STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 17, 2002
v	No. 225567 Kalkaska Circuit Court
SCOTT EDWARD MIHELSIC, Defendant-Appellant.	LC No. 98-001866-FC

Before: Griffin, P.J., and Holbrook, Jr. and Hoekstra, JJ.

GRIFFIN, P.J. (*concurring*).

Were I permitted, I would affirm defendant's conviction and sentence of extortion, MCL 750.213, and hold that the evidence was sufficient and the jury instructions given (CJI2d 21.1) accurately recited the law. However, pursuant to MCR 7.215(I)(1)[1], I must follow and apply *People v Hubbard (After Remand)*, 217 Mich App 459; 552 NW2d 493 (1996), which compels me to concur in the reversal of defendant's conviction.

I

The extortion statute, MCL 750.213, reads as follows:

> Any person who shall, either orally or by a written or printed communication, maliciously threaten to accuse another of any crime or offense, or shall orally or by any written or printed communication maliciously threaten any injury to the person or property or mother, father, husband, wife or child of another with intent thereby to extort money or any pecuniary advantage whatever, or with intent to compel the person so threatened to do or refrain from doing any

[1] MCR 7.215(I)(1) provides:

> Precedential Effect of Published Decisions. A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.

act against his will, shall be guilty of a felony, punishable by imprisonment in the state prison not more than 20 years or by a fine of not more than 10,000 dollars.

The original information filed against defendant charged extortion under the alternative theories that defendant intended to "extort money or any pecuniary advantage whatever" or "to compel the person so threatened to do or refrain from doing any act against his/her will." However, the prosecutor later amended the information to proceed only under the second theory. In addition, the jury was instructed only regarding the prosecutor's theory that defendant committed the crime of extortion because he made a threat "to compel the person so threatened to do or refrain from doing any act against his/her will."

The change in theories by the prosecution was most unfortunate because the blue jeans, which were the subject of the extortion, likely had some pecuniary value and therefore defendant's threats may have been intended to achieve "*any* pecuniary advantage *whatever*." However, the prosecution did not pursue this theory and the jury was not so instructed.

The only theory that was presented to the jury by the prosecution was that defendant committed the crime of extortion by threatening immediate harm to the victim if she did not perform an act against her will. The demanded act was the return of defendant's blue jeans.

In *People v Fobb*, 145 Mich App 786; 378 NW2d 600 (1985), a panel of this Court held that for the crime of extortion to occur, the act demanded of the victim, to do or refrain from doing against her will when threatened with bodily injury, must relate to a serious, not minor, matter. In *Fobb*, our Court held that the defendant's threat did not constitute extortion because the action demanded was the execution of a "useless note," which according to the court was a "minor [act] with no serious consequences to the victim." While the *Fobb* decision predated November 1, 1990, and therefore is not precedentially binding on this Court, MCR 7.215(I)(1), its construction of the extortion statute was later adopted in *Hubbard, supra*. Although the precise extortion issue in *Hubbard* was whether the statute was unconstitutionally vague, in resolving the question the *Hubbard* panel reaffirmed the *Fobb's* Court's construction of the statute. In *Hubbard*, *supra* at 485-486, our Court held as follows:

> The Legislature did not intend punishment for every minor threat. *Fobb, supra* at 791. Instead, the Legislature intended punishment for those threats that result in pecuniary advantage to the individual making the threat or that result in the victim undertaking an action of serious consequence, such as refusing to report a defendant's sexual misconduct or refusing to testify. *Id.* at 792-793. 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 791.
>
> We conclude that the construction afforded the statute by *Fobb* provides sufficient guidance regarding the nature of the threat and act compelled to ensure that the statute will not be enforced arbitrarily or discriminatorily. The statute is not void for vagueness.

Because *Hubbard* is precedentially binding, I am compelled pursuant to MCR 7.215(I) to follow the *Hubbard-Fobb* construction of the statute. However, because I conclude that the *Hubbard-Fobb* construction is contrary to the plain language of the statute, I urge the Supreme Court to grant leave on this case and reverse our decision and reinstate defendant's conviction.

As stated most recently by the Supreme Court in *Roberts v Mecosta Co General Hosp*, ___ Mich ___; ___ NW2d ___ (Docket Nos. 116563, 116570, 116573, issued 4/24/02), slip op at 7-8, unambiguous statutes are to be enforced as written:

> An anchoring rule of jurisprudence, and the foremost rule of statutory construction, is that courts are to effect the intent of the Legislature. *People v Wager*, 460 Mich 118, 123, n 7; 594 NW2d 487 (1999). To do so, we begin with an examination of the language of the statute. *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001). If the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written. *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001). A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Omne Financial, Inc v Shacks, Inc*, 460 Mich 305, 311; 596 NW2d 591 (1999).

See also *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

The extortion statute does not contain any language requiring that the demand of the victim to do or refrain from doing against her will, be of a *serious* consequence to the victim. On the contrary, the "serious consequence" requirement was implied in and added to the statute by the *Fobb* panel. In my view, such a statutory revision by the judiciary is not permitted and therefore the construction of the extortion statute as held in *Fobb* and adopted by *Hubbard* should be overruled. As our Supreme Court explained in *Tyler v Livonia Public Schools*, 459 Mich 382, 393, n 10; 590 NW2d 560 (1999):

> Our role as members of the judiciary is not to determine whether there is a "more proper way," that is, to engage in judicial legislation, but is rather to determine the way that was in fact chosen by the Legislature. It is the Legislature, not we, who are the people's representatives and authorized to decide public policy matters such as this. To comply with its will, when constitutionally expressed in the statutes, is our duty.

In regard to defendant's other issues, I find no error requiring reversal. Defendant's claim of right defense is without merit. *People v Maranian*, 359 Mich 361, 369; 102 NW2d 568 (1960). The trial court did not err by permitting the prosecution to impeach defendant's credibility with two prior convictions. Defendant was not denied a fair trial because MRE 609 does not require the prosecution to give a defendant pretrial notice that it plans to impeach the defendant's credibility at trial. Further, although the trial court may have erred by failing to articulate its reasoning on the record pursuant to MRE 609 and by permitting the prosecution to impeach defendant during the prosecution's case in chief, those errors were harmless because the prosecution could have properly used defendant's prior convictions to impeach him during his cross-examination. *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999). Also, defendant was

not denied effective assistance of counsel because defendant failed to show that he suffered any prejudice arising from his attorney's alleged deficient performance. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1984); *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1994).

Finally, after thoroughly reviewing the circumstances of the offense and the offender, I would hold that defendant's sentence as a second habitual offender to eight to thirty years is proportionate and not an abuse of discretion. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Were it not for MCR 7.215(I) I would affirm defendant's conviction and sentence.

/s/ Richard Allen Griffin