STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 15, 2004
v	No. 244280 Wayne Circuit Court
ROBERT EDWARD KINNEY II, Defendant-Appellant.	LC No. 01-010387

Before: Donofrio, P.J., and Griffin and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for assault with intent to do great bodily harm less than murder, MCL 750.84, possession of a firearm by a felon, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to concurrent terms of seven to fifteen years' imprisonment for the assault with intent to do great bodily harm less than murder conviction, two to five years' imprisonment for the possession of a firearm by a felon conviction, and two to five years' imprisonment for the CCW conviction; with these sentences to run consecutive to five years' imprisonment for the felony-firearm conviction (second offense). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On August 18, 2001, a fight broke out in the street across from the Hart Plaza, in Detroit, while a festival was taking place. During this fight, David Lockett was shot in the back. Jonathon Street, a friend of Lockett's, indicated to the police that defendant was the individual who shot Lockett. Defendant was chased by police and was apprehended. Police officers on the scene testified that a gun fell out of defendant's pants.

Defendant's first issue on appeal is that there was insufficient evidence to support his conviction for assault with intent to do great bodily harm less than murder. We disagree.

In reviewing the sufficiency of the evidence, we view the evidence, de novo, in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999)*; People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). However, this Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses, and questions of credibility and intent should be left

to the trier of fact to resolve. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 478, amended 441 Mich 1201 (1992); *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). It is for the trier of fact, rather than this Court, to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. See *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

To convict defendant of assault with intent to do great bodily harm less than murder, the prosecution needed to establish the following beyond a reasonable doubt: "(1) an assault, i.e., 'an attempt or offer with force and violence to do [a] corporal hurt to another' coupled with (2) a specific intent to do great bodily harm less than murder." *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996) quoting *People v Smith*, 217 Mich 669, 673; 187 NW 304 (1922). Assault with intent to do great bodily harm is a specific intent crime. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). A defendant's intent may be inferred from his conduct, and from all the facts and circumstances surrounding the crime. *Id.*; *People v Lugo*, 214 Mich App 699, 709-710; 542 NW2d 921 (1995).

Viewing the evidence, de novo, in the light most favorable to the prosecution, we believe that a rational finder of fact could conclude that defendant assaulted Lockett with the requisite intent. See *Johnson*, *supra* at 723. It is undisputed that Lockett was shot and injured. Street identified defendant as the individual he saw raise his hand and shoot towards Lockett.[1] Street testified that he indicated to the police that defendant was the individual who shot Lockett. Officer Antonio Hardwell, Detroit Police Department, testified that some guy walked up and said, “That guy, right there, just shot me,” indicating it was defendant. Officer Hardwell was chasing defendant and radioed a description to other officers. Police officers, acting on the radio call and description from Officer Hardwell, apprehended defendant who was running from the scene. Officers Julius Price and Jedadiah Hubbard testified that a gun fell out of the waistband of defendant’s pants. Officers Hardwell and Hubbard saw the gun and one empty shell casing. William Steiner, a forensic chemist for the Detroit Police Department, testified that he detected gunshot residue on a sample taken from defendant’s hand shortly after the incident. Steiner further testified that this suggests defendant either fired a fired a gun, was in close proximity to someone who recently fired a gun, or handled a recently fired gun.

Defendant contends that he was not identified as the person who shot the gun. However, this is incorrect because Street identified defendant as the person who shot the gun. Officer Hardwell identified defendant as being at the scene. And certain inferences can be fairly drawn from the evidence that when defendant was apprehended a gun fell out of his waistband and the gun residue on his hand. There is evidence that defendant was the individual who assaulted Lockett because there was testimony that he shot Lockett. With regard to the specific intent element, our Supreme Court has held that pointing a gun at a person could be regarded a threat indicating an intent to injure. See *People v Counts*, 318 Mich 45, 54; 27 NW2d 338 (1947).

[1] We do recognize that Street indicated that he did not get a good look at the individual’s face, but this is an issue of credibility we leave to the jury. See *Wolfe, supra* at 514.

Here, there is not only evidence that defendant pointed the gun, but also evidence that he fired the gun. Intent to do great bodily harm can be inferred from the fact that defendant used a dangerous weapon. *People v Crane*, 27 Mich App 201, 204; 183 NW2d 307 (1970). Defendant only raises issues of credibility, and has not established an exception to the general rule that matters of credibility are left to the jury. As such, viewing the evidence in a light most favorable to the prosecution, there was sufficient evidence to convict defendant of assault with intent to do great bodily harm less than murder.

Defendant's next issue on appeal is that the trial court erred in denying his request to instruct the jury on the lesser offense of careless, reckless or negligent use of a firearm with injury resulting. We disagree. The determination whether an offense is a lesser included offense is a question of law subject to de novo review. *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003).

A requested instruction on a necessarily included lesser offense, whether a felony or a misdemeanor, is proper if the charged greater offense requires the jury to find a disputed factual element which is not part of the lesser included offense and a rational view of the evidence would support it. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002); *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). Conversely, an instruction on a cognate lesser included offense is not permissible. *Reese, supra; People v Alter*, 255 Mich App 194, 200-201; 659 NW2d 667 (2003). A necessarily included offense is one that must be committed as part of the greater offense; it would be impossible to commit the greater offense without first having committed the lesser. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001). If a lesser offense is a necessarily included offense, the evidence at trial will always support the lesser offense if it supports the greater. *People v Veling*, 443 Mich 23, 36; 504 NW2d 456 (1993); *Alter, supra* at 199. A cognate lesser offense is one that shares some common elements with and is of the same class as the greater offense, but also has elements not found in the greater. *People v Perry*, 460 Mich 55, 61; 594 NW2d 477 (1999).

Defendant was charged with the crime of assault with intent to commit murder, MCL 750.83.[2] The jury was also instructed on the lesser offense of assault with intent to do great bodily harm less than murder and the lesser offense of felonious assault. Defendant requested that the jury be instructed on the lesser offense of careless, reckless or negligent use of a firearm with injury or death resulting, MCL 752.861.[3] The trial court denied this request. A person can

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[2] MCL 750.83 provides:

> Any person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony, punishable by imprisonment in the state prison for life or any number of years.

[3] MCL 752.861 provides:

> Any person who, because of carelessness, recklessness or negligence, but not willfully or wantonly, shall cause or allow any firearm under his immediate

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commit assault with intent to commit murder without carelessly, negligently, or recklessly discharging a firearm. MCL 752.861 penalizes the careless, reckless, or negligent discharge of a firearm in which death or injury results; neither the use or discharge of a firearm nor death or injury is an element of assault with intent to commit murder or assault with intent to do great bodily harm less than murder. Therefore, the lesser offense of careless, reckless or negligent use of a firearm with injury or death is a cognate lesser offense, and the trial court correctly declined to instruct the jury on this offense. See *Cornell, supra*.

Defendant also argues that comments made by the prosecutor during the questioning of a witness constituted prosecutorial misconduct, and deprived him of a fair trial. We disagree.

Defendant failed to preserve this issue by objecting to the prosecutor's questioning of the witness. Unpreserved issues are reviewed for plain error that affected substantial rights. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of the judicial proceedings. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Id.* at 721. The propriety of a prosecutor's remarks depends on all the facts of the case. *Rodriguez, supra* at 30. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Schutte, supra* at 721.

During direct examination, the prosecution asked Street: "The defendant, the person who shot, was standing there [indicating]." Prior to this question, Street had not identified defendant as the person who shot Lockett. Subsequently, Street did identify defendant as the person who shot Lockett.

Although it was improper for the prosecution to reference defendant as the shooter prior to Street's identification, the challenged question did not amount to plain error affecting defendant's substantial rights. The error was not prejudicial because Street did, subsequently, identify defendant as the shooter. Reviewing the evidence, in light of the other evidence admitted at trial, there was no plain error affecting defendant's substantial rights. See *Schutte, supra* at 721. Moreover, any error could have been cured by an instruction if one was requested. See *id*. In addition, the jury was instructed on more than one occasion that the questions and statements of the attorneys are not to be considered evidence. For the above reasons, we find that the prosecution's question did not rise to level of a plain error affecting defendant's substantial rights.

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> control, to be discharged so as to kill or injure another person, shall be guilty of a misdemeanor, punishable by imprisonment in the state prison for not more than 2 years, or by a fine of not more than $ 2,000.00, or by imprisonment in the county jail for not more than 1 year, in the discretion of the court.

Defendant's final issue on appeal is the he did not receive adequate notice of the charges against him and, thus, his convictions and sentences should be vacated. We disagree.

As a general rule, the trial court "may at any time before, during or after the trial amend the indictment in respect to any defect, imperfection or omission in form or substance or of any variance with the evidence." MCL 767.76; *People v Stewart (On Remand)*, 219 Mich App 38, 44; 555 NW2d 716 (1996). A trial court may amend the information during trial as long as the accused is not prejudiced by the amendment or unfairly surprised. MCR 6.112(H); *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987). Prejudice occurs when the defendant is not given a chance to defend against the crime. *Stricklin, supra* at 633. This Court reviews a trial court's decision to amend the information for an abuse of discretion, and a trial court's ruling permitting amendment of an information should not be reversed on appeal unless it is shown that the defendant was prejudiced in his defense or that a failure of justice resulted from the amendment. MCL 767.76; *People v Prather*, 121 Mich App 324, 333-334; 328 NW2d 556 (1982). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made, *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Wilhite*, 240 Mich App 587, 595; 618 NW2d 386 (2000).

The information provided that the supporting felony for the felony-firearm charge was the assault with intent to commit murder charge, and did not list felon in possession of a firearm as an alternate basis. During opening argument the prosecution stated both assault with intent to commit murder and felon in possession of a firearm as supporting a felony-firearm conviction. Then, after testimony had been presented, the defense raised this, and the prosecution attempted to update the information to include both felonies as a basis for the felony-firearm charge. The trial court allowed the prosecution to amend the information to add felon in possession as an alternate basis for the felony-firearm charge finding that this would not prejudice defendant's defense in any way. And the trial court provided that defendant could recall witnesses and/or make a new opening statement if this change affected his defense. Defendant did not avail himself of this opportunity.

Defendant never indicated how his questioning of witnesses would have been different had the information originally included felon in possession as a basis for felony-firearm. Regardless, defendant was charged in the original information with both felon in possession of firearm and felony-firearm and, thus, the addition of the felon in possession as an additional basis for felony-firearm would be less significant to the defense as the defense was already aware of and prepared to defendant against both charges.

We are not convinced that defendant was prejudiced in his defense or that a failure of justice resulted from amendment of the information. See MCL 767.76; *Prather, supra* at 333-334. Nor was defendant deprived of an opportunity to defend against the crime. On this record, defendant has failed to show that he was prejudiced by the amendment. Nothing in the record suggests that defendant would have presented an alternate defense. This is evidenced by the fact that defendant did not recall any witnesses, and defense counsel did not give a subsequent opening statement. Defendant was aware of both charges prior to trial, he was just not aware that the felon in possession charge would support the felony-firearm charge. Thus, defendant

had adequate notice of the charges against him as well as the opportunity to defend against them. Based on the foregoing, the amendment of the information did not unfairly prejudice or surprise defendant. See *id*. Therefore, it cannot be said that there was no justification for the trial court's determination to allow the amendment of the information, or that allowing the amendment was so palpably and grossly violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or the exercise of passion or bias so as to be an abuse of discretion.[4]

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard Allen Griffin
/s/ Kathleen Jansen

[4] We note that defendant was convicted of both felon in possession of a firearm and assault with intent to do great bodily harm less than murder, and either would support the felony-firearm conviction.