STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 13, 2007
v	No. 271126 Monroe Circuit Court
JESSE JAMES SWANSBROUGH, Defendant-Appellant.	LC No. 03-032958-FC

Before: O'Connell, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to a prison term of 210 to 480 months for the robbery conviction and a consecutive two-year prison term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant was convicted of robbing Tammy Leach on June 23, 2003. A 12-year-old neighbor testified that, at about 11:30 p.m., she saw defendant and a second man, whom she could not identify, walk past her home toward Leach's townhouse. Defendant appeared to be holding something near his waistband underneath his coat. Leach and Norma Ambert testified that they were in Leach's kitchen when defendant and another man, whom they could not identify because he "was covered" with a hooded sweatshirt, came into the house and directed them into the living room at gunpoint. Defendant grabbed Leach by the hair and forced her facedown onto the floor.[1] Ambert and Leach's four-year-old granddaughter were next to Leach on the floor. Defendant struck Leach in the back of the head and yelled, "Bitch, where's the money?" Leach responded that there was money in her purse. Defendant remained in the living room "making sure they didn't move," while the second man searched the house. During the robbery, Leach's 14-year-old daughter came home. The men took her into the living room where she was forced to lie on the floor next to the others. Leach's daughter identified defendant and Shannon Ward as the perpetrators, although she could only see a portion of Ward's face.

[1] Ambert testified that she got "a good look" at defendant. Leach indicated that she could see "who put [her] face-down."

After a brief time, the two men left. Leach's 22-year-old son testified that as he pulled into a parking spot in the complex, he saw defendant holding a gun and a second person who could have been Ward "trotting" on a neighbor's lawn.[2] When Leach's son entered the townhouse, the women and children were on the floor and hysterical. The police arrived and observed a lump on the back of Leach's head and swelling on the side of Ambert's face. Leach was robbed of $100, a cordless telephone, and jewelry.

At trial, defendant denied going to Leach's townhouse and robbing Leach . He testified that on June 23, 2003, he was with a friend, Mitchell Crisp, attending various parties from about 10:30 p.m. until 1:00 a.m. Crisp confirmed that on June 23, 2003, he and defendant were together from 10:00 p.m. until midnight or 1:00 a.m. Crisp acknowledged that although he and defendant are close friends, he never reported to the police that defendant was with him during the time of the robbery. Defendant also testified that on the day of the incident he had difficulty walking because he fractured his foot in mid-June and the cast was removed on June 22, 2003. Ward testified that he took defendant to the hospital in early June after he fractured his foot and that his foot was put in a cast. Crisp testified that on June 23, 2003, defendant "was limping bad." The arresting officer testified that when defendant was arrested he "had a limp" but "was able to walk."

Defendant argues the trial court erred by precluding evidence showing that his foot was still fractured on the day of the robbery. We disagree. "The decision whether evidence is admissible is within the trial court's discretion and should only be reversed where there is a clear abuse of discretion." *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). On the second day of trial, defense counsel asked to present jail records and a jail nurse's testimony to show that defendant suffered a foot fracture on June 6, 2003, that he was taken to the hospital and examined on June 27, 2003, and that the examination revealed that his foot was still fractured. The trial court indicated that it would allow the evidence if the prosecutor had no objection. The prosecutor objected, but indicated that he would not object to defendant testifying regarding his injury or to the arresting officer testifying that he observed something unusual about defendant's walking. After further discussion, the trial court ruled that the new evidence would not be allowed because it was disclosed beyond the deadline set forth in a scheduling order.

According to MCR 2.401(B)(1)(c), a trial court may enter a scheduling order "setting time limitations for the processing of the case and establishing dates when future actions should begin or be completed in the case." MCR 2.401(B)(2)(a) further provides that the court "shall establish times for events the court deems appropriate[.]" It is within a trial court's discretion "to decline to entertain actions beyond the agreed time frame." *People v Grove*, 455 Mich 439, 469; 566 NW2d 547 (1997). "Were the rules not so construed, scheduling orders would quickly become meaningless." *Id*.

Here, the relevant scheduling order stated, "Witness/Exhibit lists shall be filed and exchanged by: October 3, 2003. Any witness or exhibit not so listed and filed shall not be

[2] Leach's son was familiar with defendant and Ward. He testified that he got a "clear" look at defendant, but "did not get a clear look" at who he thought might have been Ward.

permitted at trial." Defendant's request was presented four months after the deadline and on the second day of trial, following the conclusion of the prosecutor's case-in-chief. As noted by the trial court, no request was ever made to modify the scheduling order with respect to the witness and exhibit lists before trial. Under the circumstances, the trial court did not abuse its discretion in fixing or adhering to the scheduling order, so defendant's argument on this issue fails. *Id*.

Defendant further argues that the trial court erred in refusing to instruct the jury on the offenses of attempted armed robbery and felonious assault, MCL 750.82, as lesser-included crimes of armed robbery. We disagree. "[A] trial court, upon request, should instruct the jury regarding any necessarily included lesser offense, or an attempt, . . . 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 Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002). A trial court may only instruct a jury on necessarily included lesser offenses, not cognate lesser offenses. See MCL 768.32; *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). The determination whether an offense is a lesser included offense of the charged crime is a question of law subject to de novo review. See *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003).

The trial court correctly refrained from instructing the jury on attempted armed robbery, because the evidence did not support the instruction. The victims' accounts of the events did not leave any room to doubt whether the robbers had completed their crime. The defense witnesses did not suggest that the crime was interrupted or otherwise stymied, but stated that defendant was nowhere near the scene of the crime when it occurred. Because the witnesses at the scene only testified to a completed armed robbery containing the necessary and completed elements in MCL 750.529 and MCL 750.530, no rational view of the evidence supported an attempt instruction. See *People v Adams*, 416 Mich 53, 58-59; 330 NW2d 634 (1982).

Felonious assault is not a necessarily included lesser offense of armed robbery. The offense of felonious assault requires the person to be in possession of a dangerous weapon. MCL 750.82; *People v Walls*, 265 Mich App 642, 646; 697 NW2d 535 (2005). In contrast, armed robbery allows conviction when the person has "an article used or fashioned in a manner to lead any person present to reasonably believe the article is a dangerous weapon, or [] represents orally or otherwise that he or she is in possession of a dangerous weapon." MCL 750.529. Because the offense of felonious assault contains an element not included in the offense of armed robbery, specifically the requirement of the use of a dangerous weapon, it is a cognate lesser offense. *Walls*, *supra*; *Cornell*, *supra*. Consequently, the trial court's refusal to instruct on felonious assault was not error.

Defendant also argues that he must be resentenced because the trial court's factual findings supporting its scoring of the sentencing guidelines were not determined by a jury, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree. *Blakely* does not apply to Michigan's indeterminate sentencing scheme in which a defendant's maximum sentence is set by statute and the sentencing guidelines affect only the minimum sentence. *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006). Consequently, defendant's argument is without merit.

Affirmed.

/s/ Peter D. O'Connell
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald