STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DIAMOND STERLING,

Defendant-Appellant.

UNPUBLISHED
February 16, 2001

No. 218349
Wayne Circuit Court
Criminal Division
LC No. 98-002646

Before: Neff, P.J., and Holbrook, Jr., and Jansen, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of carjacking, MCL 750.529a; MSA 28.797(a), and aggravated assault, MCL 750.81a; MSA 28.276(1), as a lesser offense to the charged crime of assault with intent to rob while unarmed (AWIR-U), MCL 750.88; MSA 28.283. Defendant was subsequently sentenced to concurrent terms of eight to twenty years' imprisonment for the carjacking conviction, and a twelve-month jail term for the assault conviction. He appeals as of right. We affirm.

Defendant first contends that the trial court should have granted his post-trial motion for an evidentiary hearing addressing the effectiveness of his trial counsel. On appeal, defendant argues that the trial court erred by denying this motion because, at such a hearing, he would have been able to adduce evidence that: (1) his counsel failed to investigate his claim that he was under house arrest by electronic tether at the time of the crimes, and (2) his counsel failed to advance an alibi defense grounded in his status on electronic tether.

This Court reviews the question whether defendant was entitled to such a hearing by determining whether his timely motion demonstrated that development of a factual record was necessary for appellate consideration of a claim that he was denied his right to the effective assistance of counsel. MCR 7.211(C)(1)(a)(ii); *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). In doing so, we bear in mind the requirements of establishing the denial of the right to effective assistance of counsel, which our Supreme Court has recently summarized as follows:

> For a defendant to establish a claim that he was denied his state or federal constitutional right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and

> that this was so prejudicial to him that he was denied a fair trial. *Strickland v Washington*, 466 US 668, 687, 104 S Ct 2052, 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303, 521 NW2d 797 (1994). As for deficient performance, a defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances. *People v Mitchell*, 454 Mich 145, 156, 560 NW2d 600 (1997). As for prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . ." *Id*. at 167. [*People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).]

Defendant was placed at the scene of the assault by the complainant and two defense witnesses, one of whom was defendant's girlfriend. The two defense witnesses testified that defendant did not participate in the assault on the complainant or take the complainant's car. All of these witnesses were familiar with defendant beforehand, so the potential for misidentification was minimal. What was essentially an offer of proof by the prosecutor revealed that the complainant contemporaneously described defendant to the police as wearing a tether on his leg at the time of the assault.[1]

The fact that defendant was on an electronic tether by no means makes it impossible for him to have been at the scene of the crime. Moreover, advancing the alibi defense now suggested by defendant would have meant abandoning or disputing the testimony of witnesses favorable to him. The fact that the complainant contemporaneously described defendant to the police as wearing a tether on his leg is arguably more damaging to defendant than any benefit derived from the questionable inference that, because he was tethered, he was somewhere else. Therefore, even if defendant could, at an evidentiary hearing, provide factual support for the claim that his attorney failed to investigate and advance the alibi defense as suggested, this would not, "overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Toma, supra* at 302. Accordingly, defendant's motion did not demonstrate that an evidentiary hearing was necessary, thus, the trial court did not err by declining to hold one.

Defendant next argues that the trial court had no authority to return a conviction on aggravated assault when defendant had not been charged with that crime and was never put on notice that he could be expected to defend against such a charge. Whether a trial court, sitting as the trier of fact, has the authority to consider lesser charges is a question of law. We review questions of law de novo. *People v Stevens (After Remand)*, 460 Mich 626, 631; 597 NW2d 53 (1999). Similarly, this Court reviews de novo the constitutional question regarding defendant's right to adequate notice of the charges against him. *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998).

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[1] The trial court sustained a defense objection to a question that would have elicited this evidence, but inquired into the factual basis for the prosecutor's inquiry. Had defendant raised his tether alibi, the police report and accompanying testimony would have clearly been admissible.

A trial court may sua sponte instruct a jury on lesser included offenses and, when sitting as the trier of fact, it may, without request, consider such lesser offenses. *Id.* at 599, citing *People v Chamblis*, 395 Mich 408, 417; 236 NW2d 473 (1975), overruled in part by *People v Stephens*, 416 Mich 252; 330 NW2d 675 (1982). Although a trial court, sitting as the trier of fact, is not subject to the prudential limitations that have been placed on the number and type of lesser included offenses that a jury may consider, *People v Cazal*, 412 Mich 680, 689-691; 316 NW2d 705 (1982), a trial court's discretion in this regard is nonetheless constrained by a defendant's due-process rights to reasonable notice of the charges against him.[2]

Only the consideration by the trial court of *cognate* lesser included offenses presents the potential for depriving a defendant of adequate notice of a charge, inasmuch as a defendant must always stand ready to defend against necessarily included offenses.[3] Because aggravated assault is a cognate lesser included offense to AWIR-U,[4] it is theoretically possible that the trial court's decision to consider, and convict defendant of, aggravated assault, violated defendant's right to adequate notice. *Chamblis, supra* at 418; *Darden, supra* at 601. The rule is that "the language of the charging document [must] 'be such as to give the defendant notice that he could at the same time face the lesser included offense," *Chamblis, supra* at 418, quoting *United States v Whitaker*, 144 DC App 344, 350; 447 F2d 314, 320 (1971). Situations where the charging document would not give such notice regarding cognate lesser included offenses are those "'where the lesser

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[2] In addition to the right of an accused "to be informed of the nature of the accusation," Const 1963, art 1, § 20, this Court in *Darden, supra* at 600, stated:

> A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense--a right to his day in court--are basic in our system of jurisprudence." *In re Oliver*, 333 US 257, 273, 68 S Ct 499, 92 L Ed 682 (1948). A defendant's right to adequate notice of the charges against the defendant stems from the Sixth Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment. See *People v Jones*, 395 Mich 379, 388, 236 NW2d 461 (1975).

[3] A lesser offense is necessarily included if one cannot commit the greater offense without having committed the lesser offense. *People v Bailey*, 451 Mich 657, 667-668; 549 NW2d (1996). A lesser included offense is cognate if it is in the same class or category as the greater offense, sharing some of its elements, but it is possible to commit the greater offense without necessarily committing all the elements of the lesser offense. *People v Hendricks*, 446 Mich 435, 443; 521 NW2d 546 (1994).

[4] AWIR-U is a felony punishable by imprisonment for up to fifteen years. MCL 750.88; MSA 28.283. Its elements are "(1) an assault with force or violence, (2) an intent to rob and steal, and (3) defendant being unarmed." *People v Chandler*, 201 Mich App 611, 614; 506 NW2d 882 (1993). The "force and violence" may be actual or constructive, and the assault may be of either the attempted-battery or reasonable-apprehension-of-imminent-battery types. *People v Reeves*, 458 Mich 236, 243-245; 580 NW2d 433 (1998). Consequently, one may commit an AWIR-U without inflicting a serious or aggravated injury. By contrast, aggravated assault is a misdemeanor punishable by imprisonment for not more than one year. It is comprised of (1) an unarmed assault that (2) results in the infliction of a serious or aggravated injury, that (3) is perpetrated without the intent to commit murder or to inflict great bodily harm less than murder. MCL 750.81a; MSA 28.276a.

included offense statute under which a defendant was convicted is relatively remote textually from the greater offense statute under which he was charged or where the logical connection between the statutes is not so obvious or well established . . . ,'" *Chamblis, supra* at 418, quoting *United States v Brewster*, 165 US App DC 1, 14, n 32; 506 F2d 62, 75, n 32 (1974).

In this case, defendant was charged with a crime that has, as one of its elements, an unarmed assault with force or violence. Having elected a bench trial, defendant had every reason to expect that the trial court would consider a cognate lesser offense consisting of an unarmed assault resulting in a serious or aggravated injury. Clearly, this is not a situation where the lesser offense "'is relatively remote textually from the greater offense'" nor one "'where the logical connection between the statutes is not so obvious or well established.'" *Id.* Additionally, defendant was tried with two codefendants, both of whom argued to the trial court that it should consider the lesser offense of aggravated assault. Consequently, we find that defendant was fairly apprised that he faced the lesser charge of aggravated assault. Finally, defendant does not argue that the complainant did not suffer a fractured jaw or that such an injury is not serious, or that these facts were plausibly subject to dispute. Where better notice would not have altered the defense, we cannot conclude that defendant was deprived of adequate notice of the charges against him. See *Darden, supra* at 602; see also, *People v Hunt*, 442 Mich 359, 365; 501 NW2d 151 (1993) (examining a defendant's right to be informed of the nature of the accusation against him in the context of whether the information could be amended after the preliminary examination).

Affirmed.

/s/ Janet T. Neff
/s/ Donald E. Holbrook, Jr.
/s/ Kathleen Jansen