STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 29, 2009
v	No. 281672 Wayne Circuit Court
DAVID BRIAN BELL, Defendant-Appellant.	LC No. 07-010120-FH

Before: Saad, C.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Following a bench trial, the trial court convicted defendant David Bell of assault and battery[1] and sentenced him to 18 months' probation. He appeals as of right. We vacate the conviction for assault and battery and remand for entry of a conviction of simple assault and sentencing for that offense.

I. Basic Facts And Procedural History

According to the trial court's findings, which are not contested on appeal, the conviction arose from an altercation between Bell and the complainant after she asked him for assistance with jump-starting a car. When Bell found out that the car belonged to the complainant's friend, he refused and a verbal argument ensued. During the argument, Bell threw a plastic cup containing a drink that struck the complainant in the face. She struck his arm with jumper cables. He obtained possession of the cables and struck her in the head and face with his fist. During the fight, the complainant's sunglasses were broken. Bell was charged with malicious destruction of property,[2] and assault with a dangerous weapon (felonious assault).[3] However, the trial court found that there was not a willful destruction of the glasses and acquitted him of the malicious destruction of property charge. With respect to the assault charge, the trial court found that Bell did not use a dangerous weapon. It found that Bell committed a battery and intended to commit a battery, that Bell was not acting in self-defense, and that the amount of force used

[1] MCL 750.81.

[2] MCL 750.377a(1)(c)(*i*).

[3] MCL 750.82.

exceeded that necessary to protect himself. The trial court found Bell "guilty of the lesser included offense of assault and battery in violation of [MCL] 750.81, a misdemeanor."

II. Lesser Included Offenses

A. Standard Of Review And Legal Standards

Bell argues, and the prosecution agrees, that the trial court could not properly convict him of assault and battery because it is not a lesser included offense of the charged offense of felonious assault. MCL 768.32(1) permits convictions only of necessarily included lesser offenses.[4] "The elements of felonious assault are '(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.'"[5] A battery is not a required element of felonious assault.[6] Therefore, assault and battery is not a necessarily included lesser offense of felonious assault. Because Bell did not object to the court's consideration of this offense, he must satisfy the plain-error standard of *People v Carines*.[7] Here, the error was plain and, as recognized by the prosecution, where a defendant cannot lawfully be convicted of the crime, the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.[8]

B. Remedy

The appropriate remedy is remand for entry of conviction of assault. In finding Bell guilty of assault and battery, the court necessarily found him guilty of assault.[9] Simple assault is a necessarily included lesser offense of felonious assault that the trial court could have properly considered in this matter.[10] Thus, the grounds for reversal of Bell's conviction for assault and battery do not apply to a conviction for assault. When a conviction for a greater offense is reversed on grounds that affect only the greater offense, an appellate court may remand for entry

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[4] *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002).

[5] *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996) (quotation and citation omitted).

[6] *People v Acosta*, 143 Mich App 95, 101; 371 NW2d 484 (1985).

[7] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[8] *Id.*

[9] See *People v Nickens*, 470 Mich 622, 628; 685 NW2d 657 (2004) (An attempted-battery assault is a necessarily included lesser offense of battery "because it is impossible to commit a battery without first committing an attempted-battery assault.")

[10] *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993) (recognizing that felonious assault is "a simple assault aggravated by the use of a weapon").

of judgment of conviction on a necessarily included lesser offense.[11] Therefore, the appropriate remedy is remand for entry of a conviction of assault and sentencing on that offense.[12]

III. Attorney Fees

Bell contests the trial court's order that he pay $400 for court-appointed attorney fees without considering his ability to pay as required by *People v Dunbar*.[13] Because Bell will be sentenced anew, the issue is moot.

We vacate Bell's conviction of assault and battery and remand for entry of a conviction of assault and sentencing for that offense. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Brian K. Zahra

[11] *People v Bearss*, 463 Mich 623, 631; 625 NW2d 10 (2001).

[12] Cf. *People v Randolph*, 466 Mich 532, 552 n 25; 648 NW2d 164 (2002); *People v Hutner*, 209 Mich App 280, 286; 530 NW2d 174 (1995); *People v Saxton*, 118 Mich App 681, 691; 325 NW2d 795 (1982).

[13] *People v Dunbar*, 264 Mich App 240, 251; 690 NW2d 476 (2004).