

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DION SAMUEL GOODELL,

Defendant-Appellant.

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UNPUBLISHED

September 20, 2007

No. 268772

Bay Circuit Court

LC No. 05-010824-FC

Before: Bandstra, P.J., and Zahra and Owens, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to do great bodily harm less than murder, MCL 750.84, and carrying a dangerous weapon with unlawful intent, MCL 750.226. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to concurrent prison terms of 100 to 240 months for the assault with intent to do great bodily harm less than murder conviction and 80 to 120 months for the carrying a dangerous weapon with unlawful intent conviction. Defendant appeals as of right. We affirm defendant's convictions and sentences, but remand for the ministerial task of correcting the judgment of sentence to show that defendant was convicted of assault with intent to do great bodily harm less than murder, not assault with intent to murder.

Defendant first argues that the trial court erred in refusing to instruct the jury on the offense of felonious assault as a lesser-included offense of assault with intent to murder. We disagree. We review de novo whether an instruction is required for a necessarily included lesser offense. *People v Brown*, 267 Mich App 141, 145; 703 NW2d 230 (2005).

An instruction on a lesser offense is proper if, and only if, the charged greater offense requires the jury to find all of the factual elements of the lesser-included offense and a rational view of the evidence would support it. *People v Mendoza*, 468 Mich 527, 533, 544-545; 664 NW2d 685 (2003); *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002). That is, a lesser offense jury instruction is appropriate only where the requested lesser offense is a necessarily included lesser offense. *People v Nickens*, 470 Mich 622, 626; 685 NW2d 657 (2004). An offense is not a necessarily included lesser offense unless all of the elements of the lesser offense are completely subsumed in the greater offense. *Id.* Cognate lesser offense instructions are impermissible. *Cornell, supra* at 357; *Brown, supra* at 146.

The elements of assault with intent to commit murder are as follows: (1) an assault; (2) with an actual intent to kill; (3) and, if successful, would make the killing murder. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The intent to kill may be inferred. *Id.* The elements of felonious assault are as follows: (1) an assault; (2) with a dangerous weapon; (3) with the intent to place the victim in reasonable apprehension of an immediate battery. *Id.* We agree with *People v Vinson*, 93 Mich App 483, 486; 287 NW2d 274 (1979), that felonious assault is a cognate lesser offense and not a necessarily included lesser offense of assault with intent to commit murder. As aptly explained by the Court in *Vinson*,

In order to convict on a charge of felonious assault, it is necessary that an assault was made with a dangerous weapon. Since a person could be found guilty of assault with intent to commit murder where no weapon was involved, and, since a weapon must be involved to support a felonious assault conviction, it is possible to commit the greater offense without committing the lesser and the offense of felonious assault is not necessarily included. [*Id.*]

Accordingly, the trial court properly declined to instruct the jury on felonious assault and defendant's assertion otherwise lacks merit.<sup>1</sup>

Defendant next argues that the minimum sentence for his conviction for carrying a dangerous weapon with unlawful intent was improperly imposed because it was outside the appropriate sentencing guidelines range for that offense. The trial court sentenced defendant to concurrent sentences for his assault with intent to do great bodily harm less than murder conviction, a class D felony, MCL 777.16d, and his carrying a dangerous weapon with unlawful intent conviction, a class E felony, MCL 777.16m. Therefore, the trial court was not required to apply the sentencing guidelines to defendant's conviction for carrying a dangerous weapon with unlawful intent. Rather, it was proper for the trial court to use the presentence investigation report prepared for defendant's conviction for assault with intent to do great bodily harm less than murder, as his highest crime class felony conviction, when imposing defendant's concurrent sentences for these offenses. MCL 777.21(2); *People v Johnigan*, 265 Mich App 463, 471; 696

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<sup>1</sup> Defendant relies on *Hanna v People*, 19 Mich 316 (1869), together with language in the statutory definition of felonious assault and the fact that felonious assault and assault with intent to commit murder are both codified in Chapter XI of the Michigan Penal Code, for the proposition that felonious assault is an "inferior" offense upon which defendant was entitled to have the jury instructed. To that end, defendant argues that the discussion in *Cornell* regarding when an instruction for a lesser-included felony should be given is merely dicta. We disagree. *Cornell* and its progeny present the binding standard for determining whether a lesser-included offense instruction is permitted. There can be no dispute that the decision concerning what instructions can be given was necessary for the outcome of *Cornell*. Plainly, under *Cornell* and its progeny, felonious assault is not a necessarily included lesser offense of assault with intent to murder. Moreover, the language from *Hanna* cannot be understood as requiring that all statutes codified within a particular chapter of the penal code are lesser-included offenses upon which the jury should be instructed. To the contrary, it is clear that the *Hanna* Court based its conclusion, in part, on the fact that the lesser-included offense contained the same factual elements as the greater offense at issue in that case. See *Hanna, supra* at 321-322.

NW2d 724 (2005); *People v Mack*, 265 Mich App 122, 127-129; 695 NW2d 342 (2005). Plainly put, a sentencing court is not required to score the guidelines for lesser class felony convictions where multiple convictions with concurrent sentences are involved. *Id.*<sup>2</sup> Thus, the sentencing court did not err when it failed to calculate a sentencing guidelines range for defendant's carrying a dangerous weapon with unlawful intent conviction. *Mack, supra* at 126-128. Moreover, as noted in *Mack*, whether defendant's class E felony sentence is proportional is not at issue because that sentence did not exceed the concurrent sentence imposed for defendant's class D felony conviction. *Id.* at 128-129.

We affirm defendant's convictions and sentences, but remand for the ministerial task of correcting the judgment of sentence to show that defendant was convicted of assault with intent to do great bodily harm less than murder, not assault with intent to murder. We do not retain jurisdiction.

/s/ Richard A. Bandstra  
/s/ Brian K. Zahra  
/s/ Donald S. Owens

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<sup>2</sup> Defendant argues that *Mack* was wrongly decided, for reasons set forth in *People v Johnigan*, 265 Mich App 463; 696 NW2d 724 (2005). The lead opinion in *Johnigan* questioned the holding in *Mack*, reasoning that while MCL 777.14(2)(e) requires that, where a defendant is being sentenced for multiple convictions, a presentence investigation report only be prepared for the offense falling in the highest crime class, the version of MCL 777.21(2) then in effect required that the sentencing court score each conviction under the sentencing guidelines, regardless of their crime class. However, *Johnigan's* lead opinion acknowledged that the result reached in *Mack* would be correct if the Legislature were to have referenced MCL 771.14 in MCL 777.21(2). *Johnigan, supra* at 471. Since the decisions in *Mack* and *Johnigan*, the Legislature has amended MCL 777.21(2), effective January 9, 2007, to do just that. MCL 777.21(2) now provides, "If the defendant was convicted of multiple offenses, subject to section 14 of chapter XI [MCL 771.14], score each offense as provided in this part." Therefore, in light of the statutory amendment, *Johnigan* does not support defendant's argument that the concurrent sentence imposed for his lower class felony conviction was improper.