

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRELL ANTHONY FOX,

Defendant-Appellant.

UNPUBLISHED

May 13, 2008

No. 277140

Wayne Circuit Court

LC No. 06-009624-01

Before: Donofrio, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant was charged with eight counts of assault with intent to commit murder, MCL 750.83, and one count of possession of a firearm during the commission of felony, MCL 750.227b. Following a bench trial, the court acquitted defendant of five counts of assault with intent to commit murder and felony-firearm, and found defendant guilty of the lesser offense of felonious assault, MCL 750.82, with respect to the remaining three counts. Defendant appeals as of right. We agree with defendant that the trial court erred in considering felonious assault as a lesser offense and that his convictions and sentences must be vacated. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Because defendant did not object to the trial court's consideration of felonious assault as a lesser offense, this issue is not preserved. Therefore, review is precluded unless the defendant demonstrates plain error that affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

If an offense consists of different degrees, a court may find the defendant guilty of the crime as charged, of an inferior offense of the crime charged, or of an attempt to commit the crime charged. MCL 768.32(1). An inferior offense is a necessarily included lesser offense, i.e., one in which "all the elements of the lesser offense are included in the greater offense[.]" *People v Mendoza*, 468 Mich 527, 532-533; 664 NW2d 685 (2003). In *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002), the Court held that MCL 768.32(1) precludes instruction on anything other than necessarily lesser included offenses. Although the holding refers to instructions, the Court noted that MCL 768.32(1) applies in both bench trials and jury trials. *Id.* at 349 n 5. Thus, "a defendant charged with an offense consisting of various degrees may not, consistent with MCL 768.32(1), be convicted of a lesser degree of the charged offense where the lesser degree contains an element not found within the higher degree." *People v Nyx*, 479 Mich 112, 115; 734 NW2d 548 (2007).

Felonious assault is not a necessarily included lesser offense of assault with intent to commit murder. *People v Otterbridge*, 477 Mich 875; 721 NW2d 595 (2006); *People v Vinson*, 93 Mich App 483, 486; 287 NW2d 274 (1979). Therefore, the trial court committed plain error in considering the cognate lesser offense of felonious assault and the error affected the outcome of the proceedings. Because defendant could not lawfully be convicted of felonious assault, the error seriously affects the fairness, integrity, or public reputation of the judicial proceedings and warrants relief under *Carines*. *Otterbridge, supra*; *People v Ronald Wheeler*, 480 Mich 965; 741 NW2d 521 (2007).

The prosecutor argues that defendant waived error in the trial court and cannot now assign error on appeal. The prosecutor states specifically that defendant “expressly endorsed felonious assault as an option for the court to consider.” The prosecutor points to the following exchange regarding felonious assault in the trial court:

Prosecutor: Your honor, I think what the People are arguing here is that certainly we don’t have AWIM here, we are not going to argue that at all. What we would be asking for is a lesser included of Assault With Intent to do Great Bodily Harm and also a Felonious Assault. We believe that we definitely have people in fear in that vehicle, that a weapon was displayed, the weapon was used. A BB gun is a dangerous weapon and can be used for the Felonious Assault. We believe that the high rates of speed that the defendant kept traveling after the victim, that’s very important. Accidents could have been caused. We had to have the victim call his father, the father had to chase off the defendant, the people in the car. And You Honor, we would ask that you do find the defendant guilty of either Assault With Intent to do Great Bodily Harm or Felonious Assault.

The Court: All right. [Defense Counsel]?

Defense Counsel: I’ll be very brief, Your Honor . . .

I agree with the prosecutor, this is not an AWIM case. I don’t believe it’s an Assault With Intent to do Great Bodily Harm case because I don’t think the—I think it’s crucial that the intent that was shown is not one to do great bodily harm to anyone by [defendant]. I think that—I *don’t really want to concede on the lesser of Felonious Assault*. However, I think certainly there was not intent to do any great bodily harm to anyone by [defendant].

I would also indicate to the court that the thing I think is significant is Mr.—well I won’t even deal with that. *I think that this is not a case of Assault With Intent to do—to Commit Murder or to do Great Bodily Harm. I would ask the court to find the appropriate sentence—appropriate verdict.* [Emphasis added.]

The prosecutor’s argument requires that defendant’s conduct be evaluated to determine whether there occurred a waiver or a forfeiture of the claimed error. Waiver constitutes the intentional abandonment of a known right while forfeiture constitutes the failure to timely assert

a right. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). A defendant who waives a known right cannot seek appellate review of a claimed error, while forfeiture will permit this Court to review the claim for plain error. *Id.* We have reviewed the record with special attention to the highlighted colloquy and conclude that defense counsel's statements do not amount to the intentional abandonment of a known right. In other words, defense counsel never affirmatively agreed to felonious assault as an option for the court. While defense counsel's statements were less than totally clear, we see no "express endorsement" of felonious assault as argued by the prosecutor. Hence, because defendant never objected during the discussion, defense counsel's statements may amount to forfeiture. Therefore, we have properly reviewed this issue for plain error that affected the outcome of the lower court proceedings. *Carines, supra* at 763-764.

Accordingly, defendant's convictions for felonious assault, and the sentences imposed for those convictions, must be vacated.

/s/ Pat M. Donofrio

/s/ David H. Sawyer

/s/ William B. Murphy