

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY WILLIAMS,

Defendant-Appellant.

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UNPUBLISHED

June 9, 2009

No. 281502

Kalamazoo Circuit Court

LC No. 07-000891-FH

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

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 705.110a(2), stemming from an illegal entry into a home to collect empty pop and beer cans. He appeals as of right. We reverse and remand for a new trial.

On appeal, defendant claims the trial court improperly denied (1) his challenge for cause involving one of the potential jurors, and (2) his request for a jury instruction on the necessarily lesser-included offense of entering a dwelling without the owner's permission. MCL 750.115(1). While the second claim is without merit, we agree with defendant on the first issue.

Defense counsel preserved Issue I for appellate review by challenging juror G<sup>1</sup> for cause following his voir dire. After the trial court denied the challenge, defense counsel made a record for appeal: "[W]e were out of preempts . . . [w]e're not satisfied with the jury. We'd like to preserve any objections we may have or challenges that we had for cause just for the record."

This Court reviews a trial court's ruling on a challenge for cause for an abuse of discretion. *Poet v Traverse City Osteopathic Hosp*, 433 Mich 228, 251; 445 NW2d 115 (1989); *People v Williams*, 241 Mich App 519, 521; 616 NW2d 710 (2000); *People v Roupe*, 150 Mich App 469, 474; 389 NW2d 449 (1986).

The trial court conducted an open jury selection where all the potential jurors were present together. During voir dire, seven potential jurors revealed they had been victims of a breaking and entering; six had had their homes invaded, and one had had his business broken into four times. Six of these potential jurors expressed doubt about their ability to be fair and

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<sup>1</sup> The initials rather than the full names of the jurors will be used to protect their privacy.

impartial. Defense counsel challenged five of these six potential jurors for cause; the trial court granted two of these challenges. Defense counsel also used three peremptory challenges to dismiss two of the potential jurors he unsuccessfully challenged for cause, and the remaining potential juror of this group that was not challenged for cause. The two remaining people of the above seven were seated on the jury, including juror G. Defendant used his two other peremptory challenges for other jurors.

Juror G described the break-in of his home in 1981 as follows: “It was a very painful and scary experience for my wife and I back in ‘81, and I still remember those [sic] like it was yesterday.” During voir dire, juror G greatly vacillated in assessing his ability to be fair and impartial, depending on who was questioning him and how the questions were phrased. He initially expressed doubt to the prosecutor about his ability to put aside his personal experience. A few moments later, however, juror G acknowledged to the prosecutor that he would be able to follow the judge’s instructions and apply the law to the facts, be able to find defendant not guilty if the prosecution did not meet its burden of proof, and not just automatically find defendant guilty regardless of the evidence. However, when defense counsel questioned juror G, he again expressed uncertainty about his ability to be fair:

[Q.] . . . Do you think you can be fair and impartial in this matter?

[A.] I can’t honestly say that I could be.

\* \* \*

[Q.] But you’ve been forthright enough to let us know that you have some concerns about that.

[A.] I have some concerns.

[Q.] If you were sitting where Mr. Williams is, would you feel comfortable with Mr. [G] sitting there?

[A.] No, I would not.

[Q.] Okay. And as Mr. [G], you well know your background—You haven’t heard evidence.—you feel there is a possibility that you could substitute experience—evidence, and it might interfere with what might come out in this trial.

[A.] I can honestly say it might interfere.

At this point, defense counsel challenged juror G for cause, the prosecutor objected, and the trial court asked a few of its own questions. Juror G seemed to change his mind again:

[Q.] Mr. [G], is there something about the situation that you and your wife went through that would cause you some discomfort here or-

[A.] No, I had an injured pet, also, and he eventually died. I just thought we were very violated. Our personal lives were very violated. As far as I know, they never caught the people that did it. So, it's just like the other people you've interviewed, it was just a personal experience I'll never forget.

[Q.] Is that going to have you—or cause you some—to have some prejudice against Mr. Williams in this case?

[A.] No.

[Q.] You would be able to sit and listen to all of the testimony that was presented and base your decision on the—on the evidence that was presented?

(No audible response)

Yes, you'd be able to do that?

[A.] Yes.

The trial court then denied defendant's challenge for cause.

A criminal defendant has a constitutional right to be tried by a fair and impartial jury. US Const, Am VI; Const 1963, art 1, § 20. *People v Miller*, 482 Mich 540; 759 NW2d 850 (2008). MCR 6.412(D) governs challenges for cause in a criminal trial. It provides:

(D) Challenges for Cause.

(1) *Grounds*. A prospective juror is subject to challenge for cause on any ground set forth in MCR 2.511(D) or for any other reasons recognized by law.

(2) *Procedure*. If, after the examination of any juror, the court finds that a ground for challenging a juror for cause is present, the court on its own initiative should, or on motion of either party must, excuse the juror from the panel.

“Although, as a general matter, the determination whether to excuse a prospective juror for cause is within the trial court's discretion, once a party shows that a prospective juror falls within the parameters of one of the grounds enumerated in MCR 2.511(D), the trial court is without discretion to retain that juror, who must be excused for cause.” *People v Eccles*, 260 Mich App 379, 382-383; 677 NW2d 76 (2004); see also MCR 6.412(D)(2).

MCR 2.511(D) lists 12 bases for challenging a juror for cause. Defense counsel did not mention the court rule at trial, but seemed to rely on MCR 2.511(D)(2) and (3), which allow a challenge for cause if the prospective juror has a bias or state of mind that would prevent him from rendering a just verdict. On appeal, defendant does cite MCR 2.511(D), and vaguely refers to grounds (2) and (3) without specifically identifying them.

This Court defers to the trial court's superior ability to assess from a prospective juror's demeanor whether the person would be impartial. *Williams, supra* at 522. However, "in criminal cases, whenever, after a full examination, the evidence given upon a challenge leaves a reasonable doubt of the impartiality of the juror, the defendant should be given the benefit of the doubt." *People v Holt*, 13 Mich 224, 227-228 (1865). Likewise, in *Poet, supra* at 238, the Supreme Court held that the trial court should err in favor of the moving party when "apprehension is reasonable":

[A]pprehension is "reasonable" when a venire person, either in answer to a question posed on voir dire or upon his own initiative, affirmatively articulates a particularly biased opinion which may have a direct affect upon the person's ability to render an unaffected decision.

In assessing the reasonableness of the trial court's denial of defendant's challenge to juror G, it is helpful to compare it with the trial court's decision to grant a "for cause" challenge as to potential juror E. The trial court's questioning of E is somewhat difficult to assess because most of her responses were recorded as "inaudible." Nonetheless, piecing together the court's questions and a few of E's words, it is clear she was expressing concern about her ability to be fair based on her personal experience as a home invasion victim. The trial court's dismissal for cause of E is not easily reconciled with its refusal to excuse juror G. When comparing juror G's responses to juror E's, there is not enough of a difference in their hesitation about their ability to be impartial that the trial court could reasonably excuse one for cause and not the other. By the time juror G was examined on voir dire, there had been six other potential jurors who had been victims of a breaking and entering. The court may have grown impatient with, or indifferent to, this fact. It is quite plausible that, had juror G been called earlier in the voir dire process, the trial court would have found his comments sufficient reason to excuse him, as it did with E.

Admittedly, this Court is not able to evaluate juror G's demeanor as the trial court could. See *Williams, supra* at 522. However, considering juror G's original comments during questioning by the prosecutor, as well as his comments in response to defense counsel's inquiry, apprehension that he would be biased would certainly have been reasonable, and the court should have "err[ed] on the side of the moving party" and dismissed him for cause. *Poet, supra* at 238. It is possible that the court, growing impatient to have a jury sworn, allowed questioning until it received positive responses from juror G. The voir dire questioning of juror G spanned ten transcript pages (including arguments for and against the cause challenge). The questioning of each of the other jurors lasted only a few pages at most. Under the circumstances, we conclude that the trial court abused its discretion by not giving defendant the "benefit of the doubt" regarding juror G's vacillating answers and by instead denying defendant's challenge for cause. *Holt, supra* at 227-228. We reverse defendant's conviction and remand for a new trial.

Defendant also argues that the trial court erred by not instructing the jury on the offense of entering a dwelling without the owner's permission, MCL 750.115(1), which is a necessarily-included lesser offense of first-degree home invasion. *People v Silver*, 466 Mich 386, 392; 646 NW2d 150 (2002); *People v Cornell*, 466 Mich 335, 360-361; 646 NW2d 127 (2002). Defense counsel requested, and was denied, instruction CJI2d 25.4. We hold that the trial court correctly denied this instruction because it was not supported by the evidence.

“[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it.” *Cornell, supra* at 357; see also *People v Mendoza*, 468 Mich 527, 545; 664 NW2d 685 (2003). “A claim of instructional error is reviewed de novo.” *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003). “Harmless error analysis is applicable to instructional errors involving necessarily included lesser offenses.” *People v Gillis*, 474 Mich 105, 140, n 18; 712 NW2d 419 (2006), citing *Cornell, supra* at 361. “[T]he failure to instruct the jury regarding such a necessarily lesser included offense is error requiring reversal, and retrial with a properly instructed jury, if, after reviewing the entire cause, the reviewing court is satisfied that the evidence presented at trial ‘clearly’ supported the lesser included instruction.” *Silver, supra* at 388. “An offense is ‘clearly’ supported when there is substantial evidence to support the requested lesser instruction.” *Id.* at 388 n 2, citing *Cornell, supra*.

For purposes of the charges in this case, first-degree home invasion requires that a person (1) enter a dwelling without permission; (2) with intent to commit a larceny, or while entering, present in, or exiting a dwelling without permission, commits a larceny; and (3) commits the above while another person is lawfully present in the dwelling. MCL 750.110a(2). In contrast to the home invasion statute, entering without permission does not require prong (2), i.e., that the person commit, or have the intent to commit a larceny in the dwelling. MCL 750.115(1); *Silver, supra* at 392.

Relying on *Silver*, defense counsel at trial argued that the facts supported the lesser offense instruction of entering without permission because there was a dispute about the larceny element. In *Silver*, the homeowner caught the defendant leaving her house. As the defendant ran out, he said, “I was just here to use your potty[.]” *Silver, supra* at 389. The trial court denied the defense’s request for an instruction on the lesser offense of breaking and entering without permission, the jury convicted the defendant of first-degree home invasion, and the Court of Appeals affirmed. The Supreme Court reversed and remanded for a new trial, concluding that whether the defendant had an intent to commit larceny in the house was “clearly disputed” at trial and that there was substantial evidence supporting the defendant’s theory of the case – that defendant was wrongfully inside the house, but his motive for being there was other than criminal. *Id.* at 392-393. The Court noted that “it was [the] defendant’s unvarying position, unblemished by inconsistent statements, that there was entry without permission, but that there was no intent to steal,” and that, if the jury believed that, “they realistically could not act on it unless they had an instruction that gave them that choice.” *Id.*

In the present case, however, it was uncontested that as defendant entered the dwelling he intended to take the empty cans, i.e., he intended to commit a larceny. Defendant testified that he saw the cans and bottles in the window, knocked on the door, received no response, came back later with two other men, they knocked again, entered, and started gathering cans. On cross-examination, defendant admitted that as he entered the house he intended to take the empty cans and bottles, which did not belong to him and which he did not have permission to take. Thus, in contrast to the facts in *Silver, supra* at 388 n 2, there was no evidence in this case, much less “substantial evidence,” that defendant entered the house for any reason other than to commit a larceny by taking the cans. Applying the *Cornell* standard, then, no rational view of the

evidence would support a finding that defendant had no intent to commit a larceny when he entered the home. *Id.* at 387.

Defense counsel further contended that the jury should have been allowed to decide if defendants and the other intruders stole the cans, or merely took them after one of the home's occupants gave them permission. It is not relevant, however, that the occupant told the intruders they could take some cans and bottles as they left. Even assuming the occupant told them this sincerely,<sup>2</sup> the intent to steal was already present when defendant *entered* the house. This "intent to commit larceny" as he entered without permission clearly fell within one of the alternatives in the first-degree home invasion statute.

Defendant's argument ignores the correct distinction between the charged offense and the lesser-included offense—an intent to commit a larceny—and instead focuses on the assertion that the dwelling was unoccupied. If the house had been vacant, this fact would have changed the offense from first-degree home invasion to second-degree home invasion, MCL 750.110a(3); it would not have reduced the charge to entering without permission because, even if the home was abandoned or vacant, the cans and bottles would have still belonged to somebody, e.g., a landlord. Unlike the spent bomb casings in *Morrisette v United States*, 342 US 246; 72 S Ct 240; 96 L Ed 2d 288 (1952), relied upon by the dissent, the "refund for deposit" cans here clearly had a monetary value that could easily be liquidated. Thus, a rational fact-finder could not conclude that defendant considered them "unwanted and abandoned junk," *Morrisette, supra* at 276, and thus defendant's intent to take the cans would constitute an intent to commit larceny at the time he entered the home.

We reverse and remand for a new trial. We do not retain jurisdiction.

/s/ Richard A. Bandstra  
/s/ William C. Whitbeck

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<sup>2</sup> As the prosecution notes, the occupant testified he told the intruders to take the cans solely to avoid a hostile confrontation with them.