

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRUCE TERRANCE FORDHAM, a/k/a
BRUCE PORTER,

Defendant-Appellant.

UNPUBLISHED
October 21, 1997

No. 190991
Recorder's Court
LC No. 95-000893

Before: Fitzgerald, P.J., and Markey and J.B. Sullivan*, JJ

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with a dangerous weapon ("felonious assault"), MCL 750.82; MSA 28.277, and of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to serve one to four years' imprisonment for the felonious assault conviction, to be served consecutive to two years' imprisonment for the felony-firearm conviction. These sentences are to be served consecutive to defendant's parole sentence. Defendant now appeals as of right, and we affirm.

Defendant argues that he was deprived of his right to a fair trial when the prosecutor improperly shifted the burden of proof to defendant, inflamed the jury, and argued facts not in evidence. However, defendant failed to preserve these issues by objecting below. Consideration of unpreserved challenges to alleged instances of misconduct is precluded unless a cautionary instruction could not have cured the prejudicial effect, or unless failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Here, our failure to provide further review will not result in a miscarriage of justice because any possible prejudice could have been and, in some instances, was cured by a timely instruction. *Id.*

Defendant also argues that the trial court erred in failing to instruct on the lesser offense of the misdemeanor of assault and battery. We disagree. A trial court's decision regarding a request for a misdemeanor instruction will be reversed on appeal only if there is an abuse of discretion. *People v*

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

Lucas, 188 Mich App 554, 582; 470 NW2d 460 (1991). Instructions on a misdemeanor offense must be given in a felony trial when: (1) there is a proper request; (2) there is an appropriate relationship between the felony charged and the requested misdemeanor; (3) the requested misdemeanor is supported by a rational view of the evidence; (4) the defendant had adequate notice that the misdemeanor is an offense against which he must defend; (5) the requested instruction would not result in undue confusion or other injustice. *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909 (1995); *People v Stephens*, 416 Mich 252, 261-265; 330 NW2d 675 (1982); *People v Moore*, 189 Mich App 315, 319; 472 NW2d 1 (1991). The trial judge is vested with substantial discretion in determining whether to give the lesser included misdemeanor instruction. *Stephens, supra* at 265; see also *People v Corbiere* 220 Mich App 260, 262-263; 559 NW2d 666 (1996). A “rational view of the evidence” means that “proof of the element or elements differentiating the two crimes must be sufficiently in dispute so that the jury may consistently find the defendant innocent of the greater and guilty of the lesser included offense.” *People v Stinnett*, 163 Mich App 213, 217; 413 NW2d 711 (1987), quoting *People v Smith*, 143 Mich App 122, 131; 371 NW2d 496 (1985).

Here, the trial court applied the test set forth in *Stephens* and found that a rational view of the evidence did not warrant the requested misdemeanor instruction. Indeed, the record reveals that proof of the elements differentiating the two crimes was not sufficiently in dispute and, therefore, we find no abuse of discretion.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Joseph B. Sullivan