STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOEL MCCALEBB,

Defendant-Appellant.

UNPUBLISHED
April 3, 1998

No. 195593
Recorder's Court
LC No. 95-011825

Before: Hoekstra, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Defendant, who was charged with first-degree criminal sexual conduct, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), was convicted by a jury of felonious assault, MCL 750.82; MSA 28.277, for which he was sentenced as an habitual offender, third offense, MCL 769.10; MSA 28.1082, to a term of four to eight years' imprisonment. He appeals as of right. We affirm.

Defendant first contends that the trial court erred in refusing his request to instruct on the lesser included offense of assault and battery. A trial court must instruct on a lesser included misdemeanor offense where (1) there is a proper request, (2) there is an inherent relationship between the greater and lesser offense, (3) the misdemeanor offense is supported by a rational view of the evidence, (4) the defendant has adequate notice when the request is made by the prosecutor, and (5) no undue confusion or other injustice would result. *People v Stephens,* 416 Mich 252, 261-265; 330 NW2d 675 (1982); *People v Corbiere,* 220 Mich App 260, 262-263; 559 NW2d 666 (1996). General assault offenses and sexual conduct offenses do not satisfy the second criterion because they further different societal interests, *Corbiere, supra* at 264-265, and thus, felonious assault is not a lesser cognate offense of first-degree CSC predicated upon the use of a weapon. *People v Harris,* 133 Mich App 646, 651; 350 NW2d 305 (1984). It follows then that assault and battery is likewise not a lesser cognate offense of first degree CSC.

However, while assault and battery is not a necessarily lesser included offense of felonious assault, *People v Acosta,* 143 Mich App 95, 101; 371 NW2d 484 (1985); *People v Parker,* 50 Mich App 537, 539; 213 NW2d 576 (1973), it may be a lesser included cognate offense. *Acosta,*

supra at 102-103. Assuming that, by giving the felonious assault instruction, the trial court became obligated to give an instruction on the lesser included offense of assault and battery if warranted, we find that such an instruction was not warranted in this case. The prosecutor's theory of the case, as supported by the victim's testimony, was that defendant used a weapon while committing a sexual assault. The defendant's theory of the case, given inconsistencies between the victim's testimony and her prior statement and the testimony of another witness, was that nothing happened or that an act of consensual sex may have occurred, but that defendant did not assault the victim, armed or otherwise. Because defendant never claimed that he assaulted the victim without being armed, and because the victim testified to a sexual assault accomplished by threat with a weapon, the evidence did not support an instruction on assault and battery, and thus the trial court did not err in refusing to give the requested instruction.

Defendant next contends that he is entitled to relief because the jury's verdict was inconsistent. Juries in criminal cases are not held to any rules of logic, nor are they required to explain their decisions. *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980). Juries have a capacity for leniency by which they can acquit the defendant or release him from some of the consequences of his act without absolving him of all responsibility. *Id*. Thus, inconsistent verdicts are permissible. See *People v Barnes*, 146 Mich App 37, 48; 379 NW2d 464 (1985).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Hilda R. Gage