STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 25, 2008
v	No. 275839 Wayne Circuit Court
CARL THOMAS ORVIS, Defendant-Appellant.	LC No. 06-008343-01

Before: Servitto, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Although charged with assault with intent to murder, MCL 750.83, defendant was convicted by a jury of the lesser included offense of assault with intent to do great bodily harm, MCL 750.84. He was subsequently sentenced to serve a term of 76 months to 10 years in prison and now appeals as of right. Because we conclude that the evidence presented below was sufficient to refute defendant's claim of self-defense, that our review of the proportionality of defendant's sentence is precluded because the sentence imposed is within the guidelines range, and that defendant was not entitled to instruction on the lesser offense of aggravated assault, we affirm.

Defendant first argues that the prosecution failed to present legally sufficient evidence to support his conviction. Specifically, defendant contends that the prosecution failed to refute his claim of self-defense. See *People v Fortson*, 202 Mich App 13, 20; 507 NW2d 763 (1993) ("[o]nce evidence of self-defense is introduced, the prosecutor bears the burden of disproving it beyond a reasonable doubt"). This Court reviews sufficiency of the evidence claims de novo, *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002), viewing the evidence in a light most favorable to the prosecution to determine whether "there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt," *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999) (citation and internal quotation marks omitted). "Questions of credibility are left to the trier of fact and will not be resolved anew by this Court." *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

In order to be justified in using nondeadly force, a defendant must honestly and reasonably believe that it was necessary to use the force to protect himself or herself. See CJI2d

7.22(3).[1] Further, the amount of force used must be proportionate to the danger. CJI2d 7.22(4); see also *People v Kemp*, 202 Mich App 318, 322-323; 508 NW2d 184 (1993). Here, defendant testified that he feared the victim, Stephen Jann, because Jann had threatened him in the past. Defendant also testified that he believed he was in danger of being harmed after Jann stated that he was "tired of drunken bums coming over," and then approached him with a telephone and balled fist. In contrast, Jann denied having threatened defendant. Rather, Jann testified that after being asked to leave the house defendant jumped from his chair, screamed that he would kill Jann, then struck Jann twice in the face, knocking him to the floor. Jann, who was recovering from serious injuries suffered in an automobile accident one month earlier and required a cane to walk, was then repeatedly punched and kicked by defendant in the head and back. According to Jann, defendant briefly stopped the attack and appeared to be leaving, but then returned to hit and kick Jann several more times as he lay on the floor. Although defendant denied having kicked Jann in the face or head, there was evidence that Jann suffered bruising on his face, neck, chest, and back and was required to undergo surgery to realign his teeth and "reconnect" his jaw. Further, shortly after the attack defendant told his sister that he had "hurt [Jann] really, really bad" and was "really, really sorry," but he did not indicate that he acted in self-defense. Viewed in a light most favorable to the prosecution, the evidence was sufficient to disprove defendant's claim that he honestly and reasonably believed that the force used by him was necessary to protect himself. Therefore, defendant is not entitled to relief on this issue.

Defendant next argues that although his sentence is within the applicable sentencing guidelines range, it is not proportionate because it fails to consider his alleged self-defense and his need for alcoholism treatment. However, pursuant to MCL 769.34(10), this Court may not consider challenges to a sentence based exclusively on proportionality if the sentence falls within the guidelines range. *People v Pratt*, 254 Mich App 425, 429-430; 656 NW2d 866 (2002). We therefore affirm defendant's sentence.

Next, defendant argues that the trial court erred when it declined to instruct the jury on the elements of aggravated assault. We disagree.

This Court reviews preserved claims of instructional error de novo. *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003). "Whether a jury instruction on a lesser offense is warranted depends on how the lesser offense is characterized." *Id*. Instruction on a necessarily included lesser offense is proper if all elements of the lesser offense are contained within those of the greater offense and a "rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2003). In contrast, instructions on cognate lesser offenses are not permitted. *Id*. at 355. A cognate lesser offense "shares some common elements with, and is of the same nature as, the greater offense, but also has elements not found in the [greater] offense." *Lowery*, *supra* at 173. Although defendant argues that an indictment for a higher grade of assault should include instructions for cognate lesser offenses,

[1] The Legislature enacted the Self-Defense Act, MCL 780.971 *et seq*., effective October 1, 2006. The Self-Defense Act provides statutory guidelines for addressing issues concerning self-defense. The assault at issue here occurred before the effective date of the act.

our Supreme Court has held that such an argument is inconsistent with the controlling statute, MCL 768.32(1), which states:

> Except as provided in subsection (2), 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.]

See *People v Nyx*, 479 Mich 112, 121; 734 NW2d 548 (2007). For a lesser offense to be *inferior* to the greater offense, all the elements of the lesser offense must be included within the greater offense. *Id*. Therefore, instruction on a cognate lesser offense is not permitted. *Cornell, supra* at 357-358.

Aggravated assault is an assault without a weapon that inflicts a "serious or aggravated injury" upon another, without the intent to murder or to do great bodily harm less than murder. MCL 750.81a(1); see also *People v Brown*, 97 Mich App 606, 610; 296 NW2d 121 (1980). In contrast, actual injury is not required for conviction of the offense of assault with intent to murder, for which defendant was on trial. Rather, all that is required is an assault of the victim coupled with the intent to kill, "which, if successful, would make the killing murder." *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005). Because aggravated assault requires that the victim sustain a serious or aggravated injury, it is a cognate lesser offense of assault with intent to murder on which instruction was not permitted. *Cornell*, *supra* at 357-358.[2]

This Court notes that the trial court declined to instruct the jury on the elements of aggravated assault because it is a misdemeanor. However, instructions for misdemeanors may be permitted if they are necessarily included offenses. See *Cornell*, *supra* at 359. Although the trial court reached the right result for the wrong reason, we conclude that the trial court did not err when it declined to instruct the jury on the elements of aggravated assault.

Affirmed.

/s/ Deborah A. Servitto
/s/ Joel P. Hoekstra
/s/ Jane E. Markey

[2] Although defendant contends that *Cornell* was wrongly decided, we are bound to follow that decision. See, e.g., *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005).