STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 11, 2005
v DAVID WAYNE MCINTEE, Defendant-Appellant.	No. 254895 Monroe Circuit Court LC No. 03-032915-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DANIEL EUGENE MCINTEE, Defendant-Appellant.	No. 255240 Monroe Circuit Court LC No. 03-032912-FH

Before: Fitzgerald, P.J., and Cooper and Kelly, JJ.

PER CURIAM.

In these consolidated appeals, defendants David Wayne McIntee and Daniel Eugene McIntee appeal as of right from their jury trial convictions of first-degree home invasion,[1] felon in possession of a firearm,[2] and possession of a firearm during the commission of a felony.[3] Defendants were each sentenced as fourth habitual offenders[4] to 260 to 480 months in prison for the first-degree home invasion convictions; 24 to 120 months in prison for the felon in

[1] MCL 750.110a(2).

[2] MCL 750.224f.

[3] MCL 750.227b.

[4] MCL 769.12.

possession of a firearm convictions; and two years in prison for the felony-firearm convictions. We affirm.

I. Facts

Defendants' convictions arose from an attempted burglary at the home of Deborah Jedryczka and Jason Redmond. At the time of the offense, Ms. Jedryczka's two children, Courtney and Blake, were home alone and the doors to the home were locked. The children saw a vehicle pull into the driveway and an unknown man began knocking on the back door of the house. When the children did not answer, someone forced the door open.[5] The children hid under a bed and phoned their grandparents for help. While the children hid, defendants ransacked the home. They laid a comforter on the kitchen floor on which they gathered items from the home, including several guns. The children's grandfather and uncle arrived and apprehended defendants at gunpoint. They ordered defendants to lay on the ground while the children called 911 for assistance. At trial, defendants did not deny being on the complainants' property. They asserted that they were there seeking assistance as their car had overheated. However, defendants denied entering the home.

II. Lesser Included Offense Instruction

Both defendants argue that the trial court improperly refused to instruct the jury on the necessarily included lesser offense of entering without permission.[6] We disagree. We review a defendant's claim of instructional error de novo.[7] Jury instructions are to be reviewed as a whole to determine if error requiring reversal occurred.[8] The determination of whether an offense is a necessarily included lesser offense is a question of law that we also review de novo.[9]

A trial court may only instruct the jury on necessarily included lesser offenses, not cognate lesser offenses.[10] "Necessarily included lesser offenses are offenses in which the elements of the lesser offense are completely subsumed in the greater offense," and, therefore, it

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[5] It is unclear whether one of the defendants was the person who forced the door open. The children saw a second vehicle outside of their home before defendants entered. Blake told a 911 operator that he heard a third man's voice inside the house. While awaiting the arrival of the police, defendants insisted that two other men were involved, and Courtney testified that defendants actually named two other men. However, no one else was arrested in connection with this crime.

[6] MCL 750.115(1).

[7] *People v Hawthorne*, 265 Mich App 47, 50; 692 NW2d 879 (2005).

[8] *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001).

[9] *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003).

[10] *People v Cornell*, 466 Mich 335, 357-359; 646 NW2d 127 (2002); *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002).

would be impossible to commit the greater offense without first committing the lesser.[11] A cognate lesser offense shares several of the same elements with, and is of the same class as, the greater offense, but contains some elements distinct from the greater offense.[12] The Michigan Supreme Court has already determined that entering without permission is a necessarily included lesser offense of first-degree home invasion.[13]

In this case, however, the requested lesser offense instruction was inappropriate as it was not supported by a rational view of the evidence.[14] The element distinguishing first-degree home invasion from entering without permission is whether the defendant possessed the intent to commit "a felony, larceny, or assault" upon entry.[15] The undisputed evidence established that the men who entered the complainants' home intended to commit a larceny. However, defendants denied ever entering the home. Therefore, defendants' intentions upon entering the home were not in dispute and the trial court properly declined to give the requested instruction.[16]

III. Sentencing Issues

A. Docket No. 254895

Defendant, David McIntee, first argues that he is entitled to resentencing, as the trial court increased his minimum sentencing guidelines ranges based on facts not found by the jury in violation of *Blakely v Washington*.[17] However, a majority of the Michigan Supreme Court has decided that *Blakely* does not apply to Michigan's indeterminate sentencing guidelines in which the maximum sentence is set by law.[18]

This defendant also contends that the trial court erred in scoring offense variable (OV) 9 at ten points. We disagree. It is within the trial court's discretion to determine the number of points to be scored as long as there is adequate evidence to support a particular score.[19] Under MCL 777.39, a trial court must score OV 9 at ten points if it determines that two to nine victims

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[11] *Mendoza*, *supra* at 532; *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001).

[12] *Mendoza*, *supra* at 532; *Bearss*, *supra* at 627.

[13] *People v Silver*, 466 Mich 386, 392; 646 NW2d 150 (2002).

[14] *Mendoza*, *supra* at 533; *Cornell*, *supra* at 357.

[15] *Id.*

[16] See *Cornell*, *supra* at 357 n 11.

[17] *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). David specifically challenges the scoring of OV 2, 9, and 16; however, he does not identify the facts upon which the trial court improperly relied.

[18] *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004) (Justices Cavanagh, Weaver, and Young concurred with Justices Taylor and Markman writing for the Court); *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd 472 Mich 881 (2005).

[19] *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

were "placed in danger of injury or loss of life as a victim." The evidence presented established that two children were inside the house and hidden under a bed as defendants ransacked the house. Defendants located several guns inside the home. The two children were clearly placed in danger by defendants' access to these weapons. Accordingly, the trial court properly scored OV 9 at ten points. As David McIntee's minimum sentence is within the appropriate sentencing guidelines range, we must affirm.[20]

B. Docket No. 255240

Daniel McIntee challenges the proportionality of his sentence. A sentence must be proportionate to the offense and the offender's criminal record.[21] Sentences within the appropriate sentencing guidelines range are presumed to be proportionate and we are precluded from considering such challenges, absent an error in scoring the sentencing guidelines or the reliance upon inaccurate information.[22] This defendant's sentences are within the appropriate guidelines ranges for the offenses. He does not challenge the scoring of the guidelines or the accuracy of the information upon which the trial court relied. Accordingly, we must presume that his sentences are proportionate.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Jessica R. Cooper
/s/ Kirsten Frank Kelly

[20] MCL 769.34(10).

[21] *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999).

[22] MCL 796.34(10); *People v Greaux*, 461 Mich 339, 342; 604 NW2d 327 (2000); *People v Pratt*, 254 Mich App 425, 429-430; 656 NW2d 866 (2002).