

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT MICHAEL OWENS,

Defendant-Appellant.

UNPUBLISHED

May 18, 2004

No. 244917

Wayne Circuit Court

LC No. 01-012293-01

Before: Wilder, P.J., and Hoekstra and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, and first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(e). The trial court sentenced defendant to five to ten years in prison on the assault with intent to do great bodily harm less than murder conviction and to 225 months to 50 years in prison on the CSC-I conviction. We affirm.

Defendant first argues that his trial counsel was not given the opportunity to make, or argue, a motion for directed verdict of acquittal. We disagree. A review of the record demonstrates that defendant's argument is without merit.

The record reveals that after the prosecution rested, and outside of the presence of the jury, defense counsel stated:

Your Honor, at this point in time I would like to motion [sic] for a directed verdict.

I recognize the standard is could a rational trier of fact find the defendant guilty beyond a reasonable doubt based upon the evidence submitted.

It's on that basis, your Honor, that I make my motion.

The trial court ruled, "I have to find that no reasonable trier of fact could conclude guilt beyond a reasonable doubt. And I cannot possibly do that in this case." Defense counsel replied, "Thank you, your Honor. I have nothing further." There is no indication in the record that defense counsel was going to argue anything further or that he was precluded from doing so. Contrary to defendant's argument, defense counsel did make a motion for directed verdict of acquittal, and

the trial court considered and denied the motion on the record. See MCR 6.419. Defendant is entitled to no relief.

Next, defendant argues that the trial court erred when it refused defendant's request to provide the jury with an instruction on felonious assault. We disagree. Claims of instructional error are reviewed de novo. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003).

MCL 768.32(1) "only permits instructions on necessarily included lesser offenses, not cognate lesser offenses." *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002), citing *People v Cornell*, 466 Mich 335, 356; 646 NW2d 127 (2002). Here, defendant was charged with assault with intent to commit murder, MCL 750.83. However, this Court has determined that "felonious assault is not a necessarily included lesser offense of assault with intent to commit murder," but rather, "felonious assault is a cognate offense of assault with intent to commit murder." *People v Vinson*, 93 Mich App 483, 485-486; 287 NW2d 274 (1979). Because felonious assault is a cognate lesser offense of assault with intent to commit murder, the trial court did not err in refusing to instruct the jury on felonious assault. *Reese, supra; Cornell, supra*.

Finally, defendant argues, citing *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), that the trial court erred in sentencing him to a minimum term of 225 months on his CSC-I conviction because his sentence is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. However, defendant's CSC-I sentence is within the sentencing guidelines. MCL 769.34(10) provides: "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." See also *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003). Pursuant to MCL 769.34(10), we must conclude that defendant's sentence, which is within the appropriate guideline range, is proportionate.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Joel P. Hoekstra

/s/ Kirsten Frank Kelly