

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

FRANK JOSEPH KNES,

Defendant-Appellant.

UNPUBLISHED

December 28, 2004

No. 249498

Wayne Circuit Court

LC No. 03-002218-01

Before: Meter, P.J., and Wilder and Schuette.

PER CURIAM.

Defendant appeals as of right his convictions of two counts of felonious assault, MCL 750.82, entered after a jury trial. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with three counts of felonious assault and one count of indecent exposure, MCL 750.335a, as a result of allegations that he brushed two teenagers with the mirror on his van while attempting to move them out of the street, and subsequently urinated in public. Defendant's theory was that he exchanged words with complainants, but neither threatened them nor struck them. The jury convicted defendant of two counts of felonious assault, and acquitted him of the remaining charges.

On appeal, defendant argues that the trial court erred in denying defendant's request to instruct the jury on the offenses of assault and assault and battery, MCL 750.81, as lesser included offenses of felonious assault.

A trial court must instruct the jury as to the applicable law. *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). A requested instruction on a necessarily included lesser offense is proper if the charged offense requires the jury to find a disputed factual element that is not part of the lesser included offense, and if a rational view of the evidence would support the giving of the instruction. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002).

A lesser included offense may be either a necessarily included lesser offense or a cognate lesser included offense. A necessarily included lesser offense is one which must be committed as part of the greater offense. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001). If either party requests an instruction on a necessarily included lesser offense, the trial court must give the instruction. *People v Torres (On Remand)*, 222 Mich App 411, 416; 564 NW2d 149

(1997). A cognate lesser included offense is one which shares some common elements with and is of the same class as the greater offense, but also has elements not found in the greater offense. *People v Perry*, 460 Mich 55, 61; 594 NW2d 477 (1999). The determination whether an offense is a lesser included offense is a question of law subject to de novo review. *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003).

The failure to instruct on a lesser included offense can be harmless error. *People v Cornell*, 466 Mich 335, 361; 646 NW2d 127 (2002). The defendant bears the burden of showing that an instructional error was outcome determinative or undermined the reliability of the verdict. *People v Rodriguez*, 463 Mich 466, 473-474; 620 NW2d 13 (2000). The reliability of a verdict is undermined if a lesser included offense instruction that was supported by substantial evidence was not given. *Cornell, supra* at 365.

The elements of felonious assault are: (1) an assault; (2) with a dangerous weapon; and (3) with the intent to place the victim in reasonable apprehension of an immediate battery. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). An assault is an attempt to commit a battery or an unlawful act that places another person in reasonable apprehension of receiving an immediate battery. *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995).

Assault and battery consists of assaulting and battering an individual. MCL 750.81. A battery is an intentional, unconsented, and harmful or offensive touching of the person of another, or of something closely connected to the person. *People v Nickens*, 470 Mich 622, 628; 685 NW2d 657 (2004).

Assault and battery is not a necessarily included lesser offense of felonious assault, and the trial court correctly declined to instruct the jury on assault and battery as a lesser included offense of felonious assault. *Reese, supra* at 446; *People v Acosta*, 143 Mich App 95, 101; 371 NW2d 484 (1985). No evidence showed that the words defendant exchanged with complainants placed complainants in reasonable apprehension of receiving an immediate battery. *Grant, supra*. The evidence supported a conclusion that defendant committed felonious assault or that he committed no crime. A rational view of the evidence did not support the giving of an instruction on assault as a lesser included offense of felonious assault. *Reese, supra*.

Affirmed.

/s/ Patrick M. Meter

/s/ Kurtis T. Wilder

/s/ Bill Schuette