

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NIQUEN GABE SANDERS,

Defendant-Appellant.

UNPUBLISHED

June 7, 1996

No. 182231

LC No. 94 004871

Before: Taylor, P.J., and Murphy and E. J. Grant,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to imprisonment for six years eight months to ten years for the assault conviction and two years for the felony-firearm conviction. Defendant appeals as of right. We affirm defendant's felony-firearm conviction, reverse defendant's assault with intent to commit bodily harm conviction, and remand for further proceedings.

Defendant argues that the court committed error requiring reversal when it refused his request to instruct the jury regarding the lesser offense of felonious assault. We agree. Defendant was charged with assault with intent to commit murder. The court instructed the jury regarding assault with intent to murder and assault with intent to commit great bodily harm less than murder. The court refused defense counsel's request for an instruction regarding the lesser offense of felonious assault, agreeing with the prosecution's argument that such an instruction was not appropriate because defendant's own testimony showed he intended at least to do great bodily harm to the victim.

A criminal defendant has the right to have a properly instructed jury consider the evidence against him. *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995), amended 450 Mich 1212 (1995). MCL 768.29; MSA 28.1052 provides that it is the duty of the trial court to instruct the jury as to the law applicable to the case. Similarly, MCR 6.414(F) provides that the court must instruct the jury as required and as appropriate. The fulfillment of this obligation requires the court instruct on

* Circuit judge, sitting on the Court of Appeals by assignment.

included offenses where there is a request to do so and where there is evidence in the record that would support a conviction of the lesser offense. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). Felonious assault is a cognate lesser offense of assault with intent to commit murder. *People v Vinson*, 93 Mich App 483, 486; 287 NW2d 274 (1979). As stated in *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991):

The test to determine whether an instruction on a cognate lesser offense must be given is as follows: The record must be examined, and if there is evidence which would support a conviction of the cognate lesser offense, then the trial judge, if requested, must instruct on it. (Citations omitted). Under this standard, there must be more than a modicum of evidence; there must be sufficient evidence that the defendant could be convicted of the lesser offense. Only then does the judge's failure to instruct on the lesser included offense constitute error.

It is also the case that the principal offense and the lesser cognate offense must be of the same class or category, i.e., there must be an inherent relationship between the two offenses. *People v Hendricks*, 446 Mich 435, 444; 521 NW2d 546 (1994).

The elements of assault with intent to commit great bodily harm are (1) an attempt or offer with force or violence to do corporal hurt to another (assault), (2) coupled with an intent to do great bodily harm less than murder. *People v Harrington*, 194 Mich App 424, 428; 487 NW2d 479 (1992). Great bodily harm has been defined as "serious injury of an aggravated nature," *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986) and as "serious and permanent bodily injury," *People v Miller*, 91 Mich 639; 52 NW 65 (1892). The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Malkowski*, 198 Mich App 610, 614; 499 NW2d 450 (1993).

The victim testified that defendant came over to her house, began cussing her out, pulled a gun, said he was going to blow her head off, and then placed the gun to her face, pulling the trigger. The victim ran out the back door and yelled to her next-door neighbor to call the police. The victim unsuccessfully attempted to scale a fence in her backyard. The victim denied that she may have punched a hole in her face while trying to scale the fence in the dark. The victim also admitted that the police never searched for a bullet or a spent shell. The victim said a bullet went into her cheek and shattered a jaw bone.

Defendant testified that he had been drinking all day and went over to the victim's house and got into an argument. He said the victim called his grandmother a bitch, that he lost his cool and pulled out his gun and struck the victim's face with it. Defendant said he never threatened to kill the victim and that he did not shoot the victim. He said he jabbed the victim with the gun and that the barrel of the gun hit the victim's cheek. Defendant said the victim did not fall down, he did not hear the gun go off, and that he did not see any blood. He also said he knew he did not hurt the victim too badly and that "it wasn't

no great bodily harm.” Defendant’s girlfriend confirmed that defendant had been drinking and she said that she was with defendant when he was arguing with the victim, but stated that she did not see the victim get hurt or hear a gunshot. She said that she left with defendant and that she did not know the victim had been hurt until the next day. The emergency room doctor stated that the victim had a through-and-through laceration to the left side of her cheek, but that no bullet or bullet fragments were found at the wound site.

The court’s failure to give a felonious-assault instruction was error requiring reversal where (1) it was specifically requested¹, (2) it is of the same class or category of crime as assault with intent to murder, and (3) there was evidence on the record that would have supported such a conviction. Jabbing or striking someone on the face with a handgun does not necessarily establish an intent to cause serious injury of an aggravated nature. *Mitchell, supra*. Thus, the prosecutor’s argument, which the court accepted, that defendant’s own testimony established an intent to commit a great bodily harm was erroneous. Indeed, defendant testified that he did not believe the victim had been seriously injured and that it was not a great bodily harm. The court’s error in failing to give the felonious-assault instruction was not harmless error where the jury acquitted defendant of the more serious charge of assault with intent to commit murder and convicted defendant of the only lesser offense on which the court instructed the jury. *People v Beach*, 429 Mich 450, 481, 493; 418 NW2d 861 (1988); *People v Mosko*, 441 Mich 496, 501-506; 495 NW2d 534 (1992).

Defendant’s remaining claims regarding counsel’s alleged ineffectiveness and sentencing are without merit or moot in light of our holding regarding the court’s failure to give a felonious-assault instruction.

This case is remanded for entry of a conviction of felonious assault and for resentencing. If the prosecutor chooses to do so, he may move for a new trial before resentencing on the charge of assault with intent to commit great bodily harm. *Vinson, supra* at 490. Defendant’s conviction of felony-firearm is affirmed.

Affirmed in part, reversed in part, and remanded. We do not retain jurisdiction.

/s/ Clifford W. Taylor
/s/ William B. Murphy
/s/ Edward J. Grant

¹ We do note that defense counsel did not make this request until after closing argument where he conceded that defendant had committed a great bodily harm. This could conceivably have been cited by the trial court as a reason for denying an instruction regarding felonious assault. However, the court is to determine if a lesser cognate instruction is appropriate on the basis of the evidence that has been adduced, and arguments of counsel are not evidence.