STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 29, 2009
v	No. 281205 Calhoun Circuit Court
ANTHONY CLIFFORD GATES, a/k/a DEION BURKE, Defendant-Appellant.	LC No. 2007-000145-FH

Before: Owens, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Defendant, Anthony Clifford Gates, was convicted, following a jury trial, of first-degree home invasion, MCL 750.110a(2), and assault (domestic), MCL 750.81(2). He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent sentences of 8 to 30 years' imprisonment for first-degree home invasion and to 120 days in jail for the assault. Defendant appeals as of right. We affirm.

The facts presented at trial established that defendant, at about 3:00 p.m. on January 1, 2007, called the victim, his exgirlfriend, and asked if they could meet to talk. The victim told defendant she could not meet, but that she would call defendant when she returned home. When she returned home at 9:30 p.m., defendant had left three voice messages for her including, "You f--king bitch just call me," and "Please call me back don't you know shut me out. Call me back." The victim spoke with defendant later that night at 11:00 p.m. and told defendant not to come by the house. The victim and defendant previously shared her home for the 3-½ years they were dating, but defendant moved out of the residence and subsequently returned the house keys to the victim when their relationship ended in November 2006. Before the victim went to bed, she heard defendant approach the house in a van. Defendant walked up to the house from the parked van three times, knocking on several doors, requesting to be let inside the home. Using a cordless telephone, the victim called her friend, who called the police and remained on the telephone with the victim during the incident. The victim had hoped defendant "would just get tired of knocking and leave," but instead, defendant entered the home while the victim was upstairs near her bedroom. She "freaked out" and yelled at defendant repeatedly asking him "Why are you here? How did you get in here? Get out!" When defendant climbed the stairs to approach the victim, the victim raised her arm and stretched it out to maneuver to get past

defendant; defendant grabbed her arm and pushed her, causing her to lose her balance and fall onto her bed. He said to the victim "I just want to talk to you." The victim got up from the bed and walked past defendant downstairs; defendant followed her asking the victim "not to call the police on him" as he "just wanted to talk." When the police arrived at the home, they found defendant intoxicated, pleading with the victim, kneeling on the kitchen floor with hands that were bloodied from an unrelated previous incident. The victim had checked all of the doors that evening and was certain that they were locked, so she was unclear at trial how defendant entered the home. There were no broken windows, but a tire iron was found near one of her doors and three witnesses, the responding police officer, the victim and the victim's friend all expressed their belief that the door had been jimmied with the tire iron.

Defendant at trial requested that the lesser offense instruction for misdemeanor entry without owner's permission, MCL 750.115, see also CJI2d 25.4, be given as a necessarily lesser included offense to the charge of first-degree home invasion, MCL 750.110a(2). Defendant asserted that the lesser included offense instruction was proper because there was sufficient evidence that defendant did not intend to assault the victim, pushed the victim in self-defense when they encountered each other at the top of the stairs, and that defendant only wanted to talk to the victim. The defense also asserted that it was unclear if defendant needed to "break and enter" in order to enter the home, suggesting he may have entered with a key. The trial court declined to give the instruction. Defendant argues on appeal that the denial of this lesser offense instruction was an abuse of discretion.

Preserved instructional errors are reviewed de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002). A trial court's determination regarding the applicability of an instruction is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). Nevertheless, the failure to give a requested instruction on a lesser included offense may be harmless error. *Id.* at 140 n 18. The validity of the verdict is presumed, and defendant bears the burden of showing that the error resulted in a miscarriage of justice, in that, after examination of the entire case, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Cornell*, 466 Mich 335, 362-364; 646 NW2d 127 (2002); MCL 769.26; MCR 2.613(A). Questions of statutory interpretation are reviewed de novo. *People v Nyx*, 479 Mich 112, 116; 734 NW2d 548 (2007). When interpreting statutes, our Court's "goal is to give effect to the intent of the Legislature by applying the plain language of the statute." *Id.*

The trial court abused its discretion when it failed to give the requested jury instruction on the lesser included offense of misdemeanor entry without permission, MCL 750.115, and only instructed the jury for the offenses of first-degree home invasion, MCL 750.110a(2), and assault, MCL 750.81(2). Our Supreme Court has recognized that misdemeanor entry without permission is a necessarily lesser included offense of first-degree home invasion, *People v Silver*, 466 Mich 386, 392; 646 NW2d 150 (2002), and that a requested instruction on a necessarily included lesser offense is proper when "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 [the lesser included offense]." *Cornell*, *supra* at 337. Therefore, if either party requests an instruction regarding a necessarily included offense, the court must instruct the jury on the

lesser offense; the "failure to instruct the jury regarding such a necessarily lesser included offense is error requiring reversal, and retrial with a properly instructed jury, if, after reviewing the entire cause, the reviewing court is satisfied that the evidence presented at trial 'clearly' supported the lesser included instruction." *Silver*, *supra* at 388. Proof of an element " 'differentiating the two crimes must be sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense.' " *Cornell, supra* at 352, quoting *United States v Whitaker*, 447 P2d 314 (1971).

The fundamental, distinguishing factual dispute between the application of MCL 750.110a(2) and MCL 750.115 to the facts of this case is specifically whether an assault occurred while defendant was present in the home. Defendant's method of entry into the home was not a distinguishing feature. To convict defendant under the theory at issue pursuant to MCL 750.110a(2), defendant had to have broken and entered the victim's residence.[1] MCL 750.115, as a lesser included offense, can be accomplished by breaking and entering. Whether defendant effected entry without breaking, an alternative for conviction under MCL 750.115, was not a critical distinction between the greater and lesser offenses in this case. The distinct element distinguishing the crimes in this case was whether defendant committed an assault after entering the dwelling. The trial court's denial of the lesser included offense instruction was not proper because the charged greater offense required the jury to find that an assault was committed, which element is not part of the lesser offense, and a rational view of the evidence would have supported the lesser offense. *Cornell, supra.* There was testimony that defendant grabbed the victim's arm only in self-defense, that he entered the residence only to speak with the victim, and the victim's testimony raised some question as to whether there was an assault because she acknowledged that she was the first to "raise a hand" when defendant and the victim encountered each other and that she fell when she lost her balance. We conclude, therefore, that the trial court abused its discretion in denying the requested lesser offense instruction.

In this case, however, the denial of the instruction was harmless error. Harmless error analysis applies to instructional errors involving lesser included offenses. *Gillis, supra* at 140 n 18. Defendant bears the burden of demonstrating that the error resulted in a miscarriage of justice and it must affirmatively appear that it is more probable than not that the error was outcome determinative. *Cornell, supra* at 362-364.

Upon a review of the entire cause, it is clear that the omitted lesser included offense instruction was not outcome determinative, because the jury independently established the disputed fact, specifically whether an assault occurred, when it convicted defendant of domestic assault. On the record, defendant cannot show that it was more probable than not that the error was outcome determinative where the jury unequivocally concluded beyond a reasonable doubt that an assault took place. Defendant has not met his burden of proof to show that a miscarriage

[1] The prosecutor pursued a theory that defendant broke and entered, and while present in the dwelling, committed an assault.

of justice occurred in this case. The denial of the instruction was harmless error and reversal of defendant's convictions is not required. MCL 769.26; MCR 2.613(A).

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Jane E. Markey