STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 15, 2011
v	No. 299410 Kent Circuit Court
ANDRES GRULLON, Defendant-Appellant.	LC No. 09-013143-FH

Before: JANSEN, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

Defendant, Andres Grullon, appeals as of right his conviction for assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced to 23 to 120 months' imprisonment. We affirm.

Defendant first argues that there was insufficient evidence to support his conviction. We review "de novo a claim of insufficient evidence." *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). In analyzing a sufficiency of the evidence claim, this Court must view the "evidence in a light most favorable to the prosecution." *People v Aldrich*, 246 Mich App 101, 124; 631 NW2d 67 (2001). "This Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). In making our determination, we "consider whether there was sufficient evidence to justify a rational trier of fact in finding that all the elements of the crime were proved beyond a reasonable doubt." *People v Phelps*, 288 Mich App 123, 131-132; 791 NW2d 732 (2010).

The elements of assault with intent to do great bodily harm less than murder are: "(1) an attempt or threat with force or violence to do corporal harm to another (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); MCL 750.84. Assault with intent to do great bodily harm less than murder is a specific intent crime. *Parcha*, 227 Mich App at 239. Intent to do great bodily harm has been defined as "'an intent to do serious injury of an aggravated nature.'" *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005), quoting *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986).

Viewed in a light most favorable to the prosecution, the evidence showed that defendant, with three friends, approached the victims with the intent to injure those he believed responsible

for damaging his car. There was testimony that defendant was angry, exited his vehicle and charged at the victims armed with a baseball bat, and he used the bat to strike several of the victims. "An intent to harm the victim can be inferred from defendant's conduct." *Parcha*, 227 Mich App at 239. A rational juror, viewing the evidence in a light most favorable to the prosecution, could find that the evidence proved beyond a reasonable doubt that defendant committed an assault with the specific intent to cause a "serious injury of an aggravated nature." *Brown*, 267 Mich App at 147. Additionally, viewed in a light most favorable to the prosecution, the prosecutor disproved defendant's claim of self-defense beyond a reasonable doubt because defendant did not have an "honest and reasonable belief that he was in imminent danger." *People v James*, 267 Mich App 675, 678; 705 NW2d 724 (2005).

Defendant next argues it was error for the trial court not to instruct the jury on the lesser offense of aggravated assault, MCL 750.81a(1). Because this issue was not raised before the trial court, it is unpreserved and reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). To demonstrate plain error, a defendant must show: (1) error occurred; (2) the error was plain; and (3) the plain error affected substantial rights. *Id*. at 763. "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. The burden is on defendant to demonstrate prejudice. *Id*.

An instruction on a lesser offense is only warranted where "the lesser offense is necessarily included in the greater offense, meaning, all the elements of the lesser offense are included in the greater offense, and a rational view of the evidence would support such an instruction." *People v Mendoza*, 468 Mich 527, 533; 664 NW2d 685 (2003). A defendant is not entitled to an instruction on cognate lesser offenses. *Id.* at 533. Cognate lesser offenses are those that "share several elements, and are of the same class or category as the greater offense, but the cognate lesser offense has some elements not found in the greater offense." *Id.* at 532 n 4.

As noted above, the elements of assault with intent to do great bodily harm less than murder are: "(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *Parcha*, 227 Mich App at 239. A showing of actual physical injury is not necessary. *People v Harrington*, 194 Mich App 424, 430; 487 NW2d 479 (1992). In contrast, the elements of aggravated assault are met where a defendant "assaults an individual without [using] a weapon and inflicts serious or aggravated injury upon that individual without intending to commit murder or to inflict great bodily harm less than murder." MCL 750.81a(1). Unlike assault with intent to do great bodily harm less than murder, aggravated assault requires a showing of an injury and requires the assault be committed without a weapon. Thus, aggravated assault is a cognate lesser offense of assault with intent to do great bodily harm less than murder, and defendant was not entitled to a jury instruction on aggravated assault. See *Mendoza*, 468 Mich at 533. Further, any error would be harmless because the jury "was given the option of an intermediate lesser offense—felonious assault—and rejected it in favor of the greater offense." *People v Wilson*, 265 Mich App 386, 395; 695 NW2d 351 (2005).

Defendant next argues his sentence was invalid because the trial court improperly enhanced his sentence beyond the statutory maximum based on judicially ascertained facts. In

People v Drohan, 475 Mich 140; 715 NW2d 778 (2006), the Michigan Supreme Court recognized that, under the Sixth Amendment of the United States Constitution, a court may not use "judicially ascertained facts" to increase a defendant's sentence beyond the statutory maximum. *Id.* at 157 (citing *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004)). However, because Michigan uses an indeterminate sentencing scheme, "departures from the minimum guidelines are not implicated by *Blakely*." *Id.* at 162 n 15. Because the trial court was bound to follow *Drohan* and defendant's sentence did not exceed the statutory maximum,[1] defendant cannot demonstrate plain error or prejudice affecting his substantial rights.

Finally, defendant suggests that the trial court should have sentenced him to a "boot camp" program. The trial court stated that it would consider such a program if the Department of Corrections recommended it, but only after defendant first served a portion of his sentence. Defendant has not cited any authority, nor could we find any, suggesting that the trial court was required to sentence him to boot camp at all, let alone that it was improper for the court to require that he first serve part of his sentence as provided for in MCL 791.234a(4).

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Douglas B. Shapiro

[1] The statutory maximum is 120 months. MCL 750.84. Defendant was sentenced to 23 to 120 months.