

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL CLIFTON MCCOLOR,

Defendant-Appellant.

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UNPUBLISHED

May 27, 2004

No. 246534

Oakland Circuit Court

LC No. 2002-185462-FH

Before: Owens, P.J. and Kelly and Gribbs\*, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of extortion, MCL 750.213 and his prison sentence of nine to forty years'.<sup>1</sup> We affirm.

I. Jury Instructions

Defendant first argues that the trial court failed to instruct the jury on the proper use of the victim's prior inconsistent statements. Defendant also argues that defense counsel was ineffective for failing to request this instruction. We disagree.

Defense counsel waived the claim of improper jury instructions when he expressly approved the instructions given. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). Therefore, we review this issue only as it relates to defendant's ineffective assistance of counsel claim. *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001). With regard to ineffective assistance of counsel claims, we review constitutional questions de novo and factual questions for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because this issue was not preserved, appellate review is limited to "mistakes apparent on the record." *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003).

To establish a claim of ineffective counsel, "a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense."

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<sup>1</sup> The trial court sentenced defendant as a third habitual offender, MCL 769.11

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

*Riley, supra* at 140, citing *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In this case, defendant has failed to demonstrate prejudice; even without proper instructions, the victim's inconsistent statements could only have helped defendant. The trial court also properly instructed the jury on witness credibility. Therefore, defendant's ineffective assistance of counsel claim is without merit.

## II. Other Acts

Defendant also argues that the victim testified about defendant's prior acts, which did not meet the requirements of MRE 404(b) because the prior acts were not offered to prove a proper purpose, were not relevant and were prejudicial. We disagree.

We review the admission of other-acts evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). We review unpreserved issues for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Three factors must be present for other-acts evidence to be admissible: (1) the evidence must be offered to prove something other than character; (2) the evidence must be relevant under MRE 402; and (3) the probative value of the evidence must not be substantially outweighed by the risk of unfair prejudice as required under MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

With respect to a proper purpose, the evidence admitted here was admissible "to give the jury an intelligible presentation of the full context in which disputed events took place." *People v Scholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). The complete picture of events is a proper purpose *despite* the limits placed on admissibility of MRE 404(b) evidence. *Id.* Additionally, "[e]stablishing motive is among the purposes for which prior-acts evidence is expressly admissible." *People v Hoffman*, 225 Mich App 103, 105; 570 NW2d 146 (1997).

The evidence was also relevant. "Relevance is a relationship between the evidence and a material fact at issue that must be demonstrated by reasonable inferences that make a material fact at issue more probable or less probable than it would be without the evidence." *Knox, supra* at 509-510. Here, defendant's general denial of the extortion charge put all the elements at issue. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). Although motive is not an element of MCL 750.213, "motive is the inducement for doing some act; it gives birth to a purpose." *Id.* at 68. Motive is also relevant to show specific intent, *People v Herndon*, 246 Mich App 371, 412-413; 633 NW2d 376 (2001) (intent necessary to prove first-degree murder), and extortion is a specific intent crime, *People v Fobb*, 145 Mich App 786, 790; 378 NW2d 600 (1985); CJ12d 21.1.

The other acts about which the victim testified led to the victim terminating defendant's employment. Defendant told the complainant that he had seen this day coming and had taken out an "insurance policy" by copying client banking numbers to make forged checks. Therefore, the incidents were probative of defendant's motive to extort. Because defendant foresaw his termination, the other acts placed in context defendant's reason for copying the bank numbers

and making forged checks. Therefore, this evidence was admissible to give the jury an “intelligible presentation” of what took place before defendant was terminated.

The probative value of the other-acts evidence was not substantially outweighed by the risk of unfair prejudice. MRE 403. Unfair prejudice occurs when marginally probative evidence is given excessive weight by the jury. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909, mod 450 Mich 1212 (1995). The probative value of this evidence was great because it established defendant’s motive to extort money from the complainant; this was not outweighed by unfair prejudice. Therefore, the lack of notice under MRE 404(b)(2) by the prosecution regarding these incidents was harmless error because of the admissibility of the evidence and the fact that defendant has not indicated on appeal or on the record how he would have responded differently. *People v Hawkins*, 245 Mich App 439, 455-456; 628 NW2d 105 (2001).

### III. Sentencing

Defendant also argues that he should be resentenced because the trial court incorrectly scored offense variables (OV) 7, 9 and 10. We disagree.

If the trial court's sentence is within the appropriate guidelines range, we must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003).

Defendant did not challenge the scoring of OV 7, but this Court has held that it is appropriate to review an unpreserved sentencing issue for plain error. *People v Kimble*, 252 Mich App 269, 277; 651 NW2d 798 (2002), lv gtd 468 Mich 870 (2003). Under OV 7, fifty points may be scored where there is evidence of terrorism, which is defined as "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense." MCL 777.37(2)(a); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). The facts support the trial court's scoring decision: in addition to threatening the victim, defendant repeatedly made threatening references to the victim’s family members, including children and a pregnant woman. This supports the score for OV 7 because it was designed to substantially increase the victim’s anxiety and fear suffered during the offense.

Defendant also challenges the points attributed to OV 9. Ten points must be attributed to OV 9 when there were two to nine victims involved. MCL 777.39(1)(c). A victim is someone who “was placed in danger of injury or loss of life.” MCL 777.39(2). Defendant argued that there was only one victim – Grudzinsky. But Grudzinsky testified that defendant warned him if he went to police defendant would be angry, indicating that he had been by Grudzinsky’s house and had seen him playing with his daughter. Defendant also indicated that he knew where Grudzinsky’s brother and nephew lived. Grudzinsky also testified that because of defendant’s behavior, Grudzinsky’s wife was terrified when a car stopped in front of the house at 4:00 a.m. The clear implication of this evidence was that more than one person was placed in danger of injury or loss of life. Therefore, we conclude the evidence supports the points awarded for OV 9.

Defendant also argues that OV 10 was incorrectly scored. Fifteen points must be attributed to OV 10 where a defendant uses predatory conduct. MCL 777.40(1)(a). Predatory conduct is defined as “preoffense conduct directed at a victim for the primary purpose of

victimization.” MCL 777.40(3)(a). Here, the prosecutor presented evidence of preoffense conduct when Grudzinsky testified that defendant told him that defendant had seen him playing in his yard with his daughter and told Grudzinsky where his brother lived. This indicated that defendant had previously determined where Grudzinsky and his family lived so that he could do something to prevent them from going to police. Therefore, we conclude sufficient evidence of preoffense conduct for the purpose of victimization was presented to justify the fifteen points attributed to OV 10.

Extortion, MCL 750.213, has a maximum sentence of twenty years’ imprisonment and is one of the enumerated felonies identified in MCL 777.161. The guidelines scoring resulted in a recommended minimum sentence range of seven years to eleven years and eight months in prison. MCL 777.63. Where the defendant is sentenced for the conviction of his third felony, the high range is increased by fifty percent. MCL 769.11; MCL 777.21(3)(b). Defendant’s high range was accordingly enhanced to seventeen years and six months. MCL 777.21(3)(b). The trial court sentenced defendant within the recommended guidelines range to nine to forty years in prison.

Because the trial court did not err in scoring defendant’s offense variable and his sentence is within the appropriate guidelines range, we must affirm defendant’s sentence.

Affirmed.

/s/ Donald S. Owens  
/s/ Kirsten Frank Kelly  
/s/ Roman S. Gribbs