STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRELL WILDER,

Defendant-Appellant.

UNPUBLISHED
October 21, 2008

No. 278737
Wayne Circuit Court
LC No. 07-004454-01

Before: Meter, P.J., and Talbot and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for third-degree home invasion, MCL 750.110a(4), and possession of a firearm during the commission of felony (felony-firearm), MCL 750.227b. Defendant was sentenced to seven months to five years' imprisonment for the third-degree home invasion conviction and two years' imprisonment for the felony-firearm conviction. We vacate defendant's convictions and sentences.

Defendant appeared, uninvited, at the victim's home in the early morning hours of December 30, 2006.[1] At the time, the victim was at home with two of her minor grandchildren. After the victim opened the door, defendant pushed past her, entered the home and removed her television set. Defendant indicated that he was taking the television because of a dispute with the victim's son. The victim protested and defendant lifted his shirt displaying a gun in his waistband. Defendant removed the television from the home and carried it down the street to an awaiting vehicle.

Defendant was charged as a third habitual offender, MCL 769.11, with first-degree home invasion, MCL 750.110a(2), felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b.[2] Although not charged, at the conclusion of the bench trial, Judge Leonard Townsend convicted defendant of third-degree home invasion, MCL 750,110a(4), in addition to felony-firearm, MCL 750.227b. The trial court summarized its findings, stating in relevant part:

[1] Defendant is a cousin of the victim's son.

[2] The charge for felon in possession of a firearm was dismissed before trial.

> Now the Court heard the testimony of the complainant, and the children who were at the house. And there was no question about who the person was.
>
> They never tried to embellish their testimony and said that he broke into the house. They never said he pulled a gun, just said that he pulled up his shirt.
>
> They identified him because everybody knew the man, so there isn't much of an argument about identification.
>
> I think the People have proven beyond a reasonable doubt that [sic] the crime of Home Invasion Third Degree. That he entered without permission; he walked right past her, and took property out.
>
> And when there was any suggestion of resistance, he pulled up his shirt and showed that he was armed. And that was that.
>
> So, the People have to show that the defendant entered without permission, for the purpose of committing a misdemeanor, taking property, or committing a felony.
>
> That his body did go in, so he entered without the owner's permission.
>
> * * *
>
> Home Invasion Third Degree . . . . That's a felony. And Possession of a Firearm.

On appeal, defendant asserts a violation of his right to due process because the trial court convicted him of third-degree home invasion, a cognate lesser offense of the charged crime of first-degree home invasion. Defendant also asserts violation of due process by the trial court's issuance of an inconsistent verdict by finding him guilty of felony-firearm but acquitting him of the underlying predicate felony of first-degree home invasion.

"Constitutional questions . . . are reviewed de novo. The effect of an unpreserved claim of constitutional error is reviewed for plain error affecting substantial rights. To avoid forfeiture under the plain error rule, a defendant must show actual prejudice. Under the plain error rule, reversal is only warranted if the defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *People v Pipes*, 475 Mich 267, 295; 715 NW2d 290 (2006) (footnotes omitted). Whether third-degree home invasion is an inferior offense of first-degree home invasion is a question of law that this Court reviews de novo. *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003).

We first address defendant's conviction for the uncharged crime of third-degree home invasion to determine whether it comprises a necessarily included lesser offense or a cognate lesser offense. A necessarily included lesser offense is defined as one which must be committed as part of the greater offense. All of the elements of the lesser offense are contained in the greater offense and it would be impossible to commit the greater offense without first having committed the lesser offense. *Mendoza, supra* at 532; *People v Bearss*, 463 Mich 623, 627; 625

NW2d 10 (2001); *People v Reese*, 242 Mich App 626, 629-630; 619 NW2d 708 (2000). Conversely, a cognate lesser offense is one that shares some common elements with and is of the same class as the greater offense, but also contains additional elements that are not found in the greater offense. *People v Perry*, 460 Mich 55, 61; 594 NW2d 477 (1999). MCL 768.32(1)[3] only permits consideration of offenses that are inferior to the greater charged offense. *Reese, supra* at 446. Inferior offenses are only those that are necessarily included in the greater offense. *Mendoza, supra* at 532-533.

MCL 750.110a(2) defines the elements of first-degree home invasion as:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
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> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling.

In contrast, MCL 750.110a(4) defines a third-degree home invasion as involving a person engaging in "either of the following":

> (a) Breaks and enters a dwelling with intent to commit a misdemeanor in the dwelling, enters a dwelling without permission with intent to commit a misdemeanor in the dwelling, or breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a misdemeanor.
>
> (b) Breaks and enters a dwelling or enters a dwelling without permission and, at any time while the person is entering, present in, or existing the dwelling, violates any of the following ordered to protect a named person or persons:
>
> (*i*) A probation term or condition.
>
> (*ii*) A parole term or condition.

[3] MCL 768.32(1) states, in relevant part: "[U]pon indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense inferior to that charged in the indictment, or of an attempt to commit that offense."

(*iii*) A personal protection order term or condition.

(*iv*) A bond or bail condition or any condition of pretrial release.

Conviction under either subsection of the statute constitutes a felony. MCL 750.110a(5), (7).

We recognize that a larceny may constitute either a felony or a misdemeanor, MCL 750.356, depending on the value of the items or property wrongfully taken. MCL 750.356, provides, in relevant part:

> (1) A person who commits larceny by stealing any of the following property of another is guilty of a crime as provided in this section:
>
> (a) Money, goods, or chattels.
>
> (b) A bank note, bank bill, bond, promissory note, due bill, bill of exchange or other bill, draft, order, or certificate.
>
> (c) A book of accounts for or concerning money or goods due, to become due, or to be delivered.
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> (d) A deed or writing containing a conveyance of land or other valuable contract in force.
>
> (e) A receipt, release, or defeasance.
>
> (f) A writ, process, or public record.

Other subsections of MCL 750.356 provide value ranges for the stolen property to categorize and distinguish what constitutes a misdemeanor from a felony. The statute detailing first-degree home invasion does not define the term "larceny," thereby permitting these offenses to be predicated on the commission of either a felony or misdemeanor larceny. *People v Sands*, 261 Mich App 158, 163; 680 NW2d 500 (2004). Because neither the prosecutor, nor defendant's counsel, proffered evidence during trial regarding the value of the property removed from the victim's home, this Court cannot discern defendant's intent when he entered the home nor ascertain whether the larceny committed by defendant constitutes a misdemeanor. However, for the purpose of first-degree home invasion, the value of the item stolen is irrelevant because MCL 750.110a(2) requires only the commission or intent to commit a larceny and does not differentiate whether the value of the item constitutes a misdemeanor or a felony.

A trial court may only consider a lesser offense if it is a necessarily included lesser offense. MCL 768.32. We find that third-degree home invasion does not comprise a necessarily lesser-included offense of first-degree home invasion. Third-degree home invasion is predicated on the commission or intent to commit a misdemeanor, an element that is distinct from the elements for the higher offense. Although, under certain factual circumstances, the same underlying offense of larceny may comprise either a felony or a misdemeanor, third-degree home invasion maintains an element that is different from the offense of first-degree home invasion. As a result, third-degree home invasion is a cognate lesser offense of first-degree home invasion and the trial court could not convict defendant for this crime.

We note that the trial court made very specific findings of fact. The trial court determined that: (1) defendant entered without the owner's permission, (2) individuals were present in the home when defendant entered (3) defendant was armed, and (4) defendant committed a larceny. The trial court's findings clearly supported a conviction for the charged offense of first-degree home invasion. Consequently, it is difficult for this Court to comprehend how the trial court could make such definitive and affirmative factual determinations regarding defendant's possession and display of a weapon when taking the victim's television and convict defendant of felony-firearm yet ignore the existence of that same weapon to acquit defendant of first-degree home invasion. "[T]rial courts in bench trials are both required to render logical verdicts and precluded from exercising a jury's capacity for lenity." *People v Hutchinson,* 224 Mich App 603, 605; 569 NW2d 858 (1997). When judges sit as finders of fact, they are not permitted to reach inconsistent verdicts. *People v Vaughn,* 409 Mich 463, 466; 295 NW2d 354 (1980). Clearly, the trial court's acquittal of defendant on the charge of first-degree home invasion and concurrent conviction for felony-firearm constitutes an inconsistent verdict, mandating reversal. *People v Smith*, 231 Mich App 50, 52; 585 NW2d 755 (1998). Because the trial court's error requires our vacating the substantive crime underlying the felony-firearm conviction, we have no alternative but to also vacate defendant's conviction for felony-firearm. *People v Burgess,* 419 Mich 305, 310-312; 353 NW2d 444 (1984).

As noted, *supra*, in our discussion of the standard of review applicable to this appeal, the plain error rule requires reversal only if the "defendant is actually innocent or the error seriously undermined the fairness, integrity, or public reputation of the trial." *Pipes, supra* at 295. Although we do not harbor any doubts regarding defendant's guilt of the charged offense, we are compelled to vacate defendant's convictions because Judge Townsend's actions have served to undermine the integrity and reputation of the trial court.

The only explanation for the trial court's ruling in this matter is Judge Townsend's impermissible use of a "waiver break." *People v Ellis,* 468 Mich 25, 27; 658 NW2d 142 (2003). Our Supreme Court has clearly determined the impropriety of the practice of using "waiver breaks" by trial courts, stating:

> A decision to drop or plea bargain charges is one that lies with one or both of the parties, not the court. Regardless of any benefit that may be realized by the trial court because of a party's strategic decision, such as the expedited docket management resulting from a defendant waiving his right to a jury, it is not within the power of the judicial branch to dismiss charges or acquit a defendant on charges that are supported by the case presented by the prosecutor.
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> * * *
>
> As a result, a trial judge that rewards a defendant for waiving a jury trial by "finding" him not guilty of a charge for which an acquittal is inconsistent with the court's factual findings cannot be corrected on appeal. [*Id.* at 27-28 (citations omitted).]

Our Supreme Court went further and definitively stated, "this judicial practice violates the law and a trial judge's ethical obligations," *id.* at 28, and, thus, constitutes "a ground for referral to

the Judicial Tenure Commission." *Id.* at 26. By way of this opinion, we refer Judge Townsend's conduct for such a review.

We vacate defendant's convictions and sentences. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Christopher M. Murray