

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BONNIE LYNN HANOVER,

Defendant-Appellant.

UNPUBLISHED

February 1, 2000

No. 210757

Bay Circuit Court

LC No. 97-001522 FH

Before: Saad, P.J., and McDonald and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from her conviction of attempted felonious assault, MCL 750.82; MSA 28.277; MCL 750.92; MSA 28.287, entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Complainant, defendant's husband, testified that defendant pointed a kitchen knife at him during the course of an argument. Complainant denied that defendant touched him with the knife, and indicated that at no time did he fear that she would do so. A police officer testified that complainant reported that defendant had stabbed him. Defendant testified on her own behalf, and indicated that she picked up the knife to protect herself during the argument with complainant. She denied touching complainant with the knife.

The trial court denied defendant's request that the jury be instructed on the misdemeanor offense of assault and battery, MCL 750.81; MSA 28.276. The jury acquitted defendant of the principal charge of felonious assault, and convicted her of the lesser included charge of attempted felonious assault. An attempt consists of: (1) an intent to do an act or to bring about certain consequences which would amount to a crime under the law; and (2) an act done in furtherance of that intent which goes beyond mere preparation. *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993).

A trial court must instruct on a lesser included misdemeanor offense if: (1) a proper request is made; (2) there is an inherent relationship between the greater and the lesser offense; (3) the requested misdemeanor instruction 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. *People v Stephens*, 416 Mich 252, 261-265; 330 NW2d 675 (1982). Greater and lesser offenses are inherently related if they pertain to protection of the same societal interests, and if proof of the lesser offense is presented in the course of proving the greater offense. *People v Steele*, 429 Mich 13, 19; 412 NW2d 206 (1987). The failure to give an appropriate instruction constitutes an abuse of discretion if a reasonable person could find no justification for the decision. *People v Malach*, 202 Mich App 266, 276; 507 NW2d 834 (1993). The failure to give a properly requested misdemeanor instruction cannot be harmless error if the jury acquitted on the principal charge and convicted the defendant of the least serious offense on which it was instructed. *People v Taylor*, 195 Mich App 57, 63; 489 NW2d 99 (1992).

Defendant argues that the trial court abused its discretion by refusing to instruct the jury on the misdemeanor offense of assault and battery. We disagree and affirm. The requirements set out in *Stephens, supra*, for giving such an instruction were not fully met in this case. The requested instruction was not supported by a rational view of the evidence. An assault is an attempt to commit a battery, or an unlawful act which places another person in reasonable apprehension of receiving an immediate battery. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). A battery is the willful touching of another person, and is the consummation of an assault. *People v Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996); *People v Rivera*, 120 Mich App 50, 55; 327 NW2d 386 (1982). Complainant testified that at no time did he fear that defendant would touch him with the knife. Moreover, both defendant and complainant testified that the knife held by defendant did not touch complainant. The evidence did not support a finding that complainant committed either an assault, *Grant, supra*, or a battery. *Terry, supra*; *Rivera, supra*. The trial court did not abuse its discretion by refusing to give the requested instruction. *Malach, supra*.

Affirmed.

/s/ Henry William Saad

/s/ Gary R. McDonald

/s/ Hilda R. Gage