

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEBORAH BROCK,

Defendant-Appellant.

UNPUBLISHED

December 16, 2004

No. 249495

Wayne Circuit Court

LC No. 03-001001-02

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

PER CURIAM.

Defendant was charged with assault with intent to commit murder. MCL 750.83. Following a nonjury trial, she was convicted of the lesser offense of aggravated assault, MCL 750.81a(1), for which she was sentenced to two years' probation. Defendant appeals her conviction as of right and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

Donna Montgomery testified that on January 5, 2002, she lived with her boyfriend Joe Brock who is defendant's brother. Montgomery was home in bed watching television. Suddenly she heard defendant coming down the hall. Defendant and another woman entered the bedroom. Defendant was armed with a stick that "was almost like a baseball bat size;" the other woman had an ankle weight. They grabbed Montgomery, and started hitting her in the head with a stick. Montgomery said they hit her fifteen or twenty times.

The two women then grabbed Montgomery by the ankles and dragged her outside. Once outside they started jumping, beating, kicking Montgomery in the head and hitting her with a stick. Specifically, defendant stomped on Montgomery's head and repeatedly hit Montgomery with a stick. Montgomery estimated that they hit her fifty times. The beating ended after fifteen minutes or so.

Montgomery testified that from what someone else told her, she believed defendant and the other woman attacked her under the mistaken impression that she had obtained a necklace someone else had stolen from defendant's son. As a result of the beating, Montgomery sustained bruises, swelling and cuts.

II. STANDARD OF REVIEW

Whether one offense is a lesser included offense of another is a question of law that is reviewed de novo on appeal. *People v Mendoza*, 468 Mich 527, 531; 664 NW2d 685 (2003).

III. ANALYSIS

Defendant's sole claim on appeal is that the trial court erred in considering and convicting her of the cognate lesser offense of aggravated assault. We agree that aggravated assault is a cognate lesser offense of assault with intent to murder because it requires proof of two elements not required in the greater offense: absence of a weapon and actual infliction of serious injury. Therefore, the court normally could not consider the lesser offense of aggravated assault. MCL 768.32(1); *People v Cornell*, 466 Mich 335, 354-355, 359; 646 NW2d 127 (2002). In this case, however, defendant specifically requested that the court consider the lesser offenses of aggravated assault and assault and battery. Therefore, any error has been waived. *People v Carter*, 462 Mich 206, 220; 612 NW2d 144 (2000); *People v Williams*, 412 Mich 711, 714-715; 316 NW2d 717 (1982). Reversible error must be that of the trial court, and not error to which the aggrieved party contributed by plan or negligence. *Smith v Musgrove*, 372 Mich 329, 337; 125 NW2d 869 (1964); *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176, lv den 461 Mich 919; 605 NW2d 316 (1999). Thus, a party cannot request a certain action of the trial court and then argue on appeal that the resultant action was error. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001).

Affirmed.

/s/ Patrick M. Meter
/s/ Kurtis T. Wilder
/s/ Bill Schuette