STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 19, 2004
v	No. 248035 St. Clair Circuit Court
MARCUS LANEIR MILLER, Defendant-Appellant.	LC No. 02-003195-FH

Before: Neff, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Defendant appeals by right from his bench trial conviction for assault and battery, MCL 750.81, for which he was sentenced to ninety-three days in jail. We reverse.

This case arose as the result of an altercation between defendant and two Port Huron police officers. The officers, who were in plain clothes and sitting in two unmarked cars, observed defendant talking to Jenny Saph in the doorway of her home. When it appeared that the situation might become violent, the officers approached defendant. The officers displayed and illuminated their badges, announced that they were police officers, and requested that defendant produce identification. Defendant twice tried to leave. During the scuffle that ensued, defendant struck one of the officers on the lip. Thereafter, defendant was arrested and charged with assaulting, resisting, or obstructing a police officer, MCL 750.81d(1), a felony, but was eventually convicted of the misdemeanor offense of assault and battery, MCL 750.81.

Defendant first argues that because his assault on Officer Tramski occurred *before* he was placed under arrest, it could not be the basis of a charge under MCL 750.81d(1). This argument is without merit. MCL 750.81d(1) provides that "an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties" is guilty of a felony. Pursuant to its clear language, violation of the statute is not predicated on the effectuation of an arrest.[1] MCL 750.81d(7)(a) specifically defines "obstructs," in pertinent part, as "a knowing failure to comply with a lawful

[1] Indeed, construing a nearly identical statute, MCL 750.479, we held that obstructing a police officer includes interfering with police in the performance of their official duties regardless of whether an arrest is made. *People v Green*, 260 Mich App 392, 401-402; 677 NW2d 363 (2004).

command." Here, the evidence indicated that, based on defendant's behavior, the police had a right to detain defendant in order to obtain his identification and determine whether they were dealing with a drunk and disorderly person or a separate situation involving Ms. Saph. Accordingly, the allegation that defendant intentionally disobeyed the officers' request for identification was sufficient to support the charged offense under MCL 750.81d(1).[2]

Defendant also argues that his conviction of misdemeanor assault and battery, MCL 750.81, is unsustainable because the assault constituted a separate crime that was not charged in the information. A defendant has a right to be reasonably informed of the charges against him so that he may have an opportunity to be heard, i.e., prepare his defense. *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). Here, defendant was charged with assaulting, resisting, or obstructing a police officer, MCL 750.81d(1), but was convicted of the cognate lesser included misdemeanor offense of assault and battery, MCL 750.81.[3]

Until recently, an instruction or a court's consideration of a cognate lesser included offense was not grounds for reversal unless it violated the defendant's right to adequate notice; that is, the lack of notice prejudiced the defendant in regards to his ability to present a defense. *Id*. at 600-602. However, this view was overruled by our Supreme Court in *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002). In *Cornell*, the Court addressed the proper interpretation of MCL 768.32, which provides in part:

> (1) Except as provided in subsection (2),[4] upon an indictment for an offense, consisting of different degrees, as prescribed in this chapter, the jury, or the judge in a trial without a jury, may find the accused not guilty of the offense in the degree charged in the indictment and may find the accused person guilty of a degree of that offense *inferior* to that charged in the indictment, or of an attempt to commit that offense. [Emphasis added.]

Construing the word "inferior," the Court concluded that an inferior offense only pertained to necessarily included lesser offenses. *Cornell, supra* at 354-355. Therefore, *Cornell* held that MCL 768.32 precludes a factfinder from finding a defendant guilty of a cognate lesser included offense that was not charged in the indictment, overruling conflicting prior case law. *Id*. at 355,

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[2] In fact, were it not for the trial court's misinterpretation of this statute regarding the importance of the timing of defendant's arrest in relation to the battery, based on the court's own factual findings defendant was guilty of violating the statute. However, because defendant was acquitted of the charged offense, retrial on this charge is prohibited on double jeopardy principles despite the court's error. MCL 768.33; *People v Herron*, 464 Mich 593, 600; 628 NW2d 528 (2001).

[3] Because the lesser included offense of assault and battery is in the same category as, and shares some of the elements with, the greater offense, it is a cognate lesser included offense, as opposed to a necessarily lesser included offense whose elements are totally subsumed in the greater offense. *People v Cornell*, 466 Mich 335, 345, 355; 646 NW2d 127 (2002).

[4] Subsection (2) relates to certain drug offenses which are not at issue in this case. MCL 768.32(2).

358. Accordingly, pursuant to *Cornell*, we hold that the trial court erred in convicting defendant of assault and battery because it is a cognate lesser offense of the offense charged in the indictment.[5] Because of our resolution of this issue, we do not reach the remaining issues raised by defendant on appeal.

Reversed.

/s/ Janet T. Neff
/s/ Michael R. Smolenski
/s/ Brian K. Zahra

[5] We note that the *Cornell* decision is limited to those cases in which the issue was raised in the trial court and properly preserved. *Cornell, supra* at 367. In this case, defendant did not have an opportunity to object during his bench trial because the trial court *sua sponte* considered the lesser offense when it rendered its verdict on the record at the close of proofs, and then immediately imposed sentence. Therefore, we find that *Cornell* is applicable in this case.