

**STATE OF MICHIGAN**  
**IN THE SUPREME COURT**

**Appeal from the Court of Appeals from  
Meter, P.J. and Talbot and Murray JJ.**

**PEOPLE OF THE STATE OF MICHIGAN,**

Plaintiff-Appellant,

-vs-

**DARRELL WILDER,**

Defendant-Appellee.

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**Supreme Court No. 137562**

**Court of Appeals No. 278737**

**Lower Court No. 07-4454-01**

**WAYNE COUNTY PROSECUTOR**

Attorney for Plaintiff-Appellant

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**STATE APPELLATE DEFENDER OFFICE**

Attorney for Defendant-Appellee

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**BRIEF ON APPEAL – APPELLEE**

**ORAL ARGUMENT REQUESTED**

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## **STATEMENT OF QUESTION PRESENTED**

- I. DID THE COURT OF APPEALS CORRECTLY FIND THAT HOME INVASION THIRD DEGREE IS A COGNATE OFFENSE OF HOME INVASION FIRST DEGREE AND THAT JUDGE TOWNSEND ERRED IN CONVICTING MR. WILDER OF THIS COGNATE OFFENSE, WHICH MANDATED REVERSAL OF MR. WILDER'S CONVICTIONS.

Defendant-Appellant answers, "Yes".

## **STATEMENT OF FACTS**

On December 30, 2006 at approximately one o'clock a.m., Denise Carter heard her door bell ring. (1b) Recognizing the person at her door as Defendant-Appellee Darrell Wilder, her son's cousin, Ms. Carter opened the door. (1b, 3b). Another man was also at the door with Mr. Wilder. (2b). When Ms. Carter appeared at the door, Mr. Wilder opened the storm door and held it open. (3b). Ms. Carter testified that Mr. Wilder then stated, "Auntee, I love you, but this has nothing to do with you. This is because of your son." (4b). Ms. Carter stated that she did intend to let Mr. Wilder in, but that he walked past her and into her house without her permission. (4b, 9b).

Mr. Wilder began unplugging and taking the television that was in Ms. Carter's living room. (5b). Mr. Wilder explained to Ms. Carter that he was taking the television because her son took something from him. (Id). Ms. Carter then stated, "You're not touching my T.V." (Id). Ms. Carter testified that Mr. Wilder then pulled up his shirt, revealing a gun. (Id). Mr. Wilder and his friend carried the television out of Ms. Carter's home and placed it into a black car. (5b, 6b). Ms. Carter testified that Mr. Wilder then headed back to her house, but then walked away. (6b). She told her grandchildren, who were also in the house that day, to call the police. (Id). Ms. Carter recalled that Mr. Wilder called her after the incident and said that he was sorry and was trying to get her television back to her. (8b).

Desharra Pitman, age 11, and Errand Kelsey, age 12, were two of the four children who were in Ms. Carter's home on December 30, 2006. Desharra recalled that she heard a knock on the door and that her sister stated that DJ (Mr. Wilder) was at the door. (10b). She testified that Ms. Carter opened the front door and that Mr. Wilder walked in, started unplugging the television, and pulled up his shirt, revealing a gun. (10b-12b).

Errand Kelsey stated that the doorbell rang and his sister stated, “It’s D.J.” (15b). According to Errand, Mr. Wilder came in the house, lifted up his shirt revealing a gun, took the television to a car parked outside and then came back to the house and banged on the door. (16b). Upon Mr. Wilder’s return the kids then went into the bathroom where they called the police. (16b, 17b).

Officer Steven Triner of the Detroit Police Department took a statement from Ms. Carter that day. (13b). Officer Triner’s report stated that Mr. Wilder came to the door and produced a handgun and forced his way in. (14b).

The defense presented one witness, Yvette Cannon, whose cousin was Mr. Wilder’s wife. (18b). Ms. Cannon testified that she, Mr. Wilder and his wife were together at a bar on the night of December 29, 2007 and the early morning of December 30, 2007. (Id). She stated that they were at the bar until around 1:30 a.m. on December 30, and that Mr. Wilder and his wife stayed at her house that night. (19b, 20b).

Mr. Wilder was charged with first-degree home invasion<sup>1</sup> and felony firearm<sup>2</sup>. On April 27, 2007, after a two-day bench trial, Mr. Wilder was found guilty of third-degree home invasion<sup>3</sup> and felony firearm (21b) and appealed as of right.

The Court of Appeals vacated Mr. Wilder’s convictions and sentences in an October 21, 2008 unpublished opinion. (22b). The state sought leave from this Honorable Court, which was granted.

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<sup>1</sup> MCL 750.110(A)(2)

<sup>2</sup> MCL 750.227(b)

<sup>3</sup> MCL 750.110(A)(4)

**I. THE COURT OF APPEALS CORRECTLY FOUND THAT HOME INVASION THIRD DEGREE IS A COGNATE OFFENSE OF HOME INVASION FIRST DEGREE AND THAT JUDGE TOWNSEND ERRED IN CONVICTING MR. WILDER OF THIS COGNATE OFFENSE, WHICH MANDATED REVERSAL OF MR. WILDER’S CONVICTIONS.**

**Introduction**

This case presents the court with a simple question, whether third-degree home invasion is a cognate or necessarily lesser offense of home invasion first-degree. If this Court finds, as the lower courts have consistently found, that it is a cognate offense, then under the current precedent of this Court, the Court of Appeals decision must be affirmed. If this Court finds, as the prosecution and the concurring judge in this matter urge, that the recent decisions of this Court are flawed with respect to “inferior” offenses when the Legislature has defined degrees within an offense, then Mr. Wilder’s convictions must still be vacated as he neither requested a lesser instruction nor assented to such an instruction/verdict and a rational view of the evidence did not support the instruction had it been requested. Finally, should this Court find that recent precedent is flawed entirely with respect to the prohibition on instructing on any cognate offenses, such an overturning of precedent should be applied prospectively given the Court’s reliance on due process and notice in its opinions<sup>4</sup>.

**Standard of Review**

Whether third-degree home invasion is a necessarily included offense of first-degree home invasion is a question of law and is reviewed de novo. *People v Smith*, 478 Mich 64; 731 NW2d 411 (2007).

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<sup>4</sup> Counsel recognizes that the question of the continuing validity of the cognate/necessarily lesser included offense dichotomy is potentially at issue in this case. However, since the Court did not grant leave on that specific issue, Counsel has not engaged in any analysis of that issue and abided by this Court’s language in the Order granting leave.

## **Issue Preservation**

There was no objection to the court's verdict as there was no opportunity for either party to object. Judge Townsend gave no notice that he would be considering any lesser included offenses prior to issuing his ruling.

## **Argument**

Although a trial court sitting as a finder of fact may consider lesser offenses, *People v Darden*, 230 Mich App 597; 585 NW2d 27 (1998), consideration of *cognate* lesser offenses is not permitted. *People v Smith*, 478 Mich 64; 731 NW2d 411 (2007).

MCL 768.32 provides in pertinent part:

[U]pon 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. (emphasis added.)

In *People v Smith*, the Michigan Supreme Court confirmed the meaning of “inferior” under MCL 768.32(1) as stated in its previous decisions:

“We believe that the word ‘inferior’ in the statute does not refer to inferiority in the penalty associated with the offense, but, rather, to the absence of an element that distinguishes the charged offense from the lesser offense. The controlling factor is whether the lesser offense can be proved by the same facts that are used to establish the charged offense. (internal citations omitted)”

*Smith* at 69.

“[U]nder MCL 768.32, a lesser offense instruction [or consideration of a lesser offense in a bench trial] is appropriate only if the lesser offense is *necessarily included* in the greater offense,” *People v Nickens*, 470 Mich 622, 626; 685 NW2d 685 (2003) (emphasis added),

meaning that “all the elements of the lesser offense are included in the greater offense.” *People v Mendoza*, 468 Mich 527, 532-533; 664 NW2d 685 (2004).

In *People v Nyx*, 479 Mich 112; 734 NW2d 548 (2007), this Court confirmed the interpretation of “inferior” under MCL 768.32:

To reiterate, MCL 768.32(1) requires the lesser offense to be inferior to the charged offense, and an offense is only inferior when all the elements of the lesser offense are included within the greater offense. Thus, even if the crime is divided by the Legislature into degrees, the offense of a lesser degree cannot be considered under MCL 768.32(1) unless it is inferior, i.e., is within a subset of the elements of the charged greater offense.

In *Nyx*, the defendant was charged with first-degree criminal sexual conduct. In a bench trial, the trial court acquitted the defendant of that charge and instead found him guilty of second-degree criminal sexual conduct. Holding that this was error, the Court reasoned that, “Given that all the elements of CSC II are not included within CSC I, the trial court was without authority to convict defendant of CSC II after it acquitted him of CSC I.” *Nyx, supra* at 121. This Court upheld the Court of Appeals decision to vacate the defendant’s convictions on these grounds.

In the instant case, Mr. Wilder was charged with first-degree home invasion but found guilty of third-degree home invasion. 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<sup>5</sup>.

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<sup>5</sup> MCL 750.110a(2)

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<sup>6</sup>.

All of the elements of third-degree home invasion are not included within first-degree home invasion even though the underlying crime may be the same. First-degree home invasion encompasses the intent to commit a felony, an assault, or a larceny. The larceny or assault on which home invasion first degree is premised can be either a felony or a misdemeanor. See *People v Sands*, 261 Mich App 158, 163; 680 NW2d 500 (2004) (finding that “assault” under the first-degree home invasion statute refers to both felony and misdemeanor assault.) On the other hand, home invasion third encompasses only the intent to commit or commission of a misdemeanor. Accordingly, third-degree home invasion is a cognate lesser included offense of first-degree home invasion.

Mr. Wilder was charged with first-degree home invasion. The trial court acquitted him of this charge and convicted him of third-degree home invasion. As the Court stated in *Nyx*, “[Consistent] with *McDonald, Hanna, Torres, Cornell, Mendoza, and Nickens*...MCL 768.32(1) precludes a judge or a jury from convicting a defendant of a cognate lesser offense even if the crime is divided into degrees...because the word ‘inferior’ in MCL 768.32(1) is best understood as meaning an offense that is necessarily included in the greater charge.” *supra* at 121.

Just as in *Nyx*, the trial court in the instant case had no authority to consider and convict Mr. Wilder of third-degree home invasion given that third-degree home invasion is a cognate lesser offense of first-degree home invasion. Accordingly, Mr. Wilder was convicted contrary to

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<sup>6</sup> MCL 750.110a(4)

due process and his convictions<sup>7</sup> must be vacated<sup>8</sup>. Const 1963, art 1, §17; US Const, amend XIV.

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<sup>7</sup> A trial court sitting as the finder of fact may not enter an inconsistent verdict. *People v Ellis*, 468 Mich 25, 658 NW2d 142 (2003). Where a court finds that the underlying offense was not committed, it cannot properly convict a defendant of felony-firearm predicated on that offense. *See People v Burgess*, 419 Mich 305, 310-312, 353 NW2d 444 (1984) (reversing a felony-firearm conviction where this Court had reversed the underlying felonious assault conviction but left the felony firearm count undisturbed).

In this case, first-degree home invasion was the only felony listed in the complaint and information as the predicate offense for the felony-firearm count. The trial court's determination that first-degree home invasion was not established is inconsistent with its guilty verdict for the felony-firearm charge, which was predicated on first-degree home invasion.

Additionally, since the third-degree home invasion conviction was in violation of due process and must be vacated, the court was also without authority to premise the felony firearm conviction on that conviction.

Absent a finding that the underlying offense was committed, the verdicts are legally inconsistent and due process requires that the felony-firearm conviction be vacated. Const 1963, art 1, §17; US Const, amend XIV; *Burgess, supra*.

<sup>8</sup> The prosecution's argument that MCL 769.26 prevents this Court from vacating Mr. Wilder's convictions is absurd and unsupported by the prosecution's own admissions. The prosecution argues that not only was third-degree home invasion an unsupported conviction in this case but that it would likely never be an appropriately given lesser offense in any case given the broad wording of the first-degree statute. Given that the conviction is unsupported by the evidence there can be no disagreement that the verdict is a miscarriage of justice.

**RELIEF REQUESTED**

Mr. Wilder asks that this Honorable Court affirm the Court of Appeals and vacate his convictions.

Respectfully submitted,  
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