STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 31, 2009
v	No. 279130 Wayne Circuit Court
DEMETRICE BENOR JOHNSON, Defendant-Appellant.	LC No. 07-006715-01

Before: Saad, C.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendant appeals his bench trial convictions of felonious assault, MCL 750.82, intentional discharge of a firearm from a motor vehicle, MCL 750.234a, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to serve concurrent prison terms of 22 months to 15 years each for the felonious assault and discharge of a firearm from a motor vehicle convictions, and 1 to 5 years for the felon in possession of a firearm conviction. The court also sentenced defendant to a consecutive 2-year prison term for the felony-firearm conviction. For the reasons set forth below, we vacate defendant's conviction and sentence for felonious assault, but in all other respects we affirm.

Defendant argues that the trial court violated his due process rights when it convicted him of felonious assault because felonious assault is a cognate offense to assault with intent to commit murder. Because defendant did not preserve this issue in the trial court, we review for plain error affecting substantial rights. *People v McNally*, 470 Mich 1, 5; 679 NW2d 301 (2004). To avoid forfeiture of an issue under the plain error rule, the defendant must show that (1) an error occurred, (2) the error was clear and obvious, and (3) the plain error affected his substantial rights, i.e., the error affected the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 103 (1999). "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Id.* at 763 (citation and internal quotation marks omitted).

In a bench trial, the judge may find the defendant not guilty of the charged offense, but convict him of an offense that is inferior to the one charged. *People v Cornell*, 466 Mich 335, 359; 646 NW2d 127 (2002), overruled in part on other grounds by *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003). This principle is codified in MCL 768.32(1), which provides:

> 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.

An offense is inferior in degree to another due "to the absence of an element that distinguishes the charged offense from the lesser offense." *Cornell, supra* at 354 (citation and internal quotation marks omitted); see also *Mendoza, supra* at 533. Thus, the test for inferior offenses is whether the lesser offense can be proven by the same facts used to establish the charged offense. *People v Nyx*, 479 Mich 112, 120-121; 734 NW2d 548 (2007). MCL 768.32(1) complies with policy goals and the constitutional demands because all the elements of the lesser offense have been alleged, and can be defended, by giving defendant notice of the greater charge. *Cornell, supra* at 349-350, 354-355. Accordingly, *Cornell* and its progeny stand for the principle that conviction of a lesser offense is generally limited to those offenses that are "necessarily included" in the greater. *Id*. at 356 n 9, 359. Cognate lesser offenses are related offenses that share many of the same elements, but have at least one element not found in the greater offense. *Mendoza, supra* at 532 n 4. Consequently, our Supreme Court has held that MCL 768.32(1) does not permit the conviction of a defendant on an uncharged cognate lesser offense. *Nyx, supra* at 123.

Felonious assault is a cognate lesser offense to assault with intent to commit murder. *People v Vinson*, 93 Mich App 483, 486; 287 NW2d 274 (1979). Specifically, it is possible to commit assault with intent to murder without committing felonious assault because to prove the latter charge it must be shown that the defendant used a dangerous weapon. *Id*. Accordingly, the trial court plainly erred when it convicted defendant of felonious assault. See *People v Otterbridge*, 477 Mich 875; 721 NW2d 595 (2006) (vacating the bench trial conviction of a defendant who was acquitted of assault with intent to murder but found guilty of felonious assault); see also *People v Wheeler*, 480 Mich 965; 741 NW2d 521 (2007) (jury trial). Our Supreme Court has further held that if a defendant could not lawfully be convicted of a crime because it is an uncharged, cognate offense, the defendant has satisfied the showing that the error "seriously affects the fairness, integrity, or public reputation of the judicial proceedings." *Otterbridge, supra* at 875; accord *Nyx, supra* at 125.

Accordingly, we vacate defendant's conviction and sentence for felonious assault.[1] In all other respects, defendant's convictions and sentences are affirmed.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra

[1] Defendant also argues that he is entitled to resentencing under *Blakely v Washington*, 542 US 296, 300; 124 S Ct 2531; 159 L Ed 2d 403 (2004). In *People v Drohan*, 475 Mich 140, 159; 715 NW2d 778 (2006), the Court held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. Accordingly, defendant is not entitled to relief on this claim.