STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 15, 2002
v	No. 233412 Kent Circuit Court
RUBEN JUNIOR MARTINEZ, Defendant-Appellant.	LC No. 00-005583-FC

Before: Murphy, P.J., and Sawyer and R. J. Danhof*, JJ.

PER CURIAM.

Defendant was charged with assault with intent to rob while being armed, MCL 750.89, with kidnapping, MCL 750.349, and with two counts of possessing a firearm during the commission of those offenses, MCL 750.227b. Defendant was jointly tried with Edward S. Wilson, Jr., who was charged with the same offenses. After the proofs and the arguments of counsel were completed, the trial court also instructed the jury on extortion as an "alternative" offense to assault with intent to rob while armed. The jury acquitted Wilson of all charges but convicted defendant of extortion and felony-firearm. The trial court denied defendant's motion for acquittal or for new trial on the basis that he was denied due process because of inadequate notice of the extortion charge and because the verdict was against the great weight of the evidence. We agree with defendant that the trial court erred by instructing the jury on extortion, and reverse.

The parties disagree on whether the alleged instructional error was preserved for appeal. Generally, preservation requires an objection in the trial court to an instruction that was given or a request that the trial court give an omitted instruction. MCL 768.29; *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000); *People v Smith*, 396 Mich 362, 363; 240 NW2d 245 (1976). Here, defense counsel objected both on and off the record to the trial court instructing the jury on extortion. After the trial court finished its charge to the jury on a Friday afternoon, it noted that lengthy discussions concerning proposed instructions had occurred in chambers and that objections would be placed on the record the following Monday. On the following Monday morning, the trial court stated that defense counsel had objected to "the giving of an instruction on extortion as an included offense." Defense counsel confirmed his objections to instructing the

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

jury on extortion "included that there was no testimony of a threat of future harm against anyone or anyone's family," and that the charged offenses "covered the basic claims of the prosecution regarding anything that was said in conjunction" with either of the charged offenses. At defendant's motion for new trial, the trial court recognized that the "question here is whether it was or was not appropriate to instruct on extortion as an alternative [to the charged] offense." The trial court further commented on defendant's claim of lack of notice, noting that the "only objection ever lodged by [defense counsel] was that extortion wasn't charged." Because the trial court has a duty to instruct the jury on the law applicable to the case, MCL 768.29; *People v Ullah*, 216 Mich App 669, 677; 550 NW2d 568 (1996); *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991), defendant's objections to the extortion instruction were broad enough to include any legal reason why it should not have been given.

Appellate review of alleged instructional error is de novo. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002); *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). No person may be deprived of life, liberty or property without due process of law. US Const, Am V; Const 1963, art 1, § 17; *People v Bearss*, 463 Mich 623, 629; 625 NW2d 10 (2001). In a criminal case, due process generally requires reasonable notice of the charge and an opportunity to be heard. *In re Oliver*, 333 US 257, 273; 68 S Ct 499; 92 L Ed 682, 694 (1948); *People v Eason*, 435 Mich 228, 233; 458 NW2d 17 (1990). In the context of instructing the jury on an offense not set forth in the charging document, due process requires that the charged offenses provide adequate notice to the defendant that a defense to the uncharged offense is necessary. *People v Darden*, 230 Mich App 597, 600-601; 585 NW2d 27 (1998); *People v Adams*, 202 Mich App 385, 388-389; 509 NW2d 530 (1993). Where notice is inadequate and affects defendant's ability to defend against the added charge, reversal is required. *Darden, supra*, 601; *Adams*, *supra*, 392.

When the jury is instructed on an uncharged offense that is necessarily included in the charged offense, however, due process is satisfied. *Bearss*, *supra*, 628. This is so because all of the elements of a necessarily included offense are contained within those of the greater offense, and thus "it is impossible to commit the greater without first having committed the lesser." *Id*., 627, citing 4 Wharton, Criminal Law & Procedure, § 1799. See also *People v Cornell*, 466 Mich 335, 354, 358; 646 NW2d 127 (2002). Thus, when the jury is instructed on a necessarily included offense, the defendant's "ability to defend against the prosecutor's charges is not impaired, since the accused is required to defend against the same evidence as when charged with only the greater offense." *Bearss, supra*, 628-629. Conversely, adding an uncharged cognate offense that may share some common elements with the charged offense but requires proof of an additional element not found in the charged offense, *People v Perry*, 460 Mich 55, 61; 594 NW2d 477 (1999), raises due process concern because it "may require an accused to present additional or different defenses to rebut the evidence the prosecutor offers on the additional elements," *Bearss*, *supra*, 629.

The due process claim in this case, however, need not be addressed because MCL 768.32(1), as interpreted recently by our Supreme Court in *Cornell*, *supra*, controls what offenses the factfinder may consider in a criminal trial, and appellate courts should avoid deciding constitutional issues where the case may be decided on other grounds, *People v Riley*, 465 Mich 442, 447; 636 NW2d 514 (2001). In *Cornell, supra*, our Supreme Court ruled that MCL

768.32(1) is a substantive law adopted by the Legislature "in connection with the prevention and detection of crime and prosecution and punishment of criminals," *id.*, 353, quoting *People v Piasecki*, 333 Mich 122, 143; 52 NW2d 626 (1952), and the statute controls when either a judge or a jury may consider uncharged offenses in a criminal case. The statute in pertinent part provides:

> [U]pon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense. [MCL 768.32(1).]

Our Supreme Court held that MCL 768.32(1) permits jury (or trial court) consideration of offenses not contained in the charging document only if the lesser offense is necessarily included in the charged offense and not merely a cognate lesser offense. *Cornell*, *supra*, 354-355. See also *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002). An offense is necessarily included where all of its elements are also contained in the charged offense, *id*., 354, and "it is impossible to commit the greater [charged offense] without first having committed the lesser" *id.*, 345, quoting *People v Jones*, 395 Mich 379, 387; 236 NW2d 461(1975). To the extent of any conflict, our Supreme Court specifically overruled contrary prior decisions, including *Jones*, *supra*, *People v Chamblis*, 395 Mich 408; 236 NW2d 473 (1975), *People v Stephens*, 416 Mich 252; 330 NW2d 675 (1982), and *People v Jenkins*, 395 Mich 440; 236 NW2d 503 (1975). *Cornell*, *supra*, 357-358.

Our Supreme Court applied its decision to both jury and bench trials, *Cornell*, *supra*, 349 n 5, and adopted limited retroactivity, applying its holding "to those cases pending on appeal in which the issue has been raised and preserved," *id*., 367. As noted above, defendant's objections to the extortion instruction below, and argument on appeal, are sufficiently broad to have "raised and preserved" this issue. When MCL 768.32(1) is applied to the case at bar, it is clear that the trial court erred by instructing on the offense of extortion because it is not necessarily included in any of the offenses that were charged in this case.

The extortion statute, MCL 750.213, makes it unlawful for any person to "orally or by a written or printed communication, maliciously threaten to accuse another of any crime or offense, or . . . maliciously threaten any injury to the person or [the person's immediate family] . . . 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." Thus, the elements of extortion are:

> 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. [*People v Fobb*, 145 Mich App 786, 790; 378 NW2d 600 (1985).]

Extortion generally relates to threats of future harm, and this Court on that basis has distinguished extortion from unarmed robbery. *People v Krist*, 97 Mich App 669, 675-676; 296 NW2d 139 (1980). A panel of this Court in *Fobb, supra*, 790, disagreed, opining that "threats of imminent injury or of continuation of injury presently being inflicted will support a conviction for extortion." Subsequent decisions by this Court have also concluded that threats of "immediate, continuing, or future harm" will support a conviction for extortion. *People v Pena*, 224 Mich App 650, 656; 569 NW2d 871 (1997), modified 457 Mich 885; 586 NW2d 925 (1998) (sentence issue); *People v Hubbard (After Remand)*, 217 Mich App 459, 485; 552 NW2d 493 (1996). Extortion does not require that an accused perform an overt act to carry out the threat, *People v Poindexter*, 138 Mich App 322, 332; 361 NW2d 346 (1984), and the crime is complete before any money is obtained, *id.* Apropos of this case, the collection of a valid debt is not a defense to a charge of extortion. *People v Maranian*, 359 Mich 361, 369; 102 NW2d 568 (1960).

MCL 750.89 prohibits assaults with the intent to rob, while armed. MCL 750.88 prohibits unarmed assaults, with intent to rob. The elements of the offense of assault with intent to rob, being armed, are: 1) an assault with force or violence; 2) an intent to rob and steal; and 3) the defendant being armed. *People v Smith*, 152 Mich App 756, 761; 394 NW2d 94 (1986). The Legislature has not defined "assault," so its elements are determined by the common law. *People v Reeves*, 458 Mich 236, 239; 580 NW2d 433 (1998). Michigan has adopted the majority rule, according to Perkins on Criminal Law (2d ed), p 117, that "a simple criminal assault "is made out from either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery." *Reeves, supra*, 240, quoting *People v Sanford*, 402 Mich 460, 479; 265 NW2d 1 (1978). For robbery, the intent of the assault must be to accomplish a contemporaneous taking of property. *People v Randolph*, 466 Mich 532, 536; 648 NW2d 164 (2002).

When the elements of extortion, as set forth in *Fobb, supra*, are compared with those of assault with intent to rob while armed, it is clear that some overlap exists. The same facts may support a conviction for either extortion or robbery where the perpetrator uses an oral or written communication that places another in reasonable apprehension of an immediate battery with the intent to then and there obtain property from within the victim's presence. For example, in *Reeves, supra*, 239, the defendant orally threatened the victim with his life, while implying he

had a gun through body posture, with intent to obtain beer from the victim (a deliveryman). However, had the victim simply pointed a gun at the victim to hold him at bay while taking the beer, assault with intent to rob would have been shown, but not extortion. Thus, it cannot be said that "it is impossible to commit the greater without first having committed the lesser." *Bearss*, *supra*, 627, citing 4 Wharton, Criminal Law & Procedure, § 1799; *Cornell*, *supra*, 345, 354, 358. Extortion is, therefore, not a necessarily included offense of assault with intent to rob while armed. The most that can be said is that extortion is a cognate or related offense to assault with intent to rob. *Bearss*, *supra.* Thus, it was error for the trial court to instruct the jurors that extortion was an alternate offense they could consider. MCL 768.32(1); *Cornell*, *supra*, 354-355; *Reese*, *supra*, 446.

Defendant was also charged with the offense of kidnapping, and although the trial court only instructed that extortion was an alternative to the charge of assault with intent to rob while armed (or unarmed), a similar analysis applies to kidnapping. MCL 750.349 establishes many different forms of kidnapping, *People v Wesley*, 421 Mich 375, 383; 365 NW2d 692 (1984), but none of the alternative forms necessarily require as an element an oral or written communication threatening harm to the victim or the victim's family. Thus, again, it cannot be said that "it is impossible to commit the greater [kidnapping] without first having committed the lesser [extortion]." *Cornell*, *supra*, 345, 354, 358. Extortion is not a necessarily included offense of kidnapping. It follows that it would also have been error for the trial court to instruct the jury that extortion was an alternate offense of kidnapping. MCL 768.32(1); *Cornell*, *supra*, 354-355; *Reese*, *supra*, 446.

We decline to address defendant's claims that the evidence was insufficient to support his convictions or that the trial court abused its discretion by not granting his motion for new trial. These issues are now moot based on our determination that the trial court erred by instructing the jury on extortion. *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995). Moreover, because we reverse defendant's extortion conviction, and because the jury acquitted defendant of assault with intent to rob and kidnapping, no predicate felony or attempted felony exists to support a conviction for felony-firearm. We must, therefore, also reverse defendant's felony-firearm conviction. *People v Burgess*, 419 Mich 305, 311-312; 353 NW2d 444 (1984).

Reversed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Robert J. Danhof