

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY A.D. HAYES,

Defendant-Appellant.

UNPUBLISHED

May 19, 2005

No. 252372

Wayne Circuit Court

LC No. 03-007763-01

Before: Murphy, P.J., and White and Smolenski, JJ.

MEMORANDUM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm, MCL 750.84, larceny of property worth more than \$200 but less than \$1,000, MCL 750.362a(4)(a), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to one year, eleven months to ten years for the assault conviction, ninety-three days to one year for the larceny conviction, and two years for the felony-firearm conviction. He appeals as of right, and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E)(1)(b).

Defendant was charged with assault with intent to commit murder. The prosecution requested that the jury be instructed on the lesser charge of assault with intent to do great bodily harm. The court granted the prosecutor's request, over defendant's objection, and, at defendant's request, additionally instructed on felonious assault. Defendant argues that the trial court erred in giving the assault with intent to commit great bodily harm instruction because there was no dispute on the element differentiating the charged offense and the lesser offense - - intent.

We review this issue de novo. *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003). "[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).

Defendant relies on his trial counsel's closing argument, in which counsel stated that the only issue in the case was identification, and on the prosecutor's argument in which she stated that the prosecution had established an intent to kill.

Although the defense theory was that identification was the sole disputed element, and had not been proved, the prosecution was still required to prove every element of the offense, including defendant's intent. And, although the prosecution argued that she had established an intent to murder, and that the assault was not made with intent to do great bodily harm, a rational view of the evidence would, nevertheless, have supported the lesser offense.

The evidence regarding defendant's intent could have supported either intent level. The only witness that saw the shooting testified that defendant shot downward, but into the car. From that testimony, the jury could rationally have found that, because the shots were fired downward, and the victim was shot in the hip, defendant had the lesser intent to commit great bodily harm. Alternatively, the jury could have found that defendant had the intent to commit murder. Therefore, the facts with regard to the element of intent were disputed, and the trial court did not err in giving the instruction.

Because we affirm the assault with intent to do great bodily harm conviction, it is unnecessary to address defendant's remaining issue.

Affirmed.

/s/ William B. Murphy
/s/ Helene N. White
/s/ Michael R. Smolenski