

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES MATTHEW EZEKIEL,

Defendant-Appellant.

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UNPUBLISHED

May 11, 2004

No. 245004

Wayne Circuit Court

LC No. 02-002533

Before: Cooper, P.J., and Griffin and Borrello, JJ.

COOPER, P.J. (*dissenting*).

I would respectfully dissent from the majority opinion of my esteemed colleagues.

I disagree with the majority ruling that assault and battery is not a lesser included offense of assault with intent to do great bodily harm. Even the prosecution has conceded that assault and battery is a lesser included offense of assault with intent to do great bodily harm, as all the elements of the lesser offense are subsumed by the greater. Battery has been defined as “the willful touching of the person of another by the aggressor . . . ; or, as it is sometimes expressed, a battery is the consummation of the assault.”<sup>1</sup> Conversely, assault has been defined as an attempted battery.<sup>2</sup> To assert that the attempt to commit a battery is a lesser included offense while asserting that the completed offense is not a lesser offense is illogical.

I also cannot agree that the trial court’s refusal to give the requested instruction amounts to harmless error. The jury found defendant guilty of a lesser included offense—aggravated assault. As such, the jury should have also had the opportunity to consider the lesser offense of assault and battery.<sup>3</sup>

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<sup>1</sup> *People v Bryant*, 80 Mich App 428, 433; 264 NW2d 13 (1978), quoting *Tinkler v Ritcher*, 295 Mich 396, 401; 295 NW 201 (1940).

<sup>2</sup> *People v Reeves*, 458 Mich 236, 240; 580 NW2d 433 (1998), quoting *People v Sanford*, 402 Mich 460, 479; 265 NW2d 1 (1978).

<sup>3</sup> *People v Beach*, 429 Mich 450, 490-491; 418 NW2d 861 (1988); *People v Zak*, 184 Mich App 1, 16; 457 NW2d 59 (1990).

Therefore, I would reverse and remand for further proceedings.

/s/ Jessica R. Cooper