STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KAREEN DESHAN HALL,

Defendant-Appellant.

UNPUBLISHED
October 4, 2012

No. 305353
Wayne Circuit Court
LC No. 10-013458-FC

Before: FORT HOOD, P.J., and METER and MURRAY, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of two counts of felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to two years' imprisonment for the felony-firearm conviction and 17 months to 4 years' imprisonment for the felonious assault convictions. Defendant appeals by right. We affirm defendant's convictions, but remand for resentencing.

Defendant's convictions arise from his occupancy of a gentlemen's club during renovations. Police officers received a dispatch to the club. They testified that they entered the club and identified themselves as police, but defendant opened fire on them. Defendant testified that the officers did not announce their presence, and he fired in self defense. Defendant was *charged in the information* with two counts of assault with intent to commit murder (AWIM), MCL 750.83, two counts of felonious assault, MCL 750.82, and felony-firearm, MCL 750.227b. Following a bench trial, he was acquitted of the AWIM counts, but convicted of the two counts of felonious assault and felony-firearm.

On appeal, defendant contends that his convictions for felonious assault violate his due process rights because he was convicted of cognate lesser included offenses of AWIM in violation of *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002). We disagree.

Whether an offense is a necessarily included lesser offense or a cognate offense presents a question of law reviewed de novo. *People v Smith*, 478 Mich 64, 68-69; 731 NW2d 411 (2007). Whether a conviction of a lesser offense violated a defendant's due process rights under the Fourteenth Amendment presents a constitutional question also reviewed de novo. *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010). Defendant did not object to the inclusion of the charges of felonious assault in the information and the trial court's consideration of those charges. Therefore, this issue is not preserved for appellate review. *People v Metamora Water*

Serv, Inc, 276 Mich App 376, 382; 741 NW2d 61 (2007). "Unpreserved issues are reviewed for plain error affecting substantial rights." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010).

"Due process requires that a defendant be on notice of all the elements of a crime that he or she is charged with and is expected to defend against." *Wilder*, 485 Mich at 47. "[C]harging decisions are solely within the prosecutor's discretion," *People v Morey*, 461 Mich 325, 335 n 6; 603 NW2d 250 (1999), and the prosecutor has broad discretion in determining the appropriate offenses to charge, *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672, 683; 194 NW2d 693 (1972). "[I]t is generally permissible to charge in a single information all offenses which do arise out of a single criminal transaction or occurrence." *People v Nicolaides*, 148 Mich App 100, 102; 383 NW2d 620 (1985). "It is the settled practice in this State to set forth counts in the same information charging offenses of varying gravity where the purpose is legitimate and justified." *People v Johns*, 336 Mich 617, 625; 59 NW2d 20 (1953). The prosecutor cannot be forced to make an election. *People v Cleveland*, 251 Mich 542, 548; 232 NW 384 (1930). "When distinct offenses are charged in different counts, but are committed by the same acts, at the same time, and the same testimony must necessarily be relied upon for conviction, the prisoner cannot be confounded in making his defense, and the people ought not to be compelled to elect." *Id*. (further citation omitted). By statute, the prosecutor may file charges in the information[1] in the alternative. MCL 767.55 entitled "Indictment; allegations of certain matters in the alternative" provides:

> In an indictment for an offense which is constituted of 1 or more of several acts, or which may be committed by 1 or more of several means, or with 1 or more of several intents, or which may produce 1 or more of several results, 2 or more of such acts, means, intents or results may be charged in the alternative.

In the present case, the prosecutor charged defendant with two counts of assault with intent to murder and two counts of felonious assault. The felonious assault charges were alternative charges to the AWIM charges, and the prosecutor sought conviction on the highest offenses, AWIM, during closing argument.

Defendant contends that the felonious assault charges violate the *Cornell* decision. In *Wilder*, 485 Mich at 41, the Supreme Court concisely summarized the holding of *Cornell* and the rationale for the distinction between conviction for a lesser offense or a cognate offense:

> . . . the *Cornell* Court concluded that MCL 768.32(1) permits the trier of fact to find a defendant guilty of a lesser offense if the lesser offense is necessarily included in the greater offense. A lesser offense is necessarily included in the greater offense when the elements necessary for the commission

[1] The word "indictment" includes "information, presentment, complaint, warrant and any other formal written accusation." MCL 750.10; see also MCL 767.1; *People v Russo*, 439 Mich 584, 588 n 1; 487 NW2d 698 (1992).

> of the lesser offense are subsumed within the elements necessary for the commission of the greater offense.
>
> Necessarily included lesser offenses are distinguishable from cognate offenses. Cognate offenses share several elements and are of the same class or category as the greater offense, but contain elements not found in the greater offense. As a result, a cognate offense is *not* an inferior offense under MCL 768.32(1). Accordingly, the trier of fact may not find a defendant not guilty of a charged offense but guilty of a cognate offense because the defendant would not have had notice of all the elements of the offense that he or she was required to defend against. [Footnotes omitted; emphasis in original.]

In the present case, *Cornell* is not implicated. The information at issue charged defendant with four separate offenses for his actions against two officers, and in light of the counts expressly charged in the information, defendant was aware of all of the elements of the offenses which he had to defend against. A due process violation, the lack of notice of the elements of a cognate lesser offense to be considered by the jury or trier of fact during deliberations, is simply not present when the alternative charges are set forth in the information. The prosecutor charged the felonious assaults as an alternative to the AWIM. Because the charges were contained in the original information, defendant was on notice of the elements of the charges that he had to defend. Defendant's challenge is without merit.

With regard to the issue of resentencing, the prosecutor concedes that defendant is entitled to resentencing. Accordingly, we remand for the purposes of resentencing.

Affirmed with regard to defendant's convictions and remanded for resentencing. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Patrick M. Meter
/s/ Christopher M. Murray