STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 9, 2009
v	No. 281502 Kalamazoo Circuit Court
GREGORY WILLIAMS, Defendant-Appellant.	LC No. 07-000891-FH

Before: Bandstra, P.J., and Whitbeck and Shapiro, JJ.

SHAPIRO, J. (*concurring in part and dissenting in part*).

I concur with the majority's reversal of the instant case based upon the jury selection issue. I write separately to respectfully indicate my disagreement with the majority on the need to instruct the jury on the lesser-included offense of entering without owner's permission, MCL 750.115. *People v Silver*, 466 Mich 386, 392; 646 NW2d 150 (2002).

The relevant standard is whether a rational view of the evidence could support a finding that defendant had no intent to commit a larceny when he entered the home. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). The defense presented substantial evidence to support such a finding and, therefore, the instruction was required. Indeed, in this case I believe that the requirement that the instruction be given was heightened by the fact that the *only* element of home invasion disputed by the defendant was his intent to steal. Thus, the decision not to give the instruction was tantamount to a directed verdict of guilty as to first-degree home invasion.

The elements of first degree home invasion require that a person: (1) enter a dwelling without permission; (2) with intent to commit a larceny, or entering, present, or exiting the dwelling without permission, commits a larceny; and (3) commit the above while another person is lawfully present in the dwelling. MCL 750.110a(2). Defendant properly requested CJI2d 25.4, which is the instruction on the lesser-included offense entering without owner's permission. This lesser offense requires proof of entry into the building without permission but does not require a larceny or intent to commit a larceny.

Defendant testified at trial. He admitted that he entered the dwelling without permission thereby satisfying the first element of first-degree home invasion. He also admitted that another

person was lawfully present in the dwelling thereby satisfying the third element.[1] Thus, the entire defense rested upon defendant's claim that he did not commit a larceny in the home, but that he intended only to take empty and abandoned pop bottles for purposes of returning them for a deposit.

The closing arguments demonstrated this as well. In closing arguments, defense counsel admitted that defendant entered the home without permission and that the home was lawfully occupied at the time. In other words, he conceded two of the three elements. Defense counsel told the jury:

> The element that's in dispute in this matter is the second element: that when the defendant entered the building he intended to either commit larceny or when he was present in or leaving the dwelling he committed the offense of larceny.

In chambers, prior to the trial court reading the jury instructions, and again on the record after the reading of the jury instructions, defense counsel objected to the lack of instruction on breaking and entering without owner's permission, MCL 750.115. The trial court concluded that the instruction was inappropriate because even if defendant only took or intended to take abandoned pop bottles, it was still a larceny. The trial court noted: "They went in there with the intent to take something that didn't belong to them. That's stealing. That's larceny." Therefore, the trial court concluded that a rational view of the evidence would not support the lesser-included offense.

Although there does not appear to be a Michigan case on point, the United States Supreme Court has addressed the issue of whether the elements of larceny are met when a person takes what they reasonably believed to be abandoned property. In *Morrissette v United States*, 342 US 246; 72 S Ct 240; 96 L Ed 288 (1952), the Supreme Court reversed a federal defendant's conviction of larceny where the defendant had gathered spent bomb casings on a United States Army practice range. The defendant in *Morrissette* testified that he had not intended to steal because he thought the property was abandoned. *Id.* at 248. However, as in the instant case, the trial court ruled that the fact that defendant thought the property was abandoned was not relevant and refused to instruct the jury that defendant's belief that the property was abandoned was a defense. *Id.* at 248-249. The Supreme Court reversed, stating:

> The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in the freedom of the human will and a consequent ability and duty of the normal individual to chose between good and evil. [*Id.* at 250.]

It noted that "it is not apparent how [the defendant] could have knowingly or intentionally converted property that he did not know could be converted, as would be the case if it was in fact, abandoned or if he truly believed it to be abandoned and unwanted property." *Id.*

[1] He testified that he believed no one was living or present in the home, but the presence of a resident in the home at the time of the break-in establishes this element regardless of the defendant's subjective belief.

at 271. It also emphasized that "[w]here intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury." *Id.* at 274.

The *Morrissette* Court determined that a jury could properly conclude that the defendant was acting with intent to steal and convict him of the charged larceny offense, but that a jury could also properly conclude that the taken items "presented an appearance of unwanted and abandoned junk, and that [there was a] lack of any conscious deprivation of property or intentional injury." *Id.* at 276. It then concluded that the issue is one which must be put to the jury based on proper instructions regardless of the view of the trial court as to the facts: "Had the jury convicted on proper instructions it would be the end of the matter. But juries are not bound by what seems inescapable logic to judges." *Id.* at 276. See also 50 Am Jur 2d, Larceny, § 58, pp 71-72 ("Abandoned property is not the subject of larceny, because property that has been voluntarily abandoned by the owner becomes subject to appropriation by the first taker or finder, who acquires it absolutely").

The proofs in the instant case demonstrate that defendant presented evidence of a reasonable belief that the empty pop bottles were "unwanted and abandoned junk and that [there was a lack] of any conscious deprivation of property." Defendant, as well as his co-participants, testified that they were unemployed and were walking through this student neighborhood collecting abandoned, empty pop bottles that they could return to stores to obtain the 10-cent deposit on each. This is certainly an activity familiar to anyone who lives in a Michigan city or town. Defendant testified that he and his friend had been going through the neighborhood for a couple of hours collecting empties. He described that they were going through garbage cans and knocking on the doors of student housing asking for empties. He testified that one of his friends spotted a "bunch of cans . . . in the windows" of the subject dwelling and that they knocked on the door to ask if they could have the cans, but left when no one answered. Later, another person joined their hunt for empties and told them that the dwelling they had seen earlier was vacant and so they returned to it. Defendant testified that the dwelling did look vacant and that there were "cans and bottles all up on the windowsills and, you know, on the porch. And we thought it was just a vacant . . . dwelling." They again knocked on the door and found that it was unlocked. One of the co-participants looked in and said it looked like no one lived there. Defendant gave the following testimony on cross-examination:

> *Q.* You admit that you had no permission to enter that place; is that correct?
>
> *A.* True.
>
> *Q.* And you admit that when you entered that residence it was your intent to take the pop bottles and cans or cans and bottles?
>
> *A.* That's all. *We wasn't stealing anything.* That was our intention, just to get cans and bottles.
>
> *Q. Well, let's let's [sic] leave it to the jury to determine –*
>
> *A.* Okay.

Q. *-whether or not that was stealing.* But you intended to take those things correct?

A. Well, I mean it make it sound like we're—Our intentions was [sic] that the house was empty and . . . to take cans and bottles. [Emphasis added.]

Defendant's friend and co-participant also testified. He stated that he believed that the building they entered was "an abandoned apartment building.. In cross-examination he testified:

Q. So you knew by going in there that you were basically breaking the law?

A. Hindsight, yes. When it first happened, I was not thinking about someone's house; I'm thinking about an empty building.

Q. OK. Because what you wanted to do was take the bottles and cans?

A. True.

Q. OK. *Did you understand that you were stealing those bottles –*

A. No.

Q. – and cans? You didn't think you were –

A. No.

Q. – Stealing those bottles and cans?

A. No.

* * *

Q. Did you believe that you had a right to take those bottles and cans?

A. Yeah.

Q. You thought you had-

A. Yeah . . . (unintelligible)

Q. - the right to take those bottles and cans?

A. I picked – Yes, I did. [Emphasis added.]

Defendant admitted intending to enter the building without permission, but disputed that he intended to steal anything. Instead, he expressed his intent to take what he thought were abandoned empty cans in an abandoned building. Given this assertion, particularly in the context of the defendant's activity collecting empties throughout the neighborhood, I believe that a

reasonable jury could find that defendant did not have the intent to steal and that this element of home invasion offense was lacking. Accordingly, the jury should have been instructed on entering without permission as an alternative to the primary charge.

/s/ Douglas B. Shapiro