STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL WHITNEY HARRIS,

Defendant-Appellant.

UNPUBLISHED
February 10, 2004

No. 234513
St. Joseph Circuit Court
LC No. 99-009679-FC

Before: Neff, P.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree home invasion. MCL 750.110a(2). He was sentenced as a habitual offender, third offense, MCL 769.11, to a minimum term of thirteen years, six months, to forty years' imprisonment. We reverse and remand for proceedings consistent with this opinion.

Defendant and the victim had a longstanding "on and off" relationship that was in the process of ending. On the date in question, the victim testified that she encountered defendant while she was with the couple's children. The victim gave defendant a ride to his mother's home, where she left the children. Defendant insisted on returning to his home, and the victim agreed to drive him there.

Once they arrived at defendant's home, the victim testified that defendant forced her to pull her car into the driveway. He then forced her into the home where he repeatedly assaulted her physically, held a knife to her throat, and tried to duct tape her to a chair. During the altercation, the victim testified that defendant kicked an adult cat and threw a kitten. The kitten was later found dead, and the mother cat suffered an injury. The victim testified that, during the assault, defendant forced her to telephone her current boyfriend and end that relationship. The victim testified that she was able to sneak out of a bedroom window when defendant was in the other room and run to a neighbor's home.

Defendant, friends, and family corroborated the couple's tumultuous relationship. However, defendant testified that the victim was always the aggressor during their altercations. Defendant admitted that he did assault the victim, but testified that any assault was in response to the victim's actions as the aggressor. Defendant testified that the victim fabricated the charges because he had begun a new relationship with another woman. Angry over the relationship, the victim ran from the home, advising defendant that he was going to jail.

Daniel Joe Tatroe was at home with his brother and a friend. It was approximately 9:45 p.m., when his girlfriend went to a skating rink to pick up her children. He heard a knock on the door and proceeded toward the door. The victim said, "He's after me" and was crying and hysterical. Tatroe was in the living room with the victim when he saw defendant, without knocking and without permission, in his home. Defendant entered the home through the backdoor and was standing in the dining room. Defendant repeatedly told the victim, "Don't call the police." He did not leave the home despite being instructed to do so by Tatroe. Rather, defendant hesitated and kept saying "Don't call the police." Tatroe "got a hold" of defendant and guided him out the back door. There was a "struggle at first but not a whole lot." Defendant stood there despite being repeatedly told to leave. Tatroe returned his attention to the victim. Defendant then came to the front door and started to enter without permission. Tatroe stopped him before he could enter. Tatroe stood between defendant and the victim. Again, defendant told the victim not to call the police. To Tatroe, defendant appeared to be "out of control," but rational. Defendant "took off," and the victim used Tatroe's telephone. Tatroe noticed police at the victim's home and walked her back there.

Defendant testified that, after the victim left the home in anger, he thought she was going to her car to leave. When he saw her proceed to the neighbors, he thought of the embarrassment to his friends and family and took off after her. Defendant admitted that he had hit the victim that evening, but stated that he was only angry because she had broken his glasses. He also admitted that he entered Tatroe's home without permission. However, defendant said that he was not there to fight or cause problems.

Defendant was charged with: (1) kidnapping, (2) home invasion, first degree, (3) assault with a dangerous weapon, (4) animal killing, and (5) animal maiming. Defendant was acquitted of counts I, III, IV, and V, and found guilty only of first-degree home invasion.

Although defendant has raised multiple issues, we conclude that the failure to instruct on the lesser included offense of illegal entry requires reversal. In *People v Silver*, 466 Mich 386, 388-389; 646 NW2d 150 (2002), the victim left her home for a five to ten minute period. The victim closed her doors, but did not lock them. When she returned, she heard a noise in her kitchen and found the defendant standing there. The victim began to yell at the defendant to leave. The defendant said to the victim, "I was just here to use your potty" and ran into a field behind the home. The victim telephoned police, and initially, did not locate anything missing. Later, the victim told police that an accumulation of change on her bedroom dresser that was visible from the window was missing. The change was not recovered. The defendant was charged with home invasion, first degree, based on the theory that defendant had entered the home with the intent to commit a larceny. *Id*. at 388-389.

The defendant testified that his brother lived in the neighborhood. He was walking and observed an elderly woman having difficulty with her lawn mower. The defendant aided her by mowing her lawn, but the woman would not let him use the bathroom. The defendant's brother was not home so he could not use the bathroom there. The defendant had a "wave" relationship with the victim and had helped carry boxes into her home. He knocked on the door, but the door was unlocked. He yelled out to see if anyone was home. Without a reply, he entered the home to use the bathroom. As he was leaving, the victim yelled at him to get out. The defendant

apologized, noting that he had only used the bathroom. The victim testified, on rebuttal, that she had never met the defendant and he never helped her move any boxes. She further denied that they exchanged "waves." The trial court instructed the jury on home invasion, but failed to instruct on the lesser included offense of breaking and entering without permission, MCL 750.115(1) (illegal entry). *Id*. at 389-390.

The Supreme Court concluded that the failure to instruct on the lesser offense of illegal entry was not harmless error:

> We hold that breaking and entering without permission is a necessarily included lesser offense of first-degree home invasion. Breaking and entering without permission requires (1) breaking and entering or (2) entering the building (3) without the owner's permission. It is impossible to commit the first-degree home invasion without first committing a breaking and entering without permission. The two crimes are distinguished by the intent to commit "a felony, larceny, or assault," once in the dwelling.
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> In this case the intent to commit a larceny in the house was clearly disputed at trial. Indeed, it was defendant's unvarying position, unblemished by inconsistent statements, that there was an entry without permission, but that there was no intent to steal. The opening statement giving his theory of the case, the cross-examination of Ms. Gardner [the victim], as well as officer Welch, and his closing argument were all directed to one end: that he was wrongfully inside the house, but did not intend to steal. The Legislature thinks such things can happen. After all, they made it a lesser crime to be in a house without permission if there is no felonious intent. Said plainly, the person that would be guilty of this would be a person inside, surely with some motive, just not a criminal motive. If the jurors believed defendant was such a person, they realistically could not act on it unless they had an instruction that gave them that choice. Not to give them an instruction that allowed them to agree with defendant's view of the events in this case undermines the reliability of the verdict. The reason is that there was substantial evidence supporting the lesser offense of breaking and entering without permission. [*Id*. at 392-393.]

Pursuant to *Silver*, reversal for failing to provide the lesser included offense instruction is warranted. In the present case, as in *Silver*, there was evidence to indicate that defendant entered Tatroe's home with motive, albeit not criminal motive. He testified that he was only trying to stop the couple from continuing to humiliate their family members and friends by having contact with authorities again. Indeed, prior contact with authorities had not resulted in the filing of criminal charges. Thus, there was evidence to support defendant's theory, and the issue was for the determination by the trier of fact. Pursuant to *Silver*, reversal is required on this instructional basis.

We note that in *People v Cornell*, 466 Mich 335, 361, 367; 646 NW2d 127 (2002), our Supreme Court held that the failure to give appropriate lesser included offense instructions was subject to the harmless error analysis. The error in *Cornell* was deemed to be harmless because there was little evidence to support the instruction on the lesser included offense. *Id*. at 366-367. In this case, the evidence of criminal versus innocent motive in entering the Tatroe home without

permission was premised on the credibility of defendant's testimony, and the resolution of credibility lies with the trier of fact. See *People v Northey*, 231 Mich App 568-576-577; 591 NW2d 227 (1998). Therefore, we cannot determine whether the error was harmless when the basis of the jury decision is unknown.

Having concluded that reversal of the conviction is required based on the failure to provide the lesser instruction, the question becomes what remedy applies. Where it is concluded that the trial court erred in failing to provide a lesser included instruction, the remedy is to reverse the conviction and instruct the trial court to enter a conviction on the lesser offense and resentence accordingly. *People v Kamin*, 405 Mich 482, 498, 501; 275 NW2d 777 (1979). However, the prosecutor is afforded the option of retrying the defendant on the original charge. *Id*.

Because of the option of retrial, we will address the remaining pertinent legal issues.[1] Defendant alleges that the evidence was insufficient to support the home invasion, first degree conviction.[2] We disagree. Questions of law present issues that an appellate court reviews de novo. *People v Carlson*, 466 Mich 130, 136; 644 NW2d 704 (2002). The application of the law to the facts is also reviewed de novo. *People v Barrera*, 451 Mich 261, 269 n 7; 547 NW2d 280 (1996). "Intent is a question of fact to be inferred from the circumstances by the trier of fact." *People v Kieronski*, 214 Mich App 222, 232; 542 NW2d 339 (1995). Intent may be inferred based on the circumstances presented in the individual case by the trier of fact. *People v McBride*, 204 Mich App 678, 682; 516 NW2d 148 (1994).

Home invasion, first degree, is codified at MCL 750.110a(2) and provides:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling without permission and, at any time

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[1] We need not address the sentencing issues because resentencing will occur regardless of the option selected by the prosecutor. In any event, the challenges to the scoring, proportionality, and the trial court's alleged lack of knowledge regarding discretion are without merit.

[2] It should also be noted that the basis for the jury's acquittal of the other offenses is in dispute, and there is no record support from jury members, only hearsay. Defendant repeatedly alleges that the acquittal for the kidnapping, assault, and animal cruelty charges indicated that the jury found defendant and his witnesses credible, while the victim's testimony was impeached and deemed incredible. However, on remand for settlement and certification of the record, the trial judge noted that, in his discussions with jurors, they indicated that they believed the case was overcharged as a kidnapping and wanted the option of a domestic violence charge. The trial judge further stated that jurors told him that they did not find defendant or his mother to be credible. Defendant's attempt to rely on the acquittal of other charges is without merit. As previously stated, the resolution of credibility lies with the trier of fact. *Northey*, *supra*. Furthermore, a jury may reach inconsistent verdicts or may reject all, part, or none of a witness' testimony when assessing credibility. Accordingly, the attempt to rely on the acquittal of other charges as a basis for reversal is without merit.

> while he or she is entering, present in, or exiting the dwelling, commits felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in or exiting the dwelling either of the following circumstances exists:
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> (a) The person is armed with a dangerous weapon.
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> (b) Another person is lawfully present in the dwelling.

See also *Silver, supra* at 390 n 3. The prosecutor's theory of the case was that the underlying felony was obstruction of justice.[3] Specifically, defendant's request that the victim not telephone the police was designed to prevent her from contacting authorities. Obstruction of justice was a creation of the common law, and our Supreme Court in *People v Thomas*, 438 Mich 448; 475 NW2d 288 (1991), addressed the offense by stating:

> Obstruction of justice is generally understood as an interference with the orderly administration of justice. This Court, in *People v Ormsby*, 310 Mich 291, 300; 17 NW2d 187 (1945), defined obstruction of justice as "impeding or obstructing those who seek justice in a court, or those who have duties or powers of administering justice therein." In *People v Coleman*, 350 Mich 268, 274; 86 NW2d 281 (1957), this Court stated that obstruction of justice is "committed when the effort is made to thwart or impede the administration of justice." While these definitions adequately summarize the essential concept of justice, we believe lack the specificity necessary to sustain a criminal conviction.

Consequently, our Supreme Court examined whether obstruction of justice was contingent upon the particular offense wronged. The Court concluded that twenty-two offenses listed by Blackstone served as a basis for determining whether conduct fell within the category of obstruction of justice. *Id*. at 455-458. However, in *People v Vallance*, 216 Mich App 415, 419; 548 NW2d 718 (1996), this Court held that the offense of obstruction of justice was not limited to Blackstone's list, but the Supreme Court's reference in *Thomas* to the list was an illustration of the category of offenses that may warrant a charge of obstruction of justice.

In *People v Somma*, 123 Mich App 658, 661-662; 333 NW2d 117 (1983), this Court stated:

> An obstruction of justice has been defined as an interference with the orderly administration of the law. It was an offense at common law to willfully and corruptly hamper, obstruct, and interfere with a proper and legitimate *criminal investigation.* [Emphasis added, citations omitted.]

[3] The Legislature, effective March 28, 2001, did codify some obstruction of justice offenses, see MCL 750.120a, MCL 750.483a, and MCL 750.122. However, the codification occurred after the offenses charged and have no bearing on the issues raised on appeal.

Thus, according to Michigan law, the hampering of an investigation is sufficient to serve as a basis for the charge of obstruction of justice, and the commencement of a court proceeding need not occur first to bring forth this charge.

However, defendant contends that the statement, "Don't call the police," is innocuous and does not rise to the level of conduct required for obstruction of justice, citing *People v Tower*, 215 Mich App 318, 319; 544 NW2d 752 (1996). Therein, the defendant appealed the circuit court's reinstatement of the charge of obstruction of justice, which this Court reversed. In *Tower*, the defendant was taken to court with another prisoner, Swoffer. The attending deputy was walking by Swoffer with the defendant when the defendant said to Swoffer, "You're making a mistake." Swoffer was scheduled to testify against the defendant's cellmate. The defendant was six to eight inches away from Swoffer when the statement was made. The deputy was able to return the defendant to jail without additional incident. *Id*.

This Court noted that coercion of witnesses was an example of obstruction of justice. The crime was complete with the "attempt through threats and coercion to dissuade a witness from testifying." *Id*. at 320. Whether the attempt to dissuade the witness was successful was immaterial, and words alone were sufficient to constitute the crime. *Id*. Accomplishment of the crime required a specific intent. *Id*. at 320-321. The defendant's statement must be unequivocally referable to the commission of obstruction of justice. Threats of violence are generally sufficient to satisfy the obstruction of justice charge. *Id*. at 321-322.

In *Tower*, this Court held that the statement "You're making a mistake" was insufficient to satisfy the obstruction of justice charge:

> … the statement at issue here, standing alone, is innocuous. There is no evidence that defendant sought out Swoffer, or that any physical gesture showed that the statement was intended as a threat. Finally, the statement contains no reference at all to the fact that Swoffer was scheduled to testify in a criminal proceeding. We agree with the California court that stated that there is no "talismanic requirement that a defendant must say, 'Don't testify' or words tantamount thereto, in order to commit the charged offenses." *Thomas, supra*, p 513. Nevertheless, the totality of the circumstances here does not reasonably support an inference that defendant intended to dissuade Swoffer from testifying. *Coleman, supra*, p 278.
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> Ordinarily, a defendant's intent is a question of fact to be inferred from the circumstances by the trier of fact. *People v Turner*, 213 Mich App 558, 567; 540 NW2d 728 (1995). Here, however, the circumstances are not sufficiently strong in themselves to warrant a cautious person to believe that defendant intended to dissuade Swoffer from testifying at Zimmerman's [defendant's cellmate] preliminary examination. *Coleman, supra*, p 278. Accordingly, the circuit court erred in reinstating the common-law felony of obstruction of justice. *Woods, supra*, p 288.

Defendant contends that, as in *Tower, supra*, the statement, "Don't call the police," was innocuous, he was not armed, and did not have the ability to carry out any purported threat. He also alleges that Tatroe, his brother, and friend, stated that he was "calm" when he entered the home. However, Tatroe characterized defendant as "out of control," but rational, noted that he had to repeatedly be told to leave the home, then had to be guided from the home. Furthermore, after being led out of the back door of the home, defendant returned to the front of the home, entered, and continued to request that the victim not involve the police.

Based on the record, there was sufficient evidence of intent to be presented to and resolved by the jury. *Kieronski, supra; McBride, supra*. Unlike the scenario in *Tower*, defendant continued to repeat the statement, had to be guided from the home, and then returned and committed a second entry without consent. The testimony at trial by defendant, his friends, and his family revealed that defendant was able to control his temper against the victim and her alleged assaults when in the presence of others. However, defendant admitted that he did responsively assault the victim. At trial, defendant testified regarding his trip to the neighbor's house after the victim:

> I saw Brenda was in on the phone. She was in … well that's not true. That's not true. I saw Brenda standing inside the door on the front porch.
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> Q [By defense counsel]. At some point did you enter?
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> A. Yes. I didn't want to come in through that door and make it look like I was trying to confront her as far as there being any hostility.

As previously stated, words are sufficient to satisfy the charge of obstruction of justice, the impact of the words on the victim are immaterial (i.e., whether it caused the victim to fail to appear or testify or file a complaint), and intent presents a question for the trier of fact based on all the facts and circumstances. *Tower, supra; Kieronski, supra*. Under the circumstances, whether the statement was innocuous or designed to prevent the victim from reporting the assault to the police was for the trier of fact that resolved it in favor of obstruction. Defendant's own testimony established that he knew with three men present that he could not enter the home being hostile, and defendant's witnesses testified that he did not retaliate against the victim's abuse in their presence. Defendant acknowledged retaliation when no one else was present. Thus, the issue of defendant's intent was properly left to the jury in light of all of the facts and circumstances.

Defendant's remaining challenges to the trial court's instructions are without merit, see *People v Cooks*, 446 Mich 503, 528-529; 521 NW2d 275 (1994), and the information gave sufficient notice of the nature of the charge against him. See *People v Roupe*, 150 Mich App 469, 476; 389 NW2d 449 (1986).

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello