STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 2016
v	No. 328356 Saginaw Circuit Court
TREVOR DEJUAN FORTENBERRY, Defendant-Appellant.	LC No. 14-039832-FC

Before: BOONSTRA, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Defendant was convicted after a jury trial of conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529, unarmed robbery, MCL 750.530, safe breaking, MCL 750.531, two counts of unlawful imprisonment, MCL 750.349b, and two counts of extortion, MCL 750.213. He was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 200 months to 30 years for the conspiracy to commit armed robbery and safe breaking convictions, 125 to 270 months for the unarmed robbery and unlawful imprisonment convictions, and 180 months to 30 years for the extortion convictions. Defendant appeals as of right, and we affirm.

I. FACTS

Thomas Sells, a former employee of the Funky Skunk, an Irish gift store, knew that the cash deposits of the Funky Skunk and 11 other stores were kept overnight in the Funky Skunk. He discussed the idea of robbing the store with a friend, Cody Ray. Sells and Ray thought Sells too recognizable to store employees, and so Ray invited his childhood friend, defendant, to assist in the robbery.

All three men testified at defendant's trial and told varying accounts of the planning and execution of the robbery. Defendant contended that he told Sells and Ray that he did not wish to participate, but that Ray told him that he had to participate in the robbery or they both would get hurt. Defendant testified that Ray also told him that Sells had a gun. Defendant testified that Sells, while holding a knife, threatened to hurt defendant and his family unless he participated. Defendant further testified that he would not have participated in the robbery if he had not been drugged and threatened.

By contrast, Sells denied threatening either defendant or Ray. Sells and Ray each testified that the three men planned the robbery together. According to Sells, Ray contacted

defendant and the three of them planned the robbery three days before it occurred while the three were together in Sells' motel room. Ray wrote down the plan and Sells diagramed the Funky Skunk while defendant was present. Ray testified that they planned that defendant's responsibility in the robbery was to keep the employees together, destroy the phone lines, and carry out the bags of money. Sells testified that after planning the robbery, they delayed execution for a couple days to enable Ray and defendant to familiarize themselves with the area of the store. Ray testified that when he was alone with defendant the day before the robbery, defendant told him that he did not want to do it, but when Sells returned they all continued to drink and smoke marijuana together. Ray testified that he saw Sells confront defendant about something but Ray did not hear what was said.

Ray testified that two days before the robbery he went to Frankenmuth with defendant and Sells to view the location of the store. Sells recounted practicing the robbery, wherein defendant and Ray followed him to Frankenmuth, parked as Sells drove elsewhere, and entered the Funky Skunk before following Sells back to the motel. By contrast, defendant denied scouting the location or practicing the robbery with Sells and Ray. Sells said that all three of them used drugs and alcohol after returning to the motel, and then defendant left to stay at his girlfriend's apartment. The day before the robbery Sells picked up defendant and defendant stayed that night at the motel with Sells and Ray. Sells reported that the men stayed up all night using drugs and discussing the robbery.

On March 12, 2014, defendant and Ray robbed the Funky Skunk. Traci Draper, the Funky Skunk's Accounts Payable Clerk, testified that she arrived at the store at 8:45 a.m. and was in the office in the back of the store when she realized that she had forgotten to lock the front door. As she began to return to the store area, a man later identified as Ray entered the store, pointed what appeared to be a gun[1] at her and demanded money. Draper testified that she replied that she did not have any money and that the man told her that he knew the Funky Skunk had money, grasped her left arm and pressed the gun in her back, and led her to the area where the deposit bags were locked in a cabinet. According to Draper, the man told her that he would hurt her if she did not give him the money. Meanwhile, a second man later identified as defendant opened and searched an unlocked jewelry cabinet. At the direction of the first man who was pointing the gun at her, Draper unlocked the cabinet containing the deposits and the second man began grabbing the deposit bags of money. Draper reported that the first man then had her open additional cabinets and that as she did so, another employee, Katie Trinklien, entered the store. The first man ordered Draper and Trinklien at gunpoint to the floor as the second man continued to empty the cabinet containing the deposit bags. Ray acknowledged that he waved the fake gun and threatened the employees.

Trinklien testified that she arrived at the store around 9:00 a.m. Trinklien saw Draper lying on the ground and heard her say that they were being robbed. Trinklien recalled that the man later identified as Ray shoved something into her face and ordered her to the ground, while the second man, later identified as defendant, did not speak. Trinklien stated that she

[1] Ray brandished a lighter that was shaped like a gun.

immediately moved to the floor. Draper testified that the robbers told them that they would not be hurt if they complied with instructions. Draper and Trinklien recalled the first man telling them not to look out the window or leave the store because someone watching would hurt them if they moved. Ray later acknowledged making this threat.

After Ray and defendant left the store, Draper called 911. Ray later identified defendant and himself in a video leaving the store with pouches of money. After leaving the store, Ray and defendant joined Sells and returned to the motel with the money. The three men counted the money and Sells divided it. Sells then drove defendant home. Defendant testified that Sells gave him over $300 to keep his mouth shut and for being present during the robbery; Sells testified that he gave defendant $900.

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that he committed the crimes under duress, and asserts that the prosecution failed to demonstrate that he was not under duress at the time he committed the crimes. We disagree.

In a criminal case, the prosecution is required to prove beyond a reasonable doubt each element of the charged crime. *People v Hartwick*, 498 Mich 192, 216; 870 NW2d 37 (2015). In determining whether the prosecution has met its burden, this Court reviews the evidence in the light most favorable to the prosecutor to ascertain whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010). We review a challenge to the sufficiency of the evidence de novo. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010).

Duress is a common law affirmative defense in which a defendant admits having committed the charged crime, but attempts to justify, excuse, or mitigate the act. *People v Lemons*, 454 Mich 234, 245-246 n 15; 562 NW2d 447 (1997); *People v Dupree*, 284 Mich App 89, 99; 771 NW2d 470 (2009). A successful duress defense excuses a defendant from criminal responsibility because the defendant was compelled to commit the crime in order to avoid a greater harm threatened by another person. *Lemons,* 454 Mich at 246, 248-249. "To merit an instruction on the affirmative defense of duress, a defendant must establish a prima facie case of the elements of duress." *People v McKinney*, 258 Mich App 157, 164; 670 NW2d 254 (2003). Duress occurs when:

> A) The threatening conduct was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
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> 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. [*People v Henderson*, 306 Mich App 1, 4-5; 854 NW2d 234 (2014), citing *Lemons,* 454 Mich at 247.]

Additionally, for the defense of duress to succeed, the threat compelling the defendant's conduct must be "present, imminent, and impending," rather than a "threat of future injury." *Henderson*, 306 Mich App at 5, citing *Lemons*, 454 Mich at 247. While "a mere threat of future injury is not enough to serve as such a defense, the issue of whether the alleged danger was immediate or imminent is, in all but the clearest cases, to be decided by the trier of fact taking into consideration all the surrounding circumstances, including the defendant's opportunity and ability to avoid the feared harm." *People v Harmon*, 53 Mich App 482, 486; 220 NW2d 212 (1974). After a defendant presents a prima facie case that he acted under duress, the burden of proof shifts to the prosecution to prove beyond a reasonable doubt that the defendant did not act under duress. *People v Terry*, 224 Mich App 447, 453-454; 569 NW2d 641 (1997).

In this case, defendant testified that prior to the robbery he was in the motel room with Ray and Sells while they were planning the robbery. Ray and Sells asked if defendant would participate, and according to defendant, he declined the invitation. According to defendant, Ray then told defendant that Sells had a gun and that if they did not participate they both would get hurt. Defendant further testified that Sells threatened defendant while holding a knife, telling him that he had to help with the robbery or Sells would hurt defendant and his family. Defendant testified that he was afraid of Sells and therefore participated in the robbery because he believed that either Sells or Ray would hurt him. Defendant therefore presented evidence from which the jury could have found that a reasonable person would have had fear of death or serious bodily injury, and that the threat compelled his illegal behavior to avoid the threatened harm.

Nevertheless, viewing the evidence in a light most favorable to the prosecution, there was also evidence sufficient to support the jury's finding that defendant was not acting under duress beyond a reasonable doubt. Sells testified that he did not threaten defendant, and Ray testified that defendant never told him that he had been threatened. Additionally, defendant did not tell the police during an initial interview that he had been threatened, but instead said that peer pressure had led him to commit the robbery. Sells also testified that defendant had approached him while they were in jail and offered to pay Sells to tell the jury that Ray had threatened them with a gun.

We will not disturb the jury's assessment regarding the weight and credibility of witnesses or the evidence. *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013), citing *People v Wolfe*, 440 Mich 508, 514–515; 489 NW2d 748 (1992). This Court evaluates all reasonable inferences and credibility choices in support of the jury verdict. *People v Gonzalez*, 468 Mich 636, 640-641; 664 NW2d 159 (2003). Here, the evidence was sufficient to support the jury's determination that defendant was not acting under duress beyond a reasonable doubt. The evidence indicated that defendant had numerous opportunities when Sells was not present to abandon the crime and seek assistance by fleeing or calling for help. Sells and Ray both testified that they practiced the route of the robbery with defendant two days before the robbery, and Sells testified that after practicing the robbery he dropped defendant off for the night at his girlfriend's apartment and picked him up the next day. The jury determined that defendant's contention that he was acting under duress was not credible in light of the evidence to the contrary, and the evidence on the record was sufficient to support that finding beyond a reasonable doubt.

III. EXTORTION

Defendant next argues that the evidence was insufficient to convict him of extortion. We disagree. When determining whether sufficient evidence has been presented to sustain a conviction of extortion, we review the evidence presented in the light most favorable to the prosecution, and we consider whether that evidence was sufficient to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *People v Harris*, 495 Mich 120, 126; 845 NW2d 477 (2014).

MCL 750.213 defines the crime of extortion, 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 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.

Thus, for the purposes of the facts of this case, to convict defendant of extortion pursuant to MCL 750.213 the prosecutor was required to prove that defendant (1) maliciously threatened (2) to harm another person (3) with the intent to compel the person threatened to do or refrain from doing any act against his or her will. See MCL 750.213; *People v Harris*, 495 Mich at 124. "Malice" is defined by our Supreme Court in *Harris* as "1. The intent, without justification or excuse, to commit a wrongful act. 2. Reckless disregard of the law or of a person's legal rights. 3. Ill will; wickedness of heart. This sense is most typical in nonlegal contexts." *Id*., at 136.

Defendant argues that the evidence did not satisfy the third element of extortion because defendant did not compel either of the two employees of the store to do an act against their will. The evidence, however, demonstrates that Ray did so and that defendant assisted him. Ray admitted that he compelled the employees to lie on the floor and hand him money, and kept the employees on the floor by telling them that someone would hurt them if they got up and left the store. Similarly, the two employees testified that Ray forced them at gunpoint to lie on the ground while the robbery continued and recalled Ray telling them not to look out the window or leave the store because someone was watching who would hurt them if they moved. One employee also testified that Ray forced her to unlock a drawer that contained bags of money and other drawers. Thus, both employees were forced to do acts against their wills.

Defendant argues that he cannot be held accountable as an accomplice for the acts of Ray because he did not give Ray assistance or encouragement in committing extortion or intend that Ray commit extortion. Accomplices to crimes may be prosecuted as if they committed the crime under the theory that they aided and abetted the crime. MCL 767.39; *People v Robinson*, 475 Mich 1, 5-6; 715 NW2d 44 (2006). A conviction under the theory of aiding and abetting requires that "(1) the crime charged was committed by the defendant or some other person; (2) the defendant performed acts or gave encouragement that assisted the commission of the crime; and (3) the defendant intended the commission of the crime or had knowledge that the principal

intended its commission at the time that [the defendant] gave aid and encouragement." *Id*., 475 Mich at 6.

Here, defendant's actions aided Ray in committing the extortion. One employee testified that defendant gathered the bags of money while Ray forced them to stay on the floor. All three participants testified that their roles were planned prior to the robbery, and a reasonable inference arises that the actions of each participant were necessary for the other participants to complete their contribution. Defendant was present while planning the robbery, including the plan that Ray would take the employees "hostage" and that Ray would use the "gun" to get the employees on the floor. In accordance with the plan, defendant removed the money from the safe and transported the money in order to free Ray to hold the employees at gunpoint. Thus, the evidence indicated that defendant knew that Ray intended to commit extortion, then assisted Ray so that Ray was free to commit the extortion.

Defendant also argues that extortion requires that the actions compelling a victim to act against his or her will must have serious, not minor, consequences to the victim. Defendant cites *People v Fobb*, 145 Mich App 786; 378 NW2d 600 (1985); and *People v Hubbard*, 217 Mich App 459; 552 NW2d 493 (1996). These cases, however, were explicitly overruled in *Harris*, 495 Mich at 122, "to the extent that those decisions require that the act or omission compelled by the defendant be of serious consequence to the victim." Our Supreme Court in *Harris* concluded that the plain language of the extortion statute includes threats to compel a person to perform "*any* act against his will". . . "without regard to the significance or seriousness of the compelled act." *Id*. at 122-123 (emphasis in original). We therefore reject defendant's contention that the evidence was insufficient to convict him of extortion.

IV. UNLAWFUL IMPRISONMENT

Next, defendant argues that the evidence was insufficient to convict him of unlawful imprisonment. We disagree. Unlawful imprisonment is defined in MCL 750.349b, which provides:

> (1) A person commits the crime of unlawful imprisonment if he or she knowingly restrains another person under any of the following circumstances:
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> (a) The person is restrained by means of a weapon or dangerous instrument.
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> (b) The restrained person was secretly confined.
>
> (c) The person was restrained to facilitate the commission of another felony or to facilitate flight after commission of another felony.

"Restrain" means "to forcibly restrict a person's movements or to forcibly confine the person so as to interfere with that person's liberty without that person's consent or without lawful authority. The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts." MCL 750.349b(3)(a); *People v Bosca*, 310 Mich App 1, 18; 871 NW2d 307 (2015), appeal held in abeyance 872 NW2d 492 (2015).

Here, defendant does not dispute that Ray unlawfully imprisoned the two employees when he forced them at gunpoint to lie on the ground while the robbery continued, and then told them not to look out the window or leave the store because someone was watching who would hurt them if they moved. Defendant argues, however, that there was no evidence that he aided and abetted Ray in the unlawful imprisonment. As discussed, one who aids and abets in the commission of a crime may be prosecuted as if that person committed the crime. *Robinson*, 475 Mich at 5-6. Here, it is undisputed that Ray committed the crime of unlawful imprisonment by restraining the employees to facilitate the robbery of the store. It is further undisputed that defendant assisted Ray in the commission of the crime by attending to the other tasks of the robbery so that Ray was available to restrain the employees. There was further ample evidence to demonstrate that defendant knew that Ray intended the commission of the crime at the time that defendant assisted him because defendant was aware of Ray's plan to restrain the employees. Sufficient evidence was therefore presented at trial to support defendant's conviction of unlawful imprisonment on a theory of aiding and abetting.

V. NONDISCLOSURE OF EVIDENCE

Lastly, defendant argues that a letter that Ray wrote to Sells while incarcerated should not have been admitted into evidence because it was not properly disclosed to the defense. According to the prosecution, Sells provided the letter during his interview with the prosecutor late on Wednesday of trial week, the prosecutor read the letter on Thursday, and sought its admission on Friday. The letter included statements that Ray forgave Sells and did not blame him for his participation in the robbery, assured him that everything would be okay, asked about Sells family, and promised to communicate more after he was transferred. Defendant argues that he was prejudiced by the admission of the letter because it affected his theory of defense that he acted under duress due to threats by Sells. We disagree.

We will not reverse a trial court's decision on an evidentiary issue absent an abuse of the trial court's discretion. *People v Watkins*, 491 Mich 450, 467; 818 NW2d 296 (2012). The trial court does not abuse its discretion when it chooses an outcome within the range of reasonable and principled outcomes. *Id*.

In Michigan, MCR 6.201 provides for the scope of criminal discovery. *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 447-448; 722 NW2d 254 (2006). MCR 6.201(A)(6) mandates the disclosure of "any document, photograph, or other paper" that the party intends to introduce at trial, and MCR 6.201(B)(3) mandates that, upon request, the prosecuting attorney must provide each defendant with

> any written or recorded statements, including electronically recorded statements, by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial.

MCR 6.201(H) provides that, "[i]f at any time a party discovers additional information or material subject to disclosure under this rule, the party, without further request, must promptly notify the other party." Here, the prosecution learned of the letter on Wednesday of trial and disclosed the letter on Friday of that same week. As the trial court noted, the prosecutor should have disclosed the letter on Thursday. However, the exclusion of evidence for failure to comply

with MCR 6.201 is an "extreme sanction." *People v Rose*, 289 Mich App 499, 526; 808 NW2d 301 (2010). Even where a party has violated its duty to disclose, "trial courts have the discretion to fashion an appropriate remedy." *Id*. at 525. MCR 6.201(J) provides, in relevant part:

> If a party fails to comply with this rule, the court, in its discretion, may order the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances.

When deciding on which course to take, "the trial court must balance the interests of the court, the public, and the parties in light of all relevant circumstances." *Greenfield*, 271 Mich App at 454 n 10, quoting *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002). Further, the complaining party must show that the violation caused him or her actual prejudice. *Rose*, 289 Mich App at 526.

Here, defendant argues that he was prejudiced by admission of the letter because it related to his theory of defense that defendant was compelled to commit the crime while under duress. Defendant argues that he was unable to take into account the impact of the letter while formulating his defense, selecting jurors, or during opening statement. However, this letter was at most only tangentially related to defendant. Defendant's theory was that he was compelled to participate in the robbery because he was afraid of the threats made by Sells. The letter did not disprove that these threats were made, but only suggests that Ray continued to regard Sells positively despite whatever occurred. The jury could not make a determination regarding Sells' purported threats towards defendant based on the letter. Additionally, the prosecutor produced the letter soon after it was discovered, and defense counsel had time to review the letter prior to his cross-examination of Ray. The trial continued the following week and defendant had the opportunity to address the letter and recall Ray as a witness if required. If the trial court can impose a remedy that limits the prejudice to a party while admitting the evidence, the trial court should not exclude the evidence. *Rose*, 289 Mich App at 525-526. We therefore conclude that the trial court did not abuse its discretion in admitting the letter.

We also reject defendant's argument that admission of the letter violated his due process rights, as the right to discovery in a criminal case is generally not a constitutional one. *People v Elston*, 462 Mich 751, 765-766; 614 NW2d 595 (2000). Therefore, the alleged violation of MCR 6.201(A) in this case due to the prosecutor's late disclosure of the letter was not constitutional in nature. *Id.*

Affirmed.

/s/ Mark T. Boonstra
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola