

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

EDWIN ELLIOTT WOLF,

Defendant-Appellant.

UNPUBLISHED

April 19, 2002

No. 228045

Calhoun Circuit Court

LC No. 00-000299-FH

Before: Gage, P.J., and Griffin and Buth* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of larceny in a building, MCL 750.360. The trial court sentenced him as a fourth felony offender, MCL 769.12, to 30 to 180 months' imprisonment. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant contends that his conviction must be reversed because the prosecutor coerced his co-defendant into deciding not to testify on defendant's behalf. This Court reviews claims of prosecutorial misconduct case by case to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). We agree with the trial court that the prosecutor did not act improperly in this case.

The record shows that the co-defendant, who was also charged with larceny in a building and being an habitual offender, had planned to testify that she took a purse and moneybag from a convenience store and defendant did not know that she took the items until they had driven away from the store. After the jury was selected, the attorney for the co-defendant indicated that she no longer intended to so testify and would take the Fifth Amendment if called. The attorney explained that he was in the process of negotiating a plea bargain for his client and the prosecutor's office had suggested that it would not pursue sentencing her as an habitual offender if she pleaded guilty to larceny in a building. However, according to defendant's attorney, the prosecutor indicated that "if she testifies for my client and makes those admissions, she would not be receiving any form of plea bargain." Defense counsel argued that using a plea bargain to thwart his calling the co-defendant as a witness required dismissal of the case. The prosecutor's position was that her testimony would be perjured and would not be rewarded with a plea

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

agreement, and he asserted that he did not threaten the co-defendant with a perjury charge if she decided to testify. The trial court declined to dismiss.

Prosecutorial intimidation of a proposed defense witness has consistently been regarded as improper by state and federal appellate courts. *People v Hooper*, 157 Mich App 669, 674-675; 403 NW2d 605 (1987). In support of his claim that the prosecutor's conduct in this case amounted to improper intimidation, defendant relies on *United States v Morrison*, 535 F2d 223 (CA 3, 1976). However, unlike *Morrison*, the prosecutor in this case did not repeatedly threaten an unrepresented witness with criminal charges or enlist the aid of police officers to intimidate her. The prosecution relies on *People v Layher*, 238 Mich App 573; 607 NW2d 91 (1999), aff'd on other grounds 464 Mich 756; 631 NW2d 281 (2001). *Layher* is also distinguishable from this case, however; the alleged threat here was the possible withdrawal of a plea offer made to a defense witness already facing a criminal charge, not a warning of the possibility of a perjury charge to an apparently unrepresented and reluctant complainant.

Cases finding that the prosecutor improperly intimidated a witness typically involve a threat of bringing criminal charges against the witness or otherwise punishing the witness for testifying. See, e.g., *People v Pena*, 383 Mich 402; 175 NW2d 767 (1970) (prosecutor improperly sent official letter to defense witnesses stating he would prosecute them for perjury if they testified untruthfully for defendant); *People v Butler*, 30 Mich App 561; 186 NW2d 786 (1971) (prosecutor improperly told witness he was under investigation for the offense and could plead the Fifth Amendment); *People v Williams #1*, 45 Mich App 623; 207 NW2d 176 (1973) (prosecutor informed witness of her Fifth Amendment rights and told her she would be prosecuted if she testified); *People v Callington*, 123 Mich App 301; 333 NW2d 260 (1983) (prosecutor's stated intent to possibly charge defense witness with a new offense or institute probation violation proceedings that could lead to life imprisonment improperly drove witness from the stand). On the other hand, where a witness is advised by counsel of the implications of testifying, see *Hooper, supra*, or the prosecutor reminds a potential defense witness that his plea bargain requires him to testify truthfully, see *State v Jackson*, 92 Ohio St 3d 436; 751 NE2d 946 (2001), courts have found no prosecutorial coercion.

In this case, there is nothing indicating that the state used its authority to intimidate or prevent the co-defendant from testifying. At most, the prosecutor threatened to terminate plea bargain negotiations if she testified untruthfully. That is more akin to informing the witness of the possible consequences of her testimony than coercion through the use of the threats of additional prosecution or punishment. The prosecutor's conduct did not constitute improper coercion of a defense witness.

Affirmed.

/s/ Hilda R. Gage
/s/ Richard Allen Griffin
/s/ George S. Buth