STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 21, 2006
v	No. 261275 Saginaw Circuit Court
FREDERICK HARVEY GRUMBLEY, Defendant-Appellant.	LC No. 04-024013-FC

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession of child sexually abusive material, MCL 750.145c(4); extortion, MCL 750.213; child sexually abusive activity, MCL 750.145c(2); possession of a weapon by a felon, MCL 750.224f; and, felony firearm, 750.227b. Because we find that defendant was not denied the effective assistance of counsel and further find no basis for vacating his extortion conviction, we affirm.

The charges against defendant arose out of an allegation by his 13 year-old half-sister that defendant had sexually abused her on two occasions (once when she was seven and once when she was twelve). The victim also alleged that defendant had been pressuring her to make a sexually explicit film with one of her male friends, and threatened that he would have the male friend charged with statutory rape if she refused to have sex with the friend and allow defendant to videotape it. The victim advised her parents of the matter and then recounted the incidents to the police, also indicating that defendant had informed her he had child pornography on his home computer. Defendant was arrested at his home the next day and a jury trial followed. After being convicted of five of the seven charges brought against him[1], defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to a prison term of 24 to 50 years on the extortion, attempt to prepare child sexually abusive material, and felon in possession charges; a term of 5 to 15 years on the count of possession of child pornography, to be served concurrently with the 24 to 50 year term; and a term of 2 years on the felony-firearm conviction, to be served preceding and consecutive with the sentences on the other charges.

[1] Defendant was acquitted of two counts of second-degree criminal sexual conduct, MCL 750.520c.

Defendant first argues on appeal that defense counsel was ineffective for failing to move for the suppression of evidence seized from defendant's home. We disagree.

Claims of ineffective assistance of counsel involve a mixed question of law and fact. The trial court must first find the facts, then decide whether they constitute a violation of the defendant's constitutional right to effective assistance of counsel. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). This Court reviews the trial court's factual findings for clear error, and the trial court's constitutional determinations are reviewed de novo. *Id.* If, as here, a claim of ineffective assistance of counsel is not preceded by an evidentiary hearing or a motion for new trial before the trial court, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973); *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). [2]

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was so deficient that counsel did not function as the counsel guaranteed by the Sixth Amendment, and that the deficient performance prejudiced the defense to the point where the defendant was deprived of a fair trial. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). The defendant must also show "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *Id*.

A defense attorney's failure to reasonably investigate or proffer a substantive defense may, under proper circumstances, constitute ineffective assistance of counsel (*People v McVay*, 135 Mich App 617, 618-619; 354 NW2d 281 (1984)), as may his failure to move for the suppression of evidence. See, e.g., *People v Thomas*, 184 Mich App 480, 482; 459 NW2d 65 (1990). However, a reviewing court is generally reluctant to substitute its own judgment for that of trial counsel in matters of defense strategy, *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Because defendant failed to timely request a *Ginther*[3] hearing in this matter, the record does not include testimony from defense counsel regarding the underlying basis of his decision to forego a motion to suppress. Moreover, the facts in the record do not support defendant's contention that a motion to suppress the evidence based on the constitutionality of the arrest and/or search would have been meritorious or that such a motion would have been outcome determinative.

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[2] Although defendant filed a pro se motion for remand and handwritten brief in support challenging the adequacy of his legal representation, defendant served these documents upon the trial court more than five months after the date he was sentenced. Defendant's motion was untimely under MCR 7.211(C)(1)(a) and thus did not preserve the issue.

[3] *People v Ginther, supra.*

Defendant asserts trial counsel should have moved to suppress the evidence seized from his home on the basis that his arrest was illegal, and that therefore the evidence obtained in the subsequent search must be excluded as "fruit of the poisonous tree". We disagree.

Under the Fourth Amendment of the United States Constitution, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." US Const, Am IV. The analogous provision under the Michigan Constitution provides as follows:

> The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation . . . [Const 1963, art 1, §1.]

The state constitutional standard is not higher than the federal standard, People *v Jordan*, 187 Mich App 582, 586; 468 NW2d 294 (1991), and "[n]either the state nor federal constitution forbids all search and seizures, but only unreasonable ones." *People v Lewis*, 251 Mich App 58, 69; 649 NW2d 792, lv den 467 Mich 895 (2002).

Generally, a warrant is not required to accomplish a felony arrest in and of itself. *People v Johnson*, 431 Mich 683, 691; 431 NW2d 825 (1988). MCL §764.15, in fact, makes clear that an arrest warrant is not required as long as there is probable cause to believe that defendant committed a felony. *Id.* However, when an arrest occurs in the defendant's residence, the federal and state constitutions require that special protections be afforded. *Id.*, citing *Payton v New York*, 445 US 573, 589; 100 S Ct 1371; 63 L Ed 2d 639 (1980); *People v Oliver*, 417 Mich 366, 378-379; 338 NW2d 167 (1983). "Entry into a private home without a warrant to effect the arrest of a defendant is justified either by consent or exigent circumstances." *People v Allen*, 429 Mich 558, 654 n 23; 420 NW2d 499 (1988).

At the time of his seizure, and under the facts that were alleged and known to them at the time, the Saginaw County Sheriff's Department officers clearly had probable cause to believe that defendant recently committed or was still committing numerous felonies, including criminal sexual conduct against his half-sister, possession of a firearm by a felon, felony-firearm, extortion, possession of child pornography, and attempt to prepare child sexually abusive material. They had received direct information from the victim that defendant had sexually abused her and had just given her a limited time in which to decide whether to participate in the video or have her friend charged with a crime. Defendant's father had also informed police that defendant had two weapons at his home. Because there was probable cause to believe a crime had been (or was still being) committed by defendant, there was probable cause to arrest him.

Under the facts established at trial, it seems reasonable to conclude that defendant was "seized" for Fourth Amendment purposes when police ordered him to the ground with their guns drawn and placed him in handcuffs.[4] However, the lower court record does not make it clear that

[4] The seizure of a person occurs when, under all the circumstances, a reasonable person would have believed that he was not free to leave. *People v Frohriep*, 247 Mich App 692; 637 NW2d
(continued…)

"the arrest" took place inside the house, on the threshold of the home, or outside the open doorway. Unable to establish the precise location where the arrest took place, we cannot say that the presence of exigent circumstances was necessary to procure defendant's arrest. Even if the arrest was illegal, however, defendant's consent to search the home allows for the admission of the seized evidence.

Under the exclusionary rule of *Wong Sun v United States*, 371 US 471; 83 S Ct 407; 9 L Ed 2d 441 (1963), "the appropriate inquiry, where a defendant claims that physical evidence should be suppressed as a result of an unlawful seizure, is whether that evidence was procured by an exploitation of the illegality or, instead, by means sufficiently distinguishable to be purged of the primary taint." *People v Kroll*, 179 Mich App 423, 427; 446 NW2d 317 (1989). Evidence is not to be excluded from trial if the connection between the purportedly illegal police conduct and the discovery and seizure of the evidence is so attenuated as to dissipate the taint. Consent by a defendant, if "sufficiently an act of free will" to purge the primary taint of the unlawful search or seizure, may produce the requisite degree of attenuation. *People v Essa*, 146 Mich App 315, 320; 380 NW2d 96 (1985).

The consent exception to the Fourth Amendment's warrant requirement allows search and seizure when consent is unequivocal, specific, and freely given. *People v Marsack*, 231 Mich App 364, 378; 586 NW2d 234 (1998). "Whether consent to search is freely and voluntarily given is a question of fact based on an assessment of the totality of the circumstances." *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999).

The officers involved in this case testified that the search of defendant's home took place pursuant to defendant's consent. Detective May testified that she was the one who asked defendant for permission to search the trailer and that defendant said she could search the trailer and take whatever she needed. Deputy Henige and Sergeant Garabelli also testified that Detective May requested that they be allowed to search his house, and defendant consented to the search. Indeed, even defendant admitted at trial that he consented to a search of his home, cooperated fully with the search, and signed a written consent that neither specified the object of the search nor limited the search in any manner. Rather than testifying that he never gave consent to the search or that he consented out of fear, defendant instead testified that he consented to the search because, although he admittedly downloaded child pornography onto a computer disk, he forgot that he had the disk in the house.

Defendant now claims, however, that he gave his consent only after armed police officers placed him under arrest, and that his consent was thus coerced and therefore invalid. Police questioning or conduct that is coercive, or the existence of a coercive atmosphere, are relevant in determining whether the consent was voluntary. *People v Klager*, 107 Mich App 812, 816; 310 NW2d 36 (1981). However, the mere circumstance of police detention of the individual providing consent does not render consent invalid. *People v Shaw*, 9 Mich App 558; 157 NW2d 811 (1968), aff'd 383 Mich 69 (1970). Likewise, drawn service revolvers do not per se invalidate an otherwise voluntary consent, *People v Randle*, 133 Mich App 335, 339; 350 NW2d

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562 (2001), lv den 466 Mich 888 (2002).

253 (1984), nor does the presence of a large number of officers in an apartment *People v Reed,* 393 Mich 342, 366; 224 NW2d 867 (1975).

At trial, defendant acknowledged consenting to the search of his home, corroborated numerous facts included in police descriptions of the search and of defendant's arrest, mentioned nothing at all about feeling scared, intimidated, or threatened, and actually provided an explanation for allowing the police to conduct this search even though defendant—by his own admission—had been using his computer and recordable media to obtain child pornography. Considering the totality of the circumstances—including defendant's age, prior experience with law enforcement, level of education (high school graduate with some college), lack of any evidence of drug or alcohol intoxication, lack of evidence of violence or threats of violence by police, the relatively short duration of the police detention, the location of that detention being defendant's home, the presence of an adult female and young child in that location, defendant's testimony regarding his belief that he had already destroyed or discarded his collection of child pornography, and numerous additional examples of defendant voluntarily waiving constitutional rights despite his awareness of those rights, we conclude that the consent to search given by defendant was the product of his own free will. Additionally, the search was carried out within the scope of defendant's voluntarily given consent. It was therefore permissible for officers to seize the evidence from defendant's home without the benefit of a warrant. The items seized were either in plain view or were found in the spots where defendant told the officers to look.

In sum, given the subject matter of the investigation, the nature of the information provided by witnesses during the interviews conducted prior to the search, and the limitless scope of defendant's consent, it is reasonable to conclude that: (1) the officers had probable cause to conduct the search, (2) defendant's voluntary, limitless consent vitiated the need for officers to obtain a search warrant, (3) the incriminating nature of the items seized was readily apparent, and (4) the officers' search never exceeded the scope of defendant's consent. The evidence was therefore admissible.

Defendant next argues that because the extortion statute requires that a threat be made directly to the person or his or her family, and the only threat made was with respect to a friend of the victim, he was entitled to a directed verdict on the extortion charge. We disagree.

"When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt." *People v Aldrich,* 246 Mich App 101, 122; 631 NW2d 67 (2001).

Issues of statutory interpretation are questions of law this Court also reviews de novo. *Columbia Assoc, LP v Dep't of Treasury,* 250 Mich App 656, 665; 649 NW2d 760 (2002). The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996). To ascertain the intent, we begin with the statute's language. If the statute's language is clear and unambiguous, we enforce the statute as written and no further judicial construction is required or permitted because we assume that the Legislature intended its plain meaning. *People v Stone,* 463 Mich 558, 562; 621 NW2d 702 (2001). "In reviewing the statute's language, every word should be given meaning, and we should avoid a construction that would render any part of the statute

surplusage or nugatory." *Wickens v Oakwood Healthcare System*, 465 Mich 53, 60; 631 NW2d 686 (2001).

At trial, the victim testified that defendant told her he wanted to blindfold her, chain her to a bed, and have her have sex with her male friend, Chad, so he could show the event online. The victim further testified that defendant said if she did not make the sex movie, he would press statutory rape charges against Chad, even though the victim denied ever having had sexual relations with Chad. The very narrow issue before this Court, then, is whether defendant's threat falls within the statutory definition of extortion.

MCL 750.213 provides:

> 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.

This Court clarified the elements of extortion in *People v Fobb*, 145 Mich App 786, 790; 378 NW2d 600 (1985) as follows:

> 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.

There is no dispute that defendant's threat was made to the victim about seeking criminal charges against her friend. The fact that defendant made no threat to seek criminal charges against the victim or a member of her family is not, however, as determinative as defendant would have us believe. This is necessarily so, as we have held that the phrase "injury to the person" includes emotional injury:

> The issue is whether MCL 750.213; MSA 28.410, which proscribes threatening "an injury to the person", contemplated that only the threat of physical injury was within the ambit of the statute.
>
> Whether emotional injury is included within the phrase, "injury to the person" is an issue of first impression.

* * *

> . . . In *People v Krist*, 97 Mich App 669, 675; 296 NW2d 139 (1980), this Court stated: "The underlying purpose of statutory extortion [is] to plug loopholes in the common law crime of robbery."
>
> We believe the Legislature intended the words "any injury to the person" to include emotional injury. The Legislature, if it had intended to restrict the scope of the statute to physical injuries, could have inserted the word "physical" in place of the word "any". Instead, it selected to use the expansive wording " 'any' injury to the person." [*People v Igaz*, 119 Mich App 172, 188-189; 326 NW2d 420 (1982), vacated on other grounds 418 Mich 893 (1983). See also *Manetta v Macomb County Enforcement Team*, 141 F3d 270, 276 (CA 6, 1998).]

Defendant's threat in this case was broad enough to encompass not only the cause of injury to Chad, but also the cause of injury to the victim in the form of humiliation, shame, parental punishment, loss of reputation, loss of friendship(s), and finally—if defendant is to be believed—the loss of a year-long romantic relationship. Moreover, there is no doubt that defendant made the threat to the victim with the intent to compel her to perform one or more acts against her will.

The phrase "against his or her will," as used in the context of the extortion statute, is defined in CJI2d 21.4 as follows:

> A person acts against [his / her] will if [he / she] only does the act in order to avoid injury to [himself / herself] or a member of [his / her] immediate family *or to avoid personal disgrace*. In other words, an act is against a person's will when circumstances force [him / her] to make a choice and [he / she] has to choose the lesser of two evils." [Emphasis added.]

As the victim in this matter was presented with a choice between making a sex video with a male friend or having criminal charges pressed against him, it is not difficult to construe defendant's threat as one to emotionally injure the victim. As a result, defendant's conduct fell well within the scope of conduct proscribed by MCL 750.213.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot