

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MACCEO ROZIER,

Defendant-Appellant.

UNPUBLISHED

December 28, 2004

No. 250027

Wayne Circuit Court

LC No. 02-015179-01

Before: Meter, P.J., and Wilder and Schuette.

PER CURIAM.

Defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to five to ten years in prison for the assault with intent to do great bodily harm less than murder conviction, two to five years in prison for the felon in possession of a firearm conviction, and two years in prison for the felony-firearm conviction. He appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant claims that the trial court erred by refusing to instruct the jury on the lesser offenses of reckless discharge of a firearm and assault and battery. We disagree.

When reviewing claims of instructional error, this Court will review on a de novo basis. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). The issue of whether an offense is a lesser included offense is a question of law, which will also be reviewed on a de novo basis. *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003).

The Michigan Supreme Court, in *People v Cornell*, 466 Mich 335, 359; 646 NW2d 127 (2002), interpreted MCL 768.32(1) to not permit jury instructions on cognate lesser offenses, but to only permit instructions on necessarily included offenses if they are supported by a rational view of the evidence. *Id.* at 359. “[C]ognate lesser included offenses are related and hence cognate in the sense that they share several elements, and are of the same class or category, but may contain some elements not found in the higher offense.” *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997). Necessarily included offenses are offenses, the elements of which must be proved in order to establish the principal offense. *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003).

Here, defendant's requested instructions are not "necessarily included offenses," but are "cognate," and therefore, not permissive instructions. Assault and battery is not an offense necessarily included within the crime of assault with intent to murder. *People v Ross*, 73 Mich App 588, 592; 252 NW2d 526 (1977). Additionally, reckless discharge of a firearm is not a necessarily included offense of assault with intent to murder. *People v Lowery*, 258 Mich App 167, 174; 673 NW2d 107 (2003).

Defendant incorrectly asserts that under *Cornell*, a trial court has the discretion to instruct the jury on cognate lesser offenses. Rather, *Cornell* expressly states that MCL 768.32(1) "precludes cognate lesser misdemeanors and only permits necessarily included lesser misdemeanors if supported by a rational view of the evidence[.]" and that MCL 768.32(1) "does not permit cognate lesser instructions." *Cornell*, *supra* at 359.

Since the requested instructions were for cognate lesser offenses of the charged crime, and *Cornell* expressly states that instructions on cognate lesser offenses are not permitted, the trial court did not err by refusing to instruct the jury on the lesser offenses of reckless discharge of a firearm and assault and battery.

Affirmed.

/s/ Patrick M. Meter

/s/ Kurtis T. Wilder

/s/ Bill Schuette