STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 14, 2003
v	No. 232695 Kalamazoo Circuit Court
WILLIAM JOHN WILKINSON, Defendant-Appellant.	LC No. 99-001425-FH

Before: Meter, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of extortion, MCL 750.213. He was sentenced to probation for two years, which included a one-year jail term.[1] He appeals as of right. We affirm.

Defendant, an attorney, represented David Oisten, who was being prosecuted for receiving or concealing stolen property. Defendant's conviction arises out of his efforts to compel a third party, Robert Lombardini, to anonymously pay some or all of the restitution amount for which Oisten would be liable by threatening that Oisten would reveal Lombardini's involvement in a criminal insurance fraud scheme unless the payment was made.

Defendant first argues that the conduct of the police and prosecutor in conducting an undercover investigation against him and charging him with extortion was so egregious and reprehensible that it violated his right to due process. We disagree. Defendant cites no authority in support of his misconduct claim. "'An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority.'" *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001), quoting *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Furthermore, as the trial court observed, undercover sting

[1] The judgment of sentence provides that defendant is to serve ninety days in jail, followed by tether for ninety days, with the balance of the jail term being suspended.

operations similar to that conducted here have not been found to be improper or a denial of due process. See, e.g., *People v Johnson*, 466 Mich 491, 501; 647 NW2d 480 (2002), and *People v Morris*, 450 Mich 316, 321; 537 NW2d 842 (1995). Defendant has not established a due process violation.

Next, defendant argues that the extortion statute, MCL 750.213, is unconstitutionally vague and overbroad and that it infringes upon protected speech, i.e., his legal right to report a crime, negotiate a settlement, and pursue his client's legal rights. This issue is not preserved because defendant failed to challenge the constitutionality of the extortion statute in the trial court. *People v Jensen*, 222 Mich App 575, 579; 564 NW2d 192 (1997), remanded on other grounds 456 Mich 935 (1998). Therefore, we review this issue for a plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A statute is accorded a strong presumption of validity and this Court has a duty to construe it as valid absent a clear showing of unconstitutionality. *People v Jensen (On Remand)*, 231 Mich App 439, 444; 586 NW2d 748 (1998). As this Court stated in *People v Vronko,* 228 Mich App 649, 652; 579 NW2d 138 (1998):

> A penal statute is unconstitutionally vague if (1) it does not provide fair notice of the conduct proscribed, (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed, or (3) its coverage is overly broad and impinges on First Amendment Freedoms.

In order to pass constitutional muster and give fair notice, "a penal statute must define the criminal offense 'with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement'" *People v Lino*, 447 Mich 567, 575-576; 572 NW2d 434 (1994), quoting *Kolender v Lawson*, 461 US 352, 357; 103 S Ct 1855; 75 L Ed 2d 903 (1983); *People v White*, 212 Mich App 298, 312; 536 NW2d 876 (1995). The statute cannot use terms that require persons of ordinary intelligence to guess at its meaning and differ regarding its application. *Id.; People v Perez-DeLeon*, 224 Mich App 43, 46; 568 NW2d 324 (1997). A statute is sufficiently definite if its meaning can fairly be ascertained by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words. *Vronko, supra* at 653.

The overbreadth doctrine is primarily applied to First Amendment cases where a statute prohibits constitutionally protected conduct. *Jenson (On Remand), supra*. "The overbreadth of a statute must be real and substantial; it must be judged in relation to the legitimate sweep of the statute where conduct and not merely speech is involved." *Id*.

The extortion statute, 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 that twenty [20] years or by a fine of not more than ten thousand [10,000] dollars.

It is not plainly apparent that the extortion statute is vague or unconstitutionally overbroad. To establish a violation of MCL 750.213, the prosecution must prove a malicious oral or written threat to (1) accuse the person threatened of a crime or offense (without regard for the truth of the accusation), *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. *People v Fobb*, 145 Mich App 786, 790; 378 NW2d 600 (1985). Additionally, the threat must be made with the intent to (1) extort money or obtain a pecuniary advantage to the threatener; *or* (2) compel the person threatened to do, or refrain from doing, an act against his or her will. *Id*. The statute uses words such as "malicious," "threat," "accuse," "intent," "extort," and "pecuniary advantage," which all have meanings that are clearly defined, well known, and are often used in Michigan jurisprudence. Also, the conduct prohibited is clearly stated. Defendant has not established plain error with regard to his claim that the statute is unconstitutionally vague.

Nor has defendant established plain error with regard to his claim that the statute is unconstitutionally overbroad as applied to his conduct. The statute prohibits conduct in the form of threats that are made maliciously, and for a wrongful purpose, i.e., to extort money or obtain a pecuniary advantage, or compel a person from acting or refraining from acting against his will. It is not plainly apparent that the statute infringes upon protected conduct, or that defendant's particular conduct was constitutionally protected. Although the Washington Court of Appeals found that Washington's extortion statute was unconstitutionally overbroad in *Washington v Pauling*, 108 Wash App 445; 31 P3d 47 (2001),[2] that case is distinguishable because the Washington statute, unlike Michigan's extortion statute, did not contain an unlawfulness or "wrongful" element. Because Michigan's extortion statute is not plainly unconstitutional, defendant is not entitled to relief on the basis of this unpreserved issue.

Next, defendant argues that the government's conduct of using a police officer to pose as an attorney in an undercover capacity violated the attorney-client privilege between himself and his client, Oisten. We disagree. Whether the attorney-client privilege may be asserted is a legal question that this Court reviews de novo. *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 618; 576 NW2d 709 (1998). The attorney-client privilege attaches to direct communications between a client and his attorney as well as communications made through their respective agents. *Reed Dairy*, *supra*. "The scope of the attorney-client privilege is narrow, attaching only to confidential communications by the client to his advisor that are made for the purpose of obtaining legal advice." *Id*. at 618-619.

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[2] Lv gtd 146 Wn2d 1001; 45 P3d 551 (2002).

In this case, defendant's statements to Terry Tobias, who was another attorney and not defendant's client, were not protected by the attorney-client privilege. Although defendant asserts that certain communications between attorneys for codefendants are privileged, defendant here was not discussing strategy with Tobias concerning any common issue between codefendants in order to facilitate representation in possible subsequent proceedings, nor was he establishing a common defense strategy. Thus, defendant's reliance on *Hunydee v United States*, 335 F2d 183, 185 (CA 9, 1965), and *United States v Montgomery*, 990 F2d 1264 (CA 9, 1993), is misplaced.

The attorney-client privilege that existed between Oisten and defendant was not violated by the fact that Tobias posed as Lombardini's attorney and recorded defendant's conversations. There was no privilege between Tobias and defendant that required Tobias to maintain confidentiality concerning defendant's extortionate statements. The trial court properly denied defendant's motion to dismiss with regard to this issue.

Defendant also contends that the work product doctrine was violated because the letter that he wrote to Lombardini was protected from disclosure as his work product. Whether a document is protected by the work-product doctrine is a question of law that is reviewed de novo. *Leibel v General Motors Corp*, 250 Mich App 229, 244; 646 NW2d 179 (2002). The work-product doctrine protects from discovery any notes, working papers, memoranda or similar materials, prepared by an attorney in anticipation of litigation. *Id*. Under MCR 2.302(B)(3)(a), the trial court "shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation." Here, the letter that defendant wrote to Lombardini was not a document containing defendant's mental impressions, conclusions, opinions or legal theories concerning anticipated litigation. Indeed, the fact that defendant himself "published" this letter to Lombardini negates any suggestion that it was protected work product. There is no merit to this claim.

Finally, defendant argues that the evidence was insufficient to support a conviction of extortion and, therefore, the trial court erred in denying his motion for a directed verdict. We disagree. A directed verdict of acquittal should be granted when there is insufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *People v Lemmon*, 456 Mich 625, 634; 576 NW2d 129 (1998). "In ruling on a motion for a directed verdict, the trial court must consider in the light most favorable to the prosecutor the evidence presented by the prosecutor up to the time the motion is made 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 Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). Circumstantial evidence and reasonable inferences arising therefrom can sufficiently establish the elements of a crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

In *Fobb*, *supra* at 790, this Court set forth the elements of extortion 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.

The malice required by the statute does not contemplate a feeling of ill will towards the person threatened, but is satisfied by the wilful [sic] doing of an act with an illegal intent.

In *People v Hubbard (After Remand)*, 217 Mich App 459, 485; 552 NW2d 493 (1996), this Court held that when a charge of extortion arises out of a compelled action or omission, a conviction may be secured upon the presentation of proof of the existence of a threat of immediate, continuing, or future harm. The Court added:

> 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 . . . 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 of extortion will not be sustained where the act required of the victim was minor with no serious consequences to the victim. *Id.* at 791. [*Hubbard*, *supra* at 485-486.]

See also *People v Peña,* 224 Mich App 650, 656; 569 NW2d 871 (1997), modified on other grounds 457 Mich 885 (1998).

Here, defendant's characterization of his actions and intent does not comport with a view of the evidence in a light most favorable to the prosecution. Defendant's actual words to Tobias were not protected speech. Rather, viewed most favorably to the prosecution, his statements are clearly encompassed by the language of the statute. Threats to accuse someone of a crime or of injury with the intent to extort money or obtain a pecuniary advantage are not protected speech.

The evidence indicated that in defendant's telephone conversation with Tobias on May 23, 1996, defendant told Tobias that if Lombardini did not reimburse the insurance company, Oisten would inform the authorities of Lombardini's involvement in criminal fraud against the insurance company, but that if Lombardini paid the restitution amount, Oisten would keep quiet about Lombardini's activities. The evidence was sufficient to enable a rationale trier of fact to

infer that defendant made an oral threat that Oisten would report Lombardini's involvement in criminal activity, with serious consequences to Lombardini, with the malicious intent to extort money from Lombardini in order to lessen the financial burden on Oisten, so that Oisten would then have the financial means to pay his attorney fees to defendant.

Further, it is apparent that the court denied defendant's motion for a directed verdict based upon defendant's taped statements and the transcripts of those statements, which were entered into evidence during the prosecutor's proofs. It was defendant's words in those statements, not his exculpatory explanations at trial, which formed the basis for the court's denial of defendant's motion. The trial court did not err in denying defendant's motion for a directed verdict.

Affirmed.

/s/ Patrick M. Meter
/s/ Janet T. Neff
/s/ Pat M. Donofrio