

MSC Order List: November 3, 2010

[4. November 2010 By Madelaine Lane](#)

On Wednesday, November 3, 2010, the Michigan Supreme Court denied seven applications for leave to appeal, and took substantive action in three criminal and one civil case which are discussed after the jump.

In *Hovanec v. City of Flint*, Case No. 141253, the Court directed the City of Flint's Chief City Attorney to address the plaintiff's accusation that defendant's brief on appeal "seriously and intentionally misrepresented the record". In particular, the court asked the defendant's counsel to explain the assertion that "[p]laintiff's knee injury is as a result of a soft tissue tumor and therefore completely unrelated to this order".

The Court granted leave to appeal the May 13, 2010 Court of Appeals' judgment in *People v. Evans*, Case No. 141381. Evans was charged with the crime of burning other real property. The state failed to indict him with burning a dwelling. Burning other real property is a lesser-included offense for burning a dwelling. At trial, Evans asserted that the prosecution failed to provide a necessary element of the crime, specifically that the burned building was not a dwelling. The trial court agreed and dismissed the case. The Court of Appeals reversed and remanded the case for a new trial. The court explained that the prosecution's failure to prove the building was not a dwelling was irrelevant because that was not an element of the crime. The court reasoned that where burning of other real property is charged as a stand-alone crime, and not as a lesser-included offense, the prosecution does not have to prove that the property is not a dwelling. The court further held that a second trial would not violate the Double Jeopardy Clause because the only finding the trial court made was that the building was not a dwelling, and that finding did not relate to an element of the crime. Our post on the Court of Appeals' opinion is [here](#).

The Supreme Court granted leave to appeal and directed the parties to address if retrial is banned under the Double Jeopardy Clauses of the Michigan and federal constitutions where the trial court's grant of defendant's motion for a directed verdict was based on an error of law and did determine an element of the crime.

In *People v. Loftin*, Case No. 141206, in lieu of granting leave to appeal the Court vacated the April 27, 2010 Court of Appeals' order and remanded the case to the Genesee County Circuit Court for resentencing. On remand, the trial court is ordered to either grant the defendant's request to withdraw his plea or to resentence the defendant to two years imprisonment on the felony-firearm charge. In reaching this conclusion, the Court found that the defendant was misinformed at his plea hearing that he would serve a two-year consecutive term for his conviction. Rather, the defendant should have been told that he faced a mandatory sentence of five years imprisonment for a felony-firearm second offense conviction.

Finally, the Court affirmed the June 2, 2009 Court of Appeals' opinion in *People v. McMullan*, Case No. 139209. In *McMullan*, the Court of Appeals held that the trial court did not err when it refused to instruct the jury in a second-degree murder case on the lesser included offense of involuntary manslaughter. The majority acknowledged that when a defendant is charged with murder, the trial court should ordinarily instruct the jury on involuntary manslaughter, but it nonetheless affirmed the trial court's decision because a rational view of the evidence did not support a finding of involuntary manslaughter. Our post on the Court of Appeals' decision can be found [here](#).

Although the Court affirmed the Court of Appeals' decision, it also took the opportunity to clarify the opinion of the Court of Appeals. The Court found that the Court of Appeals relied too heavily on the prosecution's evidence. Specifically, the Court of Appeals had accepted as fact that: 1) the defendant pushed the victim into the car and shot the victim; and, 2) that after the shooting defendant robbed the victim. The Court noted that each of these factual issues was disputed.

However, although the appellate court partially erred in accepting these assertions as true, the trial court still properly decided that the rational view of the evidence did not support an involuntary manslaughter jury instruction. In this case, a rational view of the evidence suggested that the defendant acted with malice. He intended to act with wanton and willful disregard of the likelihood that his actions would result in death or great bodily harm. The defendant admitted that after an altercation with the victim he left to retrieve a loaded gun. The evidence showed that the defendant returned with the weapon and that the victim was shot during a subsequent altercation. The facts did not support a finding that the defendant intended merely to injure someone or was merely grossly negligent, the two types of involuntary manslaughter.

Justice Kelly dissented, and was joined by Justice Cavanagh. In his dissent, Justice Kelly noted that he would have reversed the Court of Appeals' opinion based on the fact that there was substantial evidence to support a jury instruction on involuntary manslaughter. In particular, Justice Kelly asserted that a rational jury could have concluded that the defendant never intended to fire the gun but, instead, planned merely to scare the victim. This conclusion was further supported by the victim and defendant's long history, the defendant's efforts to aid Smith following the shooting, the remorse McMullan displayed for the incident, and the evidence that the defendant was under the influence of drugs at the time of the shooting.