imprisonment for assault with a dangerous weapon and twenty to forty years imprisonment for extortion are disproportionate to the defendant and the crimes. Appellate review of a claim that the sentence is disproportionate is for abuse of the trial court's discretion. *People v Milbourn* at 435 Mich 630, 636; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and offender. *Id.*

The statute governing assault with a dangerous weapon (felonious assault), MCL 750.82; MSA 28.277, provides for a penalty of imprisonment for not more than four years or a fine of not more than \$2,000, or both for a person convicted of felonious assault. The statute governing extortion, MCL 750.213; MSA 28.410, provides for a penalty of imprisonment of not more than twenty years or by a fine of not more than \$10,000 for a person convicted of extortion. However, defendant's sentences were subject to enhancement under the habitual offender, fourth offense statute and defendant was on parole for a prison escape offense at the time of the instant offense. MCL 769.12; MSA 28.1084 provides:

- (1) If a person has been convicted of 3 or more felonies, . . . and that person commits a subsequent felony within this state, the person shall be punished upon conviction as follows:
  - (a) If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term of 5 years or more, or for life, then the court . . . may sentence the person upon conviction of the fourth or subsequent offense to imprisonment in a state prison for the term of life or for a lesser term.
  - (b) If the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term which is less than 5 years, then the court . . . may sentence the person to imprisonment for a term of 15 years or a lesser term.

In applying the habitual offender penalties under the above statute, the maximum penalty for the assault conviction increased from four years up to fifteen years as a result of being a fourth offender. The maximum penalty for the extortion conviction increased from twenty years to any term of years up to life in prison. In this case, the court gave defendant a sentence of imprisonment of 10 to 15 years for the assault with a dangerous weapon conviction and 20 to 40 years' imprisonment for the extortion conviction. Therefore, both sentences fall within the statutory limits. When an habitual offender's underlying felony and criminal history demonstrate that he is unable to conform his conduct to the law, a sentence within the statutory limits is proportionate. *People v Hansford (After Remand)*, 454 Mich 320, 326; 562 NW2d 460 (1997). In light of defendant's extensive criminal history, there is no dispute that defendant was unable to conform his conduct to the law. Therefore, defendant's sentences are proportionate.

Affirmed.

/s/ David H. Sawyer  
/s/ Roman S. Gibbs  
/s/ Gary R. McDonald

<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).