

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY PAUL LAZZERI,

Defendant-Appellant.

UNPUBLISHED

July 25, 2006

No. 260333

Washtenaw Circuit Court

LC No. 03-002124-FH

Before: Neff, P.J., and Bandstra and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of assault and battery, MCL 750.81. We affirm.

The facts adduced at trial establish that defendant and the victim were previously married and had one son together, who was hospitalized after suffering internal injuries from a biking accident. According to the victim, she awoke to feel defendant penetrating her vagina with his fingers in their son's hospital room. Defendant argues that insufficient evidence was presented at trial to sustain his conviction.

In determining whether sufficient evidence has been presented to sustain a conviction, we view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Defendant argues that because the victim testified that she did not feel scared on awakening to find defendant digitally penetrating her, there was insufficient evidence that an assault occurred. However, an assault can be either an unlawful act which places another in reasonable apprehension of receiving an immediate battery (apprehension-type assault) or an attempt to commit a battery (attempted-battery assault). *People v Nickens*, 470 Mich 622, 628; 685 NW2d 657 (2004). Viewing the evidence in a light most favorable to the prosecution, sufficient evidence was presented from which a rational trier of fact could find that an attempted-battery assault was proven beyond a reasonable doubt.

Defendant also argues that because the victim did not clearly articulate that his conduct was harmful or offensive, there was insufficient evidence that his touching constituted a battery.

A battery is an intentional, unconsented and harmful or offensive touching of the person of another. *Id.* Although the victim did not specifically testify that defendant's actions were harmful or offensive, the record contains sufficient evidence from which the jury could draw such an inference. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). First, on discovering that defendant had digitally penetrated her vagina, the victim asked in a voice louder than a whisper but not a scream, "what the [expletive] . . . are you doing?" Her reaction indicated that she was offended by defendant's actions. In addition, the victim testified that she felt "shocked" and "startled" by defendant's contact with her person. Further, when discussing previous incidents of unwanted contact with defendant, the victim told him "you do not have the right to ever touch me." Because the victim testified that defendant's other acts of unwanted contact were offensive to her and that further acts of touching would be unacceptable, the jury could infer that the touching that occurred on the night of the incident was also offensive. Viewing the evidence in a light most favorable to the prosecution, sufficient evidence was presented from which a rational trier of fact could find that a battery was proven beyond a reasonable doubt.

We affirm.

/s/ Janet T. Neff
/s/ Richard A. Bandstra
/s/ Brian K. Zahra