

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

IVAN WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

May 26, 1998

No. 193397

Recorder's Court

LC No. 95-006681

Before: Fitzgerald, P.J., and Holbrook, Jr. and Cavanagh, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of armed robbery, MCL 750.529; MSA 28.797, and one count of assault with intent to commit murder, MCL 750.83; MSA 28.278. He was sentenced to two concurrent prison terms of twenty-five to forty-five years. Defendant appeals as of right. We affirm in part, reverse in part, and remand.

Defendant first argues that the trial court erred in refusing to instruct the jury on unarmed robbery. We agree.

A necessarily included lesser offense is one which must be committed as part of a greater offense. *People v Bailey*, 451 Mich 657, 667-668; 549 NW2d 325, remanded 453 Mich 1204; 551 NW2d 163, on remand 218 Mich App 645; 554 NW2d 391 (1996); *People v Garrett*, 161 Mich App 649, 651; 411 NW2d 812 (1987). If a party requests an instruction on a necessarily included lesser offense, the trial court must give the instruction, regardless of the evidence. *People v Beach*, 429 Mich 450, 463-464; 418 NW2d 861 (1988); *People v Torrest (On Remand)*, 222 Mich App 411, 416; 564 NW2d 149 (1997). Because unarmed robbery is a necessarily included lesser offense of armed robbery, *Garrett, supra* at 652, the trial court erred by failing to give the requested instruction. Although the failure to instruct the jury on a necessarily included lesser offense may be harmless if the jury had a choice to convict on another intermediate charge and convicted the defendant on the greater offense, *People v Mosko*, 441 Mich 496, 502-503; 495 NW2d 534 (1992); *People v Zak*, 184 Mich App 1, 16; 457 NW2d 59 (1990), that situation is not present here as the jury was not instructed on any lesser charges with respect to the armed robbery charge. Consequently, we reverse defendant's

armed robbery conviction and remand for entry of a conviction for unarmed robbery and for resentencing, with an alternative option

afforded the prosecutor to retry defendant on the armed robbery charge. *People v Gridiron*, 185 Mich App 395, 404; 460 NW2d 908 (1990), on rehearing 190 Mich App 366; 475 NW2d 879, amended 439 Mich 880; 476 NW2d 411 (1991).

Defendant next argues that he was denied his right to be present in the courtroom when the jury was reinstructed on the charge of assault with intent to commit murder and the lesser included offense of assault with intent to do great bodily harm less than murder. The right to be present at one's trial is a fundamental right guaranteed by statute, MCL 768.3; MSA 28.1026, and as part of the Fourteenth Amendment due process guarantee. *People v Montgomery*, 64 Mich App 101, 103; 235 NW2d 75 (1975). A defendant has a right to be present at any stage of the trial where his or her substantial rights might be adversely affected, including during the instructions to the jury. *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984). A defendant's absence from part of a trial only requires reversal if there is a reasonable possibility of prejudice resulting from the absence. *People v Woods*, 172 Mich App 476, 479; 432 NW2d 736 (1988).

Here, defendant did not personally waive his right to be present during the reinstruction of the jury. *People v Montgomery*, 64 Mich App 101, 103; 235 NW2d 75 (1975). However, defendant was not prejudiced by his absence from the courtroom during the reinstruction because the reinstruction was simply a repetition of the original instructions and the trial judge instructed the jury that defendant had been excused from the courtroom and that nothing negative was to be construed from the fact that defendant was not present. *People v Musser*, 53 Mich App 683, 694; 219 NW2d 781 (1974). We therefore find the error to be harmless beyond a reasonable doubt.

Defendant next argues that defense counsel's waiver of defendant's right to be present during the reinstruction denied him the effective assistance of counsel. We disagree.

To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced the defendant to the extent that it denied him a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). To show prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Lavearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Because we have already concluded that defendant was not prejudiced by his absence from the courtroom during the reinstruction of the jury, defendant cannot establish that he was denied the effective assistance of counsel. *Pickens, supra* at 309. Likewise, there is no cumulative error that would require reversal of defendant's assault conviction.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh