STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v THOMAS CARGILL WALLS, Defendant-Appellant.	FOR PUBLICATION April 7, 2005 9:05 a.m. No. 251454 Oakland Circuit Court LC No. 2002-184922-FC Official Reported Version

Before: Fort Hood, P.J. and Griffin and Donofrio, JJ.

DONOFRIO, J. (*concurring in the result*).

While I agree that defendant's convictions in this case should be affirmed, I write separately because I respectfully disagree with the majority's conclusion that felonious assault, MCL 750.82, is at all times and under all circumstances a cognate offense of assault with intent to rob while armed, MCL 750.89.

This Court has stated that felonious assault is a necessarily included lesser offense of assault with intent to rob while armed. *People v Stubbs*, 110 Mich App 287, 291; 312 NW2d 232 (1981).[1] Felonious assault requires the defendant to be armed, while an unarmed defendant could be convicted of assault with intent to rob while armed, provided that the defendant fashioned an article that was not actually a weapon "in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon . . . ." MCL 750.89. In effect, I believe MCL 750.89 provides two separate avenues to conviction. The first avenue requires the *actual use* of a weapon and the second avenue requires only the *impression* of a dangerous weapon. I can readily envision a scenario in which an assailant could commit assault with intent to rob while armed by holding his empty hand in his jacket pocket to look like a gun and demanding money. Such an assailant would not be guilty of felonious assault because, according to the plain language of MCL 750.82, the felonious assault statute requires the assailant to be armed with a weapon. See *People v Stevens*, 409 Mich 564, 566-567; 297 NW2d 120 (1980). Therefore, it is

[1] I recognize, as the majority points out, that *Stubbs* predates our Supreme Court's recent holdings in *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), and *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003), but I do not find its holding to be contrary to either case. Further, I do not believe the analyses required by either *Cornell* or *Mendoza* renders *Stubbs* obsolete or in any way requires the result the majority suggests in the instant case.

my conclusion that it is possible to commit the greater offense without actually committing the lesser offense under the second avenue for conviction of assault with intent to rob while armed pursuant to MCL 750.89.

Accordingly, my view is that, depending on the theory advanced by the prosecution, felonious assault could be characterized as either a necessarily included lesser offense of assault with intent to rob while armed or a cognate offense of assault with intent to rob while armed. Since here, the prosecution's theory was that defendant did possess an actual firearm during the commission of the crime, defendant cannot be found guilty of the greater offense without committing the lesser offense. *Cornell* establishes that a requested instruction on a necessarily included lesser offense cannot be given unless conviction for the greater offense would require 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 the instruction. *Cornell*, 466 Mich at 357. As such, felonious assault would be considered a necessarily included lesser offense of assault with intent to rob while armed, and defendant has established the first requirement in the analysis required by *Cornell*.

Since I concluded that, in this particular case, felonious assault is a necessarily included lesser offense of the crime charged, the issue then becomes whether the fact-finder would have needed "to find a disputed factual element that is not part of the lesser included offense" in order to convict for the greater offense and whether a rational view of the evidence would support a conviction of the lesser offense. *Cornell*, 466 Mich at 357. The actual use of a firearm is the similar element in both assault with intent to rob while armed and felonious assault. The disparate element in the crime of assault with intent to rob while armed is the intent to rob. MCL 750.89. An intent to rob is not required for a felonious assault conviction. MCL 750.82. Intent to rob was disputed; therefore, a rational view of the evidence would support the felonious assault instruction. *Cornell*, 466 Mich at 357, 361.

At trial, Mr. Rodrico Grimes testified that defendant put the gun into his ribs and demanded money. Evidence contesting Mr. Grimes's testimony is defendant's out-of-court statement to the police. In his statement, which was read into evidence, defendant denied drawing his pistol or pointing it at Mr. Grimes and denied asking Mr. Grimes for money. Defendant additionally claims that the jury could have convicted him of felonious assault because Mr. Grimes testified that defendant never orally "threatened to do any harm to him, did not hurt him or did not order him to exit the vehicle," and because "[a]ll parties agree that Defendant did not take [or] receive anything from Mr. Grimes." It is my conclusion after reviewing the record that because there was contradictory evidence regarding the issue of intent, the trial court erred in refusing the requested instruction on felonious assault.

However, as a result of instructional error, this Court is required to engage in a harmless error analysis. "[H]armless error analysis is applicable to instructional errors involving necessarily included lesser offenses . . . ." *Cornell*, 466 Mich at 361. Preserved nonconstitutional error in failing to give a lesser offense instruction in a criminal case does not warrant reversal unless it is more probable than not that it undermined the reliability of the verdict. *Id*. at 363-364. Additionally, the reliability of the verdict would be undermined only if "there is substantial evidence to support the requested instruction . . . ." *Id*. at 365. To have convicted defendant of assault with intent to rob while armed, the jury must have believed Mr. Grimes's testimony that defendant demanded money while armed because the prosecution offered no other evidence to

prove the element of an intent to rob. In order to convict defendant of felonious assault, the jury would have needed to believe defendant's statement that he never demanded money, while not believing defendant's statement that he never drew his pistol. It would be irrational for the jury to arbitrarily credit only the former portion of defendant's statement in such a manner.

Mr. Grimes's testimony that defendant did not orally threaten to harm him cannot be considered substantial evidence that defendant lacked an intent to rob him in light of Mr. Grimes' testimony that defendant put a gun to his ribs and demanded money. Furthermore, defendant's self-serving statements to the police that he never pointed a gun at Mr. Grimes, threatened him, or asked for money, do not support a finding of felonious assault because the statements do not indicate that defendant assaulted Mr. Grimes without an intent to rob, but, instead, would support the claim that no assault ever occurred.

Affirmed.

/s/ Pat M. Donofrio