STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 22, 2008
v	No. 276086 Wayne Circuit Court
TERRELL JOHNSON, Defendant-Appellant.	LC No. 06-008811-01

Before: Whitbeck, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to two years' probation for the felonious assault conviction and two years in prison for the felony-firearm conviction. We reverse and remand.

I. Basic Facts

Jason Repasky, Natalie Garver, and Andrew Hullyer were returning to an apartment complex in Canton just after 2:00 a.m. one morning. Repasky and Hullyer were intoxicated, and Garver, who was driving Repasky's truck, had consumed several beers. As they pulled into the entrance of the apartment complex, they nearly collided with a sport utility vehicle (SUV) driven by Joseph Bradley. Both vehicles stopped, and Repasky got out of the truck and approached the SUV. Bradley and Markus Chatman, a passenger, got out of the SUV. Repasky and Bradley argued, and Bradley or Chatman knocked a cup of soda out of Repasky's hand or threw it in Repasky's face.

Someone stuck a pistol in Repasky's face. Repasky could not identify the man with the pistol, but Garver identified defendant, a passenger who emerged from the SUV, as the one holding the handgun. Garver also claimed that defendant struck Repasky once in the face with the handgun. Defendant and Chatman denied that defendant had a gun or any other weapon. Defendant and Chatman asserted that Repasky had approached defendant's window, yelling, swearing, and calling names. They recalled that Repasky pushed defendant in the chest, prompting defendant to punch Repasky in the face. It is undisputed that Repasky fell to the ground. Garver claimed that Repasky was kicked several times, which defendant and Chatman denied. The next thing Repasky remembered was Hullyer picking him up off the ground.

Bradley, Chatman, and defendant got back into the SUV and drove toward the back of the apartment complex.

In a parking space assigned to a specific apartment, the police found an SUV matching the description of the one driven by Bradley. The police approached the apartment that corresponded with this parking space, and they saw defendant, who matched the description given by Repasky, standing in the doorway. Defendant's mother lived in the apartment with other members of defendant's family, but defendant did not live in the apartment. During an interview, defendant admitted that he had struck Repasky but denied that there was a gun involved. Defendant denied that there was a gun in his mother's apartment. However, during a search conducted pursuant to a search warrant, police found a black handgun between two mattresses on a bed in which two people had been sleeping.

II. Motion to Exclude Firearm

Defendant argues that the trial court abused its discretion in denying his motion to exclude the handgun found in his mother's apartment. We disagree.

The decision whether to admit evidence will not be disturbed on appeal absent an abuse of discretion, *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003), which occurs when the trial court chooses an outcome that falls outside the permissible principled range of outcomes, *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). However, the decision whether to admit evidence often involves a preliminary question of law, which is reviewed de novo. *Katt*, *supra* at 278. "A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *People v Bauder*, 269 Mich App 174, 179; 712 NW2d 506 (2005).

Defendant challenges the relevance of the handgun and claims that its admission was prejudicial. Evidence is relevant if it tends "to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401; *People v Sabin* (*After Remand*), 463 Mich 43, 56-57; 614 NW2d 888 (2000). Relevant evidence is generally admissible. MRE 402. However, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. "Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence." *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002).

Defendant was charged with felonious assault and felony-firearm. Evidence of the handgun was relevant because it tended to make it more probable that defendant was in possession of a handgun. No weapons were recovered from defendant or the SUV in which he had been riding. The gun was found in an apartment where defendant did not reside and in a room where two other people were sleeping. Defendant and Chatman testified and denied that defendant had a gun. Therefore, the probative value of the evidence was not substantially outweighed by any danger of unfair prejudice.

Defendant also argues that the prosecution failed to establish a sufficient connection or nexus between the handgun and him or the incident. In order to admit real evidence, "a

prosecutor must lay a foundation identifying the items as what they are purported to be and displaying that the items are connected with the accused or the crime[,]" *People v Jennings*, 118 Mich App 318, 322; 324 NW2d 625 (1982), but "such identification is not required to be absolute or certain[,]" *People v O'Brien*, 113 Mich App 183, 204; 317 NW2d 570 (1982).

> In short, there must be sufficient evidence of (1) the exhibit's identity and (2) its connection to the crime to support its admission at trial. A witness is not required to positively identify the weapon as being the weapon used in the crime, and it is not error requiring reversal to admit a "similar" weapon. [*People v Hence*, 110 Mich App 154, 162; 312 NW2d 191 (1981) (internal citations omitted).]

As long as there is some evidence of the exhibit's identity and a connection between the exhibit and the crime, objections regarding the sufficiency of the exhibit go to the weight of the evidence, rather than its admissibility. *Id.* at 161; *People v Burrell*, 21 Mich App 451, 456-457; 175 NW2d 513 (1970).

Repasky described the weapon used as a "pistol," and Garver stated that it was a black handgun. Garver asserted that, after the incident, defendant, Bradley, and Chatman got back into the SUV and drove toward the back of the apartment complex. A black handgun was recovered from an apartment where police found defendant after the incident and in which defendant's mother resided. Therefore, there was a sufficient connection between the handgun and defendant, as well as between defendant and the incident. The trial court did not abuse its discretion in admitting this evidence.

Defendant also contends that the gun should not have been admitted under *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982). However, the test set forth in *Golochowicz* pertains to other acts evidence sought to be admitted under MRE 404, and this test has been replaced by the test set forth in *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994), except with respect to identity evidence. See *People v Smith*, 243 Mich App 657, 670-671; 625 NW2d 46 (2000) (noting that the *Golochowicz* test has generally been supplanted by the test set forth in *VanderVliet*, but continues to be valid when used to show identification through modus operandi). Given that defendant's identity is not an issue, any reliance on *Golochowicz* is misplaced.

III. Right of Confrontation

Defendant contends that the trial court erred in refusing to permit defense counsel to cross-examine Repasky regarding whether he made any racial slurs toward defendant, thereby denying him of his right of confrontation. Although the trial court erred in limiting cross-examination in this manner, the error was harmless.

We review de novo constitutional questions, including those concerning a defendant's right to confront witnesses. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). At trial, defense counsel asked Repasky if he "ma[d]e any racial slurs toward" defendant. The prosecutor objected on grounds of relevance, and the trial court sustained the objection. However, "[a] witness's bias is always relevant[,]" and "[a] defendant is entitled to have the jury consider any fact that may have influenced the witness' testimony." *People v McGhee*, 268 Mich App 600, 637; 709 NW2d 595 (2005) (internal quotation marks and citation omitted; alteration in original.)

Moreover, "[a] limitation on cross-examination that prevents a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation." *People v Kelly*, 231 Mich App 627, 644; 588 NW2d 480 (1998). Because cross-examination regarding whether Repasky used racially offensive language was relevant to possible bias or prejudice, the trial court erred in precluding it.

However, claims concerning alleged violations of the Confrontation Clause are subject to harmless error analysis. *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005). "A constitutional error is harmless if [it is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Id*. at 347 (internal quotation marks and citations omitted; alteration in original). During direct examination, defendant testified that, as Repasky got out of the vehicle and approached defendant's window he yelled, "What the fuck is wrong with y'all, y'all stupid. Y'all about to hit my truck, you about to hit my truck." Defendant asserted that, as defendant emerged the vehicle, Repasky also said, "I'm not scared of you, you nigger." Chatman testified that he did not recall exactly what Repasky said but Repasky was "cursing, yelling, saying we cut him off," and "calling names." Repasky testified that someone stuck a pistol in his face, and Garver recalled that defendant held a handgun in Repasky's face, striking him once with it. Given that defendant testified that Repasky made a racial slur and there was substantial evidence that defendant possessed a handgun and held it in Repasky's face, it is clear beyond a reasonable doubt that the trial court's limitation on defense counsel's cross-examination of Repasky did not affect the outcome of the trial.

IV. Jury Instruction

Defendant claims that the trial court erred in denying his request for a jury instruction on simple assault. We agree. We review de novo claims of instructional error, *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003), and issues regarding whether an offense is an inferior offense within the meaning of MCL 768.32, *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003).

At trial, defense counsel requested a jury instruction regarding "simple assault" as a lesser included offense. The trial court asked if the request was for "misdemeanor assault," to which counsel affirmed. Counsel and the trial court both later referred to the requested instruction as an "assault and battery" instruction in the ensuing discussion and ruling. However, it is apparent from the record that defense counsel specifically requested an instruction on simple assault as a lesser included offense and that the trial court confirmed this request.

The trial court ruled that the requested instruction was not appropriate, apparently because it was inconsistent with the defense of self-defense. A criminal defendant may advance inconsistent defenses if the record sufficiently supports both defenses. MCR 2.111(A)(2); *People v Lemons*, 454 Mich 234, 245; 562 NW2d 447 (1997). However, in the instant case, self-defense was not inconsistent with the defense that defendant was not armed. Defendant testified that he was not armed and that he struck Repasky with his fists after Repasky pushed him.

MCL 768.32(1) requires that

> a trial court, upon request, should instruct the jury regarding any necessarily included lesser offense . . . irrespective of whether the offense is a felony or misdemeanor, if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense, and a rational view of the evidence would support it. [*People v Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002), citing *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), overruled in part on other grounds *Mendoza*, *supra*.]

All elements of a necessarily included lesser offense are contained within the greater offense, and it is impossible to commit the greater offense without first committing the lesser offense. *Cornell*, *supra* at 357; *People v Alter*, 255 Mich App 194, 199; 659 NW2d 667 (2003). "In other words, if a lesser offense is a necessarily included offense, the evidence at trial will always support the lesser offense if it supports the greater." *Id.*

Simple assault is "an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery." *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995) (internal quotation marks and citation omitted). The elements of felonious assault include an assault with a dangerous weapon and "the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). Therefore, felonious assault is "a simple assault aggravated by the use of a weapon." *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993).

Felonious assault required the jury to find a disputed factual element, i.e., the use of a weapon, that was not an element of simple assault. An instruction on simple assault was supported by a rational view of the evidence because both defendant and Chatman testified that defendant struck Repasky in the face with his fist and did not have a gun. Simple assault is a necessarily included lesser offense of felonious assault because it would be impossible to commit felonious assault without committing simple assault. See *Alter*, *supra* at 199. Therefore, the trial court erred in denying defendant's request for a lesser-included instruction regarding simple assault.

Harmless error analysis applies to errors regarding the instruction of necessarily included lesser offenses. *Cornell*, *supra* at 361-362; see also MCL 769.26; MCR 2.613(A). The error at issue is a preserved nonconstitutional error, which we will only reverse if defendant shows that, after an examination of the entire cause, it is more probable than not that the trial court's failure to provide the simple assault instruction undermined the reliability of the verdict. *Cornell*, *supra* at 363-364. The reliability of the verdict is undermined when the trial court fails to give the lesser-included instruction and the evidence "clearly" supports the instruction, i.e., "when there is substantial evidence to support the requested instruction." *Id.* at 365.

When interviewed by the police, defendant denied that he had a gun. Defendant and Chatman both testified at trial that defendant had punched Repasky with his fist and denied that defendant had a gun. Because there was substantial evidence to support simple assault, "[n]ot to give the jurors an instruction that allowed them to agree with defendant's view of the events in this case undermines the reliability of the verdict." *Silver*, *supra* at 393. Defendant is therefore entitled to reversal of his felonious assault conviction.

Accordingly, we remand for entry of a judgment of conviction of misdemeanor assault, MCL 750.81(1), and resentencing. *People v Kamin*, 405 Mich 482, 501; 275 NW2d 777 (1979), overruled in part on other grounds *People v Beach*, 429 Mich 450, 484 n 17; 418 NW2d 861 (1988); *People v Hall*, 249 Mich App 262, 271-272; 643 NW2d 253 (2002). Alternatively, if the prosecution wishes to seek a new trial on the felonious assault charge, it may proceed in that manner if it notifies the trial court before resentencing. *Kamin*, *supra* at 501; *Hall*, *supra* at 272.

Defendant requests that we also reverse his felony-firearm conviction. However, this Court has previously indicated that reduction of a defendant's conviction to a lesser offense does not necessitate vacating the defendant's felony-firearm conviction. *People v Garrett*, 161 Mich App 649, 652-653; 411 NW2d 812 (1987); see also *People v Lewis*, 415 Mich 443, 452-453; 330 NW2d 16 (1982) (stating that acquittal of an underlying felony conviction does not require reversal of a felony-firearm conviction). Indeed, inconsistent verdicts are permitted. *People v Vaughn*, 409 Mich 463, 465-466; 295 NW2d 354 (1980). Therefore, if the prosecutor chooses not to retry Johnson, then the felony-firearm conviction will stand. However, if the prosecution chooses to retry defendant on his felonious assault charge, his felony-firearm conviction shall be reversed, and the prosecution may retry defendant on that charge as well. *Garrett*, *supra* at 653; see also *People v White*, 469 Mich 944; 670 NW2d 672 (2003).

Reversed and remanded. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly