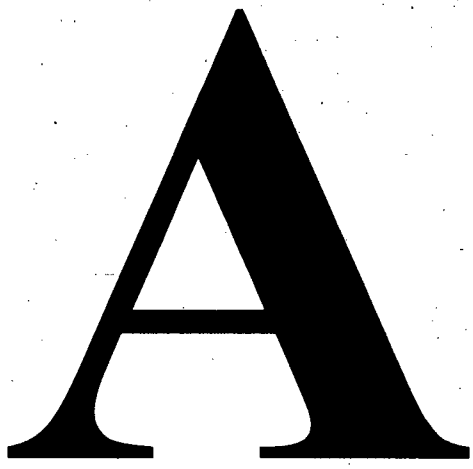
Exhibit



34 N.Y.3d 954
(The decision of the Court of Appeals of New York is referenced in the New York Supplement and North Eastern Reporter as a decision without published opinion.)
Court of Appeals of New York.

PEOPLE
v.
TAYLOR (Dante)

9/18/2019

4th Dept: 6/7/2019 (Wayne)

Opinion

Rivera, J.

Applications in Criminal Cases for Leave to Appeal Denied

All Citations

34 N.Y.3d 954, 134 N.E.3d 632 (Table), 110 N.Y.S.3d 633

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Exhibit

B

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

MOTION NO. 1058/17

KA 15-00214

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT,

V

DANTE TAYLOR, DEFENDANT-APPELLANT.

Indictment No: 13-76

Appellant having moved for reargument and a writ of error coram nobis vacating the order of this Court entered February 2, 2018, affirming a judgment of the Wayne County Court, rendered November 20, 2014,

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is hereby ORDERED that the motion for reargument is dismissed as untimely, and

It is further ORDERED that the motion for a writ of error coram nobis is denied.

Entered: June 7, 2019

Mark W. Bennett
Clerk of the Court

Exhibit

C

(Filed Sept. 27, 2019)

175 A.D.3d 1850
Supreme Court, Appellate Division,
Fourth Department, New York.

The PEOPLE of the State of New York, Respondent,

v.

Dante TAYLOR, Defendant-Appellant.

MOTION NO. 1058/17

KA 15-00214

PRESENT: CARNI, J.P., LINDLEY, NEMOYER, CURRAN, AND TROUTMAN, JJ.

Opinion

Motion for reargument and other relief denied.

All Citations

175 A.D.3d 1850, 107 N.Y.S.3d 506 (Mem), 2019 N.Y. Slip Op. 06978

End of Document

Exhibit

D

Exhibit

E

158 A.D.3d 1095
Supreme Court, Appellate Division,
Fourth Department, New York.

The PEOPLE of the State of New York, Respondent,
v.
Dante TAYLOR, Defendant–Appellant.

1058
|
KA 15–00214
|
Entered: February 2, 2018

Synopsis

Background: Defendant was convicted in the Wayne County Court, Daniel G. Barrett, J., of murder in the first degree, burglary in the first degree, and arson in the second degree. Defendant appealed.

Holdings: The Supreme Court, Appellate Division, held that:
[1] defendant was afforded fair notice of charges against him;
[2] notice to defendant was not required for statements by defendant in response to pedigree questions from police officers where defendant admitted age;
[3] defendant did not have a reasonable expectation of privacy in historical cell site location information revealed to service provider;
[4] prosecutor was allowed to question defendant about two prior convictions of robbery in the second degree;
[5] there was sufficient evidence from which a rational jury could have found defendant's identity proved beyond a reasonable doubt to support convictions;
[6] there was sufficient evidence that homicides were committed in course of committing or in furtherance of burglary to support conviction for murder in first degree; and
[7] there was not sufficient evidence that victims were alive at time fires were set to support conviction for arson in second degree.

Ordered accordingly.

West Headnotes (11)

[1] **Homicide**
⇐ Murder in general

Indictments and Charging Instruments
⇐ Defects in charging instrument

Defendant was afforded fair notice of charges against him, and thus indictment for four counts charging defendant with murder in first degree was not jurisdictionally defective; by alleging that defendant committed murder in the first degree, counts adopted title of first-degree murder statute and incorporated all of the elements of that crime, including age element. N.Y. Penal Law §§ 125.27(1)(a)(vii), (viii), 125.27(1)(b), 140.30(2), (3), 150.15.

[2] **Criminal Law**
⇐ Notice

Notice to defendant was not required for statements by defendant in response to pedigree questions from police officers where defendant admitted age; routine administrative questioning by police presumptively avoids any grounds for challenging voluntariness of statements given in response to those questions. N.Y. CPL § 710.30.

[3] **Searches and Seizures**
⇐ Abandoned, surrendered, or disclaimed items

Telecommunications
⇐ Carrier's cooperation; pen registers and tracing

Defendant did not have a reasonable expectation of privacy in historical cell site location information (CSLI) he revealed to his service provider; CSLI was information contained in the business records of defendant's service provider, and Fourth Amendment did not prohibit obtaining of information revealed to third party and conveyed by party to Government authorities, even if the information was revealed on assumption that it would be used only for limited purpose and confidence placed in the third party would not be betrayed. U.S. Const. Amend. 4; 18 U.S.C.A. § 2701 et seq.

1 Cases that cite this headnote

[4] **Searches and Seizures**

Expectation of privacy

The Fourth Amendment protects only reasonable expectations of privacy. U.S. Const. Amend. 4.

[5] **Criminal Law**

Electronic surveillance; telecommunications

Defendant was not entitled to suppression of evidence related to alleged violation of Stored Communications Act (SCA); availability of suppression remedy for statutory violations turned on provisions of statute rather than judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights, and Act provided that violation of Act may have been punishable by criminal or civil penalties or administrative discipline. U.S. Const. Amend. 4; 18 U.S.C.A. §§ 2701(b), 2707.

[6] **Witnesses**

Burglary or robbery

Witnesses

Similarity to charged offense

Prosecutor was allowed to question defendant in case alleging murder in the first degree, burglary in the first degree, and arson in the second degree about two prior convictions of robbery in the second degree; convictions involving theft, such as robbery, were highly relevant to issue of credibility because they demonstrated defendant's willingness to deliberately further self-interest at expense of society, and mere fact that prior crimes were similar in nature to instant offenses did not warrant preclusion. N.Y. Penal Law §§ 125.27(1)(a)(vii), (viii), 125.27(1)(b), 140.30(2), (3), 150.15.

[7] **Burglary**

Identity of defendant

Criminal Law

Identity and characteristics of persons or things

Homicide

Commission of or Participation in Act by Accused; Identity

There was sufficient evidence from which a rational jury could have found defendant's identity proved beyond a reasonable doubt to support conviction for murder in the first degree, burglary in the first degree, and arson in the second degree, where defendant's vehicle or one strikingly similar was seen in driveway of residence shortly before the victims went to residence, victims' blood was found in defendant's car and on items found inside defendant's residence, and victims' cell phones were located in bag with receipt linked to defendant's girlfriend. N.Y. Penal Law §§ 125.27(1)(a)(vii), (viii), 125.27(1)(b), 140.30(2), (3), 150.15.

[8] **Homicide**

Relation between predicate offense or conduct and homicide

There was sufficient evidence that homicides were committed in course of committing or in furtherance of burglary to support conviction for murder in first degree; burglary was not complete at time defendant entered property, and there was logical nexus between murder and burglary. N.Y. Penal Law §§ 125.27(1)(a)(vii), (viii), 125.27(1)(b), 140.30(2), (3).

[9] **Homicide**

Causal relationship between offense and death

The "in furtherance of" element of murder in the first degree requires a logical nexus between a murder and a felony. N.Y. Penal Law § 125.27(1)(a)(vii).

[10] **Arson**

Weight and Sufficiency

There was not sufficient evidence that victims, a mother and daughter, were alive at time fires were set to support conviction for arson in second degree; arson in the second degree required that person be alive when the fire is started, distinguishing factor that elevated arson in third degree to arson in second degree was danger to human life, evidence indicated that mother was

v. Rodney, 85 N.Y.2d 289, 293, 624 N.Y.S.2d 95, 648 N.E.2d 471 [1995]).

[3] Relying on *Riley v. California,* —— U.S. ——, 134 S.Ct. 2473, 2493–2494, 189 L.Ed.2d 430 (2014), *United States v. Jones,* 565 U.S. 400, 404–405, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012), and *People v. Weaver,* 12 N.Y.3d 433, 445, 882 N.Y.S.2d 357, 909 N.E.2d 1195 (2009), defendant contends that County Court erred in refusing to suppress the historical CSLI related to his cell phone because that information was obtained in violation of the Federal and New York State Constitutions as well as the Stored Communications Act ([SCA] 18 USC § 2701 *et seq.*). We reject that contention and conclude that the court properly refused to suppress such evidence. As we noted in *People v. Jiles,* historical CSLI is information "contained in the business records of defendant's service provider" (158 A.D.3d 75, 79–81, 68 N.Y.S.3d 787, 2017 N.Y. Slip Op. 08944, 2017 WL 6544614, *3 [4th Dept. 2017]). We thus conclude that defendant's reliance on *Riley,* which concerned a warrantless search of "digital information on a cell phone seized from an individual who ha[d] been arrested," is misplaced (—— U.S. ——, 134 S.Ct. at 2480), and that his ***1098** reliance on *Jones* and *Weaver,* which involved the physical installation of a device to track the defendant's movements (*see Jones,* 565 U.S. at 404–405, 132 S.Ct. 945; *Weaver,* 12 N.Y.3d at 445, 882 N.Y.S.2d 357, 909 N.E.2d 1195), is likewise misplaced. The United States Supreme Court has held that "the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by [that party] to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed" (*United States v. Miller,* 425 U.S. 435, 443, 96 S.Ct. 1619, 48 L.Ed.2d 71 [1976]). Moreover, that analysis "is not changed" ****260** by the mandatory nature of such record keeping (*id.*).

We thus conclude that defendant did not have a reasonable expectation of privacy in information that he revealed to his service provider (*see Jiles,* 158 A.D.3d at 80, 68 N.E.3d 787, 2017 N.Y. Slip Op. 08944 at *3; *People v. Sorrentino,* 93 A.D.3d 450, 451, 939 N.Y.S.2d 452 [1st Dept. 2012], *lv denied* 19 N.Y.3d 977, 950 N.Y.S.2d 360, 973 N.E.2d 770 [2012]; *People v. Hall,* 86 A.D.3d 450, 451–452, 926 N.Y.S.2d 514 [1st Dept. 2011], *lv denied* 19 N.Y.3d 961, 950 N.Y.S.2d 113, 973 N.E.2d 211 [2012], *cert denied* 568 U.S. 1163, 133 S.Ct. 1240, 185 L.Ed.2d 189 [2013]; *see also United States v. Davis,* 785 F.3d 498, 513 [11th Cir.2015], *cert denied*—— U.S. ——, 136 S.Ct. 479, 193 L.Ed.2d 349 [2015]; *In re Application of U.S. for Historical Cell Site Data,* 724 F.3d 600, 615 [5th Cir. 2013]; *In re Application of U.S. for an Order Directing a Provider of Elec. Communication Serv. to Disclose Records to Govt.*, 620 F.3d 304, 313–317 [3d Cir. 2010]; *cf. United States v. Skinner,* 690 F.3d 772, 777 [6th Cir. 2012], *cert denied* 570 U.S. 919, 133 S.Ct. 2851, 186 L.Ed.2d 913 [2013]). We note that defendant does not contend that the relevant CSLI data included passively-generated data, i.e., data that was not generated by the subscriber's proactive use of his or her cell phone.

[4] As the Fifth Circuit Court of Appeals has written, "[w]e understand that cell phone users may reasonably want their location information to remain private, just as they may want their trash, placed curbside in opaque bags ... or the view of their property from 400 feet above the ground ... to remain so. But the recourse for these desires is in the market or the political process: in demanding that service providers do away with such records (or anonymize them) or in lobbying elected representatives to enact statutory protections. The Fourth Amendment, safeguarded by the courts, protects only reasonable *expectations* of privacy" (*Application of U.S. for Historical Cell Site Data,* 724 F.3d at 615).

With respect to defendant's state constitutional challenge, we conclude that "there is 'no sufficient reason' to afford cell site location information at issue here greater protection ***1099** under the state constitution than it is afforded under the federal constitution" (*Jiles,* 158 A.D.3d at 81, 68 N.E.3d 787, 2017 N.Y. Slip Op. 08944 at *3; *see People v. Guerra,* 65 N.Y.2d 60, 63–64, 489 N.Y.S.2d 718, 478 N.E.2d 1319 [1985]; *People v. Di Raffaele,* 55 N.Y.2d 234, 241–242, 448 N.Y.S.2d 448, 433 N.E.2d 513 [1982]; *see also Sorrentino,* 93 A.D.3d at 451, 939 N.Y.S.2d 452; *Hall,* 86 A.D.3d at 451–452, 926 N.Y.S.2d 514; *cf. New Jersey v. Earls,* 214 N.J. 564, 588–589, 70 A.3d 630, 644 [2013]).

[5] Defendant further contends that there was a violation of the SCA and, as a result, suppression was warranted. We need not address the merits of the alleged violation because, even if there had been such a violation, defendant would not be entitled to suppression of the evidence (*see United States v. Stegemann,* 40 F.Supp.3d 249, 270 [N.D.N.Y.2014], *affd in part* 701 Fed.Appx. 35 [2d Cir. 2017]; *United States v. Guerrero,* 768 F.3d 351, 358 [5th Cir. 2014], *cert denied* —— U.S. ——, 135 S.Ct. 1548, 191 L.Ed.2d 643 [2015]; *United States v. Corbitt,* 588 Fed.Appx. 594, 595 [9th Cir. 2014]; *United States v. Zodhiates,* 166 F.Supp.3d 328, 335 [W.D.N.Y.2016]; *United States v. Scully,* 108 F.Supp.3d 59, 87 [E.D.N.Y.2015]; *see also People v. Thompson,* 51 Misc.3d 693, 714, 28 N.Y.S.3d 237 [Sup. Ct. N.Y. County 2016]).

"The availability of the suppression remedy for ... statutory, as opposed to constitutional, violations ... turns on the provisions of [the statute] rather than **261 the judicially fashioned exclusionary rule aimed at deterring violations of Fourth Amendment rights" (*United States v. Donovan*, 429 U.S. 413, 432 n 22, 97 S.Ct. 658, 50 L.Ed.2d 652 [1977]). Here, the statute provides that a violation of the SCA may be punishable by criminal or civil penalties or administrative discipline (18 USC §§ 2701[b]; 2707; *see Zodhiates*, 166 F.Supp.3d at 335; *Scully*, 108 F.Supp.3d at 88).

[6] Before trial, the court conducted a *Sandoval* hearing, after which the court determined that the People would be permitted to question defendant, should he testify, concerning certain prior convictions, but would be precluded from questioning him on other convictions or adjudications. Defendant now contends that the court abused its discretion in permitting the People to question him concerning 1998 and 2004 convictions of attempted robbery in the second degree. He contends that both convictions are too similar to the charged crimes and are too remote in time to be probative. Inasmuch as defendant failed to challenge the 2004 conviction as being too remote, he failed to preserve that contention for our review (*see People v. Major*, 61 A.D.3d 1417, 1417, 876 N.Y.S.2d 822 [4th Dept. 2009], *lv denied* 12 N.Y.3d 927, 884 N.Y.S.2d 708, 912 N.E.2d 1089 [2009]). Moreover, defendant failed to object to the court's ultimate *Sandoval* ruling and thus failed to preserve for our review his challenge to the ultimate ruling (*see People v. Huitt*, 149 A.D.3d 1481, 1482, 52 N.Y.S.3d 597 [4th Dept. 2017], *lv denied* *1100 30 N.Y.3d 950, 67 N.Y.S.3d 133, 89 N.E.3d 523 [2017]; *People v. Taylor*, 148 A.D.3d 1607, 1608, 50 N.Y.S.3d 217 [4th Dept. 2017]). We nevertheless exercise our power to review those contentions as a matter of discretion in the interest of justice (*see* CPL 470.15[6][a]). We conclude that the court did not abuse its discretion in permitting the prosecutor to question defendant about the two prior convictions. " 'Convictions involving theft, such as robbery, are highly relevant to the issue of credibility because they demonstrate the defendant's willingness to deliberately further his [or her] self-interest at the expense of society' ... Moreover, the mere fact that the prior crimes were similar ... in nature to the instant offenses [does] not warrant their preclusion" (*People v. Harris*, 74 A.D.3d 984, 984–985, 902 N.Y.S.2d 190 [2d Dept. 2010], *lv denied* 15 N.Y.3d 920, 913 N.Y.S.2d 647, 939 N.E.2d 813 [2010]; *see People v. Davey*, 134 A.D.3d 1448, 1450–1451, 22 N.Y.S.3d 713 [4th Dept. 2015]; *People v. Arguinzoni*, 48 A.D.3d 1239, 1240–1241, 852 N.Y.S.2d 546 [4th Dept. 2008], *lv denied* 10 N.Y.3d 859, 860 N.Y.S.2d 485, 890 N.E.2d 248 [2008]).

[7] Defendant raises numerous challenges to the sufficiency of the evidence supporting the conviction of various counts. First, he contends that the evidence is legally insufficient to establish his identity as the perpetrator because the People proved the element of identity through the impermissible stacking of inferences. Even assuming, arguendo, that defendant's contention is preserved for our review based on his general challenge to the proof of identity in his motion for a trial order of dismissal (*see People v. Gray*, 86 N.Y.2d 10, 19, 629 N.Y.S.2d 173, 652 N.E.2d 919 [1995]), we conclude that it lacks merit. Although the Court of Appeals has stated that "[a]n inference may not be based on another inference" (*People v. Volpe*, 20 N.Y.2d 9, 13, 281 N.Y.S.2d 295, 228 N.E.2d 365 [1967]), and that " 'the facts from which the inferences are to be drawn must be established by direct proof [instead of] conjecture, supposition, suggestion, speculation or upon other inferences' " (**262 *People v. Leyra*, 1 N.Y.2d 199, 206, 151 N.Y.S.2d 658, 134 N.E.2d 475 [1956]), "commentators have noted that the prohibition against basing an inference upon an inference, found in the case law, is merely a restatement in different terms of the principle that a jury cannot be allowed to 'make inferences which are based not on the evidence presented, but rather on unsupported assumptions drawn from evidence equivocal at best' " (*People v. Seifert*, 152 A.D.2d 433, 441, 548 N.Y.S.2d 971 [4th Dept. 1989], *lv denied* 75 N.Y.2d 924, 555 N.Y.S.2d 43, 554 N.E.2d 80 [1990], quoting *People v. Kennedy*, 47 N.Y.2d 196, 202, 417 N.Y.S.2d 452, 391 N.E.2d 288 [1979], *rearg dismissed* 48 N.Y.2d 635, 656, 421 N.Y.S.2d 198, 396 N.E.2d 480 [1979]). Here, the jury did not make any inferences based on unsupported assumptions drawn from equivocal evidence. Defendant's vehicle or one strikingly similar was seen in the driveway of the Sodus residence shortly before the women went to that residence. The victims' blood was found in defendant's car and on items found inside defendant's residence. The victims' cell *1101 phones were located in a bag with a receipt linked to defendant's girlfriend. We thus conclude, after viewing the facts in the light most favorable to the People, that " 'there is a valid line of reasoning and *permissible inferences* from which a rational jury could have found [defendant's identity] proved beyond a reasonable doubt' " (*People v. Danielson*, 9 N.Y.3d 342, 349, 849 N.Y.S.2d 480, 880 N.E.2d 1 [2007] [emphasis added]; *see generally People v. Bleakley*, 69 N.Y.2d 490, 495, 515 N.Y.S.2d 761, 508 N.E.2d 672 [1987]).

[8] Defendant further contends that the evidence is not legally sufficient to support the conviction of two counts of murder in the first degree under Penal Law § 125.27(1)(a)(vii)

because there is insufficient evidence that the homicides were committed in the course of committing or in furtherance of the burglary. As defendant correctly concedes, his contention is not preserved for our review (*see Gray*, 86 N.Y.2d at 19, 629 N.Y.S.2d 173, 652 N.E.2d 919), and we reject his related contention that preservation is not required here because the proof at trial is legally sufficient to support a conviction of a lesser included offense (*see People v. Whited*, 78 A.D.3d 1628, 1629, 910 N.Y.S.2d 626 [4th Dept. 2010], *lv denied* 17 N.Y.3d 810, 929 N.Y.S.2d 570, 953 N.E.2d 808 [2011]). Nevertheless, we exercise our power to reach the merits of defendant's challenge as a matter of discretion in the interest of justice (*see* CPL 470.15[6][a]), and we conclude that it lacks merit. Defendant specifically contends that, inasmuch as the crime of burglary is complete once a defendant enters the building with the requisite criminal intent (*see People v. Frazier*, 16 N.Y.3d 36, 41, 916 N.Y.S.2d 574, 941 N.E.2d 1151 [2010]), the murders of the women, who arrived at the residence after the burglary was complete, could not have been in the course of or in furtherance of the completed burglary.

****263** Contrary to defendant's contention, the burglary in this case was not complete at the time he entered the property. Defendant was convicted of burglary in the first degree under Penal Law § 140.30(2) and (3), which required the People to establish the additional elements of either physical injury to the victims or the use or threatened use of a dangerous instrument. Thus, the crimes of burglary were not complete until the additional elements were established. Moreover, the Court of Appeals has made it clear that a burglar "may be said to be engaged in the commission of the crime until he [or she] leaves the building with his [or her] plunder" (*Dolan v. People*, 64 N.Y. 485, 497 [1876]; *cf. People v. Cavagnaro*, 99 A.D.2d 534, 534, 471 N.Y.S.2d 323 [2d Dept. 1984]).

[9] Contrary to defendant's additional contention, the People were not required to establish that the murders were necessary to advance the purpose of the burglary (*see* ***1102** *People v. Henderson*, 25 N.Y.3d 534, 541, 14 N.Y.S.3d 770, 35 N.E.3d 840 [2015]). Rather, "[t]he 'in furtherance of' element requires 'a logical nexus between a murder and a felony' " (*id.*). Here, the evidence, viewed in the light most favorable to the People (*see People v. Contes*, 60 N.Y.2d 620, 621, 467 N.Y.S.2d 349, 454 N.E.2d 932 [1983]), is legally sufficient to establish such a nexus and support the conviction of two counts of murder in the first degree under Penal Law § 125.27(1)(a)(vii) (*see Bleakley*, 69 N.Y.2d at 495, 515 N.Y.S.2d 761, 508 N.E.2d 672) and, upon viewing the evidence in light of the elements of the crime of murder in the first degree as charged to the jury (*see Danielson*, 9 N.Y.3d at 349, 849 N.Y.S.2d 480, 880 N.E.2d 1), we conclude that the verdict on those counts is not against the weight of the evidence (*see Bleakley*, 69 N.Y.2d at 495, 515 N.Y.S.2d 761, 508 N.E.2d 672).

[10] Defendant further contends that the evidence is not legally sufficient to support the conviction of arson in the second degree because there is no evidence that the victims were still alive at the time the fires were set and, therefore, the fires were not set while "another person who [was] not a participant in the crime [was] present" (Penal Law § 150.15). We agree with defendant and reject the People's contention that section 150.15 does not require that the person be alive when the fire is started.

Although there are cases in which defendants have been convicted of arson in the second degree where the evidence established that the victim was already dead at the time the fire was started (*see People v. Douglas*, 36 A.D.2d 994, 994–995, 320 N.Y.S.2d 977 [3d Dept. 1971], *affd* 30 N.Y.2d 592, 330 N.Y.S.2d 803, 281 N.E.2d 849 [1972]; *see also People v. Pierre*, 37 A.D.3d 1172, 1173, 829 N.Y.S.2d 386 [4th Dept. 2007], *lv denied* 8 N.Y.3d 989, 838 N.Y.S.2d 492, 869 N.E.2d 668 [2007]), it appears that the defendants in those cases did not challenge the sufficiency of the evidence on the ground that the victims were no longer alive when the fires were started. We thus conclude that those cases lack any precedential value in determining the issue before this Court.

Penal Law article 150 does not contain any definition of "person." We thus rely on the definition of person found in section 10.00(7), which provides that " '[p]erson' means a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality." Although article 125 defines a person as "a human being who has been born and is alive" (§ 125.05[1]), that definition is applicable only to article 125 and "was inserted merely to insure that the death of a 'person' would not include the abortional killing of an unborn child" (*People v. Ebasco Servs. Inc.*, 77 Misc. 2d 784, 787, 354 N.Y.S.2d 807 [Sup. Ct. Queens County 1974]).

[11] Where, as here, the Penal Law article does not contain a different ***1103** definition of person, we rely on cases interpreting the Penal Law § 10.00(7) definition of person as applied to other crimes. Those cases establish that the definition of person contemplates a living human being. For example, under article 130, which deals with sex offenses, the crime of "rape" cannot be committed where the "person"

is dead at the time of the offense. In such a situation, the defendant could be charged with attempted rape if the defendant believed that the "person" was alive at the time of the crime (*see* ****264** *People v. Gorman*, 150 A.D.2d 797, 797, 542 N.Y.S.2d 225 [2d Dept. 1989], *lv denied* 74 N.Y.2d 847, 546 N.Y.S.2d 1012, 546 N.E.2d 195 [1989], *reconsideration denied* 75 N.Y.2d 770, 551 N.Y.S.2d 913, 551 N.E.2d 114 [1989]), or sexual misconduct under section 130.20(3), which prohibits "sexual conduct with ... a dead human body." If article 130, relying on the definition of person in section 10.00(7), draws a distinction between a living human being and a "dead human body," then we see no reason that article 150 should not do so as well. Indeed, the distinguishing factor that elevates arson in the third degree to arson in the second degree is the danger to human life; if there is no living person in the building, then there is no danger to human life.

According to the testimony of the Deputy Medical Examiner, the evidence "all indicate[d] that [the mother] was already dead at the time the fire was started." The evidence also established that the daughter would have died within a minute of suffering one particular stab wound to her chest. Viewing the evidence in the light most favorable to the People (*see Contes*, 60 N.Y.2d at 621, 467 N.Y.S.2d 349, 454 N.E.2d 932), we thus conclude that the evidence is legally insufficient to establish that either of the victims was still alive at the time the fires were started (*see generally Bleakley*, 69 N.Y.2d at 495, 515 N.Y.S.2d 761, 508 N.E.2d 672). Inasmuch as the evidence is legally sufficient to establish the lesser included offense of arson in the third degree (Penal Law § 150.10[1]), which requires only that a person "intentionally damages a building or motor vehicle by starting a fire or causing an explosion," we modify the judgment by reducing the conviction of arson in the second degree to arson in the third degree (*see* CPL 470.15[2][a]) and vacating the sentence imposed on that count, and we remit the matter to County Court for sentencing thereon.

It is hereby ORDERED that the judgment so appealed from is unanimously modified on the law by reducing the conviction of arson in the second degree (Penal Law § 150.15) to arson in the third degree (§ 150.10[1]) and vacating the sentence imposed on that count and as modified the judgment is affirmed, and the matter is remitted to Wayne County Court for sentencing on the conviction of arson in the third degree.

All Citations

158 A.D.3d 1095, 72 N.Y.S.3d 256, 2018 N.Y. Slip Op. 00709

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