

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
September 27, 2012

v

JAMES EARLY HARRIS, JR.,
Defendant-Appellant.

No. 304875
Saginaw Circuit Court
LC No. 10-034923-FH

Before: O’CONNELL, P.J., and JANSEN and RIORDAN, JJ.

O’CONNELL, P.J. (*concurring in part and dissenting in part*).

I concur with the majority’s conclusions on the motion to suppress and the effectiveness of defense counsel. However, I disagree with the majority’s conclusion that the prosecution produced sufficient evidence to convict defendant of extortion. Established precedent required the prosecution to prove that defendant intended to compel Neal to do something that had serious consequences, against Neal’s will. See *People v Hubbard (After Remand)*, 217 Mich App 459; 552 NW2d 493 (1996), overruled on other grounds by *People v Bryant*, 491 Mich 575, ___; ___ NW2d ___ (slip op p 40-41, June 28, 2012). Here, the uncontroverted facts established that Neal was willing to repair defendant’s truck, although the repair would not be completed immediately. If, as the majority concludes, a truck owner’s angry demand that a mechanic immediately complete a prepaid repair is extortion, I suspect that many Michigan truck owners may be at risk of extortion convictions. Accordingly, I respectfully dissent.

In *People v Fobb*, 145 Mich App 786; 378 NW2d 600 (1985), this Court defined the elements of extortion under MCL 750.213¹:

¹ MCL 750.213 provides as follows:

MALICIOUS THREATS TO EXTORT MONEY – 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

1. An oral or written communication maliciously encompassing a threat.
2. The threat must be to:
 - a. Accuse the person threatened of a crime or offense, the truth of such accusation being immaterial; *or*
 - b. Injure the person or property of the person threatened; *or*
 - c. Injure the mother, father, husband, wife, or child of the person threatened.
3. The threat must be:
 - a. With intent to extort money or to obtain a pecuniary advantage to the threatener; *or*
 - b. To compel the person threatened to do, or refrain from doing, an act against his or her will. [*Fobb*, 145 Mich App at 790.]

The *Fobb* panel noted that “Michigan cases brought under the ‘against his will’ section of the extortion statutes have been for serious demands.” *Id.* at 792. The panel reversed the defendant’s conviction for extortion, but not felonious assault, stating: “The difficulty we find with the defendant’s extortion conviction is that the act required of the victim was minor with no serious consequences to the victim.” *Id.* at 791.

In *Hubbard (After Remand)*, 217 Mich App 459, this Court rejected a defendant’s argument that the extortion statute was unconstitutionally vague:

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. [*Hubbard (After Remand)*, 217 Mich App at 485-486 (citations in original), overruled on

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.

other grounds *People v Bryant*, 491 Mich 575, ___; ___ NW2d ___ (slip op p 40-41, June 28, 2012).]

Thus, Michigan law requires something more than a “threat” to support a conviction for extortion. See also *People v Pena*, 224 Mich App 650, 656-657; 569 NW2d 871 (1997), mod on other grounds 457 Mich 885 (1998).

Here, defendant threatened to “silence” Neal if he did not return to working on the truck or partially repay defendant. Returning to work on the truck would not have been an act against Neal’s will; in fact, Neal had previously agreed to perform the repairs for his own pecuniary benefit. At most, defendant’s threat would have caused Neal to agree to return \$100 to defendant. In *Hubbard*, this Court provided two examples of “actions of serious consequence” – refusing to testify or refusing to report a defendant’s sexual misconduct. Defendant’s threat was a demand that the victim tender performance as previously and voluntarily agreed or return partial payment and be released from his obligation. Neither of these proposed actions rise to the level of “serious consequence” contemplated by this Court in *Fobb* and *Hubbard*. Viewing the facts in the light most favorable to the prosecution, defendant’s threat simply did not rise to the level necessary for extortion.

The majority acknowledges that *Fobb* is “conclusive.” However, the majority also states that “nothing in the statutory language of MCL 750.213 requires the action to be serious in nature or have significant value.” I disagree. Our Supreme Court may wish to address and clarify the precedent on extortion, including *Fobb*. In this case, however, we are bound by precedent. I would reverse defendant’s extortion conviction.

/s/ Peter D. O’Connell