STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 4, 2012
v	No. 306253 Muskegon Circuit Court
BRIAN RICHARD ENGLAND, Defendant-Appellant.	LC No. 10-059169-FH

Before: WILDER, P.J., and O'CONNELL and K.F. KELLY, JJ.

PER CURIAM.

Defendant pleaded no contest to burning of a dwelling house, MCL 750.72; and second-degree home invasion, MCL 750.110a(3). He was sentenced to 3-1/2 to 20 years' imprisonment for burning of a dwelling house, and 3-1/2 to 15 years' imprisonment for second-degree home invasion. We granted defendant's delayed application for leave to appeal, and we now affirm.

Defendant argues that the trial court abused its discretion in denying his motion to withdraw his no contest pleas. Defendant claims that he could not be guilty of second-degree home invasion or burning of a dwelling house because the structure burned in this case was not a "dwelling" or a "dwelling house." A trial court's denial of a defendant's motion to withdraw a guilty plea is reviewed for an abuse of discretion. *People v Harris*, 224 Mich App 130, 131; 568 NW2d 149 (1997). And issues of statutory construction are questions of law that we review de novo. *People v Ryan*, 295 Mich App 388, 400; 819 NW2d 55 (2012).

With regard to defendant's second degree home invasion conviction, a "dwelling" means "a structure or shelter that *is used* permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter." (Emphasis added) MCL 750.110a(1)(a). Defendant argues that the definition's requirement that the structure or shelter "is used" places the focus on the nature of a structure *at the time of the incident.* However, in *People v Powell*, 278 Mich App 318; 750 NW2d 607 (2008), this Court looked beyond a structure's use at the immediate time of the incident in concluding that a structure that is temporarily vacant nonetheless remains a dwelling as long as the inhabitant intends to return. *Id.* at 322. Thus, the intent "to use a structure as a place of abode is the primary factor in determining whether it constitutes a dwelling for purposes of MCL 750.110a(3)." *Id.* at 321. The *Powell* Court found that the structure in that case was a dwelling because even though the

owner left the house while it was being renovated due to fire damage, "he always intended to move back into the house after the fire damage was repaired." *Id*. at 322.

In this case, Jeffrey Rose purchased the house as a foreclosure from a bank for approximately $25,000 and spent another $20,000 in renovating the house. And before defendant burned the house, Rose had a land contract purchaser "lined up." Accordingly, like *Powell*, Rose's house was only temporarily vacant until the renovations were completed. Therefore, the fact that the house was temporarily unoccupied does not prevent a finding that it was a dwelling within the meaning of MCL 750.110a(3). We find that the trial court did not abuse its discretion in denying defendant's motion to withdraw his no contest plea in regard to second-degree home invasion.

With regard to defendant's conviction for burning a dwelling house, MCL 750.72, there is no statutory definition of "dwelling house." But the Michigan Supreme Court has defined the term as "any house intended to be occupied as a residence, and would include any such residence, even though not occupied by the complaining witness at the time of the burning." *People v Reeves*, 448 Mich 1, 17; 528 NW2d 160 (1995), superseded by statute on other grounds as recognized in *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000) (quotation omitted). In determining whether a structure was a dwelling house, the *Reeves* Court held that there was a distinction between a structure uninhabitable to the point of abandonment and one that was merely unoccupied. *Reeves*, 448 Mich at 19. Specifically, the *Reeves* Court held that

> [i]f a dwelling is simply unoccupied at the time it is burned, common-law arson has been committed. If a dwelling house is unoccupied and dilapidated to the extent that it is deemed abandoned, then the structure is no longer considered a dwelling house and common-law arson has not been perpetuated. [*Id.*]

The *Reeves* Court cited *State v Williams*, 154 Vt 76, 77-78; 574 A2d 1264 (1990), as an example of a structure that was merely unoccupied, and thus a dwelling house, at the time of its burning. *Reeves*, 448 Mich at 19. While the structure in *Williams* had not been occupied for 1-1/2 years before the fire, the *Williams* Court found that it was a dwelling house because the owner was actively renovating the structure, desired to keep the structure, and visited the structure every day during its vacancy. *Williams*, 154 Vt at 77-78. This case is analogous to *Williams* because the structure here was being renovated, and the structure was going to be habitable in the very near future. Accordingly, the structure in this case was a dwelling house because it was a "house intended to be occupied as a residence . . . even though not occupied by the complaining witness at the time of the burning." *Reeves*, 448 Mich at 17.

Defendant claims that at the time of the incident, Rose was renovating the structure and that under the Stille-DeRossett-Hall Single State Construction Code Act (Construction Code), MCL 125.1501 et seq., the structure was uninhabitable. Defendant's allegation that the structure was legally uninhabitable under the Construction Code does not control this case. *Reeves* required a factual finding that the structure is unoccupied and dilapidated *to the extent that it is abandoned*. *Reeves*, 448 Mich at 19. There was no evidence that the structure was dilapidated to the extent that it was abandoned. In contrast, the $20,000 in renovation expenditures incurred by Ross is evidence to the contrary. Defendant's allegation that the structure was legally uninhabitable under the Construction Code is merely one fact we considered in determining

whether the structure here was a dwelling house. See *Powell*, 278 Mich App at 322 (in the context of home-invasion statute, a structure's inhabitability will not automatically preclude the structure from being a dwelling). Therefore, we conclude that the trial court did not abuse its discretion in denying defendant's motion to withdraw his no contest plea in regard to the burning of a dwelling house.

Defendant also argues that the trial court erred in scoring offense variable (OV) 9, MCL 777.39 (number of victims), at ten points because the firefighters who responded to defendant's fire were not "victims." A trial court's sentencing scoring decision is reviewed to "determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). "'Scoring decisions for which there is any evidence in support will be upheld.'" *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

OV 9 allows the trial court to assign a score of ten points where there are two to nine victims placed in danger of physical injury or death. MCL 777.39(1)(c). A victim under MCL 777.39 is "each person who was placed in danger of injury or loss of life." MCL 777.39(2)(a). Defendant argues that OV 9 should not be scored at ten points because the firefighters arrived at the scene of the fire 9-1/2 hours after defendant set the fire. Defendant notes that while a victim under MCL 777.39(2)(a) is "each person who was placed in danger of injury or loss of life," the provision does not define how the danger must arise or provide any temporal limits to the application of the provision.[1] In *People v McGraw*, 484 Mich 120, 133-134; 771 NW2d 655 (2009), the Michigan Supreme Court recognized that

> [o]ffense variables must be scored giving consideration to the sentencing offense alone, unless otherwise provided in the particular variable. OV 9 does not provide for consideration of conduct after completion of the sentencing offense. Therefore, it must be scored in this case solely on the basis of defendant's conduct during [the sentencing offense]."

Here, defendant set fire to the house during the commission of the sentencing offense of the burning of a dwelling house. That fire was not extinguished until 9-1/2 hours later by the responding firefighters. The trial court scored OV 9 based on its finding that the firefighters

[1] Defendant construes MCL 777.39(2)(a), by asserting, without authority, that "[g]enerally when one think of the 'victim of a crime,' it is in the context of a direct injury with the harm being immediate." Defendant concludes that "any danger of injury to the responding firefighters and police officers was not intended, foreseeable, or immediate." However, defendant provides no authority for his construction of MCL 777.39(2)(a) or for his conclusion that because any danger of injury to the responding firefighters was not intended, foreseeable, or immediate, OV 9 should have been scored at zero. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

were "victimized" by the fire defendant set during the commission of the sentencing offense. It matters not that the firefighters were not "victimized" until 9-1/2 hours after the sentencing offense because the trial court scored OV 9 based solely on defendant's conduct in burning the dwelling house as required by *McGraw*. We therefore find that the trial court did not abuse its discretion in scoring OV 9 at ten points.

Defendant further argues that because OV 9 was incorrectly scored, any benefit he received under his *Cobbs*[2] agreement was illusory and thus the plea was invalid. However, because the trial court did score OV 9 correctly at ten points, defendant did receive a benefit from the *Cobbs* agreement. As a result, defendant's argument has no merit.

Finally, defendant requests that we order the trial court to scrupulously review the amount of restitution on remand. We decline the request. In his brief on appeal, defendant acknowledges that "the attorneys stipulated to the amount of restitution," and "[i]t is difficult to argue on appeal that the trial court abused its discretion in entering an order when defense counsel agreed to the amount of restitution." We agree that such an argument is "difficult." Indeed, defendant's actions waived any issue related to the amount of restitution when he agreed to the amount. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Accordingly, because waiver extinguishes any error, defendant is not entitled to any relief. *Id.*

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly

[2] *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).