

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

EDWARD LEWIS BATES,

Defendant-Appellant

UNPUBLISHED

February 6, 2007

No. 265578

Kent Circuit Court

LC No. 04-009868-FH

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, aggravated stalking, and domestic assault. Defendant was acquitted of felonious assault. He now appeals his conviction for first-degree home invasion, MCL 750.110a(2). We affirm.

Defendant argues that the trial court erred by denying his request to instruct the jury on third-degree home invasion, MCL 750.110a(4), as a necessarily lesser included offense of first-degree home invasion. This Court reviews de novo a trial court's decision whether to instruct on a necessarily lesser included offense. *People v Brown*, 267 Mich App 141, 145; 703 NW2d 230 (2005).

On September 24, 2004, defendant engaged in a dispute with his one-time girlfriend, Michelle Murrell. After returning to Murrell's house from a bar, defendant accused Murrell of having interest in another man. Murrell responded to defendant's assertions, which prompted defendant to strike her in the face. After a brief interlude, defendant again struck Murrell in the face and exited Murrell's house. Murrell then locked the back door of her house. Defendant subsequently returned, however, and smashed the glass out of Murrell's bedroom window and back door. Thereafter, he entered Murrell's house and struck her three or four more times. He also either threw a television set at Murrell, or knocked it off of her dresser in her direction.

At trial, defendant argued that he lived at Murrell's house at the time of the incident, and therefore, he could not be convicted of home invasion. Defendant admitted assaulting Murrell, and smashing her door and window.

MCL 750.110a(2), the crime with which defendant was charged, states:

(2) 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 exist:

- (a) The person is armed with a dangerous weapon.
- (b) Another person is lawfully present in the dwelling.

Defendant requested the jury instruction for third-degree home invasion. MCL 750.110a(4) states:

(4) A person is guilty of home invasion in the third degree if the person does 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 exiting 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.
- (iii) A personal protection order term or condition.
- (iv) A bond or bail condition or any condition of pretrial release.

In *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), our Supreme Court interpreted MCL 768.32,¹ the statute governing instructions on inferior offenses, to allow some instructions on lesser offenses, while prohibiting others. Instructions on necessarily included lesser offenses are “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

¹ MCL 768.32 states: “(1) Except as provided in subsection (2), upon an 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.”

would support it.” *Id.* at 357. A necessarily included lesser offense is an offense that must be committed as part of the greater offense. *Id.* at 357-359.

Based on the circumstances of this case, the parties appear to agree that third-degree home invasion is a lesser included offense of first degree home invasion.² Assuming then, without deciding, that MCL 750.110a(4) is a necessarily included lesser offense of MCL 750.110a(2), the trial court did not err in denying to instruct the jury on third-degree home invasion. On the facts of this case, the only element differentiating first-degree home invasion from third-degree home invasion was that defendant was in the house when another person was lawfully present in the dwelling. At trial, there was no factual dispute that the homeowner was lawfully present in the house when defendant broke into the home and entered. In fact, defendant admitted that he broke into and entered the victim’s house and that he assaulted the victim while there. Because the presence of the homeowner was the element differentiating the greater offense of first-degree home invasion from the lesser offense of third-degree home invasion, and because there was no factual dispute concerning this element, no rational view of the evidence would support convicting defendant of third-degree home invasion, but not first-degree home invasion. Instruction on the lesser included offense was therefore not proper. *Cornell, supra* at 357.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper

² Third degree home invasion has elements that, in situations other than the one presented in this case, differ from the elements of first-degree home invasion. For example, a defendant can be charged with third-degree home invasion for breaking and entering and violating a term of parole by engaging in activity that does not amount to a felony, and does not amount to a misdemeanor assault. However, neither party argues that third-degree home invasion is a lesser cognate of first-degree home invasion on the facts of this case.