

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONELLE MAURICE LEE,

Defendant-Appellant.

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UNPUBLISHED

April 24, 2007

No. 269100

Wayne Circuit Court

LC No. 05-008544-01

Before: Cavanagh, P.J., and Jansen and Borrello, JJ.

PER CURIAM.

Defendant appeals by right his jury convictions 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 (felony-firearm), second offense, MCL 750.227b. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

The charges against defendant arose from the shooting of John Leitner. Leitner testified that defendant came to his apartment and demanded repayment of money Leitner had borrowed. When Leitner stated that he did not have the money, defendant said that he would take items from Leitner's apartment until the money was repaid. Defendant pushed his way into the apartment, produced a handgun, and the men struggled over the gun. Defendant told Leitner he was going to kill him. During the struggle, Leitner grabbed an ice pick and began "jabbing" it at defendant while still struggling for the gun. The men fell to the floor, and as defendant began to rise, he shot Leitner in the inner thigh. Defendant told Leitner to get the money, and left the apartment.

During his opening statement, defense counsel stated defendant did not dispute that he shot Leitner, but maintained that he did so in self-defense. Counsel reiterated this defense during closing argument, and argued that, had defendant intended to kill Leitner, he would not have shot Leitner in the leg.

Defendant was initially charged with assault with intent to commit murder, MCL 750.83. Defendant contends that the trial court erred by instructing the jury, over objection, on the

necessarily lesser included offense of assault with intent to do great bodily harm.<sup>1</sup> Defendant contends that the trial court should have denied the requested instruction because the prosecution did not provide notice of its intent to seek the instruction until the close of the prosecution's proofs. Defendant also argues that the evidence did not support the instruction.

We review de novo a trial court's decision whether to instruct on a necessarily included lesser offense. *People v Brown*, 267 Mich App 141, 145; 703 NW2d 230 (2005). An instruction on a necessarily included lesser offense is "proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002).

We find that defendant's claim that the trial court erred by instructing the jury on the offense of assault with intent to do great bodily harm because he did not have adequate notice of this offense is without merit. Assault with intent to do great bodily harm is a necessarily lesser included offense of assault with intent to commit murder. *Brown, supra* at 150-151. Defendant's due process right to fair notice of the charges against him was protected by the initial charge of assault with intent to commit murder, because all the elements of the lesser offense were alleged by the charged greater offense. *Cornell, supra* at 359; *People v Martin*, 271 Mich App 280, 288; 721 NW2d 815 (2006).

We also find that defendant's argument that the evidence did not support the lesser included offense instruction is without merit. Leitner testified that defendant shot him when he was momentarily helpless. As defense counsel noted, defendant could have shot Leitner in the head had he intended to kill him. The location of the wound, along with defendant's parting words demanding the money owed to him, support a theory that defendant deliberately intended to seriously harm Leitner, but did not intend to kill him. The factual intent element was disputed, and a rational view of the evidence supported this lesser intent instruction. We find that the trial court did not err in providing the lesser included offense instruction.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Kathleen Jansen  
/s/ Stephen L. Borrello

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<sup>1</sup> The trial court also instructed the jury on defendant's claim of self-defense.