STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 19, 2000
v	No. 217047 Antrim Circuit Court
LLOYD HANK SWADLING, Defendant-Appellant.	LC No. 98-003256-FH

Before: Talbot, P.J., and Hood and Smolenski, JJ.

PER CURIAM.

Defendant was convicted of conspiracy to commit prison escape, MCL 750.157(a); MSA 28.354(1); attempted prison escape, MCL 750.193(1); MSA 28.390(1); malicious destruction of a building over $100, MCL 750.380; MSA 28.612; and two counts of extortion, MCL 750.213; MSA 28.410, as a fourth habitual offender, MCL 769.12; MSA 28.1084.[1] He was sentenced to a term of 5-15 years' imprisonment on the malicious destruction count and a term of 7-50 years' imprisonment on the remaining counts. Defendant appeals as of right from his convictions and sentences. We affirm.

This case arises from an unsuccessful attempt to escape from the Antrim County Jail. At trial, two of defendant's cell mates testified that defendant enlisted the help of other inmates in planning and executing his escape plan. The inmates cooperated in loosening a shower curtain rod, which defendant then used to crack the cell window. When he failed to break through the safety glass, defendant attempted to enter a ceiling access panel, but that escape attempt likewise failed. One of the prosecution witnesses testified that he acted as a look-out, under duress, while defendant attempted to escape. He and another witness also testified that defendant threatened them and their families with physical harm if they reported his escape attempt to jail authorities.

[1] The statute governing attempted prison escape, MCL 750.193(1); MSA 28.390(1), was amended by 1998 PA 510, effective January 8, 1999. The statute governing malicious destruction of a building, MCL 750.380; MSA 28.612, was amended by 1998 PA 311, effective January 1, 1999. Because defendant committed the instant offenses on July 23, 1998, the amended language of those statutes does not apply.

Defendant first argues that the evidence produced at trial was insufficient to support his convictions. When reviewing the sufficiency of the evidence in a criminal prosecution, we must view the evidence in the light most favorable to the prosecution and determine whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

In the present case, the extortion charges related to an oral threat of injury to a person and that person's family, with the intent to compel the person to do or refrain from doing any act against his will. The prima facie elements of extortion are: (1) an oral or written communication maliciously encompassing a threat, (2) the threat must be to injure the person, property, or immediate family of the person threatened, and (3) the threat must be made with the intent to compel the person threatened to do or refrain from doing an act against his will. *People v Fobb*, 145 Mich App 786, 790; 378 NW2d 600 (1985); MCL 750.213; MSA 28.410. "When a defendant is charged with extortion arising out of a compelled action or omission, a conviction may be secured upon the presentation of proof of the existence of a threat of immediate, continuing, or future harm." *People v Pena*, 224 Mich App 650, 656; 569 NW2d 871 (1997), modified in part, 457 Mich 885 (1998), citing *People v Hubbard (After Remand)*, 217 Mich App 459, 485; 552 NW2d 493 (1996). The extortion statute does not preclude every minor threat, but applies to threats "that result in the victim undertaking an action of serious consequence." *Hubbard*, *supra* at 485-486. "Accordingly, a conviction for extortion will not be sustained where the act required of the victim was minor with no serious consequences to the victim." *Id*. at 486.

Defendant first argues, without citation to authority, that a "generalized" threat of future harm made to a group of people, rather than a single individual, is insufficient to support an extortion conviction. We disagree. The testimony presented at trial was sufficient to convince a rational trier of fact that defendant threatened others and their families with physical injury, with the intent to prevent them from reporting defendant's criminal conduct to jail authorities. That evidence was sufficient to meet the prima facie elements of extortion.

Defendant next cites *Fobb*, *supra*, for the proposition that the extortion statute does not apply where the act required of the victim was minor, resulting in no serious consequences for the victim. Defendant contends that the threats involved in the present case were minor, and that neither victim actually refrained from performing an act against his will. First, we note that the extortion statute does not require that the person threatened actually perform or refrain from performing an act against his will. The crime of extortion is complete when the defendant utters the threat with the intent to compel the threatened person to undertake a specific action. MCL 750.213; MSA 28.410. Second, we believe that *Fobb* is distinguishable and that *Pena*, *supra*, supports a finding in the present case that sufficient evidence was presented to support defendant's extortion conviction.

In *Fobb*, the defendant was convicted of extortion and assault with intent to cause great bodily harm less than murder. The defendant had broken into the victim's office and began choking and beating her. During the attack, the defendant ordered the victim to draft and sign a note stating that the victim had been spreading lies about the defendant. The victim complied with the defendant's directions because of the physical assault. *Id*. This Court held that the

extortion statute does not apply to minor threats which carry no serious consequences for the victim. Rather, prosecutions for threatening a person and forcing him to do something against his will apply only to serious demands. *Id*. at 792. This Court reversed the defendant's extortion conviction for insufficient evidence, concluding that "the demand by the defendant that the victim execute a useless note was not an offense such as was contemplated by the extortion statute as no pecuniary advantage was obtained nor was the act demanded of such consequence or seriousness as to apply that statute." *Id*. at 793.

In the present case, the evidence indicated that defendant threatened his cell mates that he would hurt them and their families if they said anything to police about his escape plan. These facts are similar to the facts in *Pena*, *supra*, where this Court addressed an extortion conviction also involving a threat of physical injury designed to prevent the victim from reporting the defendant's conduct to the authorities. In that case, the defendant and two others assaulted a young woman. Witnesses to the assault testified that the defendant told the victim that she would kill her if she said anything to the police. Like the instant defendant, the defendant in *Pena* claimed that the threat was minor and that it did not fall within the scope of conduct which the Legislature sought to punish. The *Pena* Court rejected that argument, holding:

> Contrary to defendant's claim, threatening a victim with harm if the victim reports a crime to the police is not a "minor threat." Rather, we conclude that the demand by defendant that the victim not talk to the police was an offense contemplated by the extortion statute because the act demanded was of such consequence or seriousness that the statute should apply. [*Pena*, *supra*, at 656-657, footnote omitted.]

Applying *Pena* to the present case, we conclude that defendant's threats to his cell mates were sufficiently serious so as to fall within the scope of conduct prohibited by the extortion statute.

Finally, defendant argues that there was no evidence presented at trial to show that he had the ability to carry out the threats of future harm. We note that one of the prosecution witnesses, who had known defendant before they went to jail, testified that he believed defendant had the ability to carry out his threats. Accordingly, we conclude that the evidence presented in the instant case was sufficient to support defendant's extortion conviction.

Defendant also argues that the evidence presented at trial was insufficient to support the conspiracy conviction because no meeting of the minds occurred, where none of the witnesses testified that they willingly cooperated in planning an escape, and everyone in the cell cooperated under duress. As to the malicious destruction conviction, defendant argues that the evidence was insufficient to support a conviction because the window was broken before he entered the cell and because the prosecutor failed to prove damages exceeding $100. As to those convictions, we are convinced that the evidence presented at trial, when viewed in the light most favorable to the prosecution, was sufficient to justify a rational trier of fact in determining that defendant committed the charged offenses, beyond a reasonable doubt. *Wolfe*, *supra* at 513-514.

Defendant next argues that prosecutorial misconduct deprived him of a fair trial. We disagree. Because defense counsel failed to object to the challenged remarks at trial, review of

this issue is precluded absent a showing of manifest injustice. "Appellate review of improper prosecutorial remarks is generally precluded absent objection by counsel because the trial court is otherwise deprived of an opportunity to cure the error. An exception exists if a curative instruction could not have eliminated the prejudicial effect of where failure to consider the issue would result in a miscarriage of justice." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), citations omitted.

> This Court evaluates the remarks of a prosecutor in the context in which they were made to determine whether a defendant was denied a fair and impartial trial. A prosecutor's comments are to be considered in light of defense counsel's arguments. Further, a prosecutor may comment about and suggest reasonable inferences from the evidence presented at trial. [*People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993), citations omitted.]

We conclude that the challenged questions and remarks, when viewed in context, constituted proper response to defense counsel's suggestion that a prosecution witness was receiving leniency in exchange for testifying against defendant. Therefore, we find that no manifest injustice will result from our decision not to review this issue.

Defendant next argues that the trial court committed error requiring reversal when it failed to read five standard instructions to the jury, CJI2d 4.1, 5.6, 7.6, 7.7, and 8.5. We disagree. Defense counsel neither requested these five standard instructions nor objected to the instructions that were read at trial. "[F]ailure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused." *People v Griffin*, 235 Mich App 27, 37; 597 NW2d 176 (1999); MCL 768.29; MSA 28.1052.

Defendant next contends that his trial counsel rendered ineffective assistance when he failed to request these five jury instructions. A claim of ineffective assistance of counsel should be raised by a motion for new trial or evidentiary hearing. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Where a defendant fails to develop a testimonial record supporting his claim that defense counsel was ineffective, the issue is "largely forfeited" and review is limited solely to the existing record. *Id*. Because defendant failed to move in the trial court for an evidentiary hearing, our review of defendant's ineffective assistance of counsel claim is limited to the existing record.

A criminal defendant must overcome a "strong presumption" that counsel's assistance constituted sound trial strategy. *Stanaway*, *supra* at 687. A successful claim of ineffective assistance of counsel requires a defendant to show that "'(1) the performance of counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different.'" *People v Nimeth*, 236 Mich App 616, 624-625; 601 NW2d 393 (1999), quoting *People v Plummer*, 229 Mich App 293, 307; 581 NW2d 753 (1998). This Court will neither assess defense counsel's performance with the benefit of hindsight, nor substitute its judgment for that of defense counsel in matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Our review of the lower court record persuades us that none of the jury instructions at issue were justified by the evidence presented at trial. CJI2d 4.1 does not apply because defendant did not confess to the charged crimes. CJI2d 5.6 does not apply because defendant never claimed at trial that he had any accomplices in the escape attempt. Rather, defendant claimed that no escape attempt was ever made. CJI2d 7.6 does not apply because defendant did not argue that he acted under duress. CJI2d 7.7 does not apply because there was no evidence presented at trial that defendant was forced to attempt an escape. Rather, defendant's trial strategy was to deny that he attempted an escape. Finally, CJI2d 8.5 does not apply because defendant did not claim at trial that he was merely present while other inmates attempted an escape. Defendant denied that any escape attempt occurred and argued that the cell window was broken outside of his presence. Because none of the above instructions were applicable in the present case, defense counsel was not ineffective for failing to request them. Further, we cannot conclude that the outcome of the proceedings would have been different if defendant's trial counsel had requested these instructions.

Finally, defendant argues that the trial court imposed a disproportionately harsh sentence because defendant's escape attempt was not the most serious conduct on the continuum of criminal behavior. When reviewing a challenge to the proportionality of a sentence imposed on an habitual offender, this Court is limited to determining whether the lower court abused its discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997). An abuse of discretion will be found where the sentence imposed does not reasonably reflect the serious nature of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). "[A] trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society." *Hansford*, *supra* at 326.

The malicious destruction statute applicable to defendant's case provides that the crime constitutes a felony, but does not prescribe a specific punishment. MCL 750.380; MSA 28.612. Therefore, the offense is punishable by not more than four years' imprisonment. MCL 750.503; MSA 28.771. Attempted prison escape and conspiracy to commit prison escape are felonies punishable by not more than five years' imprisonment. MCL 750.193(1); MSA 28.390(1); MCL 750.157(a); MSA 28.354(1), and extortion is a felony punishable by not more than twenty years' imprisonment. MCL 750.213; MSA 28.410. As a fourth felony offender, defendant could have been sentenced on the malicious destruction charge to a maximum term of not more than fifteen years. MCL 769.12(1)(b); MSA 28.1084(1)(b). On the remaining charges, defendant could have been sentenced to imprisonment for life or a lesser term. MCL 769.12(1)(a); MSA 28.1084(1)(a). Therefore, the sentences which the trial court imposed fell within the statutory limits established by the Legislature.

Defendant's previous felony record includes convictions for resisting and obstructing a police officer, domestic violence, jail escape, assault with a dangerous weapon, illegal entry, retail fraud, possession of open intoxicants in a motor vehicle, and six convictions of assault and battery. The five felonies involved in the instant case, which included threats of violence toward fellow inmates and their families, illustrate defendant's long-standing inability to control his

violent behavior and to conform his conduct to the laws of society. We believe that the sentences imposed by the trial court were proportionate.

Affirmed.

/s/ Michael J. Talbot
/s/ Harold Hood
/s/ Michael R. Smolenski