

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TATJUAN MONTE HILL,

Defendant-Appellant.

UNPUBLISHED

January 25, 2005

No. 250592

Oakland Circuit Court

LC No. 2002-187034-FH

Before: Gage, P.J., and Meter and Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of felonious assault, MCL 750.82. We affirm.

On appeal, defendant argues that he was denied the effective assistance of counsel because his attorney failed to request a lesser included offense instruction on simple assault. He additionally argues that the trial court erred in failing to give such an instruction sua sponte. Defendant believes that the evidence clearly showed a dispute regarding whether defendant used a weapon during the alleged assault against the complainant. Because the use of a weapon differentiates simple assault from felonious assault, defendant believes that an instruction on simple assault should have been given to the jury.

A requested instruction on a lesser offense should be given if the lesser offense is necessarily included within the greater offense and if a rational view of the evidence would support the instruction. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002). A necessarily included offense is one that must be committed as part of the greater offense; it would be impossible to commit the greater offense without first having committed the lesser. *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001).

To be supported by a rational view of the evidence, a lesser included offense instruction must be justified by the evidence. Proof concerning an element differentiating the two crimes must be sufficiently in dispute to allow the jury to find the defendant not guilty of the charged offense but guilty of the lesser offense. *People v Steele*, 429 Mich 13, 20; 412 NW2d 206 (1987), overruled in part on other grds in *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002).

The failure to give a lesser included offense instruction is harmless if the instruction was not clearly supported by substantial evidence. *Cornell, supra* at 365.

A rational view of the evidence did not support an instruction for simple assault. At trial, the complainant testified that she and defendant had a confrontation and he began pacing around in front of her with a broomstick. She stated that this made her nervous, so she tried to get the broomstick from him, and he then hit her on the back with the broomstick. On cross-examination, she stated that defendant had placed pressure or resistance against her back with the broomstick.

The complainant admitted to the prosecutor that she had lied during defendant's preliminary examination because at that time, she "had feelings for the defendant and . . . didn't want to get him in trouble." She admitted at trial to defense counsel that, at the preliminary examination, she had denied being punched or hit by defendant. Defense counsel elicited that she had said the following at the preliminary examination:

Really, the only thing, the only confrontation was that he did push me, but, other than that, he had brought up a stick into my room and I was, out of fear, I tried to hustle and tussle it out of his hand, so, basically, by just try to tug and pull it at, uh, at, uh, at a stick, I probably caused some of the, some of the bruises and damages.

Viewing the evidence as a whole, there was simply no *reasonable* dispute concerning whether a broom was used during the assault. While the complainant stated at the preliminary examination that defendant did not hold the broomstick in a threatening manner, it is apparent from her additional testimony at the preliminary examination that defendant's actions with the broomstick *did* induce fear in her.¹ Moreover, she admitted at the preliminary examination that, soon after the altercation with defendant, she told the police that defendant had "struck me with a stick to my back[.]"

The evidence, viewed as a whole, did not clearly support an instruction on simple assault. See *Cornell, supra* at 365. Therefore, trial counsel was not ineffective; he was not required to raise a meritless issue. *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003). Moreover, the trial court did not err in failing to give a simple assault instruction sua sponte; nor, contrary to defendant's suggestion, was the court required to interpret defense counsel's request for an instruction on other lesser offenses as including a request for a simple assault instruction.

Affirmed.

/s/ Hilda R. Gage
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood

¹ Neither simple assault nor felonious assault requires an actual battery, i.e., touching, of the victim. See MCL 750.81 and MCL 750.82.