STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID EARL TROMBLEY,

Defendant-Appellant.

UNPUBLISHED
November 22, 2002

No. 233279
Antrim Circuit Court
LC No. 00-003441-FH

Before: Markey, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree home invasion, MCL 7750.110a(3), and sentenced as a second-habitual offender, MCL 769.10, to 71 to 270 months' imprisonment. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant requested that the jury be instructed on the offense of larceny in a building, MCL 750.360, as a cognate lesser included offense of home invasion. The trial court denied the request, finding that while larceny in a building appeared to be a cognate lesser included offense of home invasion, the evidence did not support the giving of an instruction on larceny in a building. The court noted that defendant testified and admitted the elements of home invasion. Defendant now argues that the trial court erred in refusing to give the instructions. We disagree.

A lesser included offense can be either a necessarily included lesser offense or a cognate lesser included offense. *People v James*, 142 Mich App 225, 227; 369 NW2d 216 (1985). All of the elements of a necessarily included lesser offense are contained within the greater offense. It is impossible to commit the greater offense without also committing the necessarily included lesser offense. A cognate lesser included offense is an allied offense of the same class or category as the greater offense. It has some elements in common with the greater offense, but also has some different elements than the greater offense. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001). A requested instruction on a necessarily included lesser offense is properly given if the greater offense requires the jury to find a disputed factual element that is not part of the lesser offense and if the evidence supports it. *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).

The question of whether larceny in a building is a cognate lesser included offense of second-degree home invasion has not been addressed by this Court in a published opinion.

However, it is unnecessary for us to address this issue because defendant admitted all of the elements of second-degree home invasion, the charged offense. If the defendant admits to conduct which, as a matter of law, constitutes the distinguishing element, an instruction on a lesser offense should not be given. *People v Bailey*, 451 Mich 657, 671; 549 NW2d 325, amended 453 Mich 1204 (1996).

A person who breaks and enters a dwelling with the intent to commit a felony, a larceny, or an assault in the dwelling, a person who enters a dwelling without permission with the intent to commit a felony, a larceny, or an assault therein, or a person who breaks and enters a dwelling or enters a dwelling without permission and at any time while entering, present in, or exiting the dwelling commits a felony, a larceny, or an assault, is guilty of second-degree home invasion. MCL 750.110a(3).

In this case, complainant and defendant testified that complainant did not give defendant permission to enter the old portion of the house. Defendant testified that his supervisor told him that the old portion of the house contained beautiful woodwork; however, defendant presented no evidence that his supervisor had the authority to give him permission to enter the old portion of the house. Defendant did not testify that he believed he had permission to enter the old portion of the house. He presented no evidence that would have permitted the jury to infer that he believed he had permission to enter the old portion of the house. Therefore, we hold that the trial court did not err by refusing to instruct the jury on the offense of larceny in a building. *Bailey*, *supra*.

Defendant argues that he is entitled to resentencing because the evidence did not support the scoring of offense variable 19 ["OV 16"] at five points based on the value of the property that complainant later discovered to have been stolen from an off-site storage area. We disagree. A sentencing court has the discretion to determine the scoring of the guidelines provided that evidence in the record adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Once a defendant effectively challenges a factual assertion, the prosecution has the burden of proving that fact by a preponderance of the evidence. *People v Ratkov*, 201 Mich App 123, 125; 505 NW2d 886 (1993).

The record shows that the trial court did not score OV 16 at five points based on a finding that defendant stole items from complainant's off-site storage area. Complainant testified at the sentencing hearing and clearly stated that he was not claiming that defendant stole those items. Five points should be scored for OV 16 if the property stolen had a value of $1,000 to $20,000. MCL 777.46. The trial court found that the evidence established that defendant took the items found to be missing from the armoire and the closet in the old portion of the home, valued at $1,975. Defendant does not challenge the trial court's findings on this issue, and thus has not established that the trial court abused its discretion by scoring OV 16 at five points. Accordingly, defendant is not entitled to resentencing.

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Michael R. Smolenski