STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 21, 2003
V	No. 234924 Wayne Circuit Court
LITTLE WILLIE BLASSINGAME, Defendant-Appellant.	LC No. 00-008383

Before: Smolenski, P.J., and Wilder and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm, MCL 750.84, and sentenced to forty to 120 months' imprisonment. He appeals by right. We affirm.

I. Facts and Proceedings

Defendant and his ex-girlfriend, Lawanda Childs, ended their nine-year relationship in mid-April 2000. After she moved out of the house all but her two youngest children remained with defendant in the home the couple had shared. Defendant was the father of one of these children, a daughter.

The victim, Marcellius "Marc" Childs (Childs), is Lawanda Childs' son. He testified that on the night of April 30, 2000, he was watching television with his older sister, Marcettia Dellihue, in his bedroom located on the main floor of the residence. Childs heard defendant call him into the front room, which was dark at the time. Childs went to the room, and defendant, who is blind in one eye and has limited vision in his other eye, asked Childs to look out a window near the front door to see whether the person who had threatened Childs earlier that day was across the street. Childs said he looked outside, responded "no" to defendant's directive, and turned to go back into his room. At that moment, defendant struck Childs twice with a machete[1], cutting him on the back of his head and on his neck. Childs fell to the ground and then cut his finger on the machete while trying to remove it from defendant's grasp. Defendant was

[1] Lawanda Childs testified that the machete had a blade approximately twenty-four inches long. She said the machete had been left on the premises by the landlord, but when she moved out, she believed it was no longer there.

"pushing" the machete toward Childs' stomach as Childs tried to get up. Childs also tried to open the front door, but his attempt was initially unsuccessful because defendant's foot was blocking the door. Eventually, Childs managed to leave the house. Although Childs did not see the machete immediately after he was wounded, once he left the house, he saw it in defendant's hand as defendant was running down the alley.

At the time of the incident, Dellihue heard screaming in the front room and went to see what was happening. She saw her brother bleeding from the back of his head and saw defendant running from the house. Dellihue testified that she called her mother, told her what happened, and then went with her brother to a neighboring house to call an ambulance. Childs was taken to the hospital and his injuries were treated with stitches and staples. He remained in the hospital overnight. When Dellihue returned home approximately twenty minutes later, she saw that the house had been ransacked and the television had been broken. She also saw defendant standing in the dining room. Defendant asked her to call the police, but she refused and then again left the house.

Thereafter, defendant went to the tenth precinct of the Detroit Police Department, where he encountered Officer Anthony Orourke. Defendant reported to Officer Orourke that someone had broken into his home and that his stepson was still there, although defendant had been able to get away. Defendant did not mention that anyone had been injured. After making his report, defendant was detained at the police station and then arrested. He was eventually charged with assault with intent to commit murder, MCL 750.83. Officer Orourke and his partner then drove to defendant's home, but found that other officers from the twelfth precinct were already there. Officer Orourke observed blood in the basement and leading out into the back yard, but did not find a weapon. He also observed that the television in the home had been smashed.

Defendant testified that he had been blind in one eye since he was five or six years old and had deteriorating vision in his other eye, with particular difficulty at night. In order to read, defendant has to hold a text just a couple of inches from his eyes. As a result, he receives social security disability payments, but nevertheless was working at night club taking out the trash, escorting people to their cars with a flashlight, and monitoring the parking lot. Just a couple of days prior to the incident, defendant went to the hospital because of headaches and chest pains, but did not fill the prescription the doctor gave him.

Despite difficulties in his relationship with some of the other children in the home, defendant claimed that he could depend on Marc Childs and related better with him than the other children. Defendant, however, had decided to move out of the house and spent time packing his belongings on April 30, 2000. He stated that he had accidentally cracked the television that day after he and his daughter moved the rug that was underneath the television. Although defendant testified that he was "comfortable" with the termination of his relationship with Lawanda Childs and had never felt that he could not live with out her, defendant had an argument on the phone with her that day regarding their daughter, which left him deeply hurt. He admitted that his breakup did cause stress in his life, especially with regard to custody of his

daughter. However, defendant had found someone else to talk to, Ms. Inka,[2] although their relationship was not romantic.

Defendant testified that on the night in question, when he arrived home around 9:00 or 9:30 p.m., he noticed that the back door was open slightly. He was unaware that anyone was at home. Earlier that day, Dellihue had informed defendant that some boys who lived down the street had been threatening her brother and "messing with" her. Later, an individual who defendant did not know came to the door, and defendant believed this had something to do with the earlier incident involving Dellihue. Then, defendant started to go downstairs, but stopped when he heard noises outside the window. Because he could not see in the darkness outside, he called Childs in to help him see who was outside the window. Defendant opened the door to get a better look and saw people outside drinking and talking loudly to one another. He also thought he heard a noise coming from the back of the house. Defendant then went downstairs to retrieve the machete, which he had noticed earlier that day when he was packing. When he returned to the front room, he again looked out the window with Childs and asked Childs who was outside. Childs responded that he did not know. Defendant then walked to another window, saw two men outside walking "back and forth from the side window." Defendant said his "feelings [were] telling [him] to be careful and watch out." He did not know whether someone was trying to enter the house or already had entered it.

Defendant claimed that by this point, he assumed that Childs had left the room because he asked Childs another question and Childs did not respond. Defendant then saw light coming in the front door as it was opening, although his back was to the door as he looked out the corner window. When the front door opened, defendant swung the knife while he was trying to get out of the corner, but he did not know that he had struck Childs. Defendant slipped, and when he got up, Childs was there saying "Willie, Willie, it's me, it's me." After asking Childs if he was all right, Defendant then started to go downstairs, but he tripped on a recliner and cut his wrist with the machete. He proceeded downstairs to the basement to see if anyone was in the house. He found no intruders, but as he sat in the doorway of the back door, he saw two people walking down the alley. He walked outside, stuck the machete in the grass,[3] lit a cigarette, and followed the two men he saw in the alley. He stopped in a store and asked a clerk to call 911. She said she could not get an answer, so defendant took a cab to the police station so he could report the incident to the police. Defendant claimed that at that point, he did not even know that Childs had been hurt.

On May 2, 2000, subsequent to his arrest, defendant gave a statement to the police that conflicted somewhat with his testimony at trial, but defendant claimed that the officer who took his statement, Investigator William Alexander, may not have accurately written what defendant told him. Defendant also moved to suppress his statement as having been involuntarily made. Outside of the jury's presence, the trial court conducted a Walker[4] hearing and denied defendant's motion to suppress his statement. In subsequent cross-examination, defendant

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[2] In the trial transcript, this name is spelled both "Inka" and "Inko."

[3] The machete was never found.

[4] *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

admitted that he told Inspector Alexander that on the night in question, "I saw a figure crouched down. I slammed the door and he didn't say a word. I swung the machete and said, who is this, who is this . . . . He still didn't say anything. That's what made me think someone had snuck in the home. I realized that the person I had hit was small, the texture wasn't right." He also told Inspector Alexander that after Childs was struck with the machete, defendant sat with him on the couch and held him.

In addition to testifying concerning the events of April 30, 2000, defendant testified that he had been shot in the arm in 1998 or 1999. During the trial, the prosecution repeatedly objected to testimony concerning the details of this incident, claiming it was not relevant. Defendant asserted that the evidence was relevant to his state of mind. The trial court sustained in part the prosecutor's objections, and permitted some of the disputed testimony Defendant testified that the shooting incident occurred when he was on his way to the store with Lawanda Childs' brother and someone pulled up on a bike and other guys started coming closer to them. Four or five people surrounded defendant during the incident. He was unexpectedly shot by a person he did not know. As a result, he is uncomfortable in crowds and is somewhat paranoid and nervous. He also has a particular dislike for having people stand behind him. Defendant received psychiatric treatment on one occasion after he was shot.

Dr. Steven Miller, a forensic psychologist, evaluated defendant on February 2, 2001 and February 12, 2001 concerning mental illness and diminished capacity and offered expert testimony concerning these topics at trial.[5] He testified that defendant indicated that he had been depressed for some time and had been experiencing symptoms of anxiety that he traced to his shooting in 1999. Dr. Miller concluded that defendant suffered from acute onset post-traumatic stress disorder, which, in general, can cause an individual to have difficulty sleeping and calming himself. Also, this disorder causes paranoia, a "hyper-alert" status, and tendencies to overreact, particularly with regard to triggering events such as (in defendant's case) the sound of a gunshot or seeing unknown youths. Because of this disorder, defendant was also prone to misinterpretation and misperception, and was less likely to act reasonably to specific circumstances. In Dr. Miller's opinion, there "certainly could be" a relationship between the way defendant acted on the night in question and his disorder. Specifically, Dr. Miller believed that defendant was overwrought and in an excitable state of mind at the time of the incident. Coupled with his vision problems and limited intelligence, defendant "would have had few options from his point of view," in Dr. Miller's opinion. However, Dr. Miller concluded that despite defendant's mental disorder, he did not suffer from mental illness, so he could not be legally insane. Moreover, Dr. Miller could not give an opinion on whether defendant possessed a specific intent, including a specific intent to kill, at the time of the incident. Additionally, he believed that a clinician, such as himself, is not able to determine whether defendant had a diminished capacity on the night in question.

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[5] The trial in this matter took place before the Michigan Supreme Court decided *People v Carpenter*, 464 Mich 223, 237, 239; 627 NW2d 276 (2001), in which it held that the defense of diminished capacity is no longer viable in Michigan because the Legislature, through MCL 768.36(3) "demonstrated its policy choice that evidence of mental incapacity short of insanity cannot be used to avoid or reduce criminal responsibility by negating specific intent." *Id.* at 237.

In its closing argument, the prosecution argued that defendant actually did not suffer from post-traumatic stress disorder. Rather, the prosecution argued that defendant's act was calculated and premeditated, committed as a result of the hurt defendant felt because of his breakup with Lawanda Childs. Defendant argued that he did not have a specific intent to kill or injure Childs, but reacted accidentally to the presence of suspected intruders. Following closing arguments, the trial court instructed the jury on the crime charged, assault with intent to murder, as well as the lesser offenses of assault with intent to do great bodily harm less than murder and assault with a dangerous weapon. Earlier, the trial court had denied defendant's request that the jury also be instructed on the crimes of aggravated assault and assault and battery. Following deliberations, the jury returned a verdict of guilty of assault with intent to do great bodily harm less than murder.

At sentencing, the prosecution requested that defendant receive a score of fifty points on offense variable (OV) seven because defendant terrorized the victim. After receiving a response from defendant, the trial court decided that although the victim had not been terrorized, the victim had been treated with excessive brutality, which also qualifies as conduct meriting a fifty point score on OV 7. Accordingly, the court assessed fifty points for that variable. Thereafter, the trial court sentenced defendant as a second habitual offender to forty to 120 months' imprisonment with credit for 306 days served.

Defendant raises three arguments on appeal. First, he contends that the trial court deprived him of his right to present a defense by excluding evidence related to his shooting and his relationship with Ms. Inka. Second, he claims that the trial court improperly refused to instruct the jury on the offense of aggravated assault. Third, he asserts that the trial court should not have scored fifty points for OV 7 when calculating his sentence.

II. Standards of Review

We review a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). An abuse of discretion exists if "an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *Id.* However, we review de novo the constitutional question whether defendant was denied his right to present a defense. *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999).

This Court also reviews de novo claims of instructional error. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996); *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). "We review jury instructions as a whole to determine if the trial court made an error requiring reversal." *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001).

Similarly, this Court reviews de novo the application of the statutory sentencing guidelines. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). "'Scoring decisions for which there is any evidence in support will be upheld.'" *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

III. Analysis

A. Right to Present a Defense

Defendant first claims that the trial court violated his constitutional right to present a defense by excluding evidence concerning his shooting because the evidence was relevant to his state of mind, lack of intent, and perceived need to arm himself. We disagree. As indicated above, defendant was permitted to testify concerning many of the details of his shooting, despite the trial court's decision to sustain the prosecution's objection to parts of his testimony on this topic. Later, defendant made an offer of proof outside of the presence of the jury. Although defendant makes a sweeping claim that the circumstances of the shooting were excluded from evidence, after comparing defendant's initial testimony with his subsequent offer of proof, we find that defendant described only a few details of the shooting in his offer of proof that he did not also present to the jury. Those details included: 1) a female approached defendant unexpectedly from behind during the incident and hit him with a bottle, scratching him; 2) Lawanda Childs was with defendant and her brother as they were going to the store; 3) defendant was hoping no one would get shot; and 4) he "moved the attention to the other side of the street and make sure, for sure I was singled out."

The prosecution claims that the excluded evidence was irrelevant because the circumstances of the instant case differed from those surrounding the prior incident and because the evidence did not make it more likely that that defendant was scared in his own home or that he did not intend to kill or do great bodily harm to the victim. We agree. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. These minor details did not make any fact of consequence to the determination of the action, including defendant's intent, more or less probable. Therefore, we agree with the conclusion reached by the trial court.

Defendant also claims that evidence concerning his relationship with his new "girlfriend" was admissible to refute the prosecution's argument that he was so distraught over his breakup that he decided to hurt Lawanda Childs by hurting her son. As the prosecution points out, however, defendant specifically testified that his new relationship was not romantic, but that defendant had found someone he could talk to. Therefore, defendant's characterization of Ms. Inka as his girlfriend is inaccurate. Moreover, the prosecutor objected to testimony concerning when defendant met Ms. Inka, not that he had initiated a relationship with another woman. After the trial court instructed defense counsel that it was not conducting a divorce or custody trial and counsel should ask relevant questions, defense counsel abandoned the line of questioning concerning Ms. Inka altogether. Contrary to defendant's claims, when defendant met Ms. Inka was not relevant to establishing his intent when he injured Childs. We therefore find that the trial court did not abuse its discretion by limiting questioning on this issue.

Additionally, we find that limiting defendant's introduction of evidence regarding the shooting and his relationship with Ms. Inka did not deprive defendant of his constitutional right to present a defense. "It is well settled that the right to assert a defense may be permissibly limited by 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *People v Toma*, 462 Mich 281, 294;

613 NW2d 694 (2000), quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Furthermore, the United State Supreme Court has stated that

> state and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. Such rules do not abridge an accused's right to present a defense so long as they are not "arbitrary" or "disproportionate to the purposes they are designed to serve." . . . [W]e have found the exclusion of evidence to be unconstitutionally arbitrary or disproportionate only where it has infringed upon a weighty interest of the accused" *United States v Scheffer*, 523 US 303, 308; 118 S Ct 1261; 140 L Ed 2d 413 (1998) (citations omitted).

Here, we find that the exclusion of irrelevant evidence was not arbitrary or disproportionate because deeming these matters inadmissible has not "infringed upon a weighty interest of the accused." *Id.* The minor details excluded from evidence did not deprive defendant of his right to present a defense. He was still permitted to testify to the fact that he was previously surrounded by unknown individuals and shot and that, as a result, he is nervous and paranoid. Additionally, defendant testified that he was not distraught about the end of his relationship with Lawanda Childs and, in fact, he did not want to see her anymore either, which directly contradicted the prosecution's theory. Therefore, defendant was not prohibited from presenting a defense.

B. Jury Instructions

Next, defendant claims that the trial court erred by failing to instruct the jury on the charge of aggravated assault, MCL 750.81a(1). We disagree. The resolution of this issue is now controlled by our Supreme Court's recent decision in *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002).[6] In *Cornell*, the Court determined that MCL 768.32(1) prohibits a jury from considering offenses that are cognate lesser offenses, as opposed to necessarily included lesser offenses. *Id.* at 354-355, 357-358. In reaching this conclusion, the Court overruled in part the main case relied upon by the parties to this action, *People v Stephens*, 416 Mich 252, 255; 330 NW2d 675 (1982), as well as its progeny.

In light of *Cornell*, if aggravated assault is not a necessarily included lesser offense of assault with intent to murder, defendant's requested instruction on aggravated assault would have been improper. A lesser offense is necessarily included if "[i]t is impossible to commit the greater offense without first committing the lesser offense." *Cornell, supra* at 360. A necessarily included lesser offense contains all of the elements of the greater offense. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001). On the other hand, "a cognate offense has some elements in common with the charged offense. It also has elements not found in the charged offense." *Id.*

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[6] Since its decision in *Cornell*, our Supreme Court has applied the *Cornell* holding retroactively. See *People v Reese*, 466 Mich 440; 647 NW2d 498 (2002).

We find that aggravated assault is a cognate lesser offense of assault with intent to murder. The elements of aggravated assault are 1) an assault without a weapon; 2) the infliction of serious or aggravated injury; 3) no intent to commit murder or to inflict great bodily harm. MCL 750.81a(1). The elements of assault with intent to murder are "(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); MCL 750.83. Because aggravated assault requires the absence of a weapon and assault with intent to murder does not, it is possible to commit assault with intent to murder without first committing aggravated assault. Consequently, aggravated assault is not a necessarily included lesser offense of assault with intent to murder but is properly characterized as a cognate lesser offense. Accordingly, because instructing juries on cognate lesser offenses is impermissible, *Cornell, supra*, the trial court did not err by failing to instruct the jury on aggravated assault.

C. Offense Variable Seven

Finally, defendant claims on appeal that the trial court inappropriately scored fifty points for OV 7, aggravated physical abuse, when calculating his sentencing guidelines. MCL 777.37, which describes OV 7, requires the sentencing court to score fifty points for each victim "treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the [victim's] fear and anxiety . . . during the offense[.]" *Id.* Initially, we note that defendant incorrectly states that the trial court assessed the fifty point score for conduct constituting terrorism, and therefore his argument is dedicated to whether defendant's conduct constituted terrorism. Although the prosecution initially requested the score on OV 7 for terrorism, the trial court found that the score was supported by an alternate factor under MCL 777.37, excessive brutality.

We find that there was evidence to support the trial court's conclusion and, therefore, affirm its score of fifty points for OV 7. The evidence showed that after cutting Childs on the back of his head and neck with the machete, defendant pointed the twenty-four inch machete blade at Childs' stomach while Childs attempted to escape. Then, defendant prevented Childs from opening the door by placing his foot in front of the door. Treating Childs in this way after already having inflicted wounds to vital areas of Childs' body constitutes excessively brutal conduct. See *People v Hernandez*, 443 Mich 1, 17-18; 503 NW2d 629 (1993) (repeatedly striking victim with a bat after he was already on the ground was excessively brutal). Additionally, the trial court could have properly concluded that defendant's conduct was designed to substantially increase the victim's fear or anxiety. We therefore conclude that the trial court properly assessed a fifty point score for OV 7. Additionally, defendant concedes that his sentencing guidelines would have remained the same even if the trial court had not assessed a fifty point score for OV 7. Therefore, any error in scoring was harmless and remand for resentencing is not required. *People v Mutchie*, 251 Mich App 273, 274-275; 650 NW2d 733 (2002); MCL 769.34(10).

Affirmed.

/s/ Michael R. Smolenski
/s/ Kurtis T. Wilder
/s/ Bill Schuette