STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 18, 2000
v	No. 215820 Calhoun Circuit Court
TIMOTHY JOHN VANBLARCUM, Defendant-Appellant.	LC No. 98-001216-FH

Before: Wilder, P.J., and McDonald and Doctoroff, JJ.

PER CURIAM.

Defendant was charged with felonious assault, MCL 750.82; MSA 28.277, and unarmed robbery, MCL 750.530; MSA 28.798.[1] After a jury trial, defendant was convicted of the lesser offense of aggravated assault, MCL 750.81a; MSA 28.276(1), and was sentenced to 24 months' probation with the first 90 days to be served in the Calhoun County Jail. Defendant appeals as of right. We affirm.

I

On appeal, defendant argues that the trial court erred in denying his motion for a directed verdict with respect to the felonious assault charge. We disagree. When reviewing a court's decision regarding a motion for a directed verdict, this Court considers the evidence presented by the prosecution up to the time the motion was made in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

Contrary to defendant's arguments on appeal, there was sufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that defendant was guilty of felonious assault on a theory of aiding and abetting. The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). A defendant is guilty of aiding and abetting a criminal offense if it is shown (1) that the substantive criminal offense was committed either by the defendant or by another, (2) that the defendant performed acts or gave encouragement that aided

and assisted the commission of the crime, and (3) that the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time of the giving of aid or encouragement. *People v Turner*, 213 Mich App 558, 568; 540 NW2d 728 (1995). The phrase "aiding and abetting" describes all forms of assistance rendered to the perpetrator of a crime, *People v Rockwell*, 188 Mich App 405, 411; 470 NW2d 673 (1991), and includes all words or deeds that may support, encourage, or incite the commission of a crime, *People v Palmer*, 392 Mich 370, 378; 220 NW2d 393 (1974). To be convicted of aiding and abetting, a person must either have possessed the required intent or have participated while knowing that the principal had the requisite intent. *Rockwell, supra*. Such intent may be inferred from circumstantial evidence. *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992).

Here, the prosecutor presented circumstantial evidence sufficient to allow a rational trier of fact to conclude that the assailants acted according to a jointly conceived plan. The victim, Timothy VanBlarcum, testified that defendant approached him and his girlfriend, Kelly Musolf, inside the video store after staring briefly in VanBlarcum's direction. VanBlarcum further testified that approximately ten minutes later, he noticed that defendant had left the store. VanBlarcum, Musolf, and another friend, Vance McKee, remained inside the store for a while longer, but were again approached by defendant as they left the store and headed for their car. At that point defendant struck VanBlarcum in the face after making a brief statement regarding derogatory comments allegedly made by VanBlarcum to defendant's sister. Shortly thereafter, a second assailant unknown to VanBlarcum entered the fray and began kicking VanBlarcum in the shoulder, back, and face, as he continued to struggle with defendant.

Musolf indicated that immediately before initiating the assault, defendant had exited the same car in which the second assailant had been sitting when Musolf left the video store with VanBlarcum and McKee. Similarly, although not able to place defendant within that car, McKee indicated that he saw defendant coming from the area of the car from which the second assailant had come. Moreover, both VanBlarcum and Musolf testified that the second assailant referred to defendant by name before fleeing the area together. VanBlarcum further testified that the two assailants entered the same car before leaving the parking lot.

When viewed in a light most favorable to the prosecution, this evidence was sufficient to defeat a motion for a directed verdict with respect to the felonious assault charge as an aider and abettor. The jury could properly infer from the evidence presented by the prosecutor that during the time between his leaving the store and his attack on VanBlarcum, defendant procured the assistance of the second assailant. Because there was other evidence from which the jury could infer that defendant was with this assailant immediately before the assault, and that defendant fled along with that person, the jury could also infer that defendant shared that person's felonious intent and participated in the crime in a manner sufficient to establish his guilt as an aider and abettor.

II

Next, defendant argues that the trial court erred by instructing the jury on the offense of aggravated assault. Specifically, defendant argues that, inasmuch as the crime of aggravated assault requires proof of serious injury, he was not given sufficient notice that he would be called upon to

defend against that charge. We disagree. The decision whether to give a requested jury instruction is reviewed for an abuse of discretion. *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993).

Aggravated assault is a misdemeanor, MCL 750.81a(1); MSA 28.276(1)(1).[2] A five-part test is used to determine whether an instruction for a lesser included misdemeanor should be given. *People v Stephens*, 416 Mich 252, 261; 330 NW2d 675 (1982). A court may instruct concerning a lesser included misdemeanor where (1) there is a proper request, (2) there is an "inherent relationship" between the greater and lesser offense, (3) the requested misdemeanor is supported by a "rational view" of the evidence, (4) the defendant has adequate notice of the charge as one of the charges against which he is expected to defend, and (5) no undue confusion or other injustice would result from the instruction. *Id.* at 261-265; *People v Steele*, 429 Mich 13, 19; 412 NW2d 206 (1987).

Here, defendant contends that he did not have adequate notice of the aggravated assault charge as one of the charges against which he was expected to defend. Although a defendant may not be convicted of a crime with which he was not charged unless he has had adequate notice, *People v Adams*, 202 Mich App 385, 387; 509 NW2d 530 (1993), where the subsequent charge is a lesser included offense of the originally charged greater offense, fair notice requirements are met, *People v Ora Jones*, 395 Mich 379, 388; 236 NW2d 461 (1975). In this context, lesser included offenses have traditionally been analyzed in terms of necessarily included offenses and cognate lesser included offenses. A cognate lesser included offense is one that is in the same class or category as the charged offense or that is closely related to the charged offense. *Ora Jones*, *supra* at 389; *Adams*, *supra* at 387. The cognate lesser offense may share some elements with the greater offense, but may also include some elements not found in the greater offense. *People v Heflin*, 434 Mich 482, 495; 456 NW2d 10 (1990). However, while the elements of the two crimes should be compared in order to determine if an offense is a cognate lesser included offense of a charged offense, whether a crime is a cognate offense generally turns on the particular facts of the case. *Id*. Thus, the question is ultimately whether, "under the facts of each particular case, the defendant had adequate notice of the need to defend against the newly added charge." *Adams*, *supra* at 388.

"The offenses of felonious assault and aggravated assault are of the same class, and bear a reasonable relationship to one another." *People v Brown*, 97 Mich App 606, 614; 296 NW2d 121 (1980). Thus, we agree with the trial court's conclusion that aggravated assault is a cognate lesser included offense of felonious assault. It is the element of "serious or aggravated injury" that differentiates aggravated assault from felonious assault. See MCL 750.81a; MSA 28.276(1). Under the facts of this case, we believe defendant was sufficiently apprised of such "serious or aggravated injury" as to satisfy fair notice requirements.

Defendant was, at the least, on notice that he would be called upon to defend the circumstances surrounding that assault. Moreover, more than three months before trial, defendant received notice that the prosecution intended to introduce medical reports generated in connection with the assault at trial and was in possession of the police reports concerning the assault. These facts, in combination with the prosecutor's pretrial disclosure of the treating physicians as prosecution witnesses, provided defendant with adequate notice of the possibility that he could be held to answer for injuries received by the victim

during the assault, and could be required to defend against the crime of aggravated assault. Thus, we find no error in the trial court's decision to instruct the jury regarding aggravated assault.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Gary R. McDonald
/s/ Martin M. Doctoroff

[1] The prosecutor dismissed the unarmed robbery charge after the presentation of its case-in-chief.

[2] MCL 750.81a(1); MSA 28.276(1)(1) provides:

> A person who assaults an individual without a weapon and inflicts serious or aggravated injury upon that individual without intending to commit murder or to inflict great bodily harm less than murder is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both.