

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH GEORGE SIAN,

Defendant-Appellant.

UNPUBLISHED

July 1, 2008

No. 278459

Ionia Circuit Court

LC No. 06-013425-FH

Before: Meter, P.J., and Smolenski and Servitto, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of assaulting a prison officer, MCL 750.197c(1), and was sentenced to concurrent prison terms of 4 to 15 years each. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the trial court erred in denying his request for a lesser-offense instruction on simple assault, MCL 750.81(1). Whether a particular offense is a lesser included offense of another offense is a question of law that is reviewed de novo. *People v Nickens*, 470 Mich 622, 625-626; 685 NW2d 657 (2004). Whether a particular instruction is applicable to the facts of the case is also a question of law that is reviewed de novo. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003).

In the case of jury trials, the court must “instruct the jury concerning the law applicable to the case and fully and fairly present the case to the jury in an understandable manner.” *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). The court is only required to instruct the jury on necessarily included lesser offenses or attempts if such an instruction is requested and is supported by a rational view of the evidence. *People v Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002). A necessarily included lesser offense is “an offense which contains some of the elements of the greater offense, but no additional elements,” such that the “greater offense cannot be committed without committing the lesser offense.” *People v Norman*, 184 Mich App 255, 259-260; 457 NW2d 136 (1990).

It appears that a misdemeanor assault is a necessarily included lesser offense of assault of a prison employee. Both statutes require that the defendant assault a person. The assault is elevated to a felony if the person is, and the defendant knows him to be, a prison employee. Case law suggests that such an instruction would be appropriate where the defendant specifically

intended to assault another inmate, but accidentally made contact with a prison employee. *People v Hurse*, 152 Mich App 811, 815-816; 394 NW2d 119 (1986). Thus, the trial court would have been obligated to instruct on simple assault if a rational view of the evidence supported a finding that defendant intended to assault another inmate and not the alleged victim, James Miller, a prison guard.

The evidence showed that defendant had been spitting water and throwing feces at another inmate who was locked in a shower cell directly across from defendant's shower cell. When Miller entered the shower area, defendant began yelling at him, addressing him by name. He turned his face toward Miller and spit directly on him. The fact that defendant continued trying to spit on Miller after Miller was armed with the extraction shield further indicates that Miller was his intended target. During cross-examination, defense counsel implied that Miller may have conceded at the preliminary examination that it was possible defendant was trying to spit at the other inmate. However, Miller's actual preliminary examination testimony was never read into the record at trial and Miller never admitted that he had made such a concession. He testified only that anything is possible, but he did not believe that was what happened here. Absent evidence that defendant was in fact trying to spit at the other inmate, or any actual concession by Miller that such was the case, Miller's mere statement that anything was possible did not rationally support a finding that defendant was trying to spit at the other inmate, because all the facts surrounding the event indicated otherwise. Because a rational view of the evidence did not permit a finding that defendant intended to assault the other inmate rather than Miller, the trial court did not err in denying defendant's request for an instruction on assault.

Defendant next argues that the evidence was insufficient to support the jury's verdict. Defendant does not dispute that a rational view of the evidence would support a finding that he intentionally spit on Miller and acknowledges that this Court has held that intentionally spitting on a prison guard is sufficient to support a conviction under MCL 750.197c(1). *People v Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996). He contends only that this Court has misinterpreted the statute and thus the simple act of spitting does not entail the use of violence. The *Terry* Court specifically rejected that argument, however, and that decision is binding under MCR 7.215(J)(1).

Affirmed.

/s/ Patrick M. Meter
/s/ Michael R. Smolenski
/s/ Deborah A. Servitto