

STATE OF MICHIGAN
IN THE SUPREME COURT

ON APPEAL FROM THE COURT OF APPEALS
Meter, P.J., and Talbot and Murray, JJ.

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

v

DARRELL WILDER
Defendant-Appellee.

No. 137562

L.C. 07-004454-01
COA No. 278737

APPELLANT'S BRIEF

ORAL ARGUMENT REQUESTED

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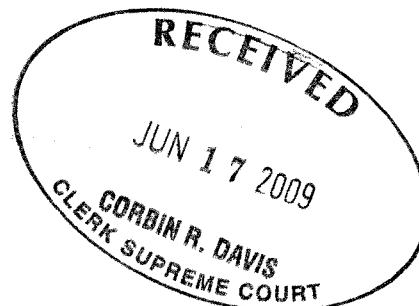


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Statement of the Question

I.

MCL § 768.32 allows conviction under certain circumstances for an “inferior degree” of the charged offense. MCL 750.110a divides the offense of home invasion into three degrees, with descending penalties. Is 3rd-degree home invasion an inferior degree of 1st-degree home invasion?

Defendant answers: “NO”

The People answer: “YES”

The Court of Appeals answered “NO”

Statement of Facts

Defendant Darrell Wilder was charged in a three count information with home invasion in the first degree, felon in possession of a firearm, and felony firearm. In the home invasion count the information charged that defendant entered a dwelling without permission, and that, while “entering, present in, or exiting did commit a larceny, and while entering, present in, or existing the dwelling while armed with a handgun, a dangerous weapon....”¹.

The statement of facts is taken from the opinion of the Court of Appeals:

Defendant appeared, uninvited, at the victim’s home in the early morning hours of December 30, 2006. 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. . . . 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:

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

¹ Defendant was also given notice that he was subject to sentencing as a third offender if convicted.

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. (2A).

The Court of Appeals reversed, finding that the verdict was an impermissible "waiver break" given the judge's factual findings, and that home invasion in the 3rd degree is not an inferior degree of home invasion to home invasion in the 1st degree. (5A).

This court granted leave to appeal "limited to the issue whether third-degree home invasion, MCL 750.110a(4), is a necessarily lesser included offense of first-degree home invasion, MCL 750.110a(2)." (6A).

Argument

I

MCL § 768.32 allows conviction under certain circumstances for an “inferior degree” of the charged offense. MCL 750.110a divides the offense of home invasion into three degrees, with descending penalties. 3rd-degree home invasion is an inferior degree of 1st-degree home invasion; in any event, the aggrieved party here is the People.

The result in this case ought to be intolerable in any society which purports to call itself an organized society. It . . . punish[es] the public for the mistakes and misdeeds of [judicial] officers, instead of punishing the [judicial] officer directly, if in fact he is guilty of wrongdoing.²

Introduction

Michigan statute provides that “*No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, . . . unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.*”³ One searches the opinion of the Court of Appeals in vain for any citation of the statute or any discussion of how the conviction in this case has worked a miscarriage of justice (that which is *necessary* to reversal). Rather, the panel, though stating that it did “not harbor any doubts regarding defendant’s guilt of the charged offense,” found that it was “compelled to vacate defendant’s convictions because Judge Townsend’s actions have served to undermine the integrity and reputation of the trial court.” This was so because “The only explanation

² *Brewer v. Williams*, 430 U.S. 387, 415-416, 97 S.Ct. 1232, 1248, 51 L Ed 2d 424 (1977)(Chief Justice BURGER, dissenting)(paraphrased to fit the facts of the present case).

³ MCL 769.26 (emphasis supplied).

for the trial court’s ruling in this matter is Judge Townsend’s impermissible use of a ‘waiver break.’” Because, then, the trial judge violated the law in granting to the defendant a “waiver break” clearly contradicted by his factfinding, the defendant is to receive the *further* windfall of the setting aside of his conviction. The conviction here manifestly did *not* work a miscarriage of justice; instead, it is the *setting aside* of that conviction which ought to be viewed as “intolerable in...an organized society.” Though this court granted leave “limited to the issue whether third-degree home invasion, MCL 750.110a(4), is a necessarily lesser included offense of first-degree home invasion, MCL 750.110a(2),” consideration of the statutory command of MCL § 769.26 that “No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, . . . unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice” is inescapable, given the mandatory nature of the statute. The People begin with the included-offense question specified in the order granting leave to appeal.

A. Home Invasion in the Third Degree is a “Cornell” Inferior Degree of Home Invasion in the First Degree

The Court of Appeals is mistaken in finding that home invasion in the 3rd degree is not an inferior degree of home invasion to home invasion in the 1st degree.⁴

⁴ Though, as the People will argue, where the predicate offense charged as either intended or committed is larceny or assault, the proofs will never support instruction on 3rd-degree home invasion.

(1) The statutory scheme: the degrees of home invasion

—1st-degree home invasion

MCL 750.110a(2) provides that one is guilty of 1st degree home invasion if he or she:

...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:

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

As is true with an increasing number of modern offenses, home invasion in the first-degree cannot be said to have certain delineated elements, but instead certain *alternative* elements. The “same” offense—home invasion in the first degree—may be committed in various ways. The alternative elements may be grouped as follows:

Element one: The defendant *either*
1)breaks and enters a dwelling, *or*
2)enters a dwelling without permission.

Element two: The defendant *either*
1)intends to commit a felony, larceny, or assault when entering, *or*
2)at any time while entering, present in, or exiting the dwelling commits a felony, larceny or assault,

When

Element three: The defendant *either*
1)is armed with a dangerous weapon, *or*
2)another person is lawfully present in the dwelling.

— 2nd -degree home invasion

MCL § 750.110a(3) provides that one is guilty of 2nd degree home invasion if he or she:

...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 second degree.

The alternative elements may be grouped as follows:

Element one: The defendant *either*
1)breaks and enters a dwelling, *or*
2)enters a dwelling without permission.

Element two: The defendant *either*
1)intends to commit a felony, larceny, or assault when entering, *or*
2)at any time while entering, present in, or exiting the dwelling commits a felony, larceny or assault.

Absent from 2nd -degree home invasion is element 3, that either the defendant was armed or someone else was lawfully present. If the first two elements of 1st -degree home invasion are shown, but a reasonable jury could conclude that defendant was not armed, and that no one else was lawfully present, then an instruction on 2nd -degree home invasion would be appropriate on request of either of the parties. 2nd -degree home invasion is a “Cornell” inferior degree of 1st -degree home invasion because all of its elements are subsumed, and one element of the higher offense is not an element of the inferior offense.

— 3rd -degree home invasion

MCL § 750.110a(4)(a) provides that one is guilty of 3rd degree home invasion if he or she:

...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.*

Element one: The defendant *either*
1)breaks and enters a dwelling, *or*
2)enters a dwelling without permission.

Element two: The defendant *either*
1)intends to commit a misdemeanor, *or*
2)at any time while entering, present in, or exiting the dwelling commits a misdemeanor.

The legislatively-designed descending order is clear: the greatest offense is defined; the next offense removes one element (which can be committed in alternative ways) from the greatest offense (that the defendant is armed or someone else is lawfully present); and the lowest grade of the offense “downgrades” the defendant’s conduct or intent from that required in the higher two grades, now requiring only the intent to commit a misdemeanor, or the commission of a misdemeanor. By way of example, if a defendant were charged with 1st-degree home invasion for 1)entering a dwelling without permission, 2)committing a felony malicious destruction of property while in the premises, when 3)someone else was lawfully present, he would be entitled to an instruction on 2nd-degree home invasion if a reasonable jury could conclude on the evidence that no one was lawfully present at the time, and entitled to an instruction on 3rd-degree home invasion if

a rational jury could conclude that the offense committed was misdemeanor rather than felony malicious destruction of property. Each offense is a subset of the elements of the greater.⁵

(2) The difficulty with alternative elements

Whether an offense is a “Cornell-included” offense of another—a subset of its elements—will depend with these statutes—those with alternative elements—on *which* “form” or forms of the offense is charged in the particular case,⁶ as often only one of the alternative methods of committing the offense will be charged (though in some cases defendant’s conduct may satisfy several alternative elements; here, for example, defendant was both armed with a weapon *and* another person was lawfully present in the dwelling. Both alternatives of “element three” were charged in the information, and proof of either would suffice to make out the crime).

Home invasion is particularly complex in this regard, in that the offense intended or committed when the entry occurs, or committed at any time also during presence in or exit from the premises, may be any felony, *or* any larceny or assault, including misdemeanor larcenies and assaults. Where a felony is charged as the predicate conduct either committed or intended, then if the evidence supports a rational finding that a misdemeanor included within that felony was committed rather than the felony, an instruction on 3rd-degree home invasion is appropriate under the principles of *Cornell*. But the situation becomes more complex because under the statute the predicate offense committed or intended need not always *be* a felony, as any larceny or assault,

⁵ At this time the People take no position on whether it would be appropriate to instruct on 3rd-degree home invasion on request of either party on the argument that a misdemeanor not itself included within the charged felony was committed; that is, some wholly separate offense.

⁶ See e.g. *People v Nickens*, 470 Mich 622 (2004).

including misdemeanor larcenies or assaults, will suffice. Where the charged predicate, then, is larceny or assault, *as a matter of fact* while 2nd-degree home invasion will be an appropriate instruction where a reasonable jury could find that the defendant was not armed and that no one else was lawfully present (whichever theory of the offense is charged, or both if both are charged, as in the present case), an instruction on 3rd-degree home invasion will not be appropriate where a reasonable jury could conclude that a misdemeanor was committed because, as to larceny and assault, a misdemeanor either intended or committed constitutes 1st or 2nd-degree home invasion (1st degree if defendant was either armed or someone else was lawfully present).

Where the predicate offense for a 3rd-degree home invasion charge (or for that matter, a charge of 2nd-degree home invasion) either intended or committed, then, is a felony, then as a matter of fact 3rd-degree home invasion can be instructed upon where supported by the evidence, but where the predicate offense is a larceny or an assault, because by definition *these* misdemeanors support 1st and 2nd-degree home invasion, the proofs will never support a 3rd-degree home invasion instruction. But if such an instruction is erroneously given, or, as here, such a verdict is improperly returned at a bench trial despite a finding as a matter of fact of all elements constituting 1st-degree (as in this case) or 2nd-degree home invasion (in a hypothetical case), no prejudice can *possibly* accrue to the defendant.⁷ It is the People of this State who are aggrieved in this situation, and, at

⁷ No possible “lack of notice” claim may be heard here; larceny was charged, and larceny found, but the defendant awarded a conviction on a lesser offense carrying a lower penalty. A lack of notice claim could only arise if the predicate offense either intended or committed was alleged to be a felony, and the jury was instructed, or the defendant convicted at a bench trial, of 3rd-degree home invasion based on a misdemeanor offense intended or committed that is not included within the predicate felony offense charged as intended or committed.

least as to the case, have no recourse. But to reward the defendant a further windfall, as has been done here, should not be tolerated, and is inconsistent with MCL § 769.26.

B. 3rd Degree Home Invasion Is An Inferior Degree of 1st-Degree Home Invasion Without Regard to the Elements of the Two Offenses

The concurring opinion in the Court of Appeals urges this Court to reconsider *People v Nyx*,⁸ where this court construed MCL § 768.32 to mean that where the legislature has created an offense (here home invasion), and divided it formally into degrees, that an inferior degree of the offense (such as third degree when compared to first degree) is *not* an inferior degree unless a subset of the elements of the greater offense. The People agree, and urge that the correctness of Justice Corrigan’s dissent is especially apparent, where, as here, the offense is set out within a *single statute*—MCL 750.110a creates the offense of “home invasion,” with the various descending (inferior) degrees spelled out in subparagraphs (the degrees of criminal sexual conduct appear in separate statutory sections) of that statutory section. Indeed, Justice Markman, concurring in the *Nyx* decision, seemed to take the view that the home invasion statute is distinguishable with regard to the “degree-offense” argument from the criminal sexual conduct statutes:

Generally, a “degreed” offense criminalizes a single act and defines the maximum punishment for that act on the basis of the circumstances underlying its commission. For example, the home invasion statute criminalizes the act of breaking and entering a dwelling or entering a dwelling without permission. However, a defendant’s maximum term of incarceration is determined by the circumstances surrounding the commission of that act. Thus, a defendant who intends to commit or actually commits a felony while engaged in that criminal act is guilty of first-degree home invasion and subject to a statutory maximum sentence of 20 years in prison. MCL 750.110a(2) and (5). A defendant who intends to commit or actually commits a misdemeanor while engaged in that same criminal

⁸ *People v Nyx*, 479 Mich 112 (2007).

act is guilty of third-degree home invasion and is subject to a maximum penalty of five years in prison. MCL 750.110a(4) and (7). However, in either case, a defendant charged with home invasion is on *notice* that he or she has been charged with a single criminal act-breaking and entering or entering without permission-and that his or her term of incarceration will be determined by the circumstances surrounding the commission of that act.⁹

MCL 768.32 does not, after all, refer to a free-standing concept of “inferiority” of one offense to the other, but specifically refers to “degrees”—where the charged offense is one “consisting of different degrees,” the defendant may be found “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.” The statute, then, refers not to “inferior offenses,” but “inferior degrees”; in *Nyx* the majority severed the word “inferior” from “degrees,” when the two must be considered together. Where the offense is home invasion, 3rd-degree home invasion is an “inferior degree” of the offense to 1st-degree home invasion without regard to *Cornell*¹⁰ (which is a tool of construction for determining inferior degrees where the legislature has not specifically divided an offense into degrees). Where the predicate offense alleged as either intended or committed is larceny or assault, where this misdemeanor conduct suffices for both 1st and 2nd-degree home invasion, an instruction will never factually be appropriate on 3rd-degree home invasion, nor will a verdict of 3rd-degree home invasion be appropriate at a bench trial where a judge finds as a matter of fact the commission or intent to commit one of these misdemeanors. But the defendant is neither denied notice so as to be able to defend (when the very conduct alleged is found to have occurred) nor aggrieved in any other way when a fact finder convicts or is allowed to

⁹ *Nyx*, 479 Mich at 137 (Markman, J., concurring).

¹⁰ *People v Cornell*, 466 Mich 335 (2002).

convict of a lesser offense not upon proof of some different element or elements, but upon proof of the very elements making up the greater offense.

In *Nyx* this court held that there are offenses—of which criminal sexual conduct is one—which “consist of different degrees,” and yet the “lower” degrees of the offense may nonetheless not be “inferior” to the higher degree(s). This is counterintuitive; the language of the statute suggests that the legislature anticipated that it flows inexorably from the division of an offense into degrees that lower degrees are inferior to higher—the notion that an offense can consist of different degrees at least some of which are “stand-alone” degrees, inferior to no “higher” degree is contratextual. The counterintuitive nature of this court’s holding flows from its conflation of two principles: offenses divided formally into degrees (“degreed offenses”), and the charging of “one offense” the constituent parts of which constitute included offenses of the greater charged offenses. That is, *one* category of “inferior offenses” arises from the charging of an offense which contains within it subsets of its elements which are independently themselves crimes; the charging of the offense *charges* all of those crimes, and, under the rationale of *Hanna v People*¹¹ and now *People v Cornell*,¹² these lesser charged offenses may be instructed upon when a rationale view of the evidence supports a finding that the lesser was committed rather than the greater. As Justice Christiancy explained long ago, in this circumstance it is logical to view these offenses, though not denominated by the legislature as “degrees” of the charged offense, “inferior” degrees of that offense.

But as other states have recognized, that a charged offense includes within it—and thereby charges—other offenses does not exhaust the field of offenses inferior *in degree* to the charged

¹¹ 19 Mich 315 (1869).

¹² 466 Mich 335 (2002).

offense; the legislature may make this determination directly by formally dividing an offense into degrees, which is done always in a hierarchical fashion of some sort. It is not necessary that these inferior offenses be subsets of the offense charged. While it is perhaps conceivable, under a bizarre set of circumstances, the like of which the People have not seen, for a due process notice claim to be raised with regard to some degreed offenses, those claims can be raised when and if they occur. But that instructions or verdicts on inferior degrees of charged offenses may conceivably raise notice issues on an as-applied basis provides no ground for construing the statute differently from its terms. And with the home invasion statute, such a scenario could only arise if a felony were charged as the predicate either intended or committed, and a judge instructed on 3rd-degree home invasion (or found that offense as a verdict at a bench trial) based on the alleged commission or intention of some misdemeanor *not* included within the charged felony. But the Court of Appeals holding ¹³ means that where a felony is charged as the predicate offense either intended or committed, and a rational jury could conclude on the evidence that a misdemeanor included within that offense was committed or intended rather than the felony, 3rd-degree home invasion is unavailable as an instruction or verdict, and the defendant who either broke and entered or entered without permission with intent to commit a misdemeanor or committing one while entering, present, or exiting, must be acquitted. This makes no sense.

Other courts have approached similar statutes concerning “inferior degrees” of offenses differently. For example, the Washington Supreme Court has said:

¹³ The People recognize that the Court of Appeals opinion is “unpublished,” meaning it is not precedential. It is, of course, readily available online, and, at least where there is no binding precedent on a point, parties and trial courts regularly rely on unpublished opinions, on the theory that *something* from a superior court trumps nothing.

We recently held that *an instruction on an inferior degree offense is properly administered* when:

“(1) the statutes for both the charged offense and the proposed inferior degree offense ‘proscribe but one offense’; (2) the information charges an offense that is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence that the defendant committed only the inferior offense.”¹⁴

Here paragraph (2) is not redundant to paragraph (1), which describes what in Michigan could be called “Cornell-included” offenses (those which are a subset of the greater offense); rather, “inferior offense” describes an offense that is inferior because the legislature has divided the offense into degrees, not because it is included within the charged offense, which is a separate category of “inferior” offense. And though it is conceivable in the mind of man that notice issues may arise with regard to some inferior offenses, this will be the rare case. For other than the rare or bizarre situation, the existence of MCL § 768.32 provides the requisite notice. In *State v Peterson*¹⁵ the defendant was charged with 1st-degree assault and convicted at a bench trial of 2nd-degree of assault,

¹⁴ *State v. Fernandez-Medina*, 6 P.3d 1150, 1153 (Wash.,2000). Indeed, Washington, and some other states, have enacted statutes separating the two types of inferior offense, with the “inferior degree” statute—indistinguishable from the Michigan statute—applicable to “degreed offenses” without regard to a subset of elements analysis; see e.g. Ind.Code § 35-1-39-1 et seq. (Burns 1975):

35-1-39-1 (9-1816). Verdict-Different degrees.-Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degrees charged in the indictment or information, and guilty of any degree inferior thereto or of an attempt to commit the offense.”

35-1-39-2 (9-1817) One offense included in another.-In all other cases, the defendant may be found guilty of an offense, the commission of which is necessarily included in that with which he is charged in the indictment or information.

¹⁵ *State v Peterson*, 948 P2d 381 (Wash, 1997).

and argued on appeal that not all of the elements of 2nd-degree assault were included within 1st-degree assault. This notice argument was rejected, though the Washington Supreme Court agreed that the offenses had different elements: “RCW 10.61.003 provides sufficient notice to a defendant that he may be convicted of any inferior offense of assault, even though the inferior degree may not be a lesser included degree of the charged crime.”¹⁶ This holding was premised on an earlier case, finding that:

The general rule regarding this right is that the crimes of which a person can be convicted, and those on which a jury is properly instructed, are limited to those which are charged in the information. *State v. Olds*, 39 Wash.2d 258, 235 P.2d 165 (1951); *State v. Galen*, 5 Wash.App. 353, 487 P.2d 273 (1971). There are two recognized exceptions to this rule: (1) where a defendant is convicted of a lesser included offense of the one charged in the information pursuant to RCW 10.61.006; and (2) where a defendant is convicted of an offense which is a crime of an inferior degree to the one charged, pursuant to RCW 10.61.003.¹⁷

This court should revisit *Nyx*, at least in the context of different offenses than criminal sexual conduct..

C. *Nyx* and Other Legislatively Wrought “Degree-Offense” Schemes

Home invasion is not the only offense aside from criminal sexual conduct where the basic offense—home invasion—is divided into degrees. For example, the conduct of “child abuse” is

¹⁶ *Peterson*, at 385. The reference statute is indistinguishable from MCL 768.32, providing that “Upon an indictment or information for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or information, and guilty of any degree inferior thereto, or of an attempt to commit the offense.”

¹⁷ *State v. Foster*, 589 P.2d 789, 794 (Wash., 1979). See also *Salinas v United States*, 277 F2d 914 (CA 9, 1960).

legislatively divided into a greatest offense and inferior degrees, all, as with home invasion, within the same statute:

A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child. Child abuse in the first degree is a felony punishable by imprisonment for not more than 15 years.

A person is guilty of child abuse in the second degree if any of the following apply:

- (a) The person's omission causes serious physical harm or serious mental harm to a child or if the person's reckless act causes serious physical harm or serious mental harm to a child.
- (b) The person knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results.
- (c) The person knowingly or intentionally commits an act that is cruel to a child regardless of whether harm results.

* * *

A person is guilty of child abuse in the third degree if any of the following apply:

- (a) The person knowingly or intentionally causes physical harm to a child.
- (b) The person knowingly or intentionally commits an act that under the circumstances poses an unreasonable risk of harm or injury to a child, and the act results in physical harm to a child.

* * *

A person is guilty of child abuse in the fourth degree if any of the following apply:

- (a) The person's omission or reckless act causes physical harm to a child.
- (b) The person knowingly or intentionally commits an act that under the circumstances poses an unreasonable risk of harm or injury to a child, regardless of whether physical harm results.

It seems highly likely that if *Nyx* is not revisited or limited, the inferior degrees of child abuse will not be available for instruction or verdict, even where supported by the evidence, as one could certainly argue that, for example, an “omission” is not included within “knowingly or intentionally caus[ing] serious physical or serious mental harm,” or that knowingly or intentionally committing an act that is “cruel” is not so included.¹⁸

D. No Miscarriage of Justice Occurred Here

Application of MCL § 769.26 is unavoidable here; it is a statutory command. The Court of Appeals is correct that the trial judge gave a “waiver break,” but wrong that the verdict given was not of an offense included within the charged offense, and wrong to reverse given the factfinding of the trial judge, even if home invasion in the third degree is not an inferior degree of home invasion to home invasion in the first degree. The trial judge here in effect entered *two* verdicts on the home invasion count, one through his fact finding and one through the announced verdict he gave from that fact finding. The latter is inconsistent with the former, and constitutes a prohibited “waiver break,” but the verdict denied no fair notice to the defendant nor prejudiced him in any way—when a trial judge at a bench trial finds all the elements charged and announces a verdict based on those findings (not on the finding of some additional element) of a lesser offense, the People are aggrieved, not the defendant. That is precisely what occurred here. The only miscarriage of justice in this case benefits the defendant, and is one which the People cannot rectify: “...this judicial practice is an improper one. . . .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. . . .a trial court's decision of not guilty, whether proper or not, is constitutionally protected by double jeopardy

¹⁸ Similarly, see vulnerable adult abuse, MCL § 750.145n, divided into degrees.

principles. . . .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.”¹⁹ But that this improper “reward” or windfall cannot be corrected by reforming the verdict to comport with the trial judge’s findings of fact does not—and certainly should not—mean that the defendant is entitled to *further* unwarranted favor from the judicial system. The injustice that has occurred should not be exacerbated. Defendant cannot show a miscarriage of justice under MCL 769.26.

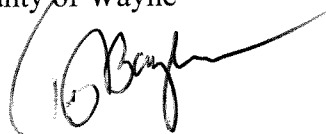
¹⁹ *People v Ellis*, 468 Mich. 25, 27-28 (2003).

Relief

Wherefore, the People respectfully request that this court reverse the Court of Appeals.

Respectfully submitted,

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

A handwritten signature in black ink, appearing to read 'Baughman', with a long, sweeping horizontal stroke extending to the right.

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