STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 27, 2008
v	No. 275446 St. Clair Circuit Court
MICHAEL ANTHONY KNIGHT, Defendant-Appellant.	LC No. 06-001453-FH

Before: Servitto, P.J., and Cavanagh and Kelly, JJ.

PER CURIAM.

Defendant was convicted of first-degree home invasion, MCL 750.110a, and was sentenced as a fourth-offense habitual offender, MCL 769.12, to 72 months to 240 months jail, with no credit for time served. Defendant appeals as of right. We affirm.

In May 2006, Annabell Jemison, an elderly blind woman, was getting dressed in her bedroom. At the time, her husband, Gene Jemison, was out running an errand. Mrs. Jemison testified that she heard a thump in the kitchen. Thinking it was her husband, she called out to him but he did not answer. When she heard the thump again, she yelled out once more. Again, there was no answer. Before she could investigate, she heard her husband talking to someone. Hearing a "scuffle," she called back to her husband. When he did not respond, Mrs. Jemison called the operator for help.

Mr. Jemison testified that he entered his house through the garage upon returning from his errand. Once inside the garage, he noticed that his lawn mower and snow blower had been moved to the center of the garage. At this point, he noticed broken glass next to the door leading inside the house. Mr. Jemison then entered the house and saw defendant standing between the stove and freezer. Frozen waffles, sausage, and ice cream that the Jemisons usually stored in the freezer were strewn across the kitchen counter. Mr. Jemison's hammer, usually kept in the garage, was also on the kitchen counter, as was diabetic medication that had also been opened and moved from its usual place. Defendant and Mr. Jemison had an altercation and defendant left the Jemisons' house. Before he left, defendant told Mr. Jemison that he had come to the house to help Mr. Jemison look for "two white boys" that had broken into the Jemison house. Defendant was eventually arrested and charged with first-degree home invasion. Because defendant was on parole for another Michigan offense at the time of the instant offense, he remained in jail pending the outcome of the home invasion charge.

I. Ineffective Assistance of Counsel

The first issue defendant raises on appeal is whether he was denied effective assistance of counsel. Defendant argues that his conviction should be overturned because counsel did not request the court to instruct the jury on the necessarily lesser included offense of breaking and entering without permission. We disagree. Defendant took no steps at trial to develop a testimonial record supporting his claim, so our review is limited to facts existing on the record. See *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). A claim of ineffective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Questions of constitutional law are reviewed de novo. *Id*.[1]

The United States and Michigan Constitutions guarantee defendant effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. Defendant has the burden of showing that "(1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007); see, also, *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). Defendant must overcome a strong presumption that counsel's performance consisted of sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). When assessing counsel's performance, we will "not second-guess matters of strategy or use the benefit of hindsight." *Odom, supra*.

Resolution of this issue is complicated by the ambiguous nature of the colloquy between the court, defense counsel, and defendant on the issue of lesser included jury instructions. After the prosecutor indicated that he was proposing a jury instruction on the elements of first-degree home invasion that blended the alternative theories of (1) breaking and entering and (2) entering without permission, see CJI2d 25.2a and 25.2c, defense counsel stated "Because the proofs came out that way, I think this supports what we heard at trial so far." Counsel then turned his attention to the possibility of other instructions:

> *Defense counsel:* . . . I also want to put on the record, your Honor, that I have asked for the inclusion of lesser included offenses with Mr. Knight. Mr. Knight agrees that this would be pretty much a go for broke, either guilty or not guilty, is that correct, Mr. Knight? Is that correct, Mr. Knight?
>
> *Defendant*: Yeah. I would like other readings besides first degree offense. I would like all the readings to be done to the Jury, first, second and third, if possible.

[1] Because the issue was not presented to the trial court, there are no factual findings to be reviewed for clear error.

> *Court*: In order for them to return a verdict of guilty they have to find each element has been proven beyond a reasonable doubt, including your intent, and that would be instructed by the Court. They could not render a verdict of guilty unless they found that your intent within the premises was for the purpose of committing the crime of larceny. That would be an instruction that will be given to them.

On appeal, defendant argues that defense counsel failed to request an instruction on breaking and entering without permission, deciding instead to pursue a "go for broke" strategy and present a simple "guilty or not guilty" verdict to the jury. This argument is predicated on one reading of the above passage. However, it is also possible to read it as defense counsel having requested lesser included instructions, with defendant concurring in that strategy. Defense counsel indicates that he "asked for the inclusion of lesser included offenses with" defendant. Defendant then responds that he "would like other readings besides first degree offense." There is no contradiction there. It is only when the comment about "this . . . be[ing] pretty much a go for broke" that an apparent contradiction arises. But only if the "this" referred to is the strategy defendant wants to pursue with respect to jury instructions. If, however, "this" refers to the prosecution's proposed jury instruction, then the contradiction is eliminated.

Either way, there is no error requiring reversal. A "go for broke" strategy would not have been an unreasonable course. The decision to request certain jury instructions is a matter of trial strategy. *People v Armstrong*, 124 Mich App 766, 769; 335 NW2d 687 (1983). Instead of mitigating the offense, the "go for broke" strategy seeks an outright acquittal. Had counsel requested the necessarily included lesser offense instruction, the jury could have more easily convicted defendant of some offense. Striving for acquittal does not amount to unsound trial strategy and this Court will not use the benefit of hindsight to find otherwise. *Odom*, *supra*. That counsel's "strategy [later] backfired . . . does not render counsel's actions unsupportable." *People v Currelley*, 99 Mich App 561, 568; 297 NW2d 924 (1980).

If defense counsel did request "the inclusion of lesser included offenses," such a sweeping request was not specific enough to put the issue of an instruction on breaking and entering without permission squarely before the court. *People v Todd*, 186 Mich App 625, 630; 465 NW2d 380 (1990) (observing that "unless a party informs the trial court of the exact lesser included offenses for which instructions are being requested, the issue is not preserved for review"). Nonetheless, a rational review of the evidence does not support such an instruction. See *People v Smith*, 478 Mich 64, 69; 731 NW2d 411 (2007). The Court in *People v Silver*, 466 Mich 386, 392; 646 NW2d 150 (2002) held that first-degree home invasion and breaking and entering without permission "are distinguished by the intent to commit 'a felony, larceny, or assault,' once in the dwelling." Defendant did dispute that he had the requisite intent and he argued it both in opening and closing statements. However, defendant's argument was premised on the items in the home moved (and those not moved) and the assertion that he could not have been the source of the thumps Mrs. Jemison heard in the kitchen. The former observation was the purely speculative proposition that someone with the intent to steal would not have moved foodstuffs onto a kitchen counter but would have began to gather up valuables.

The latter assertion was premised on the approximate times given by Mr. Jemison on when he left home to go to the party store and how long he was gone, his wife's estimation on when her husband left, Mr. Jemison's and a neighbor's estimations on how long it takes to drive to the party store, and Mrs. Jemison's assertion that "it was twelve o'clock when . . . all of this was happening." However, the tenuous time estimates of these witnesses does not support the giving of the cited jury instruction. Moreover, Mr. Jemison testified that he would have seen the reported two "white boys" leaving had they actually been in his house, because "[t]hey couldn't go nowhere but by" him. Given the difficulty in proving an actor's intent, *People v McGhee*, 268 Mich App 600, 623; 709 NW2d 595 (2005) ("Because it is difficult to prove an actor's state of mind, only minimal circumstantial evidence is required."), it is not unusual that the evidence relied on to prove the state of mind can be interpreted in another way. This does not mean, however, that the jury should always be instructed on a lesser included offense where the only difference between the greater and lesser offenses is the intent element. The evidence supporting the lesser offense must be "substantial." *Silver*, *supra* at 388 n 2. The weight and tenuous character of the timing evidence coupled with defendant's explanation of why he was in the house does not rise to the level of substantial evidence that clearly supports the giving of the lesser included instruction. See *id*.

II. Instructional Error

Defendant's second claim on appeal is that the court erred because it did not, despite defendant's request, give the jury instructions for the lesser included offenses of breaking and entering without permission, second-degree home invasion, or third-degree home invasion. Again, we disagree.

"[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002), overruled in part on other grounds by *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003). Courts are not permitted to instruct juries on cognate lesser offenses, only necessarily lesser included offenses. *Cornell*, *supra* at 354. "Cognate offenses share several elements, and are of the same class or category as the greater offense, but the cognate lesser offense has some elements not found in the greater offense." *Mendoza*, *supra* at 532 n 4. Necessarily lesser included offenses, however, are proved with the same facts as the greater offense, but lack an element of the greater offense. *Cornell*, *supra* at 361. In other words, a person cannot "commit the greater offense without first committing the lesser offense." *Id*.

A. Breaking and entering without permission

Breaking and entering without permission is a necessarily lesser included offense of first-degree home invasion. *Silver*, *supra* at 392. As noted above, defense counsel's reference to "lesser included offenses" did not specify that defendant was seeking a lesser included instruction on breaking and entering without permission. And while defendant did request that

the jury be instructed on second- and third-degree home invasion, he also made no such request at trial with respect to breaking and entering without permission. A trial court is not required to instruct the jury sua sponte on lesser offenses. *People v Ramsdell*, 230 Mich App 386, 403; 585 NW2d 1 (1998). Defendant did not ask for the instruction and thus, the court was not required to give it. Defendant's failure to ask for the instruction is not grounds for setting aside a conviction. See MCL 768.29; *People v Hendricks*, 446 Mich 435, 440-441; 521 NW2d 546 (1994). Finally, as noted above, a rational review of the evidence did not support giving this instruction.

B. Second-degree home invasion

Defendant explicitly asked that the jury hear instructions on second-degree home invasion. Second-degree home invasion is (1) an illegal entry (2) with either the intent to commit a felony, a larceny, or an assault inside the dwelling, or the actual commission of a felony, a larceny, or an assault. MCL 750.110a(3). First-degree home invasion is (1) an illegal entry (2) with either the intent to commit a felony, a larceny, or an assault inside the dwelling, or the actual commission of a felony, a larceny, or an assault, and (3) with either the possession of a dangerous weapon or the lawful presence of another person inside the dwelling. MCL 750.110a(2). In order to commit first-degree home invasion, a person must first commit second-degree home invasion. Thus, second-degree home invasion is a necessarily lesser included offense of first-degree home invasion. Defendant requested instructions for second-degree home invasion and the court did not give those instructions. No dispute existed as to a material element not part of the lesser offense, i.e., that someone was lawfully present in the house. The prosecution presented uncontroverted evidence that Mrs. Jemison was inside her house when defendant unlawfully entered the dwelling. For this reason, the court did not err when it did not instruct the jury on second-degree home invasion.

C. Third-degree home invasion

Third-degree home invasion is either an unlawful entry with an intent to commit, or actual commission of, a misdemeanor or an unlawful entry that violates a term of parole. MCL 750.110a(4). The crime of third-degree home invasion includes elements not included in the greater offense of first-degree home invasion. Thus, third-degree home invasion is a cognate of first-degree home invasion. Courts are not permitted to instruct juries on lesser included cognate offenses. *Smith*, *supra* at 73. The court did not err in refusing to instruct the jury as to third-degree home invasion.

For all of the above reasons, the trial court did not err when it instructed the jury only on first-degree home invasion.

III. Double-Jeopardy

Defendant's next claim on appeal is that his sentence violates the double jeopardy clause of the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 15. Specifically, defendant, who was on parole for another Michigan offense at the time of the instant offense, claims he is entitled to credit on the new sentence for time spent in jail between arrest and sentencing in this case.

Defendant argues that the Department of Corrections arbitrarily declined to award defendant any credit for the time he served pending resolution of this case. As this Court recently observed in *People v Filip*, ___ Mich App ___; ___ NW2d ___ (Docket No. 277204, issued March 4, 2008, approved for publication April 22, 2008), slip op p 5:

> MCL 791.238(1) provides that a parolee remains legally in the custody of the Department of Corrections, and that "[p]ending a hearing upon any charge of parole violation, the prisoner shall remain incarcerated." This provision unambiguously declares that parole violators are not eligible to avoid confinement pending resolution of the violation proceedings. Such a period of incarceration thus *constitutes part of the original sentence and in that sense is credited against it*. Moreover, "denied," as used in MCL 769.11b, implies the exercise of discretion, not the recognition of outright ineligibility. For that reason, MCL 769.11b simply does not apply to parole detainees. . . . [Emphasis added.]

Defendant was on parole for other Michigan offenses at the time of the instant offense. Consistent with MCL 791.238(2) and MCL 768.7a(2), defendant cannot receive credit against the instant offense's sentence and that his sentences must run consecutively.

IV. Statutory Violation

Defendant's last argument on appeal is that his sentence violates Michigan law. Specifically, defendant asserts that he is entitled to credit on the minimum sentence of the instant offense for time spent in jail between arrest and sentencing. This Court previously dealt with the issue defendant raises in *People v Stead*, 270 Mich App 550; 716 NW2d 324 (2006). In *Stead*, the defendant alleged that the lower court erred when it did not apply credit to the instant offense. *Id*. at 551. Like the facts in this case, the defendant committed the instant offense while on parole for a Michigan conviction and was subsequently jailed pending the outcome of the new offense. *Id*. In determining how to apply jail credit, the *Stead* Court concluded that the defendant would not be allotted credit on the new offense, but would be entitled to jail credit on the previous sentence for which parole was granted. *Id*. at 551-552.

The only additional argument defendant makes that *Stead* and its progeny do not explicitly address is whether defendant should be allowed credit on the minimum term of the new sentence for time spent in jail between arrest and sentencing. Defendant suggests that such a reading of the consecutive sentencing statute is appropriate because it would not frustrate its purpose and the Legislature has not limited such an application because the statute is silent on the matter. This argument was recently addressed in *Filip*:

> [The defendant] argues that because a parolee has necessarily served his or her minimum sentence the parolee could never get credit for jail incarceration stemming from a new violation. We disagree. MCL 791.238(2) specifically dictates that a parole violator "is liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment." And any remaining portion of the original sentence must be served before a sentence for a second offense may

begin. Thus, just because a parolee has served his or her minimum sentence, it does not follow that the credit must therefore be applied against his new sentence when he or she remains liable to continue serving out the maximum sentence. Moreover, if a defendant is not required to serve additional time on his previous sentence because of the parole violation, then the time served is essentially forfeited. [*Filip, supra*, slip op p 5.]

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly