STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL S. ANDERSON,

Defendant-Appellant.

UNPUBLISHED
January 5, 1999

No. 204939
Oakland Circuit Court
LC No. 96-147161 FH

Before: McDonald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of felonious assault, MCL 750.82; MSA 28.277. Defendant was sentenced to three to eight years' imprisonment for being an habitual offender, third offense, MCL 769.11; MSA 28.1083. Defendant now appeals as of right. We affirm.

Defendant first argues the trial court erred by failing to give a jury instruction on the lesser included offense of simple assault and battery, MCL 750.81; MSA 28.276. This Court reviews the decision to grant or deny a request for a lesser included misdemeanor instruction for an abuse of discretion. *People v Stephens*, 416 Mich 252, 265; 330 NW2d 675 (1982).

A trial court is not required to provide a requested lesser included misdemeanor instruction unless the requested misdemeanor is supported by a rational view of the evidence adduced at trial. *Stephens*, *supra* at 262. 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 and guilty of the lesser included offense." *People v Steele*, 429 Mich 13, 20; 412 NW2d 206 (1987), quoting *United States v Whitaker*, 144 US App DC 344, 347; 447 F2d 314 (1971).

A rational view of the evidence in this case does not support the requested assault and battery instruction. The sole issue at trial was whether defendant possessed the requisite specific intent; that is, whether defendant intended either "to injure or . . . to put the victim in reasonable fear or apprehension of an immediate battery." *People v Datema*, 448 Mich 585, 602; 533 NW2d 272 (1995). Intent is

not a differentiating element of the offenses of assault and battery and felonious assault. *People v Smith*, 143 Mich App 122, 134; 371 NW2d 496 (1985). The only element distinguishing the two offenses is that the assault in a felonious assault is committed with a dangerous weapon. *Id.*; *People v Buford*, 69 Mich App 27, 29; 244 NW2d 351 (1976). Since the use of a vehicle during the commission of the alleged assault was not in dispute, the jury could not reasonably have convicted defendant of the lesser offense without also finding him guilty of assault with a dangerous weapon. See *People v Stinnett*, 163 Mich App 213, 217-218; 413 NW2d 711 (1987).

It does appear from the transcript that the trial judge failed to apply the *Stephens* test in addressing defendant's request. However, where the trial court reaches the right result for the wrong reason, this Court will not reverse. *Cole v West Side Auto Employees Federal Credit Union*, 229 Mich App 639, 641 n 1; 583 NW2d 226 (1998). Moreover, the jury was instructed on the lesser offense of aggravated assault, but chose to convict defendant of the greater offense of felonious assault. Therefore, any error in failing to instruct on assault and battery was harmless. *People v Higgs*, 209 Mich App 306, 307; 530 NW2d 182 (1995).

Second, defendant argues his convictions must be reversed because the trial court provided erroneous jury instructions regarding the elements of felonious assault and aggravated assault. However, because defendant failed to object to the allegedly improper instructions, our review is foreclosed unless relief is necessary to avoid manifest injustice. *People v Kuchar*, 225 Mich App 74, 78; 569 NW2d 920 (1997). Even if the instructions are imperfect, reversal is not required if, viewed in their entirety, they presented the issues to be tried and sufficiently protected the rights of the defendant. *People v Ullah*, 216 Mich App 669, 677; 550 NW2d 568 (1996). We find that the instructions in their entirety were proper, and that review of this unpreserved issue is not necessary to prevent manifest injustice.

Affirmed.

/s/ Gary R. McDonald
/s/ Kathleen Jansen
/s/ Michael J. Talbot