

STATE OF MICHIGAN

COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

V

MARK A. PALETIS,

Defendant-Appellee.

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UNPUBLISHED  
September 14, 2004

No. 253494  
Jackson Circuit Court  
LC No. 03-000748-FC

Before: Donofrio, P.J. and White and Talbot, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the trial court's order granting defendant's motion in limine to have the jury instructed on the offenses of assault with intent to do great bodily harm less than murder, MCL 750.84, and felonious assault, MCL 750.82, as necessarily lesser included offenses of assault with intent to commit murder, MCL 750.83. Because assault with intent to do great bodily harm less than murder is a necessarily lesser included offense of assault with intent to commit murder, and felonious assault is not a necessarily lesser included offense, but a cognate lesser offense, we affirm in part, reverse in part, dissolve the stay previously imposed, and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant is charged with assault with intent to commit murder, reckless discharge of a firearm, MCL 750.234(b), and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court granted his motion in limine to have the jury instructed on assault with intent to do great bodily harm less than murder and felonious assault, finding that those crimes were necessarily included lesser offenses of assault with intent to commit murder, and that the evidence would support the giving of the instructions.

A requested instruction on a necessarily included lesser offense is proper if the charged offense requires the jury to find a disputed factual element that is not part of the lesser included offense, and if a rational view of the evidence would support the giving of the instruction. An instruction on a cognate lesser offense is not permitted. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002). A necessarily included lesser offense is one which must be committed as part of the greater offense. It is impossible to commit the greater offense without first committing the lesser offense. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001). If a lesser offense is a necessarily included offense, the evidence at trial will always support the lesser offense if it supports the greater offense. *People v Alter*, 255 Mich App 194, 199; 659

NW2d 667 (2003). If either party requests an instruction on a necessarily included lesser offense, the trial court must give the instruction. *People v Torres (On Remand)*, 222 Mich App 411, 416; 564 NW2d 149 (1997). A cognate lesser offense is one which 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). The determination whether an offense is a lesser offense is a question of law we review de novo on appeal. *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003).

The elements of assault with intent to commit murder are: (1) an assault; (2) with an actual intent to kill; (3) which, if successful, would make the killing murder. The intent to kill may be proven by inference. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The elements of assault with intent to do great bodily harm less than murder are: (1) an assault; and (2) an intent to do great bodily harm less than murder. *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). The requisite intent can be inferred from the surrounding facts and circumstances. *People v Beaudin*, 417 Mich 570, 575; 339 NW2d 461 (1983).

In *Mendoza*, *supra*, our Supreme Court held that manslaughter, both voluntary and involuntary, is a necessarily included lesser offense of murder. The *Mendoza* Court concluded that the absence of malice was the only element that distinguished manslaughter from murder. *Id.* at 540-541. Similarly, the lack of intent to kill is the only element that distinguishes the offense of assault with intent to do great bodily harm less than murder from the offense of assault with intent to commit murder. We conclude that, based on the reasoning of *Mendoza*, the trial court did not err in granting defendant's motion to instruct the jury on assault with intent to do great bodily harm less than murder as a lesser included offense of the charged offense of assault with intent to commit murder.

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). The trial court erred by granting defendant's motion to instruct the jury on felonious assault as a lesser included offense of assault with intent to commit murder. *Reese, supra*; *Vinson, supra*.

Affirmed in part, reversed in part, the stay previously imposed is dissolved, and the matter remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio  
/s/ Helene N. White  
/s/ Michael J. Talbot