

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KALANI LEE CAMPBELL,

Defendant-Appellant.

UNPUBLISHED

May 22, 2007

No. 268035

Wayne Circuit Court

LC Nos. 05-005277-01

05-007721-01

Before: Cooper, P.J., and Murphy and Neff, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of two counts of felonious assault, MCL 750.82, carrying a concealed weapon (CCW), MCL 750.227, possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), and possession of a firearm during the commission of a felony, MCL 750.227b. We affirm in part, reverse in part, and remand for further proceedings.

The charges arose out of an alleged shooting at a residence in Detroit. Defendant was tried with his alleged accomplice. According to witness testimony, defendant and members of his family became involved in an altercation with members of complainants' family. This altercation culminated in defendant and another individual approaching complainants' home and allegedly firing shots outside and inside the home. When the police arrived, an eyewitness indicated that defendant was involved in the shooting. One officer testified that he saw defendant throw or hand a firearm to an individual in a nearby vehicle. Police later recovered a handgun from the vehicle. When defendant was apprehended, the police found a number of plastic baggies containing rock cocaine in defendant's possession.

Defendant was initially charged with three counts of assault with intent to commit murder. Over defense objection, the trial court also instructed the jury on the lesser offense of felonious assault. The jury found defendant guilty of two of these lesser offenses. Defendant now claims he is entitled to reversal of his assault convictions because the trial court inappropriately instructed the jury on felonious assault. Felonious assault is a cognate lesser-included offense of assault with intent to murder, not a necessarily lesser-included offense. Plaintiff concedes that the trial court erred, and that defendant is entitled to a reversal of the assault convictions.

We agree. In *People v Otterbridge*, 477 Mich 875; 721 NW2d 595 (2006), our Supreme Court found that such an instruction required reversal of the felonious assault charges even in the absence of an objection at trial. The Court found that the instruction was plainly erroneous under *People v Cornell*, 466 Mich 335, 353-359; 646 NW2d 127 (2002), and that the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings because the defendant could not “lawfully be convicted of the crime of felonious assault” under the circumstances. *Otterbridge, supra*. We hold that defendant’s assault convictions must be vacated.

However, defendant appears to further maintain that this Court should vacate more than his assault convictions. He claims that, as evidenced by the jury’s decision to acquit him on the third assault charge and the home invasion charge, the jury likely found the prosecution witnesses not credible. He contends that, had the jury not been given the option of convicting him of felonious assault, it is likely that it would have acquitted him altogether of any charges pertaining to the claim that he entered complainants’ home and discharged a weapon.

We disagree. We first note that support for a decision that not all of defendant’s convictions must automatically be vacated due to the trial court’s instructional error is found in *Otterbridge, supra*, where our Supreme Court left intact the defendant’s other convictions for armed robbery, felon in possession of a firearm, and felony-firearm. *Id*.

Here, even taking defendant’s complaint as a request for further relief, defendant does not contest his separate convictions for CCW and possession of the cocaine.

While the felony-firearm conviction arguably poses a separate question, we find that defendant has not shown that he is entitled to a reversal of this conviction under the circumstances. In the instant case, rather than charge defendant with separate felony-firearm counts predicated on each of the underlying qualifying felonies,¹ the prosecutor charged defendant with only one count. The trial court instructed the jury that a conviction of felony-firearm could be based on a finding that defendant committed any of the three counts of assault (in any form), first-degree home invasion, or possession of cocaine. While defense counsel objected to the submission of the lesser-included assault charges, he agreed with the remainder of the trial court’s jury instructions. Defense counsel specifically agreed with the inclusion of the possession charge as a predicate felony to support a felony-firearm conviction. Nor on appeal does defendant specifically argue that the felony-firearm conviction was necessarily predicated on one or more of the assault convictions, rather than on the possession conviction. In addition, because police officers testified that defendant possessed the firearm at the same time he possessed the cocaine, the possession conviction could properly support the felony-firearm conviction. Thus, even were we to find that the erroneous inclusion of the felonious assault

¹ Pursuant to MCL 750.227b, a felony-firearm conviction cannot be predicated on CCW as the underlying felony.

instruction could render a felony-firearm conviction predicated on one of the assaults suspect,² defendant has not shown that he is entitled to further relief concerning this conviction.

While defendant does not raise the secondary issue of whether he is entitled to sentencing relief as a result of the reversal of his assault convictions, we note that the trial court should revisit defendant's sentence to make any necessary corrections.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ William B. Murphy
/s/ Janet T. Neff

²We question whether defendant could raise a colorable claim of outcome-determinative error concerning his felony-firearm conviction in any event. The jury could have convicted defendant of felony-firearm while acquitting him of the predicate assault conviction. See *People v Lewis*, 415 Mich 443, 448; 330 NW2d 16 (1982). We need not decide this question under the circumstances.