STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN PAUL CARY,

Defendant-Appellant.

UNPUBLISHED
September 17, 1996

No. 179893
LC No. 90-000447-FC

Before: MacKenzie, P.J., and Markey and J.M. Batzer*, JJ.

PER CURIAM.

This case arises out of a several-day incident in which defendant and other members of the Outriders Motorcycle Club confined, threatened, and held hostage club member Thomas Allen until Allen secured $6,700 in cash and property as repayment for club funds he was accused of stealing. Following a jury trial, defendant was convicted of kidnapping, MCL 750.349; MSA 28.581, conspiracy to kidnap, MCL 750.157a; MSA 28.354(1) and MCL 750.349; MSA 28.581, extortion, MCL 750.213; MSA 28.410, and conspiracy to commit extortion, MCL 750.157a; MSA 28.354(1) and MCL 750.213; MSA 28.410. Defendant was sentenced to concurrent terms of six to twenty years' imprisonment for each conviction. He appeals as of right. We affirm.

Defendant first claims that he received ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). Because an evidentiary hearing was not held on defendant's ineffective assistance of counsel claim, this Court's review is limited to the facts apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). It is not apparent from the record that counsel was "spread thin" and engaged in a "pattern of neglect" resulting in prejudice to defendant. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995). Further, although defense counsel failed to file a notice of alibi or present corroborative alibi evidence, defendant was not prejudiced by these omissions. First, in spite of the lack of notice, Clarence Wells was allowed to testify that defendant was with him from Thursday evening until early

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

Sunday morning attending a motorcycle race in West Virginia. Second, counsel could not put forth an effective alibi defense on this record since defendant's whereabouts from Thursday until Sunday morning were not at issue; Allen testified that he did not see defendant between late Thursday evening and Sunday afternoon. Where a witness could not have provided an effective alibi, a defendant is not deprived of the effective assistance of counsel in failing to present that witness. *People v McMillan*, 213 Mich App 134, 140-141; 539 NW2d 553 (1993). Thus, defendant cannot claim ineffective assistance of counsel on the basis of counsel's failure to present evidence corroborating his "alibi." Compare *People v Johnson*, 451 Mich 115; 545 NW2d 637 (1996).

Next, contrary to his assertion on appeal, defendant *was* afforded opportunities by the trial court to expand the record on remand from this Court and to put on proofs regarding the issue of ineffective assistance of counsel; however, defense counsel expressly declined the opportunities. Defendant may not assign as error on appeal that which he deemed proper below. *Barclay*, *supra* at 673. Further, on February 6, 1995, this Court entered an order denying defendant's motion to remand for an evidentiary hearing, and we note that, on December 5, 1995, our Supreme Court denied defendant's application for leave to appeal that order. See 450 Mich 935. The facts have not changed and we decline to revisit this issue. See, e.g., *Int'l Union v Michigan*, 211 Mich App 20; 535 NW2d 210 (1995).

Third, the trial court did not abuse its discretion in denying defendant's motion for new trial on the basis of newly discovered evidence. We agree with the trial court that the evidence was not newly discovered, that it was merely corroborative of and cumulative to Wells' testimony, that it was discoverable and could have been produced at trial with reasonable diligence, and that production of the evidence at trial would not have caused a different result. *People v Miller (After Remand)*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995).

We also reject defendant's claim that the district court and the circuit court erred in failing to dismiss the case against defendant on the basis of prejudicial pre-arrest delay. Defendant's unsupported, speculative statements are not enough to establish substantial prejudice resulting from the pre-arrest delay. *People v White*, 208 Mich App 126, 134; 527 NW2d 34 (1994); *People v Reddish*, 181 Mich App 625, 627; 450 NW2d 16 (1989); *People v Loyer*, 169 Mich App 105, 119; 425 NW2d 714 (1988); *People v Betancourt*, 120 Mich App 58, 63; 327 NW2d 390 (1982); *People v Williams*, 114 Mich App 186, 202; 318 NW2d 671 (1982). Even if some prejudice were established here, the reason for the delay in this case was the reluctance of Thomas Allen, the victim, to cooperate with the authorities. A defendant is not deprived of due process where he is prosecuted following an investigative delay, even if his defense might have been somewhat prejudiced by the lapse of time. *United States v Lovasco*, 431 US 783, 789; 97 S Ct 2044; 52 L Ed 2d 752 (1977).

Defendant also contends that there was insufficient evidence to support his convictions for extortion and conspiracy to commit extortion. We disagree. Viewing the evidence in a light most favorable to the prosecution, *People v Wolfe*, 440 Mich 508; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), a rational trier of fact could have found sufficient evidence beyond a reasonable doubt to support the convictions. It is not necessary to make a threat of *future* harm to the victim to support a conviction for extortion. *People v Fobb*, 145 Mich App 786, 789-790; 378 NW2d 600 (1985). Defendant's repeated threats to Allen that he would "blow his head off" if he did not do or say

as he was told involved fear, coercion, and duress to force Allen to do acts against his will, involved serious demands, and thus constituted extortion. *Fobb, supra* at 789-790, 792; 31A Am Jur 2d, Extortion, §§ 1, 28, 34. Even under *People v Krist*, 97 Mich App 669; 296 NW2d 139 (1980), and *People v Trevino*, 155 Mich App 10; 399 NW2d 424 (1986), relied upon by defendant, the element of threat was satisfied by defendant's threats to Allen that he would be shot if he returned to the clubhouse after he was released. Regarding defendant's conspiracy conviction, it is well established that direct proof of an agreement is not required to sustain a conviction for the offense, *People v Carter*, 415 Mich 558, 568; 330 NW2d 314 (1983), and that a person may be a party to a continuing conspiracy by knowingly cooperating to further the object of the conspiracy. *People v Blume*, 443 Mich 476, 484; 505 NW2d 843 (1993). Here, defendant's activities in concert with other club members in repeatedly threatening Allen's life if he did not obtain money or other valuables suggests an implied agreement and knowing cooperation among them to commit extortion. MCL 750.157a; MSA 28.354(1); *Blume, supra* at 483-485. We reject defendant's claim that this is the rare case where we should reverse because no reasonable jury could have found Allen to be credible. *People v Herbert*, 444 Mich 466, 474; 511 NW2d 654 (1993).

Finally, we conclude that there was sufficient evidence to support defendant's conviction for kidnapping and conspiracy to kidnap. The forcible movement of Allen to and from the credit union was to accomplish an extortion of money from Allen; therefore, the asportation element of kidnapping by forcible confinement was satisfied because there was asportation for the purpose of extortion. *People v Vaughn*, 447 Mich 217, 224, n 1; 524 NW2d 217 (1994); *People v Wesley*, 421 Mich 375, 388-389; 365 NW2d 692 (1984); *People v Adams*, 389 Mich 222, 238; 205 NW2d 415 (1973). Secret confinement kidnapping was also established. As in *People v Jaffray*, 445 Mich 287, 309; 519 NW2d 108 (1994), Allen was effectively precluded, here by physical restraints and threats of death, from communicating his predicament to others to obtain their assistance. The fact that the location of the secret confinement was Allen's home is not significant, nor is the fact that Allen's girlfriend was possibly aware of Allen's plight. *Id.*, 306, 307, 312, n 37. Defendant fails to provide authority to support his argument that a conviction for kidnapping with the intent to extort money cannot be sustained because there was no connection between Allen's initial restraint and a subsequent demand for money. This argument has therefore been abandoned and we need not address it. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). In any event, on this record a rational trier of fact could have found that when defendant forcibly seized, confined, or kidnapped Allen, he did so with the intent to extort money or other valuable things. *Jaffray, supra* at 296-297. Viewing the evidence in a light most favorable to the prosecution, therefore, there was sufficient evidence to support defendant's conviction of kidnapping. Furthermore, there was sufficient evidence of a conspiracy to kidnap. Evidence was presented that defendant, as the apparent leader and with the willing participation of other club members, seized Allen, handcuffed him to a cot, kept him in a locked room for over three days, and eventually forced him to withdraw money from his credit union accounts. See *Blume, supra; Carter, supra; Atley, supra.* We therefore affirm defendant's convictions.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Jane E. Markey
/s/ James M. Batzer