STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 24, 2007
v	No. 268956 Wayne Circuit Court
KEVIN BINYARD, Defendant-Appellant.	LC No. 05-010824-01

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

PER CURIAM.

Defendant was convicted by a jury of second-degree home invasion, MCL 750.110a(3), and was sentenced to a prison term of 57 to 180 months. He appeals as of right. We affirm. This appeal is being decided without oral argument. MCR 7.214(E).

Defendant illegally entered a woman's house to bathe and eat. He consumed a beverage and food that he found in the kitchen, rummaged through a purse and a chest of drawers, and stole a small amount of money and miscellaneous inexpensive items. He left the house when the resident returned, and was arrested a short distance away. Defendant was charged with first-degree home invasion, but the jury convicted him of the lesser-included offense of second-degree home invasion. The trial court denied defendant's request to instruct the jury on third-degree home invasion.

Defendant argues that the trial court erred in denying his request for a jury instruction on third-degree home invasion. This issue raises a question of law that is reviewed de novo on appeal. *People v Brown*, 267 Mich App 141, 145; 703 NW2d 230 (2005).

An instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find all of the factual elements of the lesser-included offense and a rational view of the evidence would support it. *People v Mendoza*, 468 Mich 527, 533, 544-545; 664 NW2d 685 (2003). A lesser offense jury instruction is appropriate only where the requested lesser offense is a necessarily included lesser offense. MCL 768.32; *People v Nickens*, 470 Mich 622, 626; 685 NW2d 657 (2004). An offense is not a necessarily included lesser offense unless all of the elements of the lesser offense are completely subsumed in the greater offense. *Id.* Instructions on cognate lesser offenses are not permissible. *Brown*, *supra* at 146.

The elements of first-degree home invasion are (1) an illegal entry, (2) with either the intent to commit a felony, a larceny, or an assault inside the dwelling, or the actual commission of a felony, a larceny, or an assault, and (3) either the possession of a dangerous weapon or the lawful presence of another person inside the dwelling. MCL 750.110a(2). The elements of second-degree home invasion are (1) an illegal entry, and (2) either the intent to commit a felony, a larceny, or an assault at the time of the illegal entry, or the actual commission of a felony, a larceny, or an assault. MCL 750.110a(3). The elements of third-degree home invasion are (1) an illegal entry, and (2) either the intent to commit a misdemeanor inside the dwelling, or the actual commission of a misdemeanor. MCL 750.110a(4).

First-degree and second-degree home invasion may be predicated on the commission or intent to commit a "larceny." MCL 750.110a(2); MCL 750.110a(3). Third-degree home invasion may be predicated on the commission or intent to commit a "misdemeanor." MCL 750.110a(4). Larceny may be either a felony or a misdemeanor, depending on the value of the goods stolen. MCL 750.356. The first-degree and second-degree home invasion statutes do not qualify the term "larceny," and those offenses may therefore be predicated on the commission or intent to commit either misdemeanor or felony larceny. See *People v Sands*, 261 Mich App 158, 163; 680 NW2d 500 (2004).

The only crime apparently committed by defendant within the dwelling was the theft of food and other inexpensive items—most likely misdemeanor larceny. MCL 750.356(4); MCL 750.356(5). Because the offenses committed by defendant within the dwelling seemingly constituted both larceny and a misdemeanor, we recognize that the facts of this case appear to support a third-degree home invasion instruction as well as the second-degree home invasion instruction that was actually given.

However, as noted above, a lesser offense jury instruction is appropriate only where the requested lesser offense is a *necessarily included* lesser offense. MCL 768.32; *Nickens*, *supra* at 626. Third-degree home invasion is not a necessarily lesser-included offense of either first-degree or second-degree home invasion because it is predicated on the commission or intent to commit a misdemeanor rather than on the commission or intent to commit a felony, a larceny, or an assault. Thus, even though the same underlying offense may constitute both a felony and a misdemeanor, see *supra*, third-degree home invasion contains an element that is distinct from the higher offenses of first-degree and second-degree home invasion. Accordingly, third-degree home invasion is a cognate lesser offense of first-degree and second-degree home invasion. *Mendoza*, *supra* at 532 n 4. The jury instruction requested by defendant was therefore not appropriate in this case. *Id*. at 533; *People v Apgar*, 264 Mich App 321, 326; 690 NW2d 312 (2004).

Defendant also argues that he was denied a fair trial because the trial court threatened to have the jury deliberate until it was exhausted. Defendant did not object to the trial court's supplemental instruction, so this issue is unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 597 NW2d 130 (1999).

Our Supreme Court has adopted ABA Standard 5.4(b) as the standard for determining whether a trial court's deadlocked-jury instructions are improperly coercive. *People v France*, 436 Mich 138, 143-144; 461 NW2d 621 (1990); *People v Sullivan*, 392 Mich 324; 220 NW2d

441 (1974). ABA Standard 5.4(b) has been incorporated into CJI2d 3.12, which seeks to guard against coercing dissenting jurors to forego their own judgments merely for the sake of reaching a verdict. *People v Pollick*, 448 Mich 376, 382 n 12, 385-386; 531 NW2d 159 (1995).

Defendant argues that the trial court's instructions were improperly coercive because the court informed the jurors that there was "no time limit," and that they would have to continue deliberating until they were exhausted.[1] However, the court's remarks were not part of a formal deadlocked jury instruction. Rather, they were made in response to some jurors' preliminary questions regarding the length of time they would be expected to deliberate before the court would conclude that they could not agree on a verdict. A deadlocked jury situation had not yet arisen at the time these comments were made. The trial court correctly responded that there is no specific time limit for deliberations. When the jurors sought further clarification concerning how long they might have to deliberate, the trial court then responded with an instruction substantially similar to CJI2d 3.12. Viewing the court's instructions as a whole, the court did not urge the jurors to abandon their individual beliefs in order to reach a consensus, nor did it threaten to detain jurors until they reached a unanimous verdict. There was no plain error affecting defendant's substantial rights in this regard.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Stephen L. Borrello

[1] The record does not support defendant's claim that the trial court informed the jurors that they would have to continue deliberations until they were exhausted. Instead, in response to a juror's question asking "if we do not come to an agreement how long do we have to deliberate for," the trial court simply responded, "Well, you have to deliberate—if that happens you have to exhausted [sic] it."