

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BILLY R. OLIVER,

Defendant-Appellant.

UNPUBLISHED

January 16, 2001

No. 212122

Wayne Circuit Court

LC No. 96-002078

Before: Neff, P.J., and Talbot and J.B. Sullivan,* J.J.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction as charged of two counts of assault with intent to commit murder, MCL 750.83; MSA 28.278, and his sentence of two concurrent prison terms of 20 to 40 years. We affirm.

This case arises out of assaults on Latrina Williams and Kathleen Gorski. Defendant initially pleaded guilty to the assault on Williams in exchange for a 10 to 15 year sentence and an agreement to drop both the charge relating to Gorski and a third habitual offender information. Noting defendant's previous convictions for unarmed robbery and murder, and the nature of the crime as described in the presentence report, the Court sentenced defendant to 15 to 25 years' imprisonment. Defendant's subsequent motion to withdraw his plea was granted on the ground that the habitual offender information was never filed, thereby rendering defendant's plea bargain illusory.

At trial, Latrina Williams testified that she, Gorski, an unnamed friend and defendant spent the evening smoking crack and drinking alcohol. Defendant gave money to both Williams and the unnamed friend to get more rocks of cocaine. Williams returned with the rocks, but the unnamed friend did not return. Defendant and Gorski went into another room to have sex, which apparently was unsuccessful for defendant. Shortly thereafter, Williams heard defendant arguing with Gorski and accusing Williams of stealing \$14 from his pants. Both Williams and Gorski denied the accusation, and Gorski told defendant to leave. Defendant later returned with an aluminum pipe, described as part of a car muffler, and began viciously beating Gorski and

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

Williams, calling them bitches and telling them they were going to die because of the money and unsatisfactory sex.

Gorski managed to run out of the house (she was later found bleeding from the head) but defendant beat Williams into unconsciousness, causing blindness in her right eye, loss of her sense of smell, a broken elbow, and the need for a metal plate in her head and extensive surgery to her face. Defendant's statements to police, admitting the beatings but claiming anger over being robbed and cut by Williams, were admitted at trial. The defense theory at trial was that voluntary intoxication with alcohol and drugs negated the specific intent to murder. The court instructed the jury on assault with intent to murder and assault with intent to do great bodily harm, but denied defendant's request for instructions on aggravated assault and felonious assault.

On appeal, defendant claims that the trial court erred in denying his motion for directed verdict because there was insufficient evidence of defendant's intent to murder. We disagree. When reviewing a decision on a directed verdict motion, this Court looks to the evidence presented in a light most favorable to the prosecution and asks whether a rational trier of fact could conclude that the essential elements of the crime had been proven beyond a reasonable doubt. *People v Vincent*, 455 Mich 110, 121; 565 NW2d 629 (1997), cert den 522 US 972; 118 S Ct 424; 139 L Ed 2d 325 (1997). Circumstantial evidence and reasonable inferences therefrom can constitute sufficient proof of the elements of a crime. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). The elements of assault with intent to murder are 1) an assault, 2) with the actual intent to kill, 3) which, if successful, would make the killing murder. *Id.* The intent to kill may be proved by inference from any facts in evidence. *Id.*

Defendant challenges only the second element, the intent to kill. That intent may be inferred from evidence that defendant argued with the victims, left and then returned with a pipe with which he repeatedly attacked them on and around the head saying he was going to kill them; that he stopped, permitted one of the victims to go to the bathroom and have a cigarette, and then continued the attack inflicting extremely serious injuries. The decisions defendant made, first to return with the pipe and then to continue the attacks after a brief hiatus, the viciousness of the attacks and defendant's statement to the victims that they were going to die constitute sufficient evidence of the intent to kill. *Id.* As to defendant's claim regarding Gorski's failure to testify, the prosecutor correctly noted that there is no requirement for a victim to testify: "We do those type[s] of cases every day . . . ; they're called murder cases." In any event, the record indicates that defendant waived Gorski's appearance. See *People v Brocato*, 17 Mich App 277, 305; 169 NW2d 483 (1969) (counsel may not harbor error as an appellate parachute).

Defendant next contends that the trial court erred when it refused to instruct the jury on the lesser included misdemeanor of aggravated assault, MCL 750.81a; MSA 28.276(1), and the lesser included felony of felonious assault, MCL 750.82; MSA 28.277. We disagree. Jury instructions are reviewed in their entirety to determine if the trial court presented the applicable law fully and in an understandable manner. *People v Henry*, 239 Mich App 140, 151; 607 NW2d 767 (1999). Even if imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. *Id.*

The rules for lesser included offenses are different depending on whether the requested instruction is for a misdemeanor or a felony. *People v Steele*, 429 Mich 13, 18, n 3; 412 NW2d

206 (1987); *People v Stephens*, 416 Mich 252; 330 NW2d 335 (1982). In *Steele, supra*, at 18, the Court quoted from *Stephens, supra*, at 255, as follows:

Whenever an adequate request for an appropriate misdemeanor instruction is supported by a rational view of the evidence adduced at trial, the trial judge shall give the requested instruction unless to do so would result in a violation of due process, undue confusion, or some other injustice.

The *Steele* Court then reiterated the five conditions, originally set forth in *Stephens*, which must be met before a lesser misdemeanor instruction is to be given, noting that “even when the conditions of *Stephens* are met, a trial court retains ‘substantial discretion’ to accept or deny a request.” *Steele, supra*, at 19. The five conditions are: 1) a party must request the exact instructions desired; 2) there must be an appropriate relationship between the requested instruction and the charged offense, a two-pronged inquiry to determine whether both relate to the protection of the same interests, and whether proof of the misdemeanor generally is necessarily presented as part of the proof for the greater offense; 3) the requested misdemeanor must be supported by a rational view of the evidence; 4) the defendant has adequate notice; and 5) the requested instruction must not result in undue confusion or injustice. *Id.*, at 19-22.

The elements of aggravated assault are 1) an assault, 2) without a weapon, 3) a battery causing serious or aggravated injury, and 4) a specific intent to injure or put the victim in reasonable fear of an immediate battery. *People v Joeseype Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979); *People v Brown*, 97 Mich App 606; 296 NW2d 121 (1980); *People v Van Diver*, 80 Mich App 352; 263 NW2d 370 (1977).

In this case, defendant satisfied the first and fourth condition for a misdemeanor instruction by specifically requesting the instruction for aggravated assault. Moreover, aggravated assault and assault with intent to murder relate to the protection of the same interests, thereby satisfying the first prong of the second condition. *People v Corbiere*, 220 Mich App 260, 264; 559 NW2d 666 (1996), citing *People v Hendricks*, 446 Mich 435, 449; 521 NW2d 546 (1994); *People v Barnett*, 165 Mich App 311, 318-319; 418 NW2d 445 (1987); and *People v Smith*, 143 Mich App 122, 131; 371 NW2d 496 (1985).

The second prong, whether the crimes are related in an evidentiary manner so that, generally, proof of the misdemeanor is necessarily presented as part of the greater charged offense, presents a closer question. Both crimes require an assault and a specific intent to either murder, *People v Beard*, 171 Mich App 538, 541; 431 NW2d 232 (1988), or to injure or put victim in reasonable fear of immediate battery, *Joeseype Johnson, supra*. Proof of intent to murder generally proves an intent to injure. However, the lesser misdemeanor also requires serious injury and the absence of a weapon, proofs which may or may not be present in the greater crime. In *Steele, supra*, at 19, n 4, the Court explained that the requirement that proof of the greater necessarily includes proof of the lesser “is necessary to prevent misuse of instructions by the defense.” Assuming that proofs of assault with intent to murder *generally* prove the elements of aggravated assault, the second condition arguably has been met.

However, the third condition demands that the requested misdemeanor be supported by a rational view of the evidence at trial, and also demands that proof on the element or elements

which differentiate the two crimes must be sufficiently in dispute to allow the jury to consistently find the defendant innocent of the greater and guilty of the lesser included offense. *Steele, supra*, at 20. As noted, aggravated assault requires proof that the defendant acted without a weapon. In this case, defendant's undisputed use of a weapon negated the possibility that the jury could have rationally found defendant guilty of the lesser offense as required by the third condition.¹ Finally, the trial court did not abuse its "substantial" discretion determining that an instruction on aggravated assault might cause undue confusion, which would have violated the fifth condition. *Id.*, at 21-22.

Defendant also requested an instruction on felonious assault, which not only is a four year felony thereby requiring a different analysis from the misdemeanor offense instructions, *id.*, at 18-20, but also is a cognate lesser, as opposed to a necessarily lesser, included offense to assault with intent to commit murder. *People v Vinson*, 93 Mich App 483, 486; 287 NW2d 274 (1979). In reviewing the propriety of a requested lesser included offense instruction, the court first determines if the lesser charge is a necessarily lesser included or a cognate lesser included offense. *People v Lemons*, 454 Mich 234, 253; 568 NW2d 442 (1997), citing *People v Bailey*, 451 Mich 657, 667; 549 NW2d 325 (1996). Necessarily included offenses are such that it is impossible to commit the greater without having first committed the lesser, and instructions for such offenses must be given regardless of the evidence presented at trial. *Lemons, supra*, 253, 254.²

On the other hand, cognate lesser included offenses share several elements with the charged offense and are of the same class or category, but may contain some elements not found in the higher offense. *Id.*, at 253; *People v Perry*, 460 Mich 55, 61; 594 NW2d 477 (1999). Instructions for cognate lesser included offenses require a review of the evidence to determine if it would support a conviction of the cognate offense, and "must be consistent 'with the evidence and defendant's theory of the case.'" *Lemons, supra*, at 254, citing *People v Heflin*, 434 Mich 482, 499; 456 NW2d 10 (1990).

Felonious assault is a specific intent crime, the elements of which 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 Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999); *People v Lakeman*, 135 Mich App 235, 240; 353 NW2d 493 (1984).

¹ While there was a factual dispute as to whether defendant was too intoxicated to form the specific intent to murder, defendant did not dispute his specific intent to injure.

² See *Stephens, supra*, 258, n 9: "[D]ecisions of this Court . . . require certain lesser included felony instructions even if such instructions are not supportable by any rational view of the evidence, confuse the jury, and invite juror compromise . . . However, this case is not an appropriate vehicle to reconsider those decisions" (citations omitted); *People v Heflin*, 434 Mich 482, 496 n 10; 456 NW2d 10 (1990): "However, if the court classified the offense as a necessarily included lesser offense, then the trial judge committed error requiring reversal despite defendant's failure to request the instruction;" and *People v Reese*, 242 Mich App 626, 633; 619 NW2d 708 (2000), lv pendings: "We urge the Supreme Court to hold that [necessarily included lesser offense] instruction[s] need be given only if [] supported by a rational view of the evidence."

In this case, the evidence at trial supports all these elements, and therefore the instruction should have been given.³ However, the failure to instruct on a cognate lesser included offense can be harmless error if the jury had a choice to convict on another intermediate charge and yet convicted on the greater offense. *People v Beach*, 429 Mich 450, 491; 418 NW2d 861 (1988). In this case, the trial court instructed the jury on assault with intent to commit murder and assault with intent to do great bodily harm less than murder. Because the jury rejected the latter and convicted on the former, any error was harmless. *Id.*, at 494. See also *People v Mosko*, 441 Mich App 496, 501-502; 495 NW2d 534 (1992).

Finally, defendant claims he is entitled to resentencing because the court imposed a greater sentence following trial than that which followed his plea and did not articulate on the record the reasons for the greater sentence. We disagree. Due process of law requires that vindictiveness against a defendant who successfully attacks an earlier conviction must play no part in the sentence he receives after a new trial. *North Carolina v Pearce*, 395 US 711, 725; 89 S Ct 2072; 23 L Ed 2d 656 (1969), overruled in part by *Alabama v Smith*, 490 US 794; 109 S Ct 2201; 104 L Ed 2d 865 (1989). If the second sentence is harsher than the first and if both sentences were imposed by the same judge, a presumption of vindictiveness attaches to the second sentence. *People v Mazzie*, 429 Mich 29, 34; 413 NW2d 1 (1987).⁴ The presumption of vindictiveness is overcome by a showing on the record that the trial judge considered information, such as the victim's testimony, which was unavailable at the initial sentencing, but only if that the new information bears a reasonable relationship to the increase in the sentence. *Id.* at 36-37, n 2.

In this case, the same judge sentenced defendant to a fifteen-year minimum following his plea and a twenty-year concurrent minimum following trial. However, any presumption of vindictiveness was overcome by the judge's statement on the record that she considered the victim's physical appearance and trial testimony (which detailed the severity and length, if not the premeditation and methodology of both beatings), and defendant's conviction on two counts of assault with intent to murder. While the judge also noted defendant's previous convictions for first degree murder and other offenses, and the fact that this assault occurred just six months after defendant's sixteen-year prior sentence, the transcript of the first sentencing indicates that

³ Arguably, defendant's intoxication defense negated not only the specific intent to murder but also the specific intent to injure element of felonious assault, thereby rendering the evidence inconsistent with defendant's theory of the case.

⁴ In *Alabama v Smith*, *supra*, at 794-795, the Court held that no presumption attaches when a trial follows a guilty plea because a trial generally produces information unavailable at the plea, and leniency is no longer appropriate. However, we believe that our Court's holding in *People v Mazzie*, 429 Mich 29, 35; 413 NW2d 1 (1987) controls this case because our Supreme Court has not adopted the distinction drawn by the Supreme Court in *Smith*.

information was available to the judge at that time. *Mazzie, supra*, 35. Finally, we find that the five-year increase to defendant's minimum sentence bears a reasonable relationship to the new information presented at trial. *Id.*, at 36.

Affirmed.

/s/ Janet T. Neff
/s/ Michael J. Talbot
/s/ Joseph B. Sullivan