STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED
v	No. 200657 Washtenaw Circuit
RICHARD ALAN SWEITZER, JR., Defendant-Appellant.	LC No. 96-006072 FH

Before: Jansen, P.J., and Kelly and Markey, JJ.

KELLY, J. (dissenting).

I respectfully dissent because I believe the trial court erred in failing to give a jury instruction on assault and battery.

A trial court must instruct on a lesser included misdemeanor where there is, (1) a proper request by the defendant, (2) there is a relationship between the greater and lesser offenses, (3) a rational jury could find defendant innocent of the greater and guilty of the lesser offense, (4) the defendant is given adequate notice (if the prosecutor requests the instruction) and (5) that the requested instruction does not result in undue confusion or some other injustice. *People v Stevens*, 416 Mich 252, 263-264; 330 NW2d 675 (1982); *People v Rollins*, 207 Mich App 465; 525 NW2d 484 (1994).

When defendant requested the instruction on the lesser included offense of assault and battery, the trial court stated that the evidence did not support such an instruction; it reasoned:

> The jury must conclude either, (a), it was done for sexual purpose, or (b), that it could reasonably be construed to be done for sexual purposes. If they don't believe the prosecutor has proven that element beyond a reasonable doubt, then he's going to be acquitted.

The trial court's ruling was incorrect. On these facts, a jury could conclude that defendant intentionally touched the victim's buttocks and that he intended to put her in fear or harm her, however slightly. Therefore, the evidence supported the assault and battery instruction. Especially significant is

the testimony of the victim to the effect that he lifted her off her feet. I believe the trial court erred in denying the instruction based on the evidence.

This case is easily distinguishable from *People v Corbiere*, 220 Mich App 620; 559 NW2d 666 (1996) relied upon by the majority. *Corbiere* involved an horrendous and continued twelve-hour ordeal where the victim was repeatedly battered, slapped and raped. The facts in this case do not approach in severity the cases relied on by the majority nor is the legislative intent, to recognize criminal sexual conduct as uniquely heinous distinct from and far more invasive of human sanctity and dignity than common assault, satisfied in this case. *Corbiere*, *supra* at 266. There was nothing uniquely heinous about these facts.

I would reverse.

/s/ Michael J. Kelly