STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 23, 2001
v	No. 218640 Saginaw Circuit Court
BILLY RAY MARTIN, Defendant-Appellant.	LC No. 98-015546-FC

Before: Holbrook, Jr., P.J., and McDonald and Saad, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of armed robbery, MCL 750.529; MSA 28.797, first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, unlawfully driving away an automobile, MCL 750.413; MSA 28.645, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to four concurrent terms of life imprisonment for the first four convictions, and a consecutive two-year term for the felony-firearm conviction. We reverse and remand.

The evidence at trial showed that an intruder broke into the victim's house, assaulted the victim, stole several items including two rifles, and then drove away in the victim's truck. The victim was unable to identify his assailant, stating that, although defendant resembled the intruder, the victim did not clearly see the individual's face during the incident. Other evidence established that defendant asked an acquaintance to hold the stolen rifles shortly after the incident. Additional items belonging to the victim were subsequently discovered during a search of defendant's residence.

The trial court instructed the jury on the lesser included offenses of unarmed robbery and felonious assault, but declined defendant's request that the jury be instructed on the offense of receiving or concealing stolen property, MCL 75.535; MSA 28.803, as a lesser included offense of home invasion. Defendant claimed that the evidence showed that he was not the assailant who broke into the victim's home and assaulted the victim, but only that he possessed some of the stolen goods following the earlier attack. Relying on *People v Rood*, 83 Mich App 350, 352-353; 268 NW2d 403 (1978), the trial court concluded that receiving or concealing stolen property was not a lesser offense of first degree home invasion and, therefore, refused to give the requested

instruction. The court also stated that, had it believed otherwise, it would have allowed defendant to present evidence of the value of the stolen property, a necessary element of receiving or concealing stolen property.

Defendant's sole argument on appeal is that the trial court erred in refusing to give the requested instruction. We agree. A trial court must instruct on a lesser included offense when the instruction is requested by the defendant and it is supported by the evidence. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). There are two types of lesser included felony offenses, necessarily included offenses and cognate lesser offenses. *People v Ora Jones*, 395 Mich 379, 387; 236 NW2d 461 (1975). A cognate lesser offense is one which shares some common elements with and is of the same "class or category" as the greater offense, but also has elements not found in the greater. *People v Perry*, 460 Mich 55, 61; 594 NW2d 477 (1999); *Jones, supra* at 387. Thus, the offenses must protect the same societal interests or be closely related, a concept also described as an "inherent relationship." *People v Hendricks*, 446 Mich 435, 444, 447; 521 NW2d 546 (1994); *Jones, supra* at 388.

Additionally, before a court instructs on a cognate lesser offense, it must examine the specific evidence to determine whether that evidence would support a conviction of the lesser offense. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991); *People v Heflin*, 434 Mich 482, 495; 456 NW2d 10 (1990). If the defendant requests an instruction regarding a cognate lesser offense and the evidence supports it, the trial court must give the instruction. *People v Veling*, 443 Mich 23, 36; 504 NW2d 456 (1993); *People v Sullivan*, 231 Mich App 510, 517-518; 586 NW2d 578 (1998).

Contrary to the trial court's conclusion, an instruction on receiving or concealing stolen property as a cognate lesser included offense of home invasion is appropriate if supported by the evidence. *People v Kamin*, 405 Mich 482, 496; 275 NW2d 277 (1979). With one important omission, the evidence presented at trial would support a conviction of receiving or concealing stolen property. What is missing from the record is any evidence on the value of the stolen items. However, the trial court foreclosed defendant from presenting such evidence after concluding that receiving or concealing stolen property was not available as a cognate lesser offense to home invasion. The court specifically stated that, had it decided otherwise, it would have allowed evidence of value to be presented.

Furthermore, we conclude that the trial court's error was not harmless. *People v Mosko*, 441 Mich 496, 501-502; 495 NW2d 534 (1992). The failure to instruct on a lesser cognate offense can be harmless is the jury had rejected the opportunity to convict on another intermediate charge. *Id.* at 504. In the case at hand, the jury was not given this option.

Normally, where reversal is required for failure to instruct on a lesser offense, the appropriate remedy is to remand for entry of a conviction on the lesser offense and resentencing, with the prosecutor being given the option of retrying the defendant on the charge for which he was convicted. See *Kamin, supra* at 501.[1] We conclude that such a remedy is inappropriate

[1] In this case, this remedy would lead to reversal of defendant's home invasion conviction, while adding a conviction for receiving or concealing stolen property, but would also leave undisturbed

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under the circumstances of this case. First, the absence of any evidence of value of the stolen property precludes a proper determination of which of the alternative offenses enumerated in MCL 750.535; MSA 28.803 was committed. Second, defendant's additional convictions are all interrelated and are inconsistent with the defense theory upon with a conviction of receiving or concealing stolen property would be predicated, i.e., that defendant merely possessed the stolen goods, but was not the person who stole them in the first instance or assaulted the victim. Thus, while a conviction for receiving or concealing stolen property might be an appropriate alternative under different circumstances, we conclude that reversal of each of defendant's convictions is warranted in this case. Accordingly, defendant's convictions are reversed and the case remanded for a new trial.

Reversed and remanded for a new trial consistent with this opinion. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Gary R. McDonald
/s/ Henry William Saad

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defendant's convictions for assault with intent to do great bodily harm, unlawfully driving away an automobile, and felony-firearm.