STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Judges: Kathleen Jansen, Peter D. O'Connell and Michael J. Riordan

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

JAMES EARLY HARRIS

Defendant-Appellant.
_____/

Supreme Court No. 146212

Court of Appeals No. 304875

Lower Court No. 10-34923FH,

SAGINAW COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

PETER JON VAN HOEK (P26615)
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BRIEF ON APPEAL - DEFENDANT-APPELLANT

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STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Saginaw County Circuit Court by jury trial, and a Judgment of Sentence was entered on June 3, 2011. A Claim of Appeal was filed on June 24, 2011, by the trial court pursuant to the indigent defendant's request for the appointment of appellate counsel dated June 3, 2011, as authorized by MCR 6.425(F)(3). This Court has jurisdiction in this appeal as of right provided for by Mich Const 1963, art 1, §20, pursuant to MCL 600.308(1); MCL 770.3; MCR 7.203(A), MCR 7.204(A)(2).

STATEMENT OF QUESTIONS PRESENTED

I. **SHOULD MR. HARRIS' CONVICTION FOR EXTORTION UNDER MCL 750.213, AND THE ACCOMPANYING FELONY-FIREARM CONVICTION, BE REVERSED AND THE CHARGE DISMISSED AS THE PROSECUTION FAILED TO PRESENT CONSTITUTIONALLY SUFFICIENT EVIDENCE IN SUPPORT OF THE EXTORTION CONVICTION, AS THE EVIDENCE DID NOT SHOW THAT THE ACT ALLEGEDLY COMPELLED WAS AGAINST MR. NEAL'S WILL AND/OR THAT THE ACT WAS SERIOUS AND DETRIMENTAL TO MR. NEAL?**

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Defendant-Appellant James Early Harris, Jr. was initially charged, in Saginaw County District Court, with felonious assault, MCL 750.82; carrying a dangerous weapon with unlawful intent, MCL 750.226; resisting and obstructing a police officer, MCL 750.81d; and three counts of possession of a firearm in the commission of a felony, MCL 750.227b. (Complaint, 11a-12a). On October 7, 2010, at the end of the preliminary examination, the prosecution moved to amend the charges against Mr. Harris, dismissing the felonious assault charge and replacing it with a charge of extortion, MCL 750.213. The examining magistrate, over a defense objection, bound Mr. Harris over on the extortion charge as well as the other counts. (13a-18a). The examining judge signed the bind over order indicating that amendment to the charges, (19a), and the Information reflects the addition of the extortion count and the dismissal of the felonious assault charge. (20a-21a).

At a jury trial before Hon. James T. Borchard on April 26-28, 2011, Mr. Harris was convicted on all six counts. On June 2, 2011, Judge Borchard sentenced Mr. Harris to prison terms of two years for the three felony-firearm convictions (all served concurrently), to be followed by a term of 40 months to 20 years on the extortion conviction to run concurrently with terms of two to five years (carrying a dangerous weapon with unlawful intent) and one to two years (resisting and obstructing a police officer). (Judgment of Sentence, 51a-52a).

Mr. Harris appealed as of right. On September 27, 2012, the Michigan Court of Appeals issued its opinion affirming the convictions and sentences (O'Connell, P.J., concurring in part and dissenting in part). (53a-62a). On March 27, 2013, this Court granted Mr. Harris leave to

appeal, limited to the issue of whether the evidence was sufficient to sustain the extortion conviction.

The charges at issue in this case arose from a dispute on September 11, 2010, between Mr. Harris and Willie Neal. Mr. Harris and Mr. Neal reached an agreement approximately a month and a half prior to September 11. Mr. Neal agreed to help repair Mr. Harris's truck's transmission in exchange for $210 up-front, and $200 more once the work was complete. As of the September date, Mr. Neal had not made much progress on the repairs since the agreement was reached, and Mr. Harris began arguing with Mr. Neal about the pace of the work done on the truck. At some point during this dispute, Mr. Harris possessed a handgun, which caused alarm with Mr. Harris's next door neighbor, Ms. Robbin Smith, who called the police. No gunshots were fired during the incident, the witnesses denied that Mr. Harris ever pointed the gun directly at Mr. Neal, and no injuries occurred. Mr. Harris, who testified at trial, admitted he possessed a handgun for a short time while on his own property, but denied having that gun on his person during his argument with Mr. Neal, and denied threatening Mr. Neal.

Following the 911 call from Ms. Smith, Officer Meehleder, the first responding officer, allegedly saw Mr. Harris walking along Mr. Harris's and Ms. Smith's shared driveway with what appeared to be a shotgun. Officer Meehleder asserted she yelled once in Mr. Harris's direction for him to get down on the ground, at which point Mr. Harris instead turned and went back into his own house. Officer Meehleder followed Mr. Harris to the back door of his house, and yelled for him to come out of the house. After a minute or two, Mr. Harris did come out peacefully and

was arrested. After the arrest, the police conducted a search of Mr. Harris's residence and seized three guns, including a handgun.[1]

At trial, the prosecution's key eyewitness was Mr. Harris's neighbor, Robbin Smith.[2] Ms. Smith testified that on September 11, 2010, she, along with her mother, Maryann Richards, and her aunt, Eileen Watson, were on the front porch of Ms. Smith's house, which is next door to Mr. Harris' residence. (22a-23a). Ms. Smith and Mr. Harris had been neighbors for two years, and had been getting along fine with each other until this incident. (27a). In the past, Ms. Smith had seen Willie Neal in Mr. Harris's portion of the shared driveway, working on Mr. Harris's truck, and saw Mr. Neal working on the truck that day. (22a). At some point Ms. Richards invited Mr. Neal over to Ms. Smith's porch so that Mr. Neal could get out of the light rain which was then falling. (22a). Ms. Smith offered to make Mr. Neal a sandwich. After she returned from inside with Mr. Neal's sandwich, Ms. Smith saw Mr. Harris on her porch, seemingly upset with Mr. Neal for not continuing to work on his truck. (24a). Ms. Smith did not like the language Mr. Harris was using, and asked him to leave her porch. (25a). Mr. Harris did so immediately. (25a).

Ms. Smith observed Mr. Harris, after leaving her porch, go inside his own house. (25a). According to the witness, once Mr. Harris came back outside, he produced a handgun and continued arguing with Mr. Neal over the agreement to repair the truck. (25a). Mr. Harris

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[1] Prior to the trial, the defense moved to suppress the evidence of the guns seized from Mr. Harris's house, arguing that the warrantless entry and search violated the Fourth Amendment. At a pre-trial hearing Judge Borchard ruled the police validly entered the house as a protective search, and that they were permitted to seize any firearms found in plain view. The two long guns were held admissible under this ruling, but the handgun was suppressed, as it was not in plain view when located and seized by the officers.

[2] Mr. Neal, the alleged victim of the extortion charge, did not testify at the trial. The prosecution indicated they had been unable to serve a subpoena on Mr. Neal, and the defense did not object to removing his name from the prosecution's witness list.

waved the gun around, but did not point it at anyone in particular. (25a). Ms. Smith overheard Mr. Harris demand his money back if Mr. Neal did not continue working on the repairs. (25a). Ms. Smith testified she overheard Mr. Harris tell Mr. Neal "if [Mr. Neal] didn't get back to work, he was going to silence him." (29a). Ms. Smith stated Mr. Neal appeared unconcerned with Mr. Harris's comments and did not appear worried about Mr. Harris's statement that he would silence him if Mr. Neal did not honor their agreement. (25a). Ms. Smith informed Mr. Harris she was going to call 911 because she did not know what was going to happen. (26a). Ms. Smith felt her aunt and mother were in danger because a gun was involved, although Ms. Smith acknowledged she never personally felt threatened and the gun was never pointed at her, her mother, or her aunt. (31a).

Ms. Smith testified Mr. Harris immediately left her property and placed the gun on his own front porch. (26a). Mr. Harris then continued talking with Mr. Neal, without yelling, and was "calming down," in Ms. Smith's opinion. (26a). Mr. Harris ceased the discussions, went into his own house, and took the gun with him. (26a). Mr. Neal did not recommence working on the truck.

Elaine Taylor, a neighbor who lived across the street from Mr. Harris and Ms. Smith, testified for the prosecution, but admitted her memory is not very good due to Alzheimer's. (33a). On September 11, Ms. Taylor was on her porch and observed Mr. Harris talking to Mr. Neal at Ms. Smith's house. (33a). Ms. Taylor did not observe Mr. Harris shouting, and could not hear anything of what was said between Mr. Harris and Mr. Neal. (33a-34a). Ms. Taylor testified she did observe Mr. Harris with a gun in his hands while having this conversation, but did not recall Mr. Harris waving the gun around, saying she saw him take the gun and lay it down on his own porch. (34a).

Maryann Richards, Ms. Smith's mother, did not personally know Mr. Neal, but knew he had been working on Mr. Harris's truck. (36a-37a). On September 11, Ms. Richards observed Mr. Neal working on the truck, and she invited Mr. Neal over to Ms. Smith's porch because it had started to rain. (37a). Ms. Richards then observed Mr. Harris having an angry discussion with Mr. Neal, with Mr. Harris wanting Mr. Neal to continue working on his vehicle. (37a). Ms. Richards acknowledged that Mr. Harris left the porch as soon as Ms. Smith asked him to leave. (37a). Mr. Harris continued his conversation from the sidewalk, and then went into his house. (37a). Ms. Richards did not see Mr. Harris the rest of the day. (37a). She did not see Mr. Harris ever waving a gun around, (37a-38a), nor did she hear Mr. Harris make any sort of threat towards Mr. Neal (38a). Ms. Richards did not recall Mr. Harris engaging in any threatening behavior, other than verbal, and did not hear Mr. Harris using the word "silence." (38a). Ms. Richards did acknowledge she had a stroke four years ago, and that may have affected her memory. (38a).

After the prosecution rested, the defense made a motion for directed verdict on all counts. (39a-41a). Defense counsel specifically focused on the charge of extortion, arguing there was insufficient evidence to show a threat was made or that Mr. Harris caused Mr. Neal to refrain from doing anything. (39aa). Judge Borchard denied the motion in full; in reference to the extortion charge, Judge Borchard noted "just holding [a gun] in your hand and yelling somebody that, go fix the car, you're going to silence them, is a sufficient factual basis for the extortion count." (40a).

Mr. Harris presented three witnesses in his defense, including himself. Christopher Clayton, a long-time friend of Mr. Harris, and Mr. Harris's wife, Rochenda Watson, were in Mr. Harris's house when the police arrived and ordered everyone inside to come out. They

confirmed that Mr. Harris came up from the basement peacefully in response to the police order. Both witnesses were inside the house during any incident between Mr. Harris and Mr. Neal at Ms. Smith's house, and did not hear or view any part of that incident.

Mr. Harris testified he arranged with Mr. Neal to help him replace the transmission of his 1994 Dodge Dakota. (43a). Mr. Harris gave Mr. Neal a $210 down payment to start the work, and promised to pay him another $200 upon completion of the repairs. (43a). Mr. Harris testified, in his estimation, it usually takes about four to five hours to fix a transmission "if you're really working on it." (43a).

On September 11, Mr. Harris was helping Mr. Neal work underneath the truck to replace the transmission. (43a). Mr. Harris briefly went back inside his house, leaving Mr. Neal outside to continue the work, but when he came back out Mr. Neal instead was sitting on his neighbor's porch. (43a). Mr. Harris recalled it had drizzled for about 20 minutes, but when he came back outside the weather was good enough to continue to work. (43a).

Mr. Harris offered to cover the truck with a tarp so that Mr. Neal would continue working, but Mr. Neal refused. (43a). When Mr. Neal refused, Mr. Harris asked for his down payment money back so he could find someone else to work on the truck. (44a). Mr. Neal agreed to give him back $100, and Mr. Harris went back to his home. (44a).

Mr. Harris acknowledged he did have a handgun, but left it on his porch while he conversed with Mr. Neal at Ms. Smith's house. (44a). Mr. Harris explained he often carried a gun because his daughter's mother and brother had both been previously shot. (44a). Mr. Harris testified he carried a pistol in his back pocket to protect himself and his family because "there's always trouble over in my area." (47a). Mr. Harris knew he must remove any weapons if he left his own property and went elsewhere. (44a).

After his discussion with Mr. Neal, Mr. Harris went back to his porch, and placed the gun back into his pocket. (44a). At this point, Mr. Harris recalled Ms. Smith asking him if he had a gun. (44a). Mr. Harris acknowledged to her that he did have a gun, but stated he was on his own property and then went back into his house. (44a).

In his final instructions to the jury, Judge Borchard gave an instruction on the necessary elements of the extortion charge. (50a).

On September 27, 2012, the Court of Appeals, in a 2-1 decision, affirmed the convictions and sentences. (53a-62a). In his separate opinion, Judge O'Connell concluded the prosecution failed to present constitutionally sufficient evidence in support of the extortion charge. (60a-62a).

I. MR. HARRIS' CONVICTION FOR EXTORTION UNDER MCL 750.213, AND THE ACCOMPANYING FELONY-FIREARM CONVICTION, SHOULD BE REVERSED AND THE CHARGE DISMISSED AS THE PROSECUTION FAILED TO PRESENT CONSTITUTIONALLY SUFFICIENT EVIDENCE IN SUPPORT OF THE EXTORTION CONVICTION, AS THE EVIDENCE DID NOT SHOW THAT THE ACT ALLEGEDLY COMPELLED WAS AGAINST MR. NEAL'S WILL AND/OR THAT THE ACT WAS SERIOUS AND DETRIMENTAL TO MR. NEAL.

Standard of Review:

Statutory interpretation is a question of law that is reviewed *de novo*. *People v Pena,* 224 Mich App 650, 656 (1997). All factual evidence is viewed in the light most favorable to the prosecution. *People v Wolfe,* 440 Mich 508, 513-515 (1992). The Due Process clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 US 358, 364; 90 S Ct 1068, 1072; 25 L Ed 2d 368, 375 (1970); US Const, Amend XIV. *Winship* established a conviction in state court cannot "constitutionally stand" when proof beyond a reasonable doubt is not secured. *Jackson v Virginia,* 443 US 307, 317-18; 99 S Ct 2781; 61 L Ed 2d 560 (1979).

Argument:

The issue before this Court is whether, even viewed in the light most favorable to the prosecution, the conduct attributed to Mr. Harris was constitutionally sufficient to support his conviction for extortion. Resolution of the issue requires this Court to interpret the extortion statute and determine, as the Court of Appeals has in several published opinions, whether that statute mandates that if the defendant is charged under the theory of extortion that he or she threatened a person with injury in order to compel that person to either do an act or refrain from

doing an act against the person's will, the act compelled must be either to the pecuniary advantage of the accused or to be a serious and detrimental act to the victim. In the instant case, while the prosecution's evidence was constitutionally sufficient to prove the requisite threat, the evidence did not show either that the compelled act was against the will of the complainant or was of any serious and detrimental impact on the victim. To the contrary, Mr. Neal had voluntarily agreed to commit the act – repair of Mr. Harris' truck – and completion of that act would have been financially beneficial to him. This Court should adopt the extortion standard applied for years in the Court of Appeals, and reverse Mr. Harris' extortion conviction and sentence.

The extortion statute, MCL 750.213,[3] has been interpreted in Michigan cases to contain three distinct elements. *See People v Fobb,* 145 Mich App 786, 790 (1985). First, there must be an oral or written communication maliciously encompassing a threat. Second, the threat must be to: (1) accuse a person threatened of a crime or offense, the truth of such accusation being immaterial; or (2) injure the person or property of the person threatened; or (3) injure the mother, father, husband, wife, or child of the person threatened. Third, the threat must be: (1) with intent to extort money or to obtain a pecuniary advantage to the accused, or (2) to compel the person threatened to do, or refrain from doing, an act against his or her will. *Id.* A conviction under this statute is punishable by a prison sentence of not more than 20 years.[4] Mr. Harris was

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[3] "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."

[4] Mr. Harris was sentenced on his extortion conviction to a prison term of 40 months to 20 years, to run consecutive to his 2 year sentence for the felony-firearm conviction. (51a-52a).

charged in this case only under the provision of compelling Mr. Neal to do an act against his will.

The extortion statute has been interpreted in several published opinions from the Michigan Court of Appeals. One frequently cited opinion is that in *People v Fobb, supra.* In *Fobb*, the defendant was upset at the complainant for allegedly spreading lies about her, and physically attacked the complainant, first by choking and then by beating. During this attack, the defendant ordered the complainant to draft and sign a note stating the complainant had reported lies about the defendant. Ms. Fobb was charged with and convicted of both extortion and assault with intent to do great bodily harm less than murder.[5]

On direct appeal, the Court of Appeals affirmed the assault conviction, but vacated the extortion conviction. In reversing the extortion conviction, the Court first disagreed with the prior decision in *People v Krist*, 97 Mich App 669 (1980), which held the statute requires the requisite threat only be for future harm, and not for present assaults. *Id.* At 789-790. The *Fobb* Court, on its facts, held the physical assault was encompassed under the statute's language of a threat to injure the person being threatened.

The *Fobb* Court found reversible error, however, in the sufficiency of the evidence concerning the act compelled by the assault – the forced writing of the note admitting the spreading of lies by the complainant. The opinion concluded the act required of the complainant was not used to the defendant's pecuniary advantage, nor did the note have any rationale or importance. *Id.* at 790. Construing the Legislature's intent in adopting the extortion statute, the Court held this compelled act was not serious enough to justify the statute's severe sentence:

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[5] MCL 750.84.

> The difficulty that 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. The note the victim was forced to write was erratic, quixotic and was not used to the victim's detriment or defendant's advantage.
>
> The Legislature did not intend punishment for every minor threat. There is a paucity of law on the subject. 86 C.J.S., Threats and Unlawful Communications, § 4, p. 795, cites an old Tennessee case, *People v. Morgan*, 50 Tenn. 262 (1871), as authority for this point. That case, in spite of its vintage, is well reasoned.

145 Mich App at 791. In the *Morgan* opinion, the Tennessee Court concluded their extortion statute, which read similarly to Michigan's statute in regards to compelling a person by a threat of injury to do an act against the person's will:[6]

> `was not intended to apply to every idle threat, but such as are evidence of serious purpose to do the injury threatened, and that, some serious injury, such as is alleged in this indictment. Nor would it apply to a threat to compel a man to do any minor act, of no great injury, or serious importance; but only such serious threats of injury as should be used to compel a party to do some act materially and seriously affecting his interest...'

Id. at 792, citing to 50 Tenn at 265.

Relying on this language, which interpreted Tennessee's similar statutory language and legislative intent, the *Fobb* Court held the demand of the defendant that the complainant write a "useless note" was not an act of sufficient severity or consequence to the complainant to fall within the extortion statute. The Court concluded, having previously held the extortion and assault convictions in the case were not the "same offense," and thus did not violate double jeopardy, the principle purpose of the extortion charge in the case was "sentence enhancement,"

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[6] Code, 4633. That statute punished a conviction by a prison sentence of not less than two years and not more than five years.

in that the extortion charge carried twice the maximum sentence than the assault charge (10 years).

The *Fobb* opinion pointed out that in prior published Michigan opinions where extortion convictions under MCL 750.213 were affirmed on appeal, the acts compelled against the will of the complainant all involved matters that were of serious consequences or detriment to the victim. See *People v Whittemore,* 102 Mich 519 (1894) (requiring the execution of a deed); *People v Garcia,* 81 Mich App 260 (1978) (persuading a witness to testify untruthfully); *People v Jones,* 75 Mich App 261 (1977) (dissuading a victim from reporting sexual misconduct); *People v Atcher,* 65 Mich App 734 (1975) (dissuading a witness to testify); and *People v Percin,* 330 Mich 94 (1951) (demanding payment in return for not reporting criminal allegation to the police). See also *People v Pena,* 224 Mich App 650 (1997).

In *People v Hubbard,* 217 Mich App 459 (1996), the Court of Appeals panel rejected a defense argument that the extortion statute is void for vagueness. The Court first concluded the word "threat" in the statute is not vague, nor does it confer unlimited discretion to the prosecution to determine whether the offense has been committed. *Id.* at 483-485. Citing to *Fobb, supra,* the *Hubbard* panel stated a threat of immediate harm will suffice under the alternative theory of compelling an act against the will of the victim.

Turning to the defendant's second claim of vagueness of the statute, that it allows a conviction for a "minor threat that results in the victim engaging in an action with no serious consequences to the victim," the Court again rejected the claim. The *Hubbard* Court wrote:

> 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 79.
>
> 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. The statute is not void for vagueness.

217 Mich App at 485-486.

Applying the *Fobb* standard to its own facts, the *Hubbard* Court concluded the act compelled in the case, which was not detailed in the opinion, was of sufficient severity to the complainant to fall within the reach of the extortion statute. 217 Mich App at 486.

In *People v Milhelsic,* an unpublished opinion of the Court of Appeals, issued May 17, 2002 (Docket No. 225567),[7] *aff'd* 468 Mich 908 (2003), the Court of Appeals majority, applying the precedent from *Fobb* and *Hubbard,* reversed an extortion conviction because "the act required of the victim was minor and without serious consequence to the victim." *Milhelsic, supra.* In *Milhelsic*, the defendant orally threatened to have the victim killed unless she gave defendant back the pants she had previously taken from him. While noting that a claim of right is not a defense to an extortion charge, the Court nonetheless believed the fact that the pants were actually the defendant's property was properly considered in the reversal. *Id.* at 2. Because requiring the victim to return the defendant's own pants was such a minor act, the Court determined the defendant's behavior was not encompassed by the extortion statute. *Id.*

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[7] This opinion is attached as Appendix A. Because *Milhelsic* is unpublished, it is not being cited for precedential value, but only to exemplify how the Court of Appeals has applied *Fobb* to similar extortion convictions.

The concurrence in *Milhelsic* noted that while decisions prior to November 1, 1990, are not binding on other panels of the Court of Appeals, *Hubbard*, decided in 1996, adopted the *Fobb* interpretation of the extortion statute, holding acts which are "minor and without serious consequence to the victim" are not encompassed by the extortion statute. *Id.* (Griffin, P.J. concurring).

This Court's majority declined to review the *Milhelsic* reversal, and the dissenting justices from the refusal to grant leave to appeal acknowledged the *Fobb* standard was correctly applied by the Court of Appeals, but believed *Fobb* was "wrongly decided." *See People v Milhelsic,* 468 Mich 908 (2003) (Corrigan, C.J. dissenting). The *Fobb* standard continues to be applied by the Court of Appeals in extortion cases. See, for example, *People v Morrissey*, Docket No. 306901, rel'd 9/13/12.

It is acknowledged that the extortion statute as written does not explicitly require that the act which is compelled to be performed (or refrained from being performed) by the complainant against his or her will must provide either a pecuniary advantage to the defendant or be of serious and/ or detrimental consequences to the victim. It is also acknowledged that in interpreting a statute, an appellate court's goal is to ascertain and give effect to the Legislature's intent. *People v Morey*, 461 Mich 325, 330 (1999). To achieve that goal, the appellate court normally must presume the Legislature intended the plain meaning of the words of the statute. *Id.*

In some situations, however, this Court has found it necessary to infer essential elements into a criminal statute, in the absence of an express statement of that element in the wording of the statute, in order to save a statute or limit the scope of a criminal provision to that reasonably intended by the Legislature. An example of such a situation is *People v Tombs*, 472 Mich 446

(2005). In *Tombs*, the defendant was convicted of distribution or promotion of child sexually abusive material under MCL 145c(3). The issue raised in the case was whether there is a criminal intent element in the offense that must be proven beyond a reasonable doubt by the prosecution. The statute as written does not explicitly require any showing of criminal intent.

The facts of the case showed the defendant, a field technician for Comcast, quit his job and was required to return his company-issued lap top computer. He had downloaded child sexually abusive material onto that computer, but there was no evidence presented he informed anyone at Comcast that the material was on the computer (the images were buried seven levels deep in a file), or that he intended anyone at Comcast to discover the existence of the material (evidence was presented that the defendant knew the common practice at Comcast was for returned computers to be wiped clean of all information without review of their contents, and the defendant expected that to happen with his computer). While the defendant did not challenge his separate conviction for possession of the child sexually abusive material, the issue was whether the mere transfer of possession of the computer containing that material violated the more severe promotion and distribution provision of the statutory scheme, even in the absence of any intent by the defendant that the person or persons to whom the computer was transferred gained knowledge of the illicit material.

This Court concluded a criminal intent element had to be inferred into the statute to limit its application to conduct that was intended by the Legislature to be reached by the distribution offense. Recognizing that strict liability criminal statutes are disfavored unless expressly created, the Court's majority found no reason to believe the Legislature wanted to dispense with the need to prove a criminal intent:

> Hence, we tend to find that the Legislature wanted criminal intent to be an element of a criminal offense, even if it was left unstated. * * *

> Considering solely the statute's words, it is apparent that criminal intent, mens rea, is not explicitly required. The only specific knowledge requirement is that the defendant knew that the sexually abusive material included or appeared to include a child.

472 Mich at 451, 452.

The *Tombs* Court considered the statutory scheme involving child sexually abusive material, consisting of three separate offenses of escalating punishment (possession, distribution or promotion, production). The Court found it unlikely the Legislature intended that the more serious offense of distribution would be a strict liability crime, with no *mens rea* element, as compared to the lower level possession crime:

> The most applicable dictionary definition of "distribute" implies putting items in the hands of others as a knowing and intentional act. Likewise, the terms "promote" and "finance," and the phrase "receives for the purpose of distributing or promoting" contemplate knowing, intentional conduct on the part of the accused.
>
> The use of these active verbs supports the presumption that the Legislature intended that the prosecution prove that an accused performed the prohibited act with criminal intent. If we held otherwise, not only would it be illogical, we would create a questionable scheme of punishment: One who, with criminal intent, possessed child sexually abusive material would be subject to a lesser punishment than someone who, without criminal intent, passed along such material to others.

Id. at 457. (Footnote omitted).

This Court further concluded that without a criminal intent element being inferred into the statute, the statute could be used by prosecutors to punish what would otherwise be considered innocent conduct:

> As the United States Supreme Court explained in *X–Citement Video* [*United States v X-Citement Video, Inc*, 513 US 64; 115 S Ct

> 464; 130 L Ed 2d 372 (1994)], if there were no *mens rea* element respecting the distribution of the material, the statute could punish otherwise innocent conduct. For instance, a person might accidentally attach the wrong file to an e-mail sent to another. The person might intend to send an innocent photograph, but accidentally send a pornographic photograph of a child instead. Also, the person might not intend that the recipient recognize or even see the material that he transferred.
>
> If the statute contained no *mens rea* element, a person lacking any criminal intent could be convicted and sentenced to seven years in prison and a fine of $50,000. Or, as in the present case, he could be found criminally liable for returning a laptop owned by his employer, intending only that the offending material be destroyed.

Id. at 458. (Footnote omitted).

The prosecution took the position in *Tombs* that all the statute's wording required was proof of a physical transfer of the child sexually abusive material, by way of the computer, without any need to prove the defendant intended anyone at Comcast to be aware of the existence of that material. The record of the case showed that several employees at Comcast had physical possession of the computer after it was returned by the defendant, with knowledge that an employee had discovered the existence of the material in the computer, before the police were contacted and the computer turned over to them. This Court found that if no criminal intent element was required, those employees, who were only seeking to report a suspected crime, would have been equally in violation of the statute and subject to possible prosecution. Such a prosecution would have been contrary to legislative intent:

> If this were the law, Comcast employees who transferred defendant's JPG computer files among themselves and ultimately to the police, knowing what was in them, would have violated MCL 750.145c(3). It would be immaterial that they had no criminal intent. Such a reading of the statute would frustrate its purpose.

Id. at 458-459. See also *People v Hill*, 486 Mich 658 (2010).[8]

This Court's decisions in *Tombs* and *Hill* provide an appropriate framework for the analysis of the issue in the case at bar. In both opinions, this Court sought to interpret the legislative intent of a statutory scheme with consideration of the express language of the statutes, the degree of punishment among several related statutes, and whether the Legislature intended to criminalize conduct that most people would reasonably see as innocent or at least not of sufficient severity to justify the length of sentence. The Court of Appeals' interpretation of the extortion statute in *Fobbs, Hubbard,* and the other cited cases focused on these same considerations – the interconnection of the statute to other larceny and assault offenses, the severity of the 20 year maximum sentence, and whether the Legislature intended this offense to apply where the compelled act was of minor significance to the alleged victim. Applying the *Fobbs* standard to the statute would not frustrate the intent or purpose of the Legislature, but instead would be consistent with the Legislature's goal to impose more stringent penalties in relation to only serious or egregious conduct.

The absence of any limitation on the type or degree of a compelled act under the statute would expand the scope and reach of the statute to everyday conduct that very likely was not contemplated by the Legislature as constituting this serious felony. The statute as written has an extremely broad reach. It does not require that the threatened injury be serious, cause great bodily harm or impairment of a bodily function, or even be a physical injury ("any injury to the

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[8] In *Hill*, this Court, in reliance in part on the *Tombs* decision, held that the most serious offense in the child sexually abusive material statutory scheme, which punishes the production or making of the material by a prison sentence up to 20 years (MCL 750.145c(2)), does not apply to a person who makes copies of the original material for personal possession. The *Hill* decision focused on the graduated scheme of offenses in interpreting the Legislature's intent.

person or property"). There is no requirement that the threatened injury or the compelled act actually occurred, as the offense is complete upon the issuance of the threat. There is no requirement that a weapon be used or displayed. Application of the statute without any restriction that the compelled act be of a serious nature, as *Fobb* requires, opens up the statute to the potential of significant punishment for relatively minimal or commonplace incidents.

For example, a parent who threatens to spank a disobedient child unless that child cleans his or her bedroom would fall within the express language of the statute – the issuance of a threat of injury in order to compel a person to do an act against that person's will. No reasonable person could conclude the Legislature, in adopting a 20 year felony for extortion, contemplated the statute would apply to this type of event, which occurs countless times every day. In his dissenting opinion in this case, Judge O'Connell made this point:

> 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.

(a).[9] Just as in *Tombs, supra*, where this Court correctly recognized the Legislature did not intend to punish the mere transfer of physical possession of child sexually abusive material under the promotion or distribution provision of the law in the absence of criminal *mens rea,* the Court should agree with and adopt the long-standing Court of Appeals' standard from *Fobb* in order to

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[9] The Court of Appeals majority below recognized and applied the *Fobb* standard, but found sufficient evidence that the act was against the will of Mr. Neal, and that the act was of serious consequence to him. (55a-57a). The majority did not explain why either completing the repairs to the truck or refunding some of the down payment would have been at all detrimental to Mr. Neal's interests.

confine the statute's reach to matters of sufficient severity and consequence proportionate to its degree of punishment.

In *People v Krist, supra,* the Court of Appeals noted the extortion statute was adopted to fill in a hole in the statutory scheme of larceny offenses. 97 Mich App at 674-676.[10] Under Michigan's larceny statutes where no assaultive conduct is alleged, the sentencing commonly escalates depending on the value of the stolen property. See, for example, MCL 750.356. Where there is assaultive conduct involved, making the larceny crime a robbery, the value of the stolen property is not relevant to punishment, but instead the sentencing is aggravated by the degree of the threat of physical injury or the use of a weapon or article fashioned to appear to be a weapon.

The extortion statute does not, on its face, have a similar graduated punishment scheme that depends on either the degree of injury threatened or the seriousness of the act being compelled. The fact that the Legislature set the maximum punishment for extortion at 20 years – a more severe sentence than for such serious crimes as manslaughter (15 years), second and third degree criminal sexual conduct (15 years), assault with intent to do great bodily harm less than murder (10 years), and unarmed robbery (15 years) – indicates the Legislature contemplated extortion to be an offense of greater or at least comparable severity than those crimes.[11] The *Fobb* Court correctly and reasonably concluded the statute was not intended to apply to threats to compel trivial or insignificant acts.

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[10] The common law crime of extortion, which applied to unlawful actions of a public official under color of law, has been codified in Michigan in a separate statute. MCL 750.214.

[11] Extortion is a Class B felony under the sentencing guidelines.

Application of the *Fobb* standard does not discount or ignore the danger presented by a threat of injury or violence. As has been recognized in the cited cases, if the act allegedly compelled is too minor to fall within the scope of the extortion statute, the threat itself can be prosecuted under an appropriate assault statute. In *Fobb*, the Court of Appeals affirmed the defendant's conviction for assault with intent to commit great bodily harm which was premised on the same conduct that was asserted to be the requisite threat for the extortion charge. In the case at bar, Mr. Harris acknowledges that the trial evidence, viewed in a light most favorable to the prosecution, would have been constitutionally sufficient to support a felonious assault conviction. That was the initial charge brought against Mr. Harris, with the prosecution moving to dismiss that count and add the extortion charge, over a defense objection, at the close of the preliminary examination. There was no legal requirement for the prosecution to dismiss the felonious assault charge, as it was not the "same offense" as the extortion count for double jeopardy purposes. *Fobb, supra* at 791. The prosecution's voluntary decision to go forward only on the extortion charge did not alter their burden to prove that charge, and all its essential elements, beyond a reasonable doubt. Mr. Harris is not arguing that his alleged possession of the handgun during his argument with Mr. Neal over the truck repairs should be excused. If that charge had gone forward to the jury, and a conviction entered on felonious assault, the trial court could have validly sentenced Mr. Harris for that offense. However, the mere fact that a gun was involved does not, under the wording of the extortion statute, mandate a conviction for that more serious offense.

The general policy in sentencing in Michigan is that the punishment should be proportionate to both the circumstances of the case and to the individual defendant. See *People v McFarlin*, 389 Mich 557, 574 (1973); *People v Chapa,* 407 Mich 309 (1979). The Offense

Variables of the sentencing guidelines directly tie increases in the recommended range for the minimum sentence to the existence of egregious facts in the particular case.[12] It has been long recognized that the Legislature, when exercising its sole power to provide for sentences in criminal matters, focuses on the severity of the conduct at issue to create sentences comparative to similarly serious offenses:

> Our preeminent requirement in formulating an alternative is to respect the purpose the Legislature of our state has manifested with regard to sentencing. The Legislature in establishing differing sentence ranges for different offenses across the spectrum of criminal behavior has clearly expressed its value judgments concerning the relative seriousness and severity of individual criminal offenses. This statutory sentencing scheme embodies the "principle of proportionality" according to which sentences are proportionate to the seriousness of the matter for which punishment is imposed.
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> * * *
>
> When the legislative scheme for criminal sentencing is viewed across the spectrum of crimes from misdemeanor traffic violations to cold-blooded murders, two aspects are immediately clear. First, the Legislature has endeavored to provide the most severe punishments for those who commit the most serious crimes. The crime of murder, for example, is punishable by a longer term than is the lesser included crime of assault. Second, offenders with prior criminal records are likewise subject to harsher punishment than those with no prior convictions, as reflected in the general and specific habitual offender provisions of the penal statutes. These two elements combine to form what might be called the "principle of proportionality." As stated over three quarters of a century ago by the United States Supreme Court, "[I]t is a precept of justice that

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[12] The sentencing guidelines prepared in this case scored Mr. Harris, who is now 49 years old, with points under the Prior Record Variables only due to the multiple convictions in this case (PRV 7), as he has no prior felony conviction record and only a single, non-scorable misdemeanor conviction from 1997, and ten total points under the Offense Variables related to his possession of the handgun (OV 1 and 2). The recommended range for the minimum sentence on the extortion conviction, under this C-II scoring, was 30 to 50 months.

> punishment for the crime should be graduated and proportioned to the offense." *Weems v United States*, 217 US 349, 367; 30 S Ct 544, 549; 54 L Ed 793 (1910).

People v Milbourne, 435 Mich 630, 635, 650 (1990).

By substituting the extortion charge for the felonious assault count, the prosecution in this case was able to increase the potential punishment by a factor of five (20 years versus 4 years). The fact that in addition to the alleged assaultive conduct the argument between Mr. Harris and Mr. Neal concerned whether Mr. Neal was going to continue to work on the truck, as he had agreed, does not justify that disparity in punishment for Mr. Harris' charged conduct. *Fobb , supra.* By dismissing the felonious assault charge, and substituting it with the extortion count, the prosecution was able to engage in an impermissible form of sentence enhancement. *Fobb, supra.* Absent adoption of the requirement that the compelled act be of a certain level of severity, prosecutors will be able to transform, for whatever reason or motivation they choose, otherwise minimal conduct into this significant offense.

The basis for the extortion charge against Mr. Harris was Ms. Smith's testimony that "[Mr. Harris] told Mr. Neal if he didn't get back to work, he was going to silence him." (29a). No witness testified Mr. Harris made any other threat, or pointed the handgun directly at him. There was no evidence presented that Mr. Neal at any other time expressed a desire to not complete work on the truck. While the testimony concerning the amount of rain falling at the

time of the incident was inconsistent,[13] no witness alleged that the weather conditions at the time made continuing to work on the truck dangerous, unreasonable, or beyond the scope of the agreement between Mr. Harris and Mr. Neal. Mr. Harris testified he offered to put a tarp over the entire truck to shield Mr. Neal for any further rain that might fall. (43a). Mr. Harris paid Mr. Neal $210 to begin fixing the transmission of his truck a month and a half prior to September 11, 2010. (43a). Mr. Neal did not testify, and thus did not dispute Mr. Harris' statement of their agreement nor his description of the incident.

Viewing this evidence even in the light most favorable to the prosecution, Mr. Harris's did not fit within the statutory and case law definition of extortion. The extortion statute did not apply to Mr. Harris's behavior because (1) Mr. Neal was not compelled to do an act against his will, and/or (2) Mr. Neal was not compelled to do any act of serious consequence or detriment to himself.

Mr. Neal voluntarily entered into the agreement with Mr. Harris, and thus was already obligated to repair Mr. Harris's truck in order to satisfy that agreement and receive full payment. Mr. Harris demanded only that Mr. Neal uphold his end of this voluntary and mutually beneficial agreement. Mr. Harris's efforts to enforce the terms of the agreement was not financially advantageous or a windfall to Mr. Harris, nor was it detrimental to Mr. Neal. Mr. Harris did not

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[13] Mr. Harris testified the light rain had stopped falling by the time he came back outside and saw Mr. Neal on Ms. Smith's porch. (43a). Ms. Smith and Ms. Richards testified that Ms. Richards invited Mr. Neal onto the porch to get out of the rain, but neither described how hard the rain was falling or the duration of the rain. Ms. Taylor testified it was raining, but "it was nice outside." (34a). The first officer to respond to the house following Ms. Smith's 911 call stated it "had been raining" prior to her arrival. Ms. Smith testified she arrived home at her house around 5:00 pm, that Mr. Harris went back into his house after the alleged threats to Mr. Neal and re-exited the house, carrying a long gun, a couple of minutes later, with the officer arriving at the scene as he was walking down the driveway. Later testimony established that the 911 call was received at 5:04 pm.

seek to force Mr. Neal to do more work, accept less money or work faster than previously agreed - Mr. Harris sought only to enforce the existing terms of the agreement. His purported statement that if Mr. Neal refused to complete the work he should refund $100 of the down payment was not (and was never alleged by the prosecution to be) a theft of Mr. Neal's property. If Mr. Neal was intending to renege on the agreement, it would have been reasonable for Mr. Harris to demand back that portion of the down payment Mr. Neal had not yet earned so that he could seek someone else to finish the work. While the alleged use of a weapon may have been subject to a felonious assault charge, insisting on enforcing the terms of a previously entered agreement cannot be "of serious consequence" to either party. Finishing the work on the truck would have been beneficial to Mr. Neal, as he would have then earned the balance of the agreed-upon payment.

Mr. Neal previously agreed to fix Mr. Harris's truck in exchange for money. Being required to do something which Mr. Neal had already freely agreed to do cannot be said to be against Mr. Neal's will. To hold that threatening consequences for a failure to uphold the terms of an agreement is tantamount to extortion would criminalize ordinary behavior between two contracting parties. Under this interpretation of MCL 750.213, an employer would satisfy all the elements of the extortion statute by threatening to fire an employee unless he does his job (forcing someone to do something against his/her will), or threatening to sue a contractor for failing to adhere to the terms of a contract (obtaining a pecuniary advantage to the threatener).

This Court should adopt the reasoning of the Court of Appeals, as expressed in *Fobb, supra*, and *Hubbard, supra*, and limit the scope of the extortion statute's provision on compelling an act against the will of the victim to acts of sufficient benefit to the accused and/or sufficient detriment or significance to the victim proportionate to the seriousness of the punishment. In the

case at bar, this Court should agree with Judge O'Connell's dissenting opinion in the Court of Appeals, and find that the act allegedly compelled by Mr. Harris was not sufficient to constitutionally support the extortion conviction and sentence. *Jackson v Virginia, supra.* In the alternative, even if this Court rejects adoption of the *Fobb* standard, Mr. Harris' extortion conviction should be vacated and the sentence dismissed (along with the accompanying felony-firearm conviction and sentence) as the act compelled was not against Mr. Neal's will, as expressly required under the statutory language.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court reverse his extortion and felony-firearm convictions and sentences, and order those two charges dismissed with prejudice.

Respectfully submitted,

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Dated: June 24, 2013.

APPENDIX A

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT EDWARD MIHELSIC,

Defendant-Appellant.

UNPUBLISHED
May 17, 2002

No. 225567
Kalkaska Circuit Court
LC No. 98-001866-FC

Before: Griffin, P.J., and Holbrook, Jr., and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of extortion, MCL 750.213.[1] The trial court sentenced him as a second habitual offender, MCL 769.10, to eight to thirty years' imprisonment. We reverse.

This case arose from an allegation that defendant orally threatened to have the victim killed by having her drowned in a river unless she removed the pants that she was wearing, but that belonged to defendant, and gave them back to defendant. At trial, the victim testified that under the threat, she did as defendant requested, taking off the pants and returning them to defendant. On appeal, defendant maintains that this evidence was insufficient to sustain a conviction of extortion pursuant to MCL 750.213. When determining whether sufficient evidence has been presented to sustain a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Godbold*, 230 Mich App 508, 522; 585 NW2d 13 (1998).

The statute pursuant to which defendant was convicted, 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

[1] The jury acquitted defendant on the charges of kidnapping, MCL 750.349, and first degree criminal sexual conduct, MCL 750.520b.

> 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.

Contained within this statute are several alternatives for maintaining a charge of statutory extortion. Here, the prosecution charged that defendant willfully made either a written or oral threat to injure or kill the victim and that the threat was made with the intent to compel the victim to do something against her will, i.e., return defendant's pants. The trial court's instructions to the jury were consistent with this theory under the statute.

In the trial court, and now on appeal, defendant maintains that the act required of the victim, i.e., the removal of the pants she was wearing that belonged to defendant and the return of them to defendant, is a minor and inconsequential act; one that is not of sufficient serious consequences on which to find defendant guilty of extortion. We agree.

When presented with an extortion case where "the act required of the victim was minor with no serious consequences to the victim" (the defendant demanded that the victim execute a useless note), this Court reversed the conviction, concluding that the offense was not one contemplated by the extortion statute. *People v Fobb*, 145 Mich App 786, 791; 378 NW2d 600 (1985); Cf *People v Pena*, 224 Mich App 650, 656-657, & n 2; 569 NW2d 871 (1997), modified and remanded on other grounds, 457 Mich 885 (1998) ("threatening a victim with harm if the victim reports a crime to the police is not a 'minor threat'"). In deciding that the extortion statute is not void for vagueness, in *People v Hubbard (After Remand)*, 217 Mich App 459, 485-486, 552 NW2d 493 (1996), this Court explained:

> 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.

In the present case, in determining whether "the act required of the victim was minor with no serious consequences to the victim," we believe that the fact that the pants were defendant's property is rightly considered.[2] Further, when compared to the acts that have been the subject of other reported cases in the Supreme Court and this Court, the act at issue here only can be described as comparatively insignificant. See *Pena, supra* at 656 (demand that victim not report crime to police); see also *Fobb, supra* at 792-793, citing *People v Whittemore*, 102 Mich 519, 524; 61 NW 13 (1894) (requiring the execution of a deed); *People v Garcia*, 81 Mich App 260,

[2] We note that claim of right is not a defense to an extortion charge. See *People v Maranian*, 359 Mich 361, 369; 102 NW2d 568 (1960) ("The collection of a valid, enforceable debt does not permit malicious threats of injury to one's person, loved ones, or property if payment is not made.").

265; 265 NW2d 115 (1978) (urging a witness to testify untruthfully); *People v Jones*, 75 Mich App 261, 267; 254 NW2d 863 (1977) (dissuading a victim from reporting a crime); *People v Atcher*, 65 Mich App 734, 736, 738; 238 NW2d 389 (1975) (dissuading a witness from testifying). Because the return of defendant's pants was minor and without serious consequences to the victim, who admitted to taking defendant's pants less than a month before while defendant was sleeping and who testified that she intended to return them, the evidence was insufficient to sustain a conviction of extortion.

In light of our resolution of this issue, we need not address defendant's additional claims of error.

Reversed.

/s/ Donald E. Holbrook, Jr.
/s/ Joel P. Hoekstra

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT EDWARD MIHELSIC,

Defendant-Appellant.

UNPUBLISHED
May 17, 2002

No. 225567
Kalkaska Circuit Court
LC No. 98-001866-FC

Before: Griffin, P.J., and Holbrook, Jr. and Hoekstra, JJ.

GRIFFIN, P.J. (*concurring*).

Were I permitted, I would affirm defendant's conviction and sentence of extortion, MCL 750.213, and hold that the evidence was sufficient and the jury instructions given (CJI2d 21.1) accurately recited the law. However, pursuant to MCR 7.215(I)(1)[1], I must follow and apply *People v Hubbard (After Remand)*, 217 Mich App 459; 552 NW2d 493 (1996), which compels me to concur in the reversal of defendant's conviction.

I

The extortion statute, MCL 750.213, reads as follows:

> 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

[1] MCR 7.215(I)(1) provides:

> Precedential Effect of Published Decisions. A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, or by a special panel of the Court of Appeals as provided in this rule.

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.

The original information filed against defendant charged extortion under the alternative theories that defendant intended to "extort money or any pecuniary advantage whatever" or "to compel the person so threatened to do or refrain from doing any act against his/her will." However, the prosecutor later amended the information to proceed only under the second theory. In addition, the jury was instructed only regarding the prosecutor's theory that defendant committed the crime of extortion because he made a threat "to compel the person so threatened to do or refrain from doing any act against his/her will."

The change in theories by the prosecution was most unfortunate because the blue jeans, which were the subject of the extortion, likely had some pecuniary value and therefore defendant's threats may have been intended to achieve "*any* pecuniary advantage *whatever*." However, the prosecution did not pursue this theory and the jury was not so instructed.

The only theory that was presented to the jury by the prosecution was that defendant committed the crime of extortion by threatening immediate harm to the victim if she did not perform an act against her will. The demanded act was the return of defendant's blue jeans.

In *People v Fobb,* 145 Mich App 786; 378 NW2d 600 (1985), a panel of this Court held that for the crime of extortion to occur, the act demanded of the victim, to do or refrain from doing against her will when threatened with bodily injury, must relate to a serious, not minor, matter. In *Fobb*, our Court held that the defendant's threat did not constitute extortion because the action demanded was the execution of a "useless note," which according to the court was a "minor [act] with no serious consequences to the victim." While the *Fobb* decision predated November 1, 1990, and therefore is not precedentially binding on this Court, MCR 7.215(I)(1), its construction of the extortion statute was later adopted in *Hubbard, supra.* Although the precise extortion issue in *Hubbard* was whether the statute was unconstitutionally vague, in resolving the question the *Hubbard* panel reaffirmed the *Fobb's* Court's construction of the statute. In *Hubbard, supra* at 485-486, our Court held as follows:

> 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. The statute is not void for vagueness.

Because *Hubbard* is precedentially binding, I am compelled pursuant to MCR 7.215(I) to follow the *Hubbard-Fobb* construction of the statute. However, because I conclude that the *Hubbard-Fobb* construction is contrary to the plain language of the statute, I urge the Supreme Court to grant leave on this case and reverse our decision and reinstate defendant's conviction.

As stated most recently by the Supreme Court in *Roberts v Mecosta Co General Hosp*, ___ Mich ___; ___ NW2d ___ (Docket Nos. 116563, 116570, 116573, issued 4/24/02), slip op at 7-8, unambiguous statutes are to be enforced as written:

> An anchoring rule of jurisprudence, and the foremost rule of statutory construction, is that courts are to effect the intent of the Legislature. *People v Wager,* 460 Mich 118, 123, n 7; 594 NW2d 487 (1999). To do so, we begin with an examination of the language of the statute. *Wickens v Oakwood Healthcare System,* 465 Mich 53, 60; 631 NW2d 686 (2001). If the statute's language is clear and unambiguous, then we assume that the Legislature intended its plain meaning and the statute is enforced as written. *People v Stone,* 463 Mich 558, 562; 621 NW2d 702 (2001). A necessary corollary of these principles is that a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself. *Omne Financial, Inc v Shacks, Inc,* 460 Mich 305, 311; 596 NW2d 591 (1999).

See also *Sun Valley Foods Co v Ward,* 460 Mich 230, 236; 596 NW2d 119 (1999).

The extortion statute does not contain any language requiring that the demand of the victim to do or refrain from doing against her will, be of a *serious* consequence to the victim. On the contrary, the "serious consequence" requirement was implied in and added to the statute by the *Fobb* panel. In my view, such a statutory revision by the judiciary is not permitted and therefore the construction of the extortion statute as held in *Fobb* and adopted by *Hubbard* should be overruled. As our Supreme Court explained in *Tyler v Livonia Public Schools,* 459 Mich 382, 393, n 10; 590 NW2d 560 (1999):

> Our role as members of the judiciary is not to determine whether there is a "more proper way," that is, to engage in judicial legislation, but is rather to determine the way that was in fact chosen by the Legislature. It is the Legislature, not we, who are the people's representatives and authorized to decide public policy matters such as this. To comply with its will, when constitutionally expressed in the statutes, is our duty.

In regard to defendant's other issues, I find no error requiring reversal. Defendant's claim of right defense is without merit. *People v Maranian,* 359 Mich 361, 369; 102 NW2d 568 (1960). The trial court did not err by permitting the prosecution to impeach defendant's credibility with two prior convictions. Defendant was not denied a fair trial because MRE 609 does not require the prosecution to give a defendant pretrial notice that it plans to impeach the defendant's credibility at trial. Further, although the trial court may have erred by failing to articulate its reasoning on the record pursuant to MRE 609 and by permitting the prosecution to impeach defendant during the prosecution's case in chief, those errors were harmless because the prosecution could have properly used defendant's prior convictions to impeach him during his cross-examination. *People v Lukity,* 460 Mich 484; 596 NW2d 607 (1999). Also, defendant was

not denied effective assistance of counsel because defendant failed to show that he suffered any prejudice arising from his attorney's alleged deficient performance. *People v Pickens,* 446 Mich 298; 521 NW2d 797 (1984); *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1994).

Finally, after thoroughly reviewing the circumstances of the offense and the offender, I would hold that defendant's sentence as a second habitual offender to eight to thirty years is proportionate and not an abuse of discretion. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Were it not for MCR 7.215(I) I would affirm defendant's conviction and sentence.

/s/ Richard Allen Griffin