STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v TOMMY BROWN, Defendant-Appellant.	FOR PUBLICATION June 23, 2005 9:20 a.m. No. 254494 Wayne Circuit Court LC No. 03-011212-01 Official Reported Version

Before: Griffin, P.J., and Bandstra and Hoekstra, JJ.

HOEKSTRA, J., *(concurring in the result)*.

I concur with the result reached by the majority, but write separately because my reasons for affirming are quite different. The majority concludes that assault with intent to do great bodily harm less than murder is a necessarily included lesser offense of assault with intent to murder. Consequently, the majority holds that the trial court properly denied defendant's objection to instructing the jury on assault with intent to do great bodily harm less than murder. My analysis leads me to conclude that these offenses do not meet the definitions for either a necessarily included lesser offense or a cognate offense, but that other considerations favor instructing on assault with intent to do great bodily harm when the primary charge is assault with intent to murder if a party requests it and the facts support it.

On appeal, defendant argues that the trial court erred in instructing the jury at the request of the prosecution and over objection by defense counsel on the offense of assault with intent to cause great bodily harm, as a necessarily included offense of assault with intent to murder. Specifically, defendant argues that the offense of assault with intent to cause great bodily harm is a cognate, as opposed to necessarily included lesser offense, of the offense of assault with intent to murder and that, therefore, instruction on that offense was not permissible.

In *People v Cornell*, 466 Mich 335, 357, 359; 646 NW2d 127 (2002), our Supreme Court held that jury instructions regarding uncharged cognate lesser offenses are not permissible, but that instructions on necessarily included lesser offenses are "proper 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." Thus, to resolve this issue it must first be determined whether the offense of assault with intent to cause great bodily harm is a necessarily included or cognate lesser offense of the crime of assault with intent to murder. The determination whether an offense is a lesser included offense on which instruction is permissible

is a question of law that we review de novo. *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003).

A necessarily included lesser offense is one that must be committed as part of the greater offense, i.e., it would be impossible to commit the greater offense without first having committed the lesser because the elements of the lesser offense are completely subsumed by those of the greater. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001); *Mendoza*, *supra* at 532 n 3. In contrast, a cognate lesser offense is one that shares some common elements with and is of the same class of the greater offense, but also has elements not found in the greater offense. *People v Perry*, 460 Mich 55, 61; 594 NW2d 477 (1999), *Mendoza*, *supra* at 532 n 4.

With respect to the elements of the offenses at issue here, the offense of assault with intent to murder requires proof of an assault, committed with an actual intent to kill, which, if successful, would make the killing murder. *People v Lugo*, 214 Mich App 699, 710; 542 NW2d 921 (1995). The crime of assault with intent to cause great bodily harm requires an assault, coupled with an intent only to inflict great bodily harm. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). As is apparent, both offenses share the common element of assault and are, therefore, of the same class and category. However, they are distinguishable from each other by the intent required of the actor at the time of the assault. Thus, categorization of either as an offense cognate to or necessarily included within the other must center on an analysis of these distinguishing intents.

An understanding of these two intents begins with the criminal law of murder and the common law concept of malice—the mens rea required for murder—which is broadly defined to include the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and willful disregard of the likelihood that the natural and probable consequence of such behavior is to cause death or great bodily harm. See *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). *Mens rea* is an essential element of every crime at common law, and represents "[t]he state of mind that the prosecution, to secure a conviction, must prove that a defendant had when committing a crime . . . ." Black's Law Dictionary (8th ed). Thus, the concept of malice recognizes varying definitions of the state of mind required for murder, two of which are at issue here. However, central to this analysis is that, in the context of murder, the intent to kill and the intent to cause great bodily harm are merely different definitions of the same element, i.e., malice, and within that element are coequal to one another. That is, either is itself sufficient to establish malice independent of the other. Applied to the definitions of necessarily included and cognate offenses, this characteristic of the intents to kill or to cause great bodily harm makes placement of the subject offenses into the category of offenses either necessarily included or cognate, problematic.[1]

[1] Indeed, previous panels of this Court have, in unpublished opinions, split on the question whether the offense of assault with intent to cause great bodily harm is a cognate or necessarily included lesser offense of assault with intent to murder. See *People v Paletis*, unpublished opinion per curiam, issued September 14, 2004 (Docket No. 253494) (finding assault with intent
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I would conclude that the offenses of assault with intent to murder and assault with intent to cause great bodily harm are not cognate to one another because both require proof of the same two elements, i.e., an assault, and malice in the form of either an intent to kill or an intent to cause great bodily harm. Thus, neither offense contains an element that is not found in the other. *Perry*, *supra*. Similarly, neither is a necessarily included lesser offense of the other because either intent is, independent of the other, sufficient to establish malice. In other words, because it is possible to commit an assault with only the express intent to kill, it cannot be said that it is impossible to commit the offense of assault with intent to murder without first having committed the offense of assault with intent to cause great bodily harm. *Bearss*, *supra*. Consequently, the answer to whether assault with intent to cause great bodily harm is either a cognate or necessarily included lesser offense of assault with intent to murder is that it is neither.

Respectfully, I disagree with the majority's finding that the intent to do great bodily harm is less than the intent to kill and, therefore, assault with intent to do great bodily harm is a necessarily included lesser offense to assault with intent to murder. Initially, I note that *People v Taylor*, 422 Mich 554; 375 NW2d 1 (1985), upon which the majority relies, provides no support for the contention that the intent to do great bodily harm is less than the intent to kill. *Taylor* recognizes that malice may be proved without establishing an intent to kill. *Id*. at 567. But it in no way suggests that proving malice through one of the alternative definitions of malice, i.e. an intent to inflict great bodily harm or wanton and willful disregard of the likelihood that the natural tendency of the actor's behavior is to cause death or great bodily harm, is lesser proof of malice. Recognizing the distinctive ways to prove malice, as *Taylor* does, does not equate to categorizing any one of them as greater or lesser to the others.

Respectfully, I also disagree with the majority's reliance on the proposition that "[i]t defies common sense to suggest that a defendant could commit an assault with the intent to kill another person without also intentionally and knowingly inflicting great bodily harm." *Ante* at ___. Admittedly, the doing of an act that will kill another requires that before death results a serious injury must be inflicted on the intended victim. But the law distinguishes between criminal acts and the intent with which the acts are done. For the purpose of categorizing these offenses, the act is not relevant. It is the intent or state of mind of the actor that distinguishes the two offenses. Clearly, there is a difference that the law recognizes between intending to kill and intending to inflict great bodily harm. The problem here is that for the purpose of establishing malice the law says that either, independent of the other, is sufficient. Thus, in the context of murder in which these intents are known in the law, one is not lesser to the other.

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to cause great bodily harm less than murder to be a necessarily lesser included, as opposed to cognate, offense of assault with intent to murder), and *People v Norwood*, unpublished opinion per curiam, issued March 20, 2001 (Docket No. 218207) (declaring assault with intent to cause great bodily harm less than murder to be a cognate lesser offense of assault with intent to murder). The problems arising from the differing degrees of malice associated with the subject offenses, when attempting to categorize those offenses as either necessarily included or cognate, were also recently recognized by Justice Cavanagh, who, in his concurring opinion in *Mendoza*, *supra* at 552-553, found any such categorization to be "troubling."

Finally, I respectfully find unavailing the comparison offered by the majority of the offenses at issue here with that of murder and manslaughter, as discussed by the Supreme Court in *Mendoza*. Indeed, the comparison assumes the point that I dispute, i.e., that the intent to inflict great bodily harm is lesser than that of the intent to kill. Moreover, murder and manslaughter are distinguishable from the instant offense because unlike murder the element of malice need not be proven to establish manslaughter. The absence of an element is not comparable to the issue presented here regarding whether one otherwise coequal assaultive intent is necessarily included or cognate to the other.

But, my conclusion that these offenses do not satisfy either the definition of being a necessarily included lesser offense or a cognate offense does not answer the ultimate question at issue here—whether it was error for the trial court to instruct the jury that, in addition to the charged offense of assault with intent to murder, it could also consider the offense of assault with intent to cause great bodily harm. Because these two offenses are not subject to the necessarily included lesser or cognate offense analysis, resolution requires addressing the issue in the context of the peculiar relationship these offenses bear to each other. In this context, I would hold that, because the subject offenses merely codify within the law of assault criminally culpable intents that, although punished differently as assaults depending on which of the intents is involved, are otherwise coequal under the common law of malice, a trial court must instruct on the offense of assault with intent to cause great bodily harm when the principal charge is assault with intent to murder, if the instruction is supported by a rational view of the evidence and has been requested by a party.[2] Under such circumstances, I discern no reason to deprive either party of an instruction on assault with intent to do great bodily harm less than murder. Indeed, inasmuch as the offenses at issue here are substantively the same because of their coequal intents, this holding would not be adverse to *Cornell*, *supra*, which applies only to instructions on offenses "inferior" to the primary charge. *Id*. at 341. Consequently, I agree with the majority that the trial court's instruction on the offense of assault with intent to cause great bodily harm was proper.

/s/ Joel P. Hoekstra

[2] In reaching this conclusion, I recognize that the rationale employed here could logically be interpreted to require instruction on the offense of assault with intent to murder where assault with intent to do great bodily harm is the principal offense. However, that issue is not presented here and, therefore, I do not reach the question whether such an instruction could be proper.