STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 22, 2011
v SHANE LEE DOLITTLE, Defendant-Appellant.	No. 298235 Wayne Circuit Court LC No. 09-029474-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v BRIAN MARK EUASHKA, Defendant-Appellant.	No. 298236 Wayne Circuit Court LC No. 09-029474-FH

Before: MURPHY, C.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

Following a joint jury trial, Shane Dolittle and Brian Euashka were each convicted of arson of a dwelling house[1], mutilation of a dead body[2], and tampering with evidence.[3] Euashka and Dolittle were sentenced to concurrent prison terms of 10 to 20 years for the arson conviction, and one to ten years each for the mutilation and tampering convictions. We affirm the convictions for mutilation of a dead body and tampering with evidence, but reverse their

[1] MCL 750.72.

[2] MCL 750.160.

[3] MCL 750.483a(6)(b).

convictions for arson of a dwelling house[4] and remand for entry of convictions for the lesser offense of burning other real property[5] and for resentencing.

The arson convictions arise from a commercial dumpster fire in an alley between a commercial building located on Warren Avenue and a residence on Mettetal Street in Detroit during the early morning hours of November 10, 2009. Inside the dumpster was the dead body of Shanita Brown, who had previously died from blunt force trauma to the head. Brown was not alive when her body was burned, and there were no allegations that Dolittle or Euashka killed her. Although the dumpster was located near a residential structure, there was no evidence that the structure was damaged by the fire, but there was evidence that some overhanging tree branches were charred. The prosecution's theory at trial was that Dolittle and Euashka set fire to the dumpster at the request of Dolittle's uncle in exchange for cocaine. Dolittle and Euashka denied any involvement or participation in the arson.

I. SUFFICIENCY OF THE EVIDENCE

Dolittle first argues that there was insufficient evidence to support his arson conviction because there was no evidence that any dwelling, or any structure within the curtilage of a dwelling, was burned. The prosecutor concedes error on this point. In ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court "must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt."[6]

The purpose of the statutory provision[7] is to prevent the burning of dwellings.[8] The elements of arson of a dwelling house are that (1) the defendant willfully and maliciously burned a dwelling house, a building within the curtilage of the dwelling house, or the contents of the dwelling house or building, and (2) when the defendant burned the dwelling house, he intended to burn the house or any of its contents, or intentionally committed an act that created a very high risk of burning the house or its contents and that, while committing the act, the defendant knew of the risk and disregarded it.[9]

The prosecutor concedes, and we agree, that Dolittle's arson conviction[10] cannot stand because there was no evidence that a dwelling, or a structure within the curtilage of a dwelling,

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[4] MCL 750.72.

[5] MCL 750.73.

[6] *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

[7] MCL 750.72.

[8] *People v Ayers*, 213 Mich App 708, 721; 540 NW2d 791 (1995).

[9] MCL 750.72; *People v Barber*, 255 Mich App 288, 294-295; 659 NW2d 674 (2003).

[10] MCL 750.72.

was burned. Rather, only tree branches overhanging the dumpster were charred. We also agree with the prosecutor that, under the circumstances, the appropriate remedy is to vacate Doolittle's arson conviction[11] and remand for entry of conviction on the lesser offense of burning other real property.[12] In this case, at the request of Dolittle and Euashka, the jury was instructed on burning of other real property as a lesser offense of arson of a dwelling house, but convicted Dolittle and Euashka of the higher offense. Although we conclude that the arson convictions for the higher offense cannot stand because there was insufficient evidence to establish the element that distinguishes the higher offense from the lesser offense, the jury's verdict reflects that it necessarily found that all the elements of the lesser offense were established beyond a reasonable doubt. Accordingly, we remand for entry of a conviction on the lesser offense of burning other real property. Although Euashka has not raised this issue on appeal, we concur with the prosecutor that it is appropriate to extend this same relief to Euashka.[13] Because entry of the lesser conviction will also affect the sentencing guidelines, Dolittle and Euashka are also entitled to resentencing.

II. ADMISSION OF EUASHKA'S CUSTODIAL STATEMENT

Euashka also contends that the trial court erred in admitting his custodial statement because it was given while he was fatigued and intoxicated and, accordingly, was not knowingly, intelligently, and voluntarily made.

Statements of a defendant made during a custodial interrogation are inadmissible unless the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights.[14] Whether a defendant's statement was knowing, intelligent, and voluntary comprises a question of law that a court evaluates under the totality of the circumstances.[15] "[D]eference is given to the trial court's assessment of the weight of the evidence and the credibility of the witnesses, and the trial court's findings [of fact] will not be disturbed unless they are clearly erroneous."[16] A

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[11] *Id.*

[12] MCL 750.73. See *People v Williams*, 475 Mich 101, 104-105; 715 NW2d 24 (2006), citing *People v Randolph*, 466 Mich 532, 553; 648 NW2d 164 (2002), aff'd in part, rev'd in part 466 Mich 532 (2002). The crime of burning other real property under MCL 750.73 is a necessary lesser included offense of the crime of burning a dwelling under MCL 750.72. *People v Evans*, 288 Mich App 410, 416; 794 NW2d 848 (2010), lv gtd 488 Mich 924 (2010); citing *People v Antonelli (On Rehearing)*, 66 Mich App 138; 238 NW2d 551 (1975).

[13] See MCR 7.216(A)(7).

[14] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966); *People v Abraham*, 234 Mich App 640, 644; 599 NW2d 736 (1999).

[15] *People v Cheatham*, 453 Mich 1, 27, 43-44; 551 NW2d 355 (1996).

[16] *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). See also, *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000).

finding is clearly erroneous if it leaves the reviewing court "with a definite and firm conviction that a mistake has been made."[17]

Whether a statement was voluntary "is determined by examining police conduct," while whether it was made knowingly and intelligently depends in part upon the defendant's "capacity to understand the warnings given."[18] Our Supreme Court set forth the following nonexhaustive list of factors that a trial court should consider in determining whether a statement is voluntary:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.[19]

"No single factor is determinative. . . ."[20]

Euashka did not testify about the circumstances surrounding his statement. Only the officer who conducted the interview provided testimony on this subject. The trial court considered the officer's testimony and determined that it was credible. Euashka has not demonstrated that the trial court's finding of credibility is clearly erroneous. This Court will defer to the "trial court's superior ability to view the evidence and witnesses."[21]

The record supports the trial court's finding that Euashka understood his rights and knowingly and intelligently waived them. Although Euashka "dozed off" intermittently, he was awake as the officer read through the constitutional rights form. Euashka read the rights form back to the officer "very clearly" and "didn't stumble over any words." Euashka's statement that he had "been through this a million times" further supports that he understood his rights. Throughout the brief interview, Euashka appeared to fully comprehend the officer's questions, consistently gave responsive answers to the questions, and never expressed any misunderstanding or unwillingness to continue the interview. Euashka provided his address, telephone number, date of birth, and part of his social security number. When the officer questioned him about the circumstances of the incident, he coherently articulated an account of

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[17] *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

[18] *Howard*, 226 Mich App at 538.

[19] *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).

[20] *People v Fike*, 228 Mich App 178, 181-182; 577 NW2d 903 (1998).

[21] *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997).

his and Dolittle's actions at the time of the fire. Viewing the totality of the circumstances, the trial court did not clearly err in finding that Euashka knowingly and intelligently waived his Fifth Amendment rights.

We find that Euashka's statement was voluntary as the interview was conducted in the afternoon on the day of the fire and lasted no more than 30 minutes. There is no evidence that Euashka was threatened, abused, or promised anything in exchange for his statement. There is likewise no evidence that he was deprived of food or drink. Although Euashka lacked sleep and stated that he had used crack cocaine, there is no indication that he was fatigued or under the influence of drugs to a degree that he was not operating of his own free will. The record shows that Euashka was 53 years of age and could read. There is no indication that he had any learning disabilities or psychological problems. Also, the record shows that he had previous experience with the police and the criminal process. Viewing the totality of the circumstances, we are not convinced that a mistake occurred.

III. THE JURY'S REQUEST TO REVIEW TESTIMONY

Euashka also argues that the trial court erred by refusing to grant the jury's request to review testimony, and that the trial court's instruction in response to the jury's request requires reversal. This Court reviews a trial court's decision regarding a jury's request to review testimony for an abuse of discretion.[22] Because Euashka did not object to the trial court's responsive jury instruction the issue is not preserved and our review of the instructional issue is limited to plain error affecting Euashka's substantial rights.[23]

A defendant does not have an absolute right to have a jury review testimony.[24] A trial court is required to "exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request."[25] The court rule also provides that the court may order the jury to continue deliberations without the requested testimony, "so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed."[26]

The trial court did not abuse its discretion by initially refusing to provide the requested testimony. The jury's request was unreasonable because it was made only a short time after it had began deliberations. The trial court's instruction in response to the jury's request was not coercive, and it did not foreclose the possibility that the testimony could be reviewed later. The court specifically informed the jury that it would order the court reporter to prepare the testimony if, after further discussions, the jury still had serious questions regarding the identified testimony. Because the request was made on a Monday, it was not unreasonable to explain that the

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[22] *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996).

[23] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[24] *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000).

[25] MCR 6.414(J).

[26] *Id.*

testimony could probably be provided by Wednesday, if needed. We disagree with Euashka's contention that the fact that the jury returned its verdict approximately an hour later is evidence that it was coerced into reaching a verdict. It is just as likely that, after further deliberations, the jury determined that it was able to reach a verdict without the need to review the testimony. Accordingly, the trial court's jury instruction was not plain error.

IV. SCORING OF OFFENSE VARIABLE 3

Dolittle and Euashka further argue that resentencing is required because the trial court erroneously scored 100 points for offense variable (OV) 3. Although we have already concluded that resentencing is necessary, we shall address this issue because it is likely to arise at resentencing.

"A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score."[27] A scoring decision "for which there is any evidence in support will be upheld."[28] "The proper interpretation and application of the legislative sentencing guidelines are questions of law, which this Court reviews de novo."[29]

Offense variable (OV) 3 considers "physical injury to a victim" and assesses points depending on the degree of injury suffered by "a victim." As used in OV 3, the term "victim" has been defined to mean "any person harmed by the criminal actions of the charged party."[30] The instructions pertaining to the assessment of points for this variable provide, in relevant part:

> Score offense variable 3 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) A victim was killed 100 . . . points
>
> * * *
>
> (2) All of the following apply to scoring offense variable 3:
>
> * * *

[27] *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

[28] *Id.* (citation omitted).

[29] *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

[30] *People v Albers*, 258 Mich App 578, 593; 672 NW2d 336 (2003).

(b) Score 100 points if death results from the commission of a crime and homicide is not the sentencing offense.[31]

In scoring any offense variable, "[t]he sentencing offense determines which offense variables are to be scored in the first place, and then the appropriate offense variables are generally to be scored on the basis of the sentencing offense."[32] This means that "[o]ffense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise."[33] "[T]he general rule is that the relevant factors are those relating to the offense being scored . . . ."[34]

Consistent with case law, the scoring of OV 3 must be confined to the circumstances of defendants' arson convictions.[35] There was no evidence that a victim was killed during the course of Dolittle's and Euashka's arson offense. The evidence clearly established that at the time the Euashka and Dolittle set fire to the dumpster, Brown was already deceased because of having suffered a blunt force trauma to the head at the hands of someone other than Dolittle or Euashka. Even if Brown might properly be considered a "victim," OV 3 mandates that the death "results from" the Dolittle's and Euashka's criminal actions and, here, no factual causation exists.[36] The record reflects that the actions of Dolittle and Euashka did not cause, facilitate, or contribute to Brown's death. For these reasons, the evidence does not support a conclusion that Brown's death "result[ed] from" the criminal actions of Dolittle and Euashka. Accordingly, the trial court abused its discretion in scoring100 points for OV 3.

V. CONCLUSION

Although we affirm the convictions of Dolittle and Euashka for mutilation of a dead body and tampering with evidence, we reverse their convictions for arson of a dwelling house.[37] We remand for entry of convictions for Dolittle and Euashka for the lesser offense of burning other real property[38] and for resentencing.

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[31] MCL 777.33(1), (2).

[32] *People v McGraw*, 484 Mich 120, 124; 771 NW2d 655 (2009), quoting *People v Sargent*, 481 Mich 346, 348; 750 NW2d 161 (2008).

[33] *McGraw*, 484 Mich at 135.

[34] *Id.* at 125, quoting *Sargent*, 481 Mich at 349.

[35] See *McGraw*, 484 Mich at 124.

[36] See *People v Wood*, 276 Mich App 669, 672; 741 NW2d 574 (2007).

[37] MCL 750.72.

[38] MCL 750.73.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot