

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANK NALI,

Defendant-Appellant.

UNPUBLISHED

December 29, 2005

No. 247843

Wayne Circuit Court

LC No. 02-013154

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

FRANK NALI,

Defendant-Appellee.

No. 260267

Wayne Circuit Court

LC No. 02-013154

Before: Jansen, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of extortion, MCL 750.213.¹ In Docket No. 247843, defendant appeals his conviction as of right. In Docket No. 260267, the prosecutor challenges defendant's new sentence. We affirm.

We first consider defendant's arguments that there was insufficient evidence to support a conviction for extortion, and that the trial court therefore erred in denying defendant's motion for a directed verdict. In reviewing a trial court's decision on a motion for a directed verdict, "this

¹ The trial court directed a verdict of acquittal of three counts of disseminating obscenity, MCL 752.365(1). Additionally, the jury acquitted defendant of one count of stalking, MCL 750.411. Defendant was originally sentenced to thirteen to twenty years' imprisonment for the extortion conviction. Following a motion for resentencing, he was sentenced to a reduced term of 50 to 240 months' imprisonment.

Court considers the evidence presented in the light most favorable to the prosecution to determine whether a rational factfinder could find that the essential elements of the charged crimes were proven beyond a reasonable doubt.” *People v Davis*, 216 Mich App 47, 52-53; 549 NW2d 1 (1996). The sufficiency of the evidence is similarly evaluated by reviewing the evidence in a light most favorable to the prosecution to determine if a rational trier of fact could find every element of the crime proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985). The resolution of credibility disputes is within the exclusive province of the trier of fact, which is entitled to draw reasonable inferences from the evidence. *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991); *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

MCL 750.213 provides, in pertinent part:

Any person who . . . shall orally or by any written or printed communication maliciously threaten any injury to the person . . . of another . . . 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[.]

In enacting this statute, “[t]he Legislative did not intend punishment for every minor threat.” *People v Fobb*, 145 Mich App 786, 791; 378 NW2d 600 (1985); see also *People v Hubbard (After Remand)*, 217 Mich App 459, 485; 552 NW2d 493 (1996). Rather, the act that the defendant seeks to compel the victim to do (or not do) must not be minor or without consequence. *Fobb, supra* at 791-793. Although the threat must be intelligible, *People v Atcher*, 65 Mich App 734, 738; 238 NW2d 389 (1975), no overt act is required, *People v Bruno*, 30 Mich App 375, 383; 186 NW2d 339 (1971). Whether a threat was actually implied or intended by the defendant is a question of fact for the jury. *People v Percin*, 330 Mich 94, 99; 47 NW2d 29 (1951).

Contrary to what defendant asserts, the plain language of MCL 750.213 does not require a showing that the victim was actually coerced or intimidated by the defendant’s threats to undertake an action of serious consequence. Where a statute is clear and unambiguous, it must be enforced as written. *People v McIntire*, 461 Mich 147, 153; 599 NW2d 102 (1999). We do not read *Hubbard* as holding otherwise. On the contrary, this Court in *Hubbard* held that there was sufficient evidence to support the defendant’s extortion conviction where a rational trier of fact could find that the defendant “demanded that the victim undertake an act of serious consequence.” *Hubbard, supra* at 486. Further, in *Percin, supra* at 99, our Supreme Court stated that “[t]he Legislature did not make commission of the offense dependent upon the state of mind of the person threatened, and there is no occasion for reading into the statute qualifications not there found” (citations omitted). The Court further stated that “[i]f the Legislature had ‘intended that to constitute the offence the person threatened was intimidated . . . it is the rational inference that it would have so declared.’” *Id.* at 99-100 (citations omitted). Thus, a requirement that the victim actually accede to the extortionist’s demands may not be implied into the statute.

In the present case, the evidence indicated that when the victim had attempted to break up with defendant in the past, he threatened to expose their affair, including revealing letters and videotapes to her family, if she did not continue with the relationship. On September 5, 2002, the victim finally broke off her ten-year relationship with defendant. Between September 6 and 12, 2002, defendant left 17 telephone messages with the victim indicating that there would be

consequences to her conduct, that she deserved to be punished, and that he would be the person to do it. On September 12, 2002, the victim went to the police. An officer called defendant, who denied having called the victim. The following day, a videotape depicting defendant and the victim together appeared at her ex-husband's home, addressed to the victim's daughter. Two additional videotapes followed, addressed to two of the victim's brothers.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a reasonable jury to find beyond a reasonable doubt that defendant maliciously threatened to injure the victim with the intent to compel her not to break up with him. Therefore, defendant was properly convicted of extortion, and the trial court did not err in denying defendant's motion for a directed verdict.

Defendant also argues in his pro se brief that the trial court abused its discretion by denying his motion for newly appointed counsel and for a continuance of trial. We disagree. A trial court's decision whether to appoint substitute counsel is reviewed for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). A trial court's denial of a motion for a continuance is also reviewed for an abuse of discretion. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). In deciding whether to grant a continuance, a trial court should consider whether the defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) was negligent, and (4) requested previous adjournments. *Lawton, supra* at 348. Defendant must also show that he was prejudiced by the trial court's denial of his motion for a continuance. *Id.*

Appointment of substitute counsel is warranted only upon a showing of good cause, and if substitution will not unreasonably disrupt the judicial process. *Traylor, supra*. Counsel may be removed for, among other things, gross incompetence or a legitimate difference of opinion with regard to a fundamental trial tactic. *Id.*; see also *People v Johnson*, 215 Mich App 658, 663; 547 NW2d 65 (1996).

Defendant failed to demonstrate good cause for appointment of substitute counsel. The record does not support defendant's claim that counsel failed to investigate the facts and was unprepared to proceed to trial. To the contrary, counsel successfully moved to quash a search warrant for defendant's home before trial, resulting in the exclusion of all evidence seized from the home. At trial, counsel successfully moved for a verdict of acquittal on three counts of disseminating obscenity and obtained an acquittal on an additional charge of stalking. The trial court did not abuse its discretion in denying defendant's motions for new counsel and for a continuance.

Defendant also argues that the trial court committed several errors that deprived him of a fair trial and violated his right to due process. We find no merit to these claims. Constitutional claims of due process violations are reviewed de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997). Claims of instructional error are also reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002).

Defendant argues that the trial court violated his constitutional right of confrontation by not allowing him to recall the victim to testify. We disagree. After the prosecution rested, defendant asked that he be allowed to represent himself and stated that he would like to recall some of the witnesses who testified previously. The trial court denied defendant's requests.

Contrary to what defendant argues, his constitutional right of confrontation, US Const, Am VI; Const 1963, art 1, § 20, was not implicated where the victim had previously testified under oath before defendant's jury, was cross-examined by defense counsel, and her competency to testify was not challenged. *People v Pesquera*, 244 Mich App 305, 309; 625 NW2d 407 (2001); *People v Byrne*, 199 Mich App 674, 679; 502 NW2d 386 (1993).

Because defendant did not object to the trial court's jury instructions, appellate review of defendant's claims of instructional error is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Aldrich*, 246 Mich App 101, 124-125; 631 NW2d 67 (2001). The trial court instructed the jury on the elements of extortion in accordance with CJI2d 21.1, CJI2d 3.9, CJI2d 21.3, CJI2d 21.4, and CJI2d 21.5. Contrary to what defendant argues, a threat alone can support a conviction for extortion, and it is not necessary that the victim be actually coerced or intimidated into complying with the defendant's demand. MCL 750.213; *Percin*, *supra*. Defendant has not established a plain error with regard to the trial court's jury instructions.

Although defendant argues that the trial court should have sua sponte instructed the jury on his theory of the case, he does not indicate what the trial court should have said that was not already covered in the court's instructions, nor does he explain how any additional instruction might have affected the outcome of the trial. Thus, defendant has failed to show that the court's failure to sua sponte instruct the jury concerning his theory of the case was plain error affecting his substantial rights. *Carines*, *supra*; *Aldrich*, *supra*.

Because defense counsel expressed satisfaction with the trial court's refusal to immediately provide transcripts in response to the jury's request and to instead instruct the jury in the manner that it did, this issue has been waived. *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000). An "apparent error that has been waived is 'extinguished'" and, therefore, is not susceptible to review on appeal. *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001).

Next, although the trial court's supplemental instructions concerning the elements of the offenses were not read into the record at trial, the record discloses that written copies of the instructions were prepared and submitted to the jury and the court confirmed that the attorneys had approved the points of law before they were given to the jury. Defendant has not established any error in this regard.

Defendant's contention, that the extortion statute is unconstitutionally vague, was rejected by this Court. *Hubbard*, *supra* at 483-486. Further, contrary to what defendant argues, the statute does not impermissibly impinge on First Amendment freedom of expression. A law directed at expressive conduct is constitutional if it furthers an important or substantial government interest that is unrelated to free expression and the incidental restriction on First Amendment rights is no greater than is essential to further that interest. *United States v O'Brien*, 391 US 367, 377; 88 S Ct 1673; 20 L Ed 2d 672 (1968). The extortion statute is aimed at preventing coercion, which is a legitimate government interest unrelated to free expression. For these reasons, we reject this claim of error.

Defendant next argues that the trial court erred in denying his motion for a new trial or an evidentiary hearing. Although defendant's motions below raised numerous different claims in

support of his request for a new trial or an evidentiary hearing, defendant fails to address the merits of any of these underlying issues on appeal and merely asserts that the trial court abused its discretion in denying his motion for a new trial or an evidentiary hearing. A party may not merely announce his position and leave it to this Court to discover and rationalize the basis for the claim. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Accordingly, we deem this issue abandoned.

In Docket No. 260267, the prosecutor alleges that the successor trial judge erred in resentencing defendant because he lacked the authority to set aside defendant's original sentence of 13 to 20 years' imprisonment. We disagree.

MCR 6.429(A) provides that a trial court "may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed, except as provided by law." See also *In re Dana Jenkins*, 438 Mich 364, 368; 475 NW2d 279 (1991). As our Supreme Court observed in *People v Miles*, 454 Mich 90, 97-98; 559 NW2d 299 (1997), the staff comment to MCR 6.429(A) states that an "[i]nvalid sentence refers to any error or defect in the sentence or sentencing procedure that entitles a defendant to be resentenced or to have the sentence changed." But "only appellate courts are authorized to invalidate sentences for lack of proportionality." *People v Wybrecht*, 222 Mich App 160, 168; 564 NW2d 903 (1997).

In this case, the successor trial judge gave several reasons for granting defendant's motion for resentencing, some of which can be characterized as reflecting his view that defendant's original sentence of 13 to 20 years was disproportionate. Apart from the concept of proportionality, however, the successor trial judge found, and we agree, that the original departure sentence was improperly based on factors already considered by the guidelines, such as the nature and severity of the offense and the psychological injury to the victim, contrary to MCL 769.34(3)(b). The successor trial judge also found that the original departure was based on factors prohibited by MCL 769.34(a), such as defendant's legal occupation and lack of employment. The reliance on factors prohibited by MCL 769.34(3), as a basis for departing from the guidelines, constituted a "defect in [defendant's] sentence . . . that entitle[d] . . . defendant to be resentenced or to have the sentence changed." MCR 6.429(A). Therefore, it was not error to resentence defendant. In light of our decision, it is unnecessary to consider defendant's argument that his original sentence was disproportionate.

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood