# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL SEAN JOHNSON,

Defendant-Appellant.

UNPUBLISHED
November 24, 2020

No. 348810
Cass Circuit Court
LC No. 18-010313-FC

Before: SAWYER, P.J., and M. J. KELLY and SWARTZLE, JJ.

PER CURIAM.

Defendant, Michael Sean Johnson, appeals as of right his jury convictions of assault with intent to do great bodily harm (AWIGBH), MCL 750.84; and felonious assault, MCL 750.82. The trial court sentenced defendant as a third-offense habitual offender, MCL 769.11, to concurrent terms of 6 to 20 years' imprisonment for the AWIGBH conviction and 3 to 8 years' imprisonment for the felonious-assault conviction. We affirm.

This appeal arises from a nonfatal stabbing of Michael McCloud at his residence. McCloud shared a child with Emily Carpenter, and Carpenter and the child lived at McCloud's residence. On one occasion in September 2018, Carpenter arrived at McCloud's house with her mother and her stepfather, defendant, to pick up the child. McCloud permitted Carpenter and her mother to enter his house to get the child, but McCloud did not permit or invite defendant to enter his residence. McCloud accompanied Carpenter and her mother to the back bedroom where the child was located. According to McCloud, he heard a noise from his front screen door and found defendant standing inside his house. After McCloud asked defendant to leave, defendant turned as if he were leaving, and McCloud turned to return to the bedroom. Defendant then struck McCloud from behind, and McCloud felt sharp stings, which he later recognized as two knife stabs to his upper left shoulder and a knife stab to his lower right back. McCloud testified that he and defendant "tussled" and that he attempted to defend himself from defendant's fists and knife. According to defendant, the incident began when McCloud touched his face, after which he hit McCloud. Defendant testified that he acted in self-defense. The jury found defendant guilty of AWIGBH and felonious assault.

Defendant argues that the AWIGBH offense and the felonious-assault offense are mutually exclusive offenses and that the plain language of the statutes does not support jury verdicts for both offenses. We disagree.

Defendant failed to preserve this issue for appellate review by raising it in the trial court. See *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011). Therefore, our review is limited to plain error affecting defendant's substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Mutually exclusive verdicts are those in which a guilty verdict of one offense necessarily excludes a guilty verdict of another offense. *People v Davis*, 320 Mich App 484, 493; 905 NW2d 482 (2017), vacated in part 503 Mich 984 (2019). In other words, inconsistent verdicts or mutually exclusive verdicts involve "conviction[s] of two crimes that—by the plain text of the relevant statutes—are fundamentally inconsistent." *People v McKewen*, 326 Mich App 342, 355-356; 926 NW2d 888 (2018).

This Court in *Davis*, 320 Mich App at 489, addressed the issue whether the defendant's convictions of AWIGBH and aggravated domestic assault constituted mutually exclusive verdicts. The *Davis* Court determined that the AWIGBH and aggravated domestic assault offenses were mutually exclusive because AWIGBH required the defendant to act with the specific intent to do great bodily harm less than murder, whereas aggravated domestic assault required the defendant to act without the intent to do great bodily harm less than murder. *Id*. at 490. This Court concluded that "a defendant cannot violate both statutes with one act as he or she cannot both intend and yet not intend to do great bodily harm less than murder." *Id*.

The Michigan Supreme Court in *People v Davis*, 503 Mich 984, 984; 923 NW2d 891 (2019), vacated in part this Court's decision. The Supreme Court determined that the mutually-exclusive-verdicts principle did not apply. *Id*. at 985. The Supreme Court explained:

> In this case, the jury was instructed that to convict defendant of AWIGBH, it must find that defendant acted "with intent to do great bodily harm, less than the crime of murder." See MCL 750.84(1)(a). However, with respect to aggravated domestic assault, the jury was not instructed that it must find that defendant acted *without* the intent to inflict great bodily harm. See MCL 750.81a(3); *People v Doss*, 406 Mich 90, 99; 276 NW2d 9 (1979) ("While the absence of malice is fundamental to manslaughter in a general definitional sense, it is not an actual element of the crime itself which the people must establish beyond a reasonable doubt."). Since, with respect to the aggravated domestic assault conviction, the jury never found that defendant acted without the intent to inflict great bodily harm, a guilty verdict for that offense was not mutually exclusive to defendant's guilty verdict for AWIGBH, where the jury affirmatively found that defendant acted with intent to do great bodily harm. Thus, the Court of Appeals erred by relying on the principle of mutually exclusive verdicts to vacate defendant's aggravated domestic assault conviction. We thus vacate that part of the Court of Appeals judgment relevant to that finding. [*Davis*, 503 Mich at 985.]

The Supreme Court order in *Davis* is binding precedent and applicable to this case.[1] The trial court instructed the jury that it was required to find that defendant acted with the intent to do great bodily harm less than murder in order to find defendant guilty of AWIGBH. The trial court did *not* instruct the jury that it was required to find that defendant acted *without* the intent to inflict great bodily harm when it made its findings regarding the felonious-assault offense. Because the jury was not instructed to find that defendant acted without the intent to inflict great bodily harm regarding the felonious-assault offense, it cannot be presumed that the jury made this finding. As the Supreme Court reasoned in *Davis*, 503 Mich at 985, the jury's guilty verdict for the felonious-assault offense was not mutually exclusive to defendant's guilty verdict for AWIGBH, notwithstanding that the jury affirmatively found that defendant acted with intent to do great bodily harm in order to find defendant guilty of AWIGBH, because the jury did not find that defendant acted without the intent to inflict great bodily harm regarding the felonious-assault offense. Therefore, the jury's guilty verdicts of AWIGBH and felonious assault were not erroneous under the principle of mutually exclusive verdicts.

Moreover, the plain language and elemental analysis of the AWIGBH and felonious-assault statutes support the conclusion that these offenses are not mutually exclusive. MCL 750.84 proscribes an assault with the intent to do great bodily harm less than murder. The elements of AWIGBH 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 Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005) (citation omitted). MCL 750.82 proscribes an assault with a dangerous weapon. The elements of felonious assault are that a defendant commits " '(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery.' " *People v Nix*, 301 Mich App 195, 205; 836 NW2d 224 (2013) (citation omitted).

However, the provision in MCL 750.82 that a defendant commit an assault with a dangerous weapon "without intending to commit murder or to inflict great bodily harm less than murder" is not an element of the crime. Negative concepts, or the absence of an element, need not be proven by the prosecution beyond a reasonable doubt in a criminal case. *People v Doss*, 406 Mich 90, 98-99; 276 NW2d 9 (1979). Examples of such negative concepts include "unarmed," as in an unarmed robbery, and "without malice," as in the absence of the intent to kill, which distinguishes the offense of manslaughter from the offense of murder. *Id*. at 99. Although negative concepts can be fundamental to an offense in a "general definitional sense," the concepts are not positive elements of an offense that the prosecution must prove in order for a jury to convict a defendant of that offense. *Id*. Therefore, the phrase "without intending to commit murder or to inflict great bodily harm less than murder" in the felonious-assault statute is a negative concept meaning in the absence of the intent to inflict great bodily harm.

In this case, the prosecution was not required to prove that defendant acted without the intent to inflict great bodily harm. Rather, the prosecution had to prove that defendant committed an assault with a dangerous weapon and that defendant had the intent to injure or place McCloud

[1] "Supreme Court orders that include a decision with an understandable rationale establish binding precedent." *People v Giovannini*, 271 Mich App 409, 414; 722 NW2d 237 (2006).

in reasonable apprehension of an immediate battery. See *Nix*, 301 Mich App at 205. The trial court instructed the jury on the elements of the offenses, and jurors are presumed to follow their instructions. See *People v Stevens*, 498 Mich 162, 177, 190; 869 NW2d 233 (2015). The jury's verdict demonstrated that the jury found that the prosecution proved beyond a reasonable doubt that defendant assaulted McCloud with the intent to do great bodily harm and that defendant assaulted McCloud with a dangerous weapon with the intent to injure or place McCloud in reasonable apprehension of a battery. See *id*.; *Brown*, 267 Mich App at 147.

The Supreme Court's decision in *Davis* and the elemental analysis of MCL 750.84 and MCL 750.82 support the conclusion that AWIGBH and felonious assault are not mutually exclusive when a jury is not instructed to make a finding that the defendant acted without the intent to inflict great bodily harm in order to find the defendant guilty of felonious assault. Therefore, there was no plain error in the jury's verdicts of both AWIGBH and felonious assault. See *Carines*, 460 Mich at 763-764.

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Kelly
/s/ Brock A. Swartzle