STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY MATYAS,

Defendant-Appellant.

UNPUBLISHED
January 23, 1998

No. 192663
Allegan Circuit Court
LC No. 95-9782-FH

Before: Saad, P.J., and Neff and Reilly, JJ.

PER CURIAM.

Defendant was charged but acquitted of third-degree child abuse, MCL 750.136b(4); MSA 28.331(2)(4), a misdemeanor. Over defense objection, and at prosecutorial request, the jury was instructed on the lesser misdemeanor offense of assault and battery, and defendant was convicted of that charge. Defendant now appeals as of right, contending that the giving of an assault and battery instruction as a lesser included offense of third-degree child abuse was error. We find no error and thus affirm.

In *People v Stephens,* 416 Mich 252, 261-265; 330 NW2d 675 (1982), the Supreme Court held that a court must instruct concerning a lesser included misdemeanor where: (1) there is a proper request, (2) there is an "inherent relationship" between the greater and lesser offense, (3) the requested misdemeanor is supported by a "rational view" of the evidence, (4) the defendant has adequate notice, and (5) no undue confusion or other injustice would result. See *People v Corbiere,* 220 Mich App 260, 262-263; 559 NW2d 666 (1996). We will analyze these elements in turn (the "Stephens" test).

Defendant does not dispute that the first element was met -- there was a proper request here by the prosecutor for the assault and battery misdemeanor instruction. Cf. *People v Barnett,* 165 Mich App 311, 318; 418 NW2d 445 (1987).

Defendant contends, however, that the second element of the *Stephens* test was not met. Specifically, defendant asserts that assault and battery is not "inherently related" to third-degree child abuse. Offenses are "inherently related" if they both relate to the protection of the same *interests*, and are related in an evidentiary manner such that, generally, proof of the lesser charge

is necessarily presented as part of the proof of the greater offense. *People v Steele*, 429 Mich 13, 19; 412 NW2d 206 (1987). The "inherent relationship" analysis looks beyond the nature or effect of each crime and focuses on the precise problems the Legislature sought to correct. *Corbiere*, 220 Mich App at 263.

Defendant relies primarily upon *People v Barnett*, 165 Mich App 311, 317-318; 418 NW2d 445 (1987),[1] where this Court held that assault and battery was not a lesser included or even cognate lesser offense of child torture (a statute now repealed). Since *Barnett* was decided, the offense of child torture has been replaced by first-degree child abuse (MCL 750.136b(2); MSA 28.331(2)), while lesser forms of child abuse are now degrees two through four (MCL 750.136b(3)-(5); MSA 28.331(3)-(5)). Nonetheless, the Court in *Barnett* asserted that child torture and assault and battery were not aimed at protecting the same societal interest because child torture "protects the child who is subordinated to an adult's authority from that adult's abuses and excesses," while assault and battery "protects all people from unwanted touchings." *Barnett*, 165 Mich App at 318.

Because *Barnett* interpreted a now-repealed statute, and because we do not find its analysis or reasoning particularly persuasive, we do not find it controlling here. Third-degree child abuse protects against unwanted touchings which are knowing or intentional and result in physical harm to a child. See MCL 750.136b(4); MSA 28.331(2)(4). Indeed, according to *People v Flowers*, 222 Mich App 732, 735; 565 NW2d 12 (1997), the societal interest served in making all degrees of child abuse a crime are to protect children from the abuses and excesses of adults and "*the protection of children from assaultive behavior*." Assault and battery protects against unwanted touchings which are intentional but may not result in physical harm. See MCL 750.81; MSA 28.276.

Both statutes protect the same interest – protection from assaultive behavior – the only difference is the class of person protected. Unlike *People v Corbiere*, 220 Mich App 260; 559 NW2d 666 (1996), which properly distinguished two different statutory schemes (one protecting sexual abuse and the other protecting physical abuse),[2] these statutes protect the identical interest – one protects only children and the other protects all persons – from physical abuse. Further, we do not read *Corbiere's* cite of *Barnett* as controlling on this point because its use of *Barnett* was simply to distinguish between sexual abuse and physical or corporal harm. *Corbiere*, at 264. Here, both statutes focus on physical abuse – one requires a showing of physical harm, the other simply an assault (which is why it is properly a lesser included offense).

The strong evidentiary relationship between the offenses of third-degree child abuse and assault and battery is also unmistakable. The elements of third-degree child abuse are: (1) the defendant had care or custody of or authority over the child when the abuse allegedly happened, (2) the defendant either knowingly or intentionally caused physical harm to the child, and (3) the child was at the time under the age of eighteen. CJI2d 17.21. The elements of assault and battery are: (1) the defendant intentionally touched the victim or something closely connected with the victim against the victim's will in a forceful or violent manner, and (2) the defendant intended to either injure the victim or intended to make the victim reasonably fear an immediate battery. It does not matter whether the touching caused an injury. *Espinoza v Thomas*, 189 Mich App 110, 119; 472 NW2d 16 (1991); CJI2d 17.2, CJI2d 17.16. If the jury believed that unreasonable force was used, but that the child was not harmed, it could

properly find defendant was guilty of assault and battery but not third-degree child abuse. We therefore conclude that the second element of *Stephens* was met.

With respect to the third element of *Stephens,* not only must the evidence justify a conviction of the lesser offense, but proof on the element or elements differentiating the two crimes must be sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater offense and guilty of the lesser included offense. *People v Steele,* 429 Mich 13, 20; 412 NW2d 206 (1987). Where, as here, the element of physical harm (which is required in establishing third-degree child abuse but not assault and battery), was in dispute at trial, the jury could have found defendant not guilty of the greater offense of third-degree child abuse but guilty of the lesser offense of assault and battery.

With regard to the fourth and fifth elements of the *Stephens* test, defendant does not argue that he did not have adequate notice of the assault and battery charge, or that the assault and battery instruction resulted in undue confusion or other injustice. As the trial court noted in instructing the jury, the jury had only three possible resolutions of the case: (1) not guilty, (2) guilty of third-degree child abuse, or (3) guilty of assault and battery.

Because each of the *Stephens* elements is met, the trial court did not err in giving an instruction on the lesser included offense of assault and battery. To rule here that defendant ought not to be held responsible for the lesser included offense – for his assaultive behavior upon a child – would be anomalous to say the least. If we were to so rule, we would construe these statutes to provide lesser protection for those to whom the Legislature chose to grant greater protections.

Affirmed.

/s/ Henry William Saad
/s/ Janet T. Neff

I concur in result only.

/s/ Maureen Pulte Reilly

[1] Defendant also relies upon *People v Kelley,* 176 Mich App 219, 224; 439 NW2d 315 (1989), *reversed on other gds.,* 433 Mich 882; 446 NW2d 821 (1989), which simply cited *Barnett*.

[2] In *Corbiere,* the defendant was convicted of two counts of third-degree criminal sexual assault for raping his wife. Defendant requested and the trial court refused to give a lesser instruction on domestic assault. Our Court affirmed, reasoning that third-degree CSC and domestic assault do not relate to protection of the same interests. *Corbiere,* 220 Mich App at 262 (CSC statutes prohibit particular kinds of sexual conduct; assault statutes preserve "safety and security" by protecting people against corporal harm).