STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES BARNES,

Defendant-Appellant.

UNPUBLISHED
January 21, 1997

No. 184538

Recorder's Court
LC No. 94-009037

Before: Reilly, P.J. and White and P.D. Schaefer,* JJ.

PER CURIAM.

Defendant was charged with two counts of assault with intent to murder, MCL 750.83; MSA 28.278, and felony-firearm, 750.227b; MSA 28.424(2). At trial, some eyewitnesses identified defendant as the gunman, and other eyewitnesses, including an off-duty police officer, placed defendant at the scene but testified he was not the gunman. Following a bench trial, defendant was found not guilty of the charged offenses, but guilty of the uncharged offense of carrying a weapon in a motor vehicle (CCW/MV), MCL 750.227; MSA 29.424.[1] We reverse.

Defendant first argues that he had inadequate notice of the possibility of being convicted of CCW/MV, and that his due process rights were thus violated. We agree.

A court's consideration of lesser included offenses is guided by the following principles:

> A trial court has no authority to convict a defendant of an offense not specifically charged unless the defendant has had adequate notice. The notice is adequate if the latter charge is a lesser included offense of the original charge. A trial court may not instruct a jury on a cognate lesser included offense unless the language of the charging document gives the defendant notice that he could face a lesser offense charge.

---

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

> A cognate lesser included offense is one that is in the same class or category as the charged offense or that is closely related to the charged offense. The cognate lesser offense may share some elements with the greater offense, but may also include some elements not found in the greater offense. The elements of the two crimes should be compared in order to determine if an offense is a cognate lesser included offense of a charged offense. However, whether a crime is a cognate offense generally turns on the particular facts of the case. [*People v Adams*, 202 Mich App 385, 387-388; 509 NW2d 530 (1993), quoting *People v Usher*, 196 Mich App 228, 231-232; 492 NW2d 786 (1992).]

Defendant was charged with assault with intent to commit murder and felony-firearm for allegedly firing a pistol at two men during a street brawl. The elements of assault with intent to commit murder are: 1) an assault, 2) with an actual intent to kill, 3) which, if successful, would make the killing murder. *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempted commission of a felony. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The elements of CCW/MV are: (1) there was a pistol in a motor vehicle occupied or operated by defendant, (2) defendant knew there was a pistol in the vehicle, and (3) defendant "carried" the pistol. *People v Butler*, 413 Mich 377, 384-385; 319 NW2d 540 (1982); MCL 750.227(2); MSA 29.424.

Assuming, arguendo, that a charge of carrying a concealed weapon in a motor vehicle could appropriately be considered given the information, defendant was nevertheless provided with insufficient notice of the charge. The cases discussing whether the court can properly instruct the jury on an uncharged offense presume that the defendant will have notice that the trier of fact will be so instructed. *People v Hendricks*, 446 Mich 435; 521 NW2d 546 (1994); *Adams, supra*.

Here, the court gave no indication to defendant or the prosecutor at any time until rendering its decision that the court would be considering the offense. Defendant had no opportunity to address argument to the offense. While the subject of defendant's knowledge of and involvement with the gun clearly came up at trial,[2] the proofs were presented in the context of the issue being the identity of the gunman. Argument was presented in this fashion as well.

Further, the only evidence presented at trial that defendant had knowledge of the gun's presence in the vehicle was the testimony that defendant was the gunman. Other evidence tended to establish that defendant's uncle emerged from the vehicle with a gun and shot it. The court expressed reasonable doubt as to this issue. Defendant was unable to address the court regarding the paucity of evidence regarding the knowledge and carrying elements of the CCW/MV charge because the court gave no notice that it would be considering the weapons offense, notwithstanding that under the circumstances of this case, neither the charge nor the evidence would itself put defendant on notice that the CCW/MV offense would be considered.

We therefore vacate defendant's CCW/MV conviction. In light of our disposition we need not address defendant's remaining challenge regarding his sentence.

Reversed.

/s/ Helene N. White
/s/ Philip D. Schaefer

I concur in result only.

/s/ Maureen Pulte Reilly

[1] Although MCL 750.227; MSA 424 is captioned "Concealed weapons, carrying," section 2 actually proscribes the carrying of a pistol, whether concealed or otherwise, in a vehicle operated or occupied by the person, without the necessary license.

[2] Defendant testified he did not have a gun and did not know his uncle had a gun. The other witness who occupied the car was not questioned regarding defendant's connection with the gun, except to the extent that she testified that the uncle was the gunman and she never saw defendant with a gun, and regarding the gun's location in the vehicle, testified only that the uncle retrieved the gun from under the passenger seat and that she did not know that there was a gun in the car until he did so. Again, the questioning was in the context of defendant's guilt of the charged offenses. Circumstances that would shed further light on whether defendant would have likely known of the gun's presence and whether defendant carried or aided and abetted the carrying of the gun were not explored.