STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 16, 1999
v	No. 204051 Saginaw Circuit Court
JAMES CARPENTER, Defendant-Appellant.	LC No. 95-011473 FC AMENDED

Before: Neff, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), two counts of felonious assault, MCL 750.82; MSA 28.277, possession of a firearm by a convicted felon, MCL 750.224f; MSA 28.421(6), possession of a firearm in the commission of a felony, MCL 750.227b; MSA 28.424(2), and resisting and obstructing a police officer, MCL 750.479; MSA 28.747. The trial court sentenced defendant to twenty-eight months to twenty years' imprisonment for the home invasion conviction, twenty-eight months to four years' imprisonment for each of the two counts of felonious assault, twenty-eight months to five years' imprisonment for the felon in possession conviction, the mandatory consecutive two years' imprisonment for the felony-firearm conviction, and one to two years' imprisonment for the resisting and obstructing conviction. We affirm.

Defendant first contends that the trial court erred by requiring him to prove his claim of diminished capacity by a preponderance of the evidence. According to defendant, by assigning the burden of establishing diminished capacity to defendant, the trial court impermissibly shifted the burden of proof with respect to an essential element of the applicable offenses in this case, namely, specific intent, and thus violated the constitutional principle that requires the prosecution to carry the burden of proof beyond a reasonable doubt on all essential elements of an offense. See *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970).

In 1994, the Legislature amended the insanity statute to provide that the insanity defense is an affirmative defense and that "[t]he defendant has the burden of proving the defense of insanity by a preponderance of the evidence." MCL 768.21a(3); MSA 28.1044(1)(3). The Legislature clearly

intended to place the burden of proof of this defense on defendants. Beginning with this Court's determination in *People v Mangiapane*, 85 Mich App 379, 395; 271 NW2d 240 (1978), and consistently thereafter,[1] this Court has construed the defense of diminished capacity to come within the codified definition of legal insanity and therefore has held that it is subject to the same procedural requirements that are statutorily imposed on the insanity defense. Plaintiff correctly maintains that when the Legislature amends existing statutes, it is presumed to act with knowledge of appellate court statutory interpretations. *People v Borchard-Ruhland*, 230 Mich App 166, 169; 583 NW2d 247 (1998). According to plaintiff, therefore, it follows that because the Legislature had not specifically included the diminished capacity defense by name in the insanity statute prior to *Mangiapane*, and because the 1994 amendment did not otherwise change the definition of insanity or the procedural requirements imposed by the statute, it must be presumed that the Legislature, aware of this Court's inclusion of the diminished capacity defense within the codification of the insanity defense, intended that this Court's construction of the insanity statute remain in force. The trial court agreed with the prosecution and assigned the burden of proof to defendant with respect to the defense of diminished capacity.

We conclude that the trial court's decision to require defendant to establish the defense of diminished capacity by a preponderance of the evidence does not require reversal. This requirement did not impermissibly shift the burden of proof to defendant on the specific intent elements of the crime.

The trial court did not relieve the prosecution of its burden of establishing beyond a reasonable doubt all the essential elements of the offense in this case, which included the specific intent to commit the acts proscribed by the applicable statutes. In this bench trial, the trial court articulated in a written opinion that the prosecution had proved beyond a reasonable doubt all the essential elements of each offense for which the court returned a conviction, and only then did the trial court turn to the question whether defendant had established by a preponderance of the evidence that he suffered from a diminished capacity due to voluntary intoxication. The trial court concluded that he had not. Therefore, because the trial court expressly determined that the prosecution had carried its burden of proof beyond a reasonable doubt with respect to the relevant offenses in this case, there was no improper shifting of the burden.

Defendant next contends that, even if he was required to establish the defense of diminished capacity, the evidence he presented at trial sufficiently established that defense and thereby negated the specific intent necessary for the home invasion charge and the two assault charges. We review the sufficiency of the evidence in a bench trial de novo in a light most favorable to the prosecution to determine whether the trial court could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985).

There was evidence that defendant had been drinking prior to the incident, and several of his friends testified that they believed he was intoxicated. However, none of them reported that he engaged in any bizarre behavior or made any delusional statements, and two of them believed defendant was sober enough to drive his vehicle. Defendant's behavior in demanding entry to his former girlfriend's home, his forcible entry into the home, his confrontation with and assault on his former girlfriend and her male companion, and his subsequent telephone call to her warning her not to contact the police was–as

the trial court concluded–goal oriented and understandable, even if it is not the sort of behavior that organized society condones. It was not until the police arrived at defendant's home that he began ranting and talking about demons and the F.B.I., and about someone stealing money from his company. This case does not present a situation where there is insufficient evidence for the trial court's conclusion. Each side presented both expert and lay testimony concerning defendant's state of mind. Where there is adequate evidence on both sides of this issue, it is a matter for the trier of fact to determine where the truth lies. We find that the trial court's findings were supported by sufficient evidence.

Defendant next contends that there was insufficient evidence to support the trial court's conclusion that he intentionally broke and entered the complainant's home and that he should therefore have been acquitted of the charge of first-degree home invasion. To establish the charge of first-degree home invasion, the prosecutor had to prove beyond a reasonable doubt, among other elements, that defendant broke into a dwelling. MCL 750.110a; MSA 28.305(1). Under Michigan law, any amount of force used to open a door or a window to enter the building, no matter how slight, is sufficient to constitute the breaking. *People v Toole*, 227 Mich App 656, 659; 576 NW2d 441 (1998). The uncontradicted testimony of the witnesses established that defendant demanded entry into his former girlfriend's home, that he insisted that he was coming in, and that when he was refused entry, he jumped through a glass window and proceeded to assault his former girlfriend and her companion. In response, defendant offered only his speculation that he accidentally fell through the window. Because the evidence of the breaking was consistent with defendant's stated intention to enter the home, the trial court was justified in finding that defendant intentionally broke into and entered the complainant's home.

Next, defendant contends that if this Court sets aside his convictions for first-degree home invasion and felonious assault, it must also set aside his conviction for felony-firearm. However, because we affirm defendant's convictions for the predicate felonies, we likewise affirm defendant's felony-firearm conviction.

Defendant next contends that there was insufficient evidence that he resisted and obstructed a police officer. Defendant argues that the police officer was not justified in reaching through a window to grab him and that he did not resist being arrested, but rather merely properly tried to avoid being dragged through a window and a torn screen. The purpose of the resisting and obstructing statute "is to protect officers from physical harm." *People v Little*, 434 Mich 752, 759; 456 NW2d 237 (1990). In this Court's recent decision in *People v Philabaun*, ___ Mich App ___; ___ NW2d ___ (Docket No. 201759, issued 3/19/99), the majority held that in order for the prosecution to meet the statutory requirements for a charge of resisting or obstructing a police officer, there must be an active interference, either verbal or physical, or a threatened interference with the ability to carry the threat out. *Id.*, slip op, p 5. In this case, the police officer testified that he attempted to reach inside the side window to grab defendant and take him into custody, but defendant pulled back and then closed the window on the officer's hand. The trial court properly found that defendant resisted the officer in the performance of his lawful duties. There was sufficient evidence to support defendant's conviction of resisting and obstructing.

Finally, defendant contends that his conviction for being a felon in possession of a firearm violates the constitutional prohibition against ex post facto laws, US Const, art 1, § 10; Const 1963, art

1, § 10, because imposing punishment for a felon in possession conviction amounts to improper additional punishment for a prior conviction. In *People v Tice*, 220 Mich App 47, 51-52; 558 NW2d 245 (1996), this Court held that the felon in possession of a firearm statute did not seek to impose further punishment for a prior conviction, but rather imposed punishment for the "recent act of possessing a firearm" in order to "protect the public by precluding certain convicted felons from possessing firearms." Defendant's ex post facto argument is therefore meritless.

Defendant also claims the felon in possession statute violates his constitutional right to keep and bear arms. Const 1963, art 1; § 6. In both *People v Swint*, 225 Mich App 353, 364-365; 572 NW2d 666 (1997), and *People v Green*, 228 Mich App 684, 692; 580 NW2d 444 (1998), this Court held that the felon in possession statute did not violate the state's constitutional provision guaranteeing the right to keep and bear arms. Defendant argues that this Court's decisions have not addressed the decision of our Supreme Court in *People v Zerillo*, 219 Mich 635; 189 NW 927 (1922), which held that a statute forbidding unnaturalized, foreign-born residents from possessing firearms was unconstitutional. We find *Zerillo* to be distinguishable. The Supreme Court recognized that the right to keep and bear arms was subject to reasonable regulation, but held that a statute that made that right subject to the will of the local sheriff, and that prohibited foreign-born residents from using firearms to legitimately defend their persons and property, was an unconstitutional regulation. The felon in possession statute does not suffer from the infirmities identified in *Zerillo*, but instead represents a reasonable legislative regulation aimed at protecting the public safety by forbidding convicted felons from possessing firearms.

Affirmed.

/s/ Janet T. Neff
/s/ Harold Hood
/s/ William B. Murphy

[1] See, e.g, *People v Anderson*, 166 Mich App 455, 464; 421 NW2d 200 (1988); *People v Belanger*, 158 Mich App 522, 530; 405 NW2d 405 (1987), vacated on other grounds 432 Mich 880; 436 NW2d 667 (1989); *People v Hollis*, 140 Mich App 589, 592; 366 NW2d 29 (1985); *People v Denton*, 138 Mich App 568, 571; 360 NW2d 245 (1984).