

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

CROMWELL DIVER BOST,

Defendant-Appellant.

---

UNPUBLISHED

June 10, 2004

No. 246774

Wayne Circuit Court

LC No. 02-007599

Before: Sawyer, P.J., and Gage and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for felonious assault, MCL 750.82, carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant first asserts that he was improperly convicted of felonious assault when he was charged with assault with intent to murder. Our Supreme Court has held that a jury, or the judge in a trial without a jury, may only consider necessarily included lesser offenses, not cognate lesser offenses. *People v Cornell*, 466 Mich 335, 359; 646 NW2d 127 (2002), citing MCL 768.32(1). This Court has specifically held that felonious assault is a cognate, not a necessarily included, lesser offense of assault with intent to commit murder. *People v Vinson*, 93 Mich App 483, 485-486; 287 NW2d 274 (1979). A lesser offense is necessarily included if “[i]t is impossible to commit the greater offense without first committing the lesser offense.” *Cornell*, *supra* at 360.

Any error in this case is not grounds for reversal. In his closing argument, the prosecutor requested that the court consider felonious assault. Defendant did not object, and when the court asked defense counsel if he was asking for all or nothing, counsel stated he would leave it up to the court to decide. The issue is unpreserved and subject to the plain error standard. *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). Where defendant acquiesced in the decision there is no showing that his substantial rights were affected.

Defendant also argues that there was insufficient evidence to support his convictions. In determining whether sufficient evidence has been presented to sustain a conviction, a reviewing court must view the evidence in a light most favorable to the prosecution, and determine whether any rational finder of fact could have found that the essential elements of the crime were proven

beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, mod 441 Mich 1201 (1992). The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Here, defendant only argues that the prosecution's witnesses were not credible. This does not provide a basis for challenging the sufficiency of the evidence.

Finally, defendant argues that he was denied the effective assistance of counsel when his attorney failed to move to suppress the gun and did not provide defendant with discovery information. To establish an ineffective assistance of counsel claim, defendant first must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. The defendant must overcome a strong presumption that counsel's actions constituted sound trial strategy. Second, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). Where defendant failed to move for an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

The record shows no basis for suppressing the handgun; thus, there is no support for the claim that trial counsel was ineffective in failing to move to suppress. Further, there is no showing that defendant was prejudiced by counsel's failure to provide him with information received in discovery.

Affirmed.

/s/ David H. Sawyer  
/s/ Hilda R. Gage  
/s/ Donald S. Owens