

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

ANTHONY MAURICE WHITLOCK,

Defendant-Appellant.

UNPUBLISHED

April 4, 2006

No. 259080

Calhoun Circuit Court

LC No. 04-001145-FH

Before: Smolenski, C.J., and Owens and Donofrio, JJ.

PER CURIAM.

Defendant appeals by right his jury conviction for assault with intent to commit great bodily harm less than murder, MCL 750.84. Because the claim of instructional error in the trial court's refusal to instruct on cognate lesser offenses is not meritorious, we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant, who was accused of kicking, punching, and striking complainant with a baseball bat, requested lesser offense instructions on aggravated assault, MCL 750.81a, assault and battery, MCL 750.81, and felonious assault, MCL 750.82. The trial court refused to instruct on aggravated assault and felonious assault, but agreed to instruct on assault and battery. The jury found defendant guilty of the charged offense of assault with intent to do great bodily harm less than murder. Defendant now maintains that the trial court erroneously refused to instruct the jury as requested.

We review claims of instructional error de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002), remanded on other grounds 467 Mich 888 (2002). A jury's verdict is presumed valid; therefore, the defendant bears the burden of showing that an instructional error was outcome-determinative. *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000). An instructional error is outcome-determinative if it undermined the reliability of the verdict. *People v Cornell*, 466 Mich 335, 363-364; 646 NW2d 127 (2002); *Rodriguez, supra* at 474. The reliability of a verdict is undermined if, considering the entire case, a lesser included offense instruction that was supported by substantial evidence was not given. *Cornell, supra* at 365. In contrast, the failure to give a lesser included offense instruction is harmless if the instruction was not clearly supported by substantial evidence. *Id.*

A defendant is entitled to an instruction on a necessarily included lesser offense if a rational view of the evidence would support it; however, a defendant is not entitled to an

instruction on a cognate lesser offense. *Cornell, supra* at 357, 359. A cognate lesser offense shares some common elements with and is of the same class as the greater offense, but also has elements not found in the greater offense. *People v Perry*, 460 Mich 55, 61; 594 NW2d 477 (1999).

The trial court did not err by refusing to instruct on aggravated assault. Defendant acknowledges that aggravated assault is a cognate lesser offense of assault with intent to do great bodily harm less than murder. To be found guilty of aggravated assault, the defendant must have actually caused the victim serious or aggravated injury. See MCL 750.81a; *People v Brown*, 97 Mich App 606, 611; 296 NW2d 121 (1980). In contrast, evidence of actual injury is not necessary to convict a defendant of assault with intent to do great bodily harm less than murder. See MCL 750.84; *People v Pena*, 224 Mich App 650, 659; 569 NW2d 871 (1997), modified in part on other grounds, 457 Mich 885 (1998).

Furthermore, the trial court did not err by refusing to instruct on felonious assault. Felonious assault is a cognate, not a necessarily included, lesser offense of assault with intent to commit great bodily harm less than murder. In order to convict on a charge of felonious assault, the assault must be made with a dangerous weapon. MCL 750.82; *People v Vinson*, 93 Mich App 483, 486; 287 NW2d 274 (1979). However, a person may be found guilty of assault with intent to commit murder where no weapon is involved. MCL 750.84. Because a weapon must be involved to support a felonious assault conviction, it is possible to commit the greater offense without committing the lesser offense.

The trial court properly followed *Cornell, supra*, and did not err by refusing to instruct on aggravated assault and felonious assault.

Affirmed.

/s/ Michael R. Smolenski

/s/ Donald S. Owens

/s/ Pat M. Donofrio