

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UNPUBLISHED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.

WHITE, J. (*dissenting*).

I respectfully dissent. *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), is inapplicable. *Cornell* was given limited retroactive effect, and applies only to those cases pending on appeal in which the issue has been raised and preserved. *Id.* at 367. This issue was never raised below or on appeal. More important, *Cornell* does not preclude a lesser offense instruction where degrees of the same offense are involved. *Id.* at 353-354. MCL 768.32(1). Malicious destruction of property less than \$1,000 is a lesser degree of the same offense as malicious destruction of property over \$1,000, but less than \$20,000. That the former requires that the amount be less than \$1,000 does not render it a cognate lesser offense any more than the “not armed” element of robbery not armed renders it a cognate lesser offense of armed robbery. See *People v Beach*, 429 Mich 450, 484 n 17; 418 NW2d 861 (1988).

Both sides agree that the dispositive question is whether there was evidence from which a rational jury could conclude the malicious destruction involved was less than \$1,000. I conclude that there was. The vehicle owner’s preliminary examination testimony was read at trial due to her unavailability. She testified that she bought the vehicle for \$1,000, and sold it after the incident for \$100. While there was evidence that the destruction involved was more than \$1,000, the owner’s testimony was sufficient to support a finding that “the amount of destruction or injury is \$200 or more but less than \$1,000.” MCL 750.377a(1)(c). Defendant met all the requirements of *People v Stephens*, 416 Mich 252, 255; 330 NW2d 252 (1982),¹ which was applicable at the time. Thus, the court abused its discretion in refusing to instruct on this offense. Further, the error was not harmless because, while there was evidence on both sides of the issue and it is impossible to predict what the jury would have done, it is more probable than not that

¹ *Stephens, supra*, was overruled in part in *Cornell, supra* at 357-358.

the failure to give the instruction undermined reliability in the verdict, *Cornell, supra* at 364, where, on the entire record, the testimony regarding the purchase price and the sale price after the destruction clearly supported a verdict of guilt on the lesser charge. *Id.* at 364-366.

Under the circumstances, the felony-firearm conviction must also be vacated. While the jury must have found defendant guilty of the underlying felony in order to convict him, the jury was not given the option of finding him guilty of the misdemeanor.

In light of these conclusions, I do not address defendant's remaining arguments.

I would reverse and remand for a new trial.

/s/ Helene N. White