STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN KEITH WHITE,

Defendant-Appellant.

UNPUBLISHED
February 28, 2003

No. 238735
Midland Circuit Court
LC No. 01-009859-FH

Before: Kelly, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction for malicious destruction of property over $1,000, but less than $20,000, MCL 750.377a(1)(b)(i), and felony-firearm, MCL 750.227b. We affirm.

Defendant asserts that the trial court erred in denying his request for a jury instruction of the lesser offense of malicious destruction of property under $1,000. "[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). Malicious destruction of property less than $1,000 is a cognate lesser included offense because it requires proof of a different element than the charged offense: the destruction of property worth less than $1,000. See *People v Marji*, 180 Mich App 525, 531; 447 NW2d 835 (1989). MCL 768.32 does not permit the consideration of cognate lesser included offenses. *Cornell*, *supra*, 359. If the jury found that the automobile was worth less than $1,000, it was required to acquit defendant. The trial court did not err in denying the lesser included offense instruction.

Even if the court had erred in failing to grant a lesser included offense instruction, that would not require reversal of the felony-firearm conviction. It is not necessary to obtain a conviction on the underlying felony to obtain a felony-firearm conviction. *People v Lewis*, 415 Mich 443; 330 NW2d 16 (1982). The jury found that defendant committed a felony, and that finding is not disturbed by an instructional error. *People v Garrett*, 161 Mich App 649, 653; 411 NW2d 812 (1987).

A sentencing court is not required to hold a separate hearing or to make express findings on the record in respect to the amount of restitution absent a timely objection by the defendant.

People v Grant, 455 Mich 221, 244; 565 NW2d 389 (1997). MCL 780.767(4) only requires that the prosecution establish the appropriate amount of restitution by a preponderance of the evidence. *People v Gahan*, 456 Mich 264, 276; 571 NW2d 503 (1997). Defendant waived his right to a hearing by not requesting one in the trial court. *Id.*

The amount of damages in a malicious destruction of property action is measured by the fair-market-value test. The damage is the fair market value of repairing or replacing the property destroyed. *People v Hamblin*, 224 Mich App 87, 93, 96; 568 NW2d 339 (1997). Testimony was presented indicating that the wholesale value of the automobile was between $1,400 and $1,600. The repair cost was loosely estimated as well in excess of $1,000. Even though complainant bought the car for $1,000, the court could find that the true market value was greater. In the absence of contrary evidence, the restitution amount was supported by the preponderance of the evidence.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Joel P. Hoekstra