

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK LAMAR TAYLOR,

Defendant-Appellant.

UNPUBLISHED

May 2, 1997

No. 185744

Calhoun Circuit Court

LC No. 94-002567 FH

Before: Bandstra, P.J., and Hoekstra and J.M. Batzer,* JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of felonious assault, MCL 750.82; MSA 28.277. Defendant was sentenced to one to four years' imprisonment. We affirm.

Defendant first contends that the trial court abused its discretion in denying his motion to instruct the jury on the lesser included misdemeanors of assault and assault and battery. A court must instruct on a lesser included misdemeanor when: (1) the defendant makes a proper request; (2) there is an inherent relationship between the greater and lesser offenses; (3) the jury could rationally find the defendant innocent of the greater offense but guilty of the lesser offense; (4) the defendant has adequate notice; and (5) no undue confusion or other injustice would result. *People v Steele*, 429 Mich 13, 19-21; 412 NW2d 206 (1987); *People v Rollins*, 207 Mich App 465, 468-469; 525 NW2d 484 (1994).

With respect to the third element of this test, the requested misdemeanor instructions could not be supported by a rational view of the evidence. A battery is the willful touching of the person of another by an aggressor or by some substance put in motion by him. *People v Bryant*, 80 Mich App 428, 433; 264 NW2d 13 (1978). With respect to the actions for which defendant was convicted, there was no evidence presented at trial that defendant committed a battery against the victim. The victim testified that defendant swung at him several times with the pool stick, but never struck him. None of the witnesses testified that defendant ever touched the victim, either with or without a weapon.

* Circuit judge, sitting on the Court of Appeals by assignment.

Therefore, defendant's requested assault and battery instruction is not supported by a rational view of the evidence. Defendant argues that the various witnesses each presented a slightly different account of the events that occurred at the bar and the jury could reasonably have concluded that defendant committed a misdemeanor assault. An assault is an attempted battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery. *People v Grant*, 211 Mich App 200, 202; 535 NW2d (1995). However, all of the witnesses consistently testified that defendant's assaultive behavior involved a pool stick.¹ The element of using a potentially deadly weapon in a threatening manner differentiates felonious assault from simple assault under the facts of this case and was not sufficiently disputed to allow the jury to consistently find defendant not guilty of felonious assault but guilty of simple assault. *Steele, supra* at 20. A rational view of the evidence does not support the requested misdemeanor assault instruction. *Id.*

Defendant also contends that the trial court abused its discretion in allowing the admission of testimony that defendant's companion was carrying a gun in the tavern at the time of defendant's assault on the victim. First, defendant argues that the trial court improperly admitted the evidence under the present sense impression exception to the hearsay rule. MRE 803(1). Defendant argues that there was no indication that the statement that "the other guy back there has got a gun," was made while the declarant was perceiving the event or condition. Evidence was presented that the entire incident occurred within several minutes. The statement made during this brief altercation falls within the requirements of the present sense impression exception to the hearsay rule. *Johnson v White*, 430 Mich 47, 57; 420 NW2d 87 (1988); *People v Cross*, 202 Mich App 138, 142; 508 NW2d 144 (1993).

Next, defendant argues that the testimony that his companion was carrying a gun is irrelevant and that its probative value is outweighed by the prejudice to defendant. Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v VanderVliet*, 444 Mich 52, 60; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205; 520 NW2d 338 (1994). Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *People v Mills*, 450 Mich 61, 74-75; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212; 539 NW2d 504 (1995).

Evidence regarding the gun was relevant as to the assault charge. The jury could properly infer that the assault victim's knowledge that defendant's companion was carrying a gun heightened his apprehension as a result of the assault by defendant. Defendant argues that admission of such evidence could have led the jury to improperly infer that because defendant's companion had a gun, defendant also had a gun, or that defendant planned to rob the tavern. However, a review of the record reveals that there was no evidence presented, or argument advanced, that defendant was carrying a gun or that defendant or his companion made any attempt to rob the tavern. Evidence that defendant's companion was carrying a gun was relevant, and the probative value of such evidence was not outweighed by the potential prejudice to defendant.

We affirm.

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra

/s/ James M. Batzer

¹ Defendant also contends that the victim's testimony that defendant turned over tables with glasses on them and broke the pool stick would allow the jury to rationally conclude that defendant committed a simple assault. There was no evidence that any of these actions put the victim in fear of an immediate battery. There was little, if any, evidence to suggest that defendant did not wildly swing the pool stick.