FILED
AUG 31 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed August 31, 1978
v.	)	
JOHNNY FARRIS SCOTT, JR.,	)	582/60909
Appellant.	)	

Appeal from Black Hawk District Court - Peter Van Metre, Judge.

Defendant appeals following conviction and sentencing for the offense of assault with intent to commit great bodily injury, § 694.6, The Code, 1977. Reversed and remanded.

Alfredo G. Parrish, Des Moines, for appellant.

Richard C. Turner, Attorney General, Raymond W. Sullins, Assistant Attorney General, and David H. Correll, Black Hawk County Attorney, for appellee.

Submitted to Donielson, Acting C.J., Snell, Oxberger and Carter, JJ.

Defendant appeals following conviction and sentencing for the offense of assault with intent to commit great bodily injury, § 694.6, The Code, 1977. We reverse.

The only issues presented on appeal are whether the trial court erred in failing to submit to the jury the question of whether defendant might be guilty of the lesser offenses of assault and battery, § 694.1, The Code, 1977, or simple assault, § 694.1, The Code, 1977. With respect to the offense of assault and battery, we hold that the offense is not a lesser included offense within the present charge. It requires the element of a battery which is not an essential element of the greater offense. It thus fails to meet the statutory test for a lesser included offense. See State v. Redmon, 244 N.W.2d 792, 796 (Iowa 1976); State v. Rosewall, 239 N.W.2d 171, 174 (Iowa 1976).

With respect to the offense of simple assault, the result is otherwise. That offense does meet the statutory test because it is composed of some but not all elements of the greater offense and (unlike assault and battery) does not require an additional element not needed to constitute the greater offense. See State v. Redmon, supra at 797.

The State argues that even if the statutory test as to the element is satisfied there is no factual record in the present case for submitting the included offense to the jury. We disagree. On the evidence presented it would be possible for a jury to find that an assault had been committed by the defendant, yet fail to find that he had the intent necessary to comprise the greater offense.

Lastly, the State urges that defendant failed to preserve error on the issue in the trial court. It cites State v. Sallis, 262 N.W.2d 240, 248 (Iowa 1978) for the proposition that preservation of error on a requested instruction requires both (a) the request, and (b) an exception to the failure to grant the request. We decline to require such a two step process in the present case where the defendant's request that the lesser offenses be submitted to the jury was made during the course of and as a part of his exceptions to the final draft of the court's instructions. Under such circumstances the request for additional instruction constituted an exception taken to the court's instructions and adequately apprised the court of the claimed error.

We hold the failure to submit the lesser included offense of simple assault requires that defendant's conviction be reversed and that he be given a new trial.

REVERSED AND REMANDED.