STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 21, 2008
v	No. 278574 Wayne Circuit Court
CALVIN MAURICE COOLEY, Defendant-Appellant.	LC No. 06-008668-01

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, felonious assault, MCL 750.82 and felon in possession of a firearm, MCL 750.224f. Defendant was sentenced to 35 to 70 years' imprisonment for the second-degree murder conviction, two years' imprisonment for the felony-firearm conviction, two to four years' imprisonment for the felonious assault conviction and two to five years' imprisonment for the felon in possession of a firearm conviction. Defendant appeals as of right. We affirm defendant's convictions and sentences, but vacate the trial court's order that defendant pay for his court-appointed attorney and remand for proceedings consistent with this opinion.

Defendant first contends that there was insufficient evidence presented at trial to convict him of felon in possession of a firearm. We disagree. In reviewing a challenge based on the sufficiency of the evidence, this Court conducts a de novo review. *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000). A conviction will be affirmed when, viewing the evidence in the light most favorable to the prosecutor, a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

"MCL 750.224f prohibits a person convicted of a felony from possessing a firearm if fewer than three years have passed since the person paid all fines, served all terms of imprisonment, and successfully completed all terms of probation or parole imposed for the violation." *People v Perkins*, 262 Mich App 267, 269; 686 NW2d 237 (2004) (Footnote omitted). Furthermore:

> By the clear and unambiguous terms of the statute, a person convicted of a specified felony is prohibited from possessing a firearm until five years after he

has paid all fines, served all terms of imprisonment, and completed all terms of probation or parole imposed for the offense. MCL 750.224f(2)(a). Moreover, after the five-year period has passed, the convicted felon is prohibited from possessing a firearm until his right to do so has been formally restored under MCL 28.424. MCL 750.224f(2)(b). [*Id*. at 270-271.]

MCL 750.224f governs possession of a firearm by a person convicted of a felony and provides in relevant part:

> (2) A person convicted of a specified felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until all of the following circumstances exist:
>
> (a) The expiration of 5 years after all of the following circumstances exist:
>
> (i) The person has paid all fines imposed for the violation.
>
> (ii) The person has served all terms of imprisonment imposed for the violation.
>
> (iii) The person has successfully completed all conditions of probation or parole imposed for the violation.
>
> (b) The person's right to possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm has been restored pursuant to section 4 of Act No. 372 of the Public Acts of 1927, being section 28.424 of the Michigan Compiled Laws.
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> (6) As used in subsection (2), "specified felony" means a felony in which 1 or more of the following circumstances exist:
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> (i) An element of that felony is the use, attempted use, or threatened use of physical force against the person or property of another, or that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.
>
> (ii) An element of that felony is the unlawful manufacture, possession, importation, exportation, distribution, or dispensing of a controlled substance.
>
> (iii) An element of that felony is the unlawful possession or distribution of a firearm.
>
> (iv) An element of that felony is the unlawful use of an explosive.
>
> (v) The felony is burglary of an occupied dwelling, or breaking and entering an occupied dwelling, or arson.

Defendant does not dispute that he possessed a firearm on the night in question and that he was previously convicted of malicious destruction of property, MCL 750.377a(1). The parties agree that if malicious destruction of property is not a specified felony, defendant was legally permitted to possess a firearm. Conversely, if malicious destruction of property is a specified felony, because defendant made no showing that his right to carry a firearm had been restored, sufficient evidence existed to support defendant's conviction for felon in possession of a firearm. Therefore, this Court must determine whether malicious destruction of property is a specified felony pursuant to MCL 750.224f(6).

Review of MCL 750.224f(6) reveals that the elements of the specified felony must include the actual use, attempted use, or threatened use of physical force against the person or property of another. Alternatively, the crime, by its nature, must include a substantial risk that physical force may be used against a person or property of another. MCL 750.224f(6).[1]

In accordance with MCL 750.377a(1), "[a] person who willfully and maliciously destroys or injures the personal property of another person" is guilty of malicious destruction of property. This Court has previously stated "[t]he malicious destruction of personal property statute proscribes the wilful and malicious destruction or injury of the personal property *of another, by any means."* *People v Walker*, 234 Mich App 299, 312; 593 NW2d 673 (1999) (emphasis in original). The function of a reviewing court resolving disputed interpretations of statutory language is to effectuate the legislative intent. *People v Valentin*, 457 Mich 1, 5; 577 NW2d 73 (1998). When a statute does not define a term, the plain, ordinary meaning of a term may be applied or a dictionary may be consulted. *People v Peals*, 476 Mich 636, 641; 741 NW2d 61 (2007). The definition of the term "destroy" is "to reduce (a thing) to useless fragments or a useless form, as by smashing or burning; injure beyond repair; demolish." Random House Webster's College Dictionary (2000), p 361. The definition of the term "destroy" indicates that the use of some degree of force is applied to achieve the injury to property. That is, a thing is reduced to fragments by smashing, burning, or committing an act that injures an item beyond repair. Accordingly, the malicious destruction of property felony satisfies the requirements of MCL 750.244f(6)(i).[2]

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[1] Defendant relies on hypothetical scenarios to assert that the elements of the offense may be satisfied without the actual use of physical force. The fact that a hypothetical could be posed to cast doubt upon a statute is inappropriate; rather, the analysis centers on the language of the statute itself as applied to the individual defendant. See *People v Derror*, 475 Mich 316, 337; 715 NW2d 822 (2006).

[2] At oral argument, it was represented that the recent decision in *People v Althoff*, ___ Mich App ___; ___ NW2d ___ (2008), Docket No. 274906, issued September 2, 2008, distinguished between an element test and a nature test. Defense counsel asserted that where a statute utilized the nature terminology, the circumstances of the individual offense had to be examined, and therefore, this Court had to remand to the circuit court to determine the nature of the circumstances surrounding the malicious destruction of property conviction. In *Althoff, supra*, the Court of Appeals was directed to determine whether the convicted offense required registration as a sex offender based on the "nature" of the offense and in light of the catchall provision, MCL 28.722(e)(xi). See *People v Althoff*, 477 Mich 961 (2006). Review of MCL

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Next, defendant asserts that the trial court erred in failing to instruct the jury on imperfect self-defense. We disagree. "The determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court." *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002). The abuse of discretion standard recognizes that in certain circumstances there are multiple reasonable and principled outcomes and, so long as the trial court selects one of these outcomes, its ruling will not be disturbed. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

This Court has previously stated that imperfect self-defense can mitigate a second-degree murder to a voluntary manslaughter. *People v Butler*, 193 Mich App 63, 67; 483 NW2d 430 (1992). However, "[t]he doctrine applies only where the defendant would have been entitled to self-defense had he not been the initial aggressor." *Id*. Therefore, in order to determine whether defendant is shielded by the doctrine of imperfect self-defense, this Court must determine whether defendant would have been entitled to self-defense had he not initiated the confrontation with the victim. A defendant is entitled to self-defense if "he honestly and reasonably believe[d] that he [was] in imminent danger of death or great bodily harm and that it [was] necessary for him to exercise deadly force." *People v Riddle*, 467 Mich 116, 119; 649 NW2d 30 (2002). The doctrine "requires that the actor try to avoid the use of deadly force if he can safely and reasonably do so, for example by applying nondeadly force or by utilizing an obvious and safe avenue of retreat." *Id*. An individual can only use the amount of force that is necessary to defend himself. *People v Kemp*, 202 Mich App 318, 322; 508 NW2d 184 (1993). In addition, where the defendant was the initial aggressor, self-defense is not available unless the defendant first withdrew from the encounter and communicated that withdrawal to the victim. *Id*. at 323.

In the present case, there is no evidence that defendant attempted to withdraw from the encounter and communicated the withdrawal to the victim. *Kemp, supra*. Accordingly, the trial court did not abuse its discretion in declining the requested instruction. *Heikkinen, supra*.

Defendant next asserts the prosecution denied him a fair trial during its closing argument. We disagree. Where the alleged misconduct has been properly objected to, this Court analyzes the context of the prosecutor's comments to ascertain whether the defendant was denied a fair and impartial trial. *People v Truong*, 218 Mich App 325, 336; 553 NW2d 692 (1996). Whether

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750.224f(6) reveals that it is not limited to an examination of the nature of the offense alone. Rather, MCL 750.224f(6) examines the elements of the felony *or* the nature. See *People v Warren*, 462 Mich 415, 429 n 24; 615 NW2d 691 (2000) ("Every word of a statute should be given meaning and no word should be treated as surplusage or rendered nugatory."). In light of the fact that the elements of malicious destruction of property include destroying property and the term necessarily requires some degree of force or action to achieve the destruction, we need not examine the individual nature of the offense at issue. Moreover, counsel may not harbor error as an appellate parachute. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). Although this issue arose in the lower court, there is no indication that the defense examined the case file involved in the destruction of property case. Further, defendant did not file an affidavit in the trial court to delineate the circumstances surrounding the conviction. Therefore, the reliance on hypotheticals and the nature test is an insufficient basis to warrant a remand where the plain language of MCL 750.224f(6) provides for examination of the elements of the offense as well as the nature of the offense.

a particular act is misconduct is evaluated on a case-by-case basis, and is evaluated in the context of the evidence and theories of the defense. *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). "The prosecution has wide latitude in arguing the facts and reasonable inferences, and need not confine argument to the blandest possible terms." *Id*. at 66. However, a prosecutor is not permitted to make a factual statement to the jury that is not supported by the evidence. *Id*.

First, defendant contends that the prosecutor improperly commented on his failure to testify when the prosecutor asked why Johnny never heard back from defendant despite defendant's reassurance that he would call. As described above, this Court has stated that a prosecutor is granted wide latitude in arguing the facts and reasonable inferences in a case. The record in the present case does not support defendant's contention that the prosecutor was commenting on his decision to not testify. Rather, when the prosecutor stated that there was never an explanation for why Johnny did not get a call back from defendant or why defendant left his wife and child in Michigan to go to Toledo, it seemed that he was merely alluding to defendant's decision to flee from authorities rather than turn himself in. Furthermore, the prosecutor never stated that defendant himself was required to explain the reason for not calling Johnny. The prosecutor merely stated that nobody provided an explanation for the failure to call. Defendant cannot show that he was prejudiced by the comment as his failure to return a phone call was likely not what persuaded the jury of his guilt. Furthermore, the trial court instructed the jury that defendant's decision to not testify could not be considered an indication of his guilt, nor was his decision to flee necessarily an indication of guilt. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Defendant has not established that the jurors were unable to follow the instructions.

Next, defendant asserts that the prosecution denied him a fair trial when it argued that the reason the police initially sought Corey Kimson for Brown's murder was because they were led on a wild goose chase by Dave Johnson. Specifically, the prosecutor stated, "if you look at what Mr. [Andra] Dailey describes Mr. Johnson's doing, it's not coincidence that they send the police on a wild goose chase." Defendant implies that Clay was the initial source of Kimson's name and that the prosecution's argument improperly bolstered Clay's credibility. The prosecutor's comment was likely too ambiguous to truly be prejudicial to defendant. First, Dailey did not describe Johnson as doing anything that could be considered unusual. Furthermore, after implying that Johnson was doing something unusual, the prosecutor stated that it was not surprising that "they" led the police on a wild goose chase. It is unclear whom the prosecutor was referring to as "they." Additionally, it is not entirely clear that the prosecution was referring to the initial focus on Kimson when it stated the police were on a wild goose chase. The statement challenged by defendant was ambiguous, poorly structured and did not coherently fit with the rest of the prosecution's argument. There is no evidence that it had the effect of bolstering Clay's credibility or that it denied defendant a fair trial.

Finally, defendant asserts that the trial court erred in ordering him to pay for his court-appointed attorney without considering his financial circumstances. We agree. This Court reviews unpreserved claims of error for plain error affecting the substantial rights of the defendant. *People v Carines*, 460 Mich 750, 763, 597 NW2d 130 (1999).

A defendant may be required to reimburse the county for the cost of a court-appointed attorney, but the court must order a fee that bears a relationship to the defendant's foreseeable

ability to pay. *People v Dunbar*, 264 Mich App 240, 251; 254-255; 690 NW2d 476 (2004). A trial court's pronouncement of the costs without consideration of the defendant's present and future ability to pay is insufficient and warrants a remand to the trial court. *Id*. at 255. The sentencing court need not conduct a formal evidentiary hearing. *People v DeJesus*, 477 Mich 996, 997; 725 NW2d 669 (2007).[3] The record does not indicate any inquiry into defendant's ability to pay. Therefore, we vacate the portion of the judgment of sentence requiring defendant to pay attorney fees and remand for reconsideration in light of defendant's present and future ability to pay the attorney fees.[4]

Defendant's convictions and sentences are affirmed. The trial court's order regarding attorney fees is vacated, and this matter is remanded for a determination regarding defendant's ability to pay.

/s/ Stephen L. Borrello
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood

[3] Although this holding was rendered in an order, not an opinion, an order of the Supreme Court is binding precedent when the rationale can be understood. See *People v Edgett*, 220 Mich App 686, 693 n 6; 560 NW2d 360 (1996).

[4] The prosecution submits that *Dunbar* is no longer valid law. However, the issue of the validity of *Dunbar* and its constitutional underpinnings was briefed and argued before the Supreme Court, *People v Carter*, 480 Mich 938; 741 NW2d 23 (2007), but the Supreme Court declined the opportunity to invalidate the decision. *People v Carter*, 480 Mich 1063; 743 NW2d 918 (2008).