

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIJUANE LAQUAY OTTERBRIDGE,

Defendant-Appellant.

UNPUBLISHED

February 2, 2006

No. 256739

Kent Circuit Court

LC No. 03-000224-FC

Before: Meter, P.J., Whitbeck, C.J., and Schuette, J.

PER CURIAM.

In a bench trial, the trial court convicted defendant Tijuane Otterbridge of armed robbery,¹ felonious assault,² being a felon in possession of a firearm (felon in possession),³ and possession of a firearm during the commission of a felony (felony firearm).⁴ The trial court sentenced Otterbridge, as a third felony offender,⁵ to concurrent prison terms of 14½ to 30 years for the robbery conviction, two to eight years for the assault conviction, and one to ten years for the felon in possession conviction. The trial court also sentenced him to two years' consecutive imprisonment for the felony-firearm conviction. He appeals as of right. We affirm. We decide this appeal without oral argument.⁶

I. Basic Facts And Procedural History

Melvin Williams testified that on July 22, 2002, he found Otterbridge waiting in his car when he returned from a convenience store. Williams explained that he had known Otterbridge since he was 12 or 13-years-old. But as Williams was giving Otterbridge a ride to a friend's house, Otterbridge pulled out a gun and pointed it at Williams' leg. Otterbridge told Williams to

¹ MCL 750.529.

² MCL 750.82.

³ MCL 750.224f.

⁴ MCL 750.227b.

⁵ MCL 769.11.

⁶ MCR 7.214(E).

give him anything that Williams had in his pockets. Otterbridge then pointed the gun at Williams' chest and, when Williams pushed the gun away, the gun discharged. Williams was wounded in the arm, chest, and back. Otterbridge took approximately \$30 from Williams' pocket and fled the car, running backwards while still pointing the gun at Williams.

Otterbridge claimed that he met with Williams at the convenience store in order to buy marijuana. He stated that Williams pointed a gun at him and tried to rob him. Otterbridge denied any of the charged crimes.

The trial court found Otterbridge guilty as charged on armed robbery, felon in possession, and felony firearm. However, the trial court found Otterbridge not guilty of assault with intent to commit murder, with which he was originally charged, on the ground that the proofs were insufficient to establish the requisite specific intent. Rather, the trial court found Otterbridge guilty of a lesser charge of felonious assault. Otterbridge did not object to the trial court's conviction of the lesser charge.

At the sentencing hearing, the trial court found that Otterbridge shot Williams several times. Otterbridge did not object to the trial court's findings of fact at the hearing.

II. Conviction On Lesser Charge

A. Standard of Review

Otterbridge argues that the trial court erred in finding him guilty of the lesser charge of felonious assault based on the original charge of assault with intent to commit murder. Because Otterbridge did not object to the trial court's finding of guilt of felonious assault, this issue is unpreserved. We review unpreserved constitutional claims for plain error.⁷ To avoid forfeiture under the plain error rule, three requirements must be met. The defendant must show that (1) an error occurred, (2) the error was clear and obvious, and (3) the plain error affected his substantial rights, that is that the error affected the outcome of the lower court proceedings.⁸ Once a defendant satisfies the three requirements, an appellate court must exercise its discretion in deciding whether to reverse.⁹ "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings' independent of the defendant's innocence.""¹⁰

⁷ *People v McNally*, 470 Mich 1, 5; 679 NW2d 301 (2004).

⁸ *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

⁹ *Id.*

¹⁰ *Id.*, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993), quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 2d 555 (1936).

B. Legal Standards

The judge in a bench trial may find a defendant not guilty of the offense charged and may instead find him guilty of an offense inferior to that with which is charged.¹¹ A trial court does not violate due process notice requirements by convicting a defendant of a necessarily included offense, that is, a lesser-included offense that has no elements different from the greater offense.¹² However, conviction of an uncharged *cognate* lesser offense is generally impermissible because the defendant was not provided with adequate notice that he might be charged with the lesser offense.¹³ An offense is a cognate lesser-included offense if it contains any element outside of those in the greater offense.¹⁴

C. Elements Of The Crime

The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.¹⁵ The elements of assault with intent to commit murder are (1) an assault, (2) with the actual intent to kill, (3) which, if successful, would make the killing murder.¹⁶ Because felonious assault contains an element not found within the offense of assault with intent to murder (use of a dangerous weapon), it is a cognate lesser offense.¹⁷ Therefore, we conclude that the trial court erred in considering the uncharged offense.

D. Effect Of The Error

Otterbridge, however, has not carried his burden of showing that he was actually innocent or that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.¹⁸ Williams testified that Otterbridge pointed a gun at him, demanding money. Once the gun discharged, Otterbridge fled from the car, while still pointing the gun at Williams. The trial court found that Otterbridge did have a gun and used it to rob Williams. The trial court further found that Otterbridge likely had his finger on the trigger, but because there was a struggle over the gun, there was not a specific intent to kill. These facts do not point to actual innocence on Otterbridge's part.

¹¹ *People v Cornell*, 466 Mich 335, 359; 646 NW2d 127 (2002).

¹² *People v Torres (On Remand)*, 222 Mich App 411, 419; 564 NW2d 149 (1997).

¹³ See *Cornell*, *supra* at 353-359; *People v Apgar*, 264 Mich App 321, 327; 690 NW2d 312 (2004).

¹⁴ *Cornell*, *supra* at 356.

¹⁵ *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996).

¹⁶ *Id.*

¹⁷ *People v Vinson*, 93 Mich App 483, 485; 287 NW2d 274 (1979).

¹⁸ *Carines*, *supra*.

Further, had the prosecutor charged Otterbridge initially with felonious assault, the evidence would support such a charge. Otterbridge had a weapon that he used to assault Williams. The facts could reasonably lead to the conclusion that Otterbridge's intent was to place Williams in reasonable apprehension of an immediate battery. Williams actually suffered a battery and was wounded. For these reasons, we hold that the trial court's error did not seriously affect the fairness, integrity, or the public reputation of the judicial proceedings.¹⁹

III. Sentencing

Otterbridge argues that he should be resentenced because the trial court based his sentence on erroneous information. More specifically, he argues that the trial court's finding at the sentencing hearing that he "shot the victim here, several times" was mistaken and requires resentencing. Generally, we review for clear error a trial court's factual findings at sentencing.²⁰ But because Otterbridge did not object, this issue is unpreserved, and he must, therefore, show a plain error that affected his substantial rights.²¹

There is no dispute that Williams suffered several wounds, which could account for the trial court's reference to the victim being shot several times. Further, the doctor who treated Williams was unable to conclude that only one bullet was the cause of all wounds and opined that the wounds may have been caused by two bullets. This testimony supports the trial court's finding. Therefore, we conclude that resentencing is not required.

We affirm.

/s/ Patrick M. Meter
/s/ William C. Whitbeck
/s/ Bill Schuette

¹⁹ *Id.*

²⁰ *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004).

²¹ *Carines, supra* at 774.