STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 11, 2004
v	No. 245004 Wayne Circuit Court
JAMES MATTHEW EZEKIEL, Defendant-Appellant.	LC No. 02-002533

Before: Cooper, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of aggravated assault, MCL 750.81a, possession of a firearm during the commission of a felony, MCL 750.227b, and felon in possession of a firearm, MCL 750.224f. He was acquitted of an additional charge of felonious assault. Defendant was sentenced to concurrent terms of one year for the aggravated assault conviction and sixteen to sixty months' imprisonment for the felon in possession conviction, to be preceded by a two-year term for the felony-firearm conviction. We affirm.

I

Defendant first argues that the trial court erred by failing to give an instruction on simple assault or assault and battery as a lesser offense to the charge of assault with intent to do great bodily harm. The prosecution agrees that the trial court erroneously failed to give a lesser offense instruction on assault and battery, but argues that the error was harmless under the test for nonconstitutional error, because it was not more probable than not that the outcome would have been different absent the error. We note that the trial court did instruct the jury on aggravated assault and that the jury convicted defendant of this lesser offense rather than the charged offense of assault with intent to do great bodily harm. We review a claim of instructional error de novo. *People v Lowery*, 258 Mich App 167, 173; 673 NW2d 107 (2003). However, to warrant reversal of a conviction based on a trial court's erroneous refusal to instruct on a lesser offense, a defendant must show that it is more probable than not that the failure to give the requested instruction undermined the reliability of the verdict. *Id.* at 172-173. We conclude that the trial court did not err by refusing to give an instruction on assault and battery and that any error in failing to instruct on simple assault does not warrant appellate relief.

An instruction on a requested lesser offense should be given if (1) the lesser offense is a necessarily included lesser offense, i.e., all of its elements are contained within the elements of

the charged offense, (2) conviction of the greater charged offense would require the jury to find a disputed factual element that is not part of the lesser offense, and (3) a rational view of the evidence would support conviction of the lesser offense rather than the charged offense. *People v Cornell*, 466 Mich 335, 356-359; 646 NW2d 127 (2002).[1]

The elements of assault with intent to do great bodily harm are (1) an attempt or threat with force or violence to do corporal harm to another, i.e., an assault, and (2) an intent to do great bodily harm. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). Thus, assault and battery is not a necessarily included lesser offense of assault with intent to do great bodily harm because battery is not an element of the latter crime.[2] Accordingly, the trial court properly refused to give a lesser offense instruction on assault and battery with regard to the assault with intent to do great bodily harm charge.

In contrast, simple assault is plainly a necessarily included lesser offense of assault with intent to do great bodily harm, inasmuch as an assault is one of the elements of the greater crime. However, we conclude that any error in refusing to instruct on simple assault does not warrant reversal in light of the absence of substantial evidence to warrant a conviction for that offense. The crime of aggravated assault, of which defendant was convicted, consists of assaulting a person without a weapon and inflicting serious or aggravated injury. MCL 750.81a(1). Serious or aggravated injury for purposes of this statute includes injury that causes disfigurement. *People v Norris*, 236 Mich App 411, 415 n 3; 600 NW2d 658 (1999); *People v Brown*, 97 Mich App 606, 611; 296 NW2d 121 (1980).

In the present case, Dominque "Don" Govan and Crystina Jones testified that victim Elnora Jones' teeth were chipped during the incident. Other witnesses also testified to seeing Elnora with chipped teeth later on the day of the incident. No witness testified to Elnora having been assaulted, but not suffering chipped teeth as a result.[3] In *Cornell, supra* at 365-367, our Supreme Court held that an error in refusing to instruct on a lesser offense did not warrant relief where there was not "substantial evidence" to support a conviction of the lesser offense as opposed to the greater offense. We similarly conclude in this case that there was no substantial evidence to support a conviction of simple assault, rather than aggravated assault, in light of the testimony of multiple witnesses indicating that Elnora's teeth were chipped during the assault, a

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[1] Although the *Cornell* decision was given limited retroactive effect, *Cornell, supra* at 367, the trial in this case occurred after *Cornell* was decided. Accordingly, *Cornell* is applicable to this case.

[2] In this regard, the prosecution is incorrect in indicating that assault and battery is subsumed within assault with intent to do great bodily harm.

[3] Defendant's brief on appeal is misleading insofar that it indicates that Dedarue Penn-Jones (mother of Crystina and Elnora) testified that Elnora's "teeth were chipped like they had been chipped before," which might suggest that Penn-Jones indicated that Elnora's teeth were not chipped during the incident. Penn-Jones actually testified that she saw that two of Elnora's teeth were broken on the day of the incident and only described *one* tooth as having previously been chipped. Further, she said that the previously broken tooth had been fixed before the day of the incident.

form of disfigurement, but no description by a witness of an assault without Elnora's teeth being chipped. Thus, the trial court's failure to instruct on the lesser offense of simple assault does not warrant appellate relief.

Defendant also briefly argues that the trial court erred by failing to give a requested lesser offense instruction on assault and battery or simple assault with regard to the felonious assault charge of which defendant was acquitted. However, because defendant was acquitted outright of the felonious assault charge, it is apparent that any error in this regard does not warrant relief because it is not more probable than not that it undermined the reliability of the verdict. *Cornell, supra* at 367; *Lowery, supra* at 172-173.

II

Defendant next argues that there was insufficient evidence to support his convictions and, therefore, the trial court erred by denying his motion for a directed verdict. We disagree. In determining the sufficiency of the evidence to support a conviction, we view the evidence in a light most favorable to the prosecution to decide whether it would warrant a reasonable juror in finding guilt beyond a reasonable doubt. *People v Gonzalez*, 468 Mich 636, 640; 664 NW2d 159 (2003).

First, contrary to what defendant contends, the trial court did not err by failing to consider the credibility of the witnesses when ruling on his motion for a directed verdict. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). Likewise, in considering the sufficiency of the evidence, we must make credibility choices in support of the jury verdict. *Gonzalez, supra* at 640-641.

As discussed previously, aggravated assault consists of assaulting an individual without a weapon and inflicting serious or aggravated injury. MCL 750.81a(1). Such injury may include disfigurement. *Norris, supra* at 415 n 3; *Brown, supra* at 611. Don's testimony that defendant hit Elnora in the mouth, causing her teeth to chip, was sufficient to support defendant's conviction of aggravated assault.

Felon in possession of a firearm consists of a person previously convicted of a felony possessing a firearm before certain statutory requirements are met. MCL 750.224f. Here, Don and Trina Govan both testified that they saw defendant holding a gun. The parties stipulated that defendant had been previously convicted of a felony and that "the statutory requirements for eligibility to carry a firearm have not been achieved." Thus, there was sufficient evidence to support defendant's conviction of felon in possession of a firearm.

Felony-firearm consists of the possession of a firearm during the commission of or attempt to commit a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). In this case, the predicate felony for the felony-firearm charge was felonious assault, which consists of (1) an assault (2) with a dangerous weapon and (3) with an intent to injure or place the victim in reasonable apprehension of an immediate battery. *Id.* Don's testimony that defendant pointed a gun at him and made a remark to the effect that he was going to kill Don was sufficient evidence to support a conclusion that defendant assaulted Don with a dangerous weapon with an intent to place Don in reasonable apprehension of an immediate battery and that defendant

possessed a firearm at the time. Thus, there was sufficient evidence to support defendant's felony-firearm conviction.[4]

Defendant alternatively argues that his convictions are against the great weight of the evidence. We review a trial court's denial of a motion for a new trial based on the great weight of the evidence for an abuse of discretion. *People v Abraham*, 256 Mich App 265, 269; 662 NW2d 836 (2003). Defendant's arguments rest on alleged inconsistencies in witness testimony. However, in considering a claim that convictions are against the great weight of the evidence, unless testimony was so far impeached as to be deprived of all probative value or the jury could not believe it, or the testimony contradicted indisputable physical facts or defied physical realities, a court must defer to the jury's determination. *People v Musser*, 259 Mich App 215, 219; 673 NW2d 800 (2003).

It is apparent that defendant has provided no basis for reaching this high threshold. Indeed, some of defendant's suggestions of contradictory testimony are simply unfounded. For example, defendant suggests that it was contradictory that some witnesses testified to seeing him wearing underwear while others saw him wearing black clothing. Actually, Don and Crystina testified that defendant was wearing underwear during the incident in which he initially confronted the children and assaulted Elnora, while Lindbergh "David" Davis and Trina described him as wearing black clothing at a later point when he emerged from the house. This is not contradictory, given that defendant could have put on additional clothing inside the house after the incident. Admittedly, there were some actual or apparent inconsistencies in witness testimony. However, they largely involved minor details over which it is not surprising that witnesses might have some difficulty with recollection. At a bare minimum, Don's testimony regarding the incident strongly supports defendant's convictions and there is no basis for holding that it was so impeached as to be deprived of probative force. The substantial lack of recollection of the event by Elnora and the lesser difficulties with memory suffered by Crystina could reasonably be attributed to the trauma of the event and their young age. It is also not surprising that perceptions of an unexpected and rapidly moving event as described by Don and Crystina would vary to some degree, perhaps explainable by Don's and Crystina's different vantage points at various times. In sum, defendant has not established that his convictions are against the great weight of the evidence.

Affirmed.

/s/ Richard Allen Griffin
/s/ Stephen L. Borrello

[4] Although defendant was acquitted of felonious assault, this did not preclude a felony-firearm conviction. Our Supreme Court has expressly held that an acquittal by a jury of the underlying felony to a felony-firearm charge does not require setting aside the jury's conviction on the felony-firearm charge. *People v Lewis*, 415 Mich 443, 446; 330 NW2d 16 (1982). Juries are not held to rules of logic. *Id.* at 449.