STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, V THOMAS CARGILL WALLS, Defendant-Appellant.	FOR PUBLICATION April 7, 2005 9:05 a.m. No. 251454 Oakland Circuit Court LC No. 2002-184922-FC Official Reported Version

Before: Fort Hood, P.J. and Griffin and Donofrio, JJ.

GRIFFIN, J.

Defendant was convicted by jury of assault with intent to rob while armed, MCL 750.89; felon in possession of a firearm, MCL 750.224f; two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; and resisting and obstructing a police officer, MCL 750.479. He was sentenced as a third-offense habitual offender, MCL 769.11, to concurrent prison terms of thirty to fifty years for assault with intent to rob while armed, five to fifteen years for felon in possession of a firearm, and five to fifteen years for resisting and obstructing a police officer. He was also sentenced to a two-year prison term for each of the felony-firearm convictions, which sentences are to be served consecutively to the other sentences. Defendant appeals as of right, challenging only his assault with intent to rob while armed conviction. We affirm and hold that the crime of felonious assault is a cognate offense of assault with intent to rob while armed, not a necessarily included lesser offense.

Defendant's sole argument on appeal is that the trial court committed error requiring reversal in refusing to instruct the jury on felonious assault as a necessarily included lesser offense of assault with intent to rob while armed. We disagree. We review de novo a trial court's ruling on a necessarily included lesser offense instruction. *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003).

Defendant misstates the law by claiming that a defendant has a right to a jury instruction for a cognate offense if evidence would support that verdict and bases that conclusion on *People v Beach*, 429 Mich 450; 418 NW2d 861 (1988). While *Beach* would support defendant's proposition, *id*. at 463-464, our Supreme Court recently held in *People v Cornell*, 466 Mich 335, 359; 646 NW2d 127 (2002), that an instruction on a cognate offense is not permitted under MCL 768.32(1). *Id*. at 353-355. Instead, the *Cornell* Court held that MCL 768.32 only allows a jury to consider necessarily included lesser offenses. *Id*. at 353-354.

Similarly, the rule stated by defendant that Michigan law provides an absolute right to an instruction for a necessarily included lesser offense is also not supported by *Cornell*. *Cornell* establishes that a requested instruction on a necessarily included lesser offense cannot be given unless conviction for the greater offense would require 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 the instruction. *Cornell, supra* at 357. Therefore, here, to be entitled to the instruction, defendant must first establish that felonious assault is a necessarily included lesser offense of assault with intent to rob while armed.

A necessarily included lesser offense is a crime for which it is impossible to commit the greater offense without first having committed the lesser. *Cornell, supra* at 356. "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." *People v Alter*, 255 Mich App 194, 199; 659 NW2d 667 (2003). In particular, "[n]ecessarily included lesser offenses are offenses in which the *elements* of the lesser offense are completely subsumed in the greater offense." *People v Mendoza*, 468 Mich 527, 532 n 3; 664 NW2d 685 (2003) (emphasis added).

On the other hand, cognate offenses "share several elements, and are of the same class or category as the greater offense, but the cognate lesser offense has some elements not found in the greater offense." *Mendoza, supra* at 532 n 4. See also *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001). Because the crime of felonious assault requires an *element* not found in the crime of assault with intent to rob while armed, felonious assault is a cognate offense of assault with intent to rob while armed.

In this regard, the crime of assault with intent to rob while armed is defined as follows:

> Any person, being armed with a dangerous weapon, *or any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon*, who shall assault another with intent to rob and steal shall be guilty of a felony, punishable by imprisonment in the state prison for life, or for any term of years. [MCL 750.89 (emphasis added).]

The felonious assault statute, MCL 750.82(1), states:

> Except as provided in subsection (2), a person who assaults another person with a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon without intending to commit murder or to inflict great bodily harm less than murder is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.

As indicated by the above, the elements of the crime of felonious assault require the offender to be in possession of a dangerous weapon. However, the elements of the crime of assault with intent to rob while armed allow conviction for the offense when the offender has "any article used or fashioned in a manner to lead a person so assaulted reasonably to believe it to be a dangerous weapon." The crime of felonious assault, therefore, requires an *element* not necessary for the crime of assault with intent to rob while armed. For this reason, the elements of the lesser offense are not "completely subsumed in the greater offense." *Mendoza, supra* at 532 n 3; *Cornell, supra* at 356. Accordingly, felonious assault is a cognate offense of assault with intent

to rob while armed, not a necessarily included lesser offense,[1] and the trial court correctly denied defendant's requested jury instruction.

Affirmed.

Fort Hood, P.J., concurred.

/s/ Richard Allen Griffin
/s/ Karen M. Fort Hood

[1] We note that *People v Stubbs*, 110 Mich App 287, 291; 312 NW2d 232 (1981), citing *People v Guidry*, 67 Mich App 653, 658 n 2; 242 NW2d 461 (1976), suggests a contrary conclusion. However, because *Stubbs* predates *Cornell* and *Mendoza* and does not incorporate an analysis consistent with these more recent Supreme Court decisions, it is no longer viable precedent in this regard.