STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 25, 2002
v	No. 229650 Macomb Circuit Court
JAMES DAVID LICK, Defendant-Appellant.	LC No. 99-002919-FH

Before: Neff, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Defendant was charged with assault with intent to commit great bodily harm less than murder, MCL 750.84, and convicted by a jury of leaving the scene of a serious injury accident, MCL 257.617. He was sentenced to a term of twenty-three months to five years' imprisonment. He appeals as of right. We reverse.

The underlying incident involved defendant and two brothers, Charles and Donald Fowler. All three of them had been drinking, and Donald had been drinking "a lot." Defendant and Charles were both sitting in their respective vans, exchanging words through the open windows because defendant believed that Charles had vandalized his van, when Donald walked between the vans. According to defendant and his two passengers, Donald punched defendant in the face. According to the Fowler brothers, Donald did not hit defendant. All agree that defendant began to drive away and that Donald was pinned between the two vehicles. Defendant testified that he panicked and drove immediately to the police station where he reported that Donald had assaulted him. Defendant's eye was red and swollen and a police photograph was taken of his injury. The Fowler brothers and their mother testified that defendant hit Donald at least twice with his van before defendant drove away. Defendant said that he knew he hit Donald but did not believe he was seriously hurt, and said that hitting Donald was an accident. Several witnesses, however, including defendant's passengers, testified that Donald began screaming after he was hit. Donald's scrotum was "ripped open" in the collision.

Defendant unsuccessfully moved for a directed verdict on the charged offense, and presented evidence in support of his theory that he hit Donald by accident. After the close of defendant's proofs, the prosecutor requested instruction on the "lesser offense" of leaving the scene of a serious injury accident. The prosecutor suggested that, although defendant had admitted most of the elements, the jury could acquit him of the lesser crime if it believed he made a "good faith effort" to report the accident. The trial court questioned why it could not

simply find defendant guilty of the lesser offense. Defendant raised a general objection, arguing that there was no evidence that he knew the severity of the accident and that "it's not fair."

Defendant argues on appeal that the trial court erred in instructing on the "lesser offense." We agree. "It is elementary that a defendant may not be convicted of a crime with which he was not charged." *People v Jones*, 395 Mich 379, 388; 236 NW2d 461 (1975). A defendant has the constitutional "right to know the nature and cause of the accusation against him." *Id.* A trial judge may not instruct on lesser included offenses over the defendant's objection unless the language of the charging document gives defendant notice that he could at the same time face the lesser charge. *People v Darden*, 230 Mich App 597, 600-601; 585 NW2d 27 (1998). Minimal due process notice requirements are met, however, if the charged crime and the lesser offense are "of the same or of an overlapping nature." *Jones, supra.*

Necessarily included lesser offenses are those for which all elements are contained within those of the greater offense, whereas a cognate offense merely has some elements in common with the charged offense. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001). The late addition of a necessarily included offense does not impinge on a defendant's due process rights because the accused must defend against the same evidence as when charged with only the greater offense. However, the addition of a cognate offense may give rise to due process concerns. *Id.* at 628-629.

Here, the elements of the charged crime, assault with intent to do great bodily harm less than murder, are (1) an assault, and (2) the specific intent to do great bodily harm less than murder. *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996). To be convicted of the offense of leaving the scene of a serious injury accident, the jury must find that the driver of a vehicle, who knows or has reason to believe that he was involved in an accident, on a public road or any property open to the public, resulting in serious or aggravated injury, did not stop his vehicle at the scene of the accident and remain there to give information and aid. MCL 257.617; MCL 257.619; *People v Noble*, 238 Mich App 647, 652; 608 NW2d 123 (1999). The elements of the two offenses are entirely different, and the offense of which defendant was convicted is neither necessarily included nor cognate to assault with intent to do great bodily harm.

In Michigan, the decision to charge and what charge to bring rests in the sole discretion of the prosecutor. *People v Venticinque*, 459 Mich 90, 100; 586 NW2d 732 (1998). In this case, from the moment that defendant first made his police report on the night of the incident, he admitted most of the elements of leaving the scene of a serious injury accident. He was not, however, charged with that offense and did not have notice that he would be required to defend, or argue to the jury that they should acquit him of, that charge. The trial court erred in giving the jury the option of convicting defendant of the uncharged offense. *DeJonge v Oregon*, 299 US 353, 362; 57 S Ct 255; 81 L Ed 278 (1937); *People v Adams*, 202 Mich App 385, 391; 509 NW2d 530 (1993). Accordingly, defendant's conviction is reversed.

In light of our disposition, we do not address defendant's remaining issues on appeal.

Reversed.

/s/ Janet T. Neff
/s/ Richard Allen Griffin
/s/ Michael J. Talbot