

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACK CALVIN MCDONNELL,

Defendant-Appellant.

UNPUBLISHED

July 21, 1998

No. 201535

Jackson Circuit Court

LC No. 95-74346-FH

Before: Sawyer, P.J., and Kelly and Doctoroff, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of two counts of extortion, MCL 750.213; MSA 28.410. He was sentenced to two terms of twelve to twenty years' imprisonment, to be served consecutive to the terms defendant was already serving. He now appeals as of right. We affirm.

This case arises out of the mailing and receipt of letters written by defendant to William Forsyth, Kent County Prosecutor, and Dennis Hurst, Jackson County Prosecutor, while defendant was an inmate at Jackson Prison. One letter threatened to murder Forsyth and his family unless he resigned from office, reversed defendant's convictions, and paid defendant \$10,000. The other letter threatened to kill Hurst and his family and burn Hurst's house unless he paid defendant \$50,000.

Defendant first argues that the evidence was insufficient to support his convictions. We disagree. When reviewing a claim of insufficient evidence in a jury trial, this Court must view the evidence in a light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified 441 Mich 1201 (1992).

The elements of extortion are: (1) a communication, (2) threatening accusation of any crime or offense, or any injury to the person or property or mother, father, husband, wife, or child of another, (3) with intent thereby to extort money or pecuniary advantage as to compel the person so threatened to do or refrain from doing an act against his will. *People v Krist*, 97 Mich App 669, 675; 296 NW2d 139 (1980). When a defendant is charged with extortion arising out of the taking of property by threat of

harm, a conviction may be secured only upon the presentation of proof of the existence of a threat of future harm. *People v Hubbard*, 217 Mich App 459, 485; 552 NW2d 493 (1996).

Viewing the evidence in a light most favorable to the prosecutor, a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. The undisputed evidence at trial established that defendant sent Forsyth a written communication maliciously encompassing a threat to kill Forsyth, his wife and children, unless Forsyth resigned from office, released defendant from prison and paid defendant \$10,000. The undisputed evidence at trial also established that defendant sent Hurst a written communication maliciously encompassing a threat to kill Hurst, his wife and children, and burn down Hurst's house, unless Hurst paid defendant \$50,000. Therefore, the evidence was sufficient to support the jury verdict against defendant for both counts of extortion.

Defendant next argues that he was denied the effective assistance of counsel because his trial counsel failed to investigate and prepare his defense and failed to seek an independent psychiatric examination under MCL 768.20a(3); MSA 28.1043(1)(3). We disagree. Because defendant failed to move for a new trial or an evidentiary hearing below, this Court's review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

To establish a claim of ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness, and that counsel's representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To demonstrate prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.*

Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). A criminal defendant is denied the effective assistance of counsel by his attorney's failure to properly prepare a meritorious insanity defense. *People v Newton (After Remand)*, 179 Mich App 484, 490; 446 NW2d 487 (1989).

From the limited record in this case, it appears that defense counsel did not seek an insanity defense at trial and did not find it necessary to seek another psychiatric examination, nor did he ask for a preliminary instruction on the insanity defense or a final jury instruction that defendant was not guilty by reason of insanity. There is no basis on the record below from which to conclude that counsel's failure to present an additional unidentified psychiatric witness was error or that the jury would have had reasonable doubt respecting defendant's guilt if such a witness had been presented. See *Mitchell*, *supra* at 166. Counsel's trial strategy appeared to rely on expert testimony that defendant had maladaptive behavior, which would raise a question as to defendant's intent. On this record, defendant has not overcome the presumption that counsel's representation was effective.

Defendant's third claim is that the trial court committed error requiring reversal by refusing to give a guilty but mentally ill instruction. We disagree.

This Court reviews jury instructions in their entirety to determine if there is error requiring reversal. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). Even if the instructions are imperfect, there is no error if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id.* Jury instructions must include all the elements of the charged offense and must not exclude material issues, defenses, and theories if there is evidence to support them. *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). Where there is evidence to support a defense instruction, the trial court is obliged to so instruct. *Id.*

The trial court refused to give the requested instruction because defense expert, Dr. Lois Wightman, testified that defendant was not mentally ill. The record supports this finding. Wightman testified that defendant had a severe personality disorder consistent with his self-mutilation, but he was neither mentally retarded nor mentally ill. Because there was no evidence to support the instruction, the trial court's refusal to give it was not error.

Finally, defendant argues that the trial court abused its discretion in sentencing him to terms of twelve to twenty years' imprisonment on each count of extortion. We disagree.

This Court reviews a sentencing court's decision for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion if the sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.*

The trial court reviewed defendant's presentence investigation report and considered several factors in sentencing defendant, including punishment, rehabilitation, deterrence and protection of society. The trial court noted that defendant has suicide ideations and aggressive ideations of wanting to stab or choke someone, and that he made statements to Detective Maxwell that he was going to "get all of them back" if he got out. In addition, defendant received 209 misconduct violations since February 1989 and had five prior extortion convictions. Defendant's presentence investigation report also notes that defendant became involved in extreme self-mutilation, including cutting his arms and legs, ingesting glass and body excrements, inserting pencils, paper and other objects into his eardrums, staples and glass into his urethra and pieces of metal into various parts of his body, which indicates that he is a threat to society and himself. On this record, we find that the trial court's sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender, and the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ David H. Sawyer

/s/ Martin M. Doctoroff