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NO. 63685-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ABDIGANI HASSAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable James D. Cayce

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

In violation of Hassan's Fourteenth Amendment right to due process of law and Sixth Amendment right to a defense, the trial court erred in refusing to instruct on the lesser-included offense of assault in the fourth degree.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

An accused person is entitled to an instruction on a lesser included offense where the lesser crime is legally and factually a lesser included offense of the greater crime and the facts in the light most favorable to the accused support the inference that only the lesser crime was committed. In a prosecution for rape in the second degree, the court issued a lesser included offense instruction for attempted rape in the second degree but refused Hassan's request for an instruction on assault in the fourth degree, even though the evidence supported the inference that only this crime was committed. Was the failure to issue the instruction error that prevented Hassan from receiving a fair trial and arguing his theory to the jury?

C. STATEMENT OF THE CASE

Veronica Parker met appellant Abdigani Hassan late at night after the Fourth of July fireworks. 4/13/09 RP 84.¹ That evening, Parker's 14-year-old daughter was staying overnight with a friend and Parker's live-in boyfriend had gone to sleep. 4/13/09 RP 82-83. Parker was drinking alone and staying up late. Id. She was outside on the back porch of her Kent apartment smoking a cigarette when Hassan walked by. The two chatted for 30-45 minutes and then Parker invited Hassan inside. 4/13/09 RP 84-85.

Once inside Parker offered Hassan a beer and then she turned on some music and invited Hassan to dance. 4/13/09 RP 100. The two danced together, although Parker claimed this dancing "was not provocative in any way." 4/13/09 RP 100, 116. Parker claimed that she eventually became tired and told Hassan to leave. 4/13/09 RP 86. Parker asserted that Hassan did leave, but then returned through the front door. 4/13/09 RP 90. Because

¹ Five hearings on April 8, 9, 13, 14, and 20, 2009, were transcribed by court reporter Ed Howard and bound in a single volume. These were not consecutively paginated; instead, each hearing date is numbered from page 1, even though the hearings are bound together. For this reason, the hearings from these dates are referenced in this brief by date followed by page number. Additional hearings on April 15, 2009, and June 9, 2009, transcribed by court reporters David Erwin and J. Dan. Lavielle, are also referenced by date followed by page number.

Parker was intoxicated, she was “kinda sketchy” regarding the details of what occurred, but asserted that she ended up on the floor. 4/13/09 RP 91, 107. She claimed Hassan kept telling her, “shut up, bitch” and slammed her head on the floor and punched her several times. 4/13/09 RP 94-95.

A neighbor heard Parker screaming and called 911. 4/13/09 RP 8. Kent police officers arrived shortly after to find Parker's door standing open. 4/13/09 RP 27. Parker was lying on the floor, naked from the waist down, and Hassan was on top of her, nude. Id. The officers observed Hassan punch Parker once in the face as they entered and they pulled him off of her. Id.

According to Hassan, Parker never asked him to leave. Instead, she began to flirt with him and eventually they wound up on the floor with Parker undressing Hassan. Ex. 47. Although initially surprised by Parker's advances, Hassan became aroused and anticipated having sex with Parker. Ex. 47. Parker was on top of Hassan, at one point – a fact which was corroborated by rug burns on Parker's knees – but suddenly, when they switched positions so Hassan was on top, she became agitated and started attacking him. 4/13/09 RP 111. She struck Hassan in the testicles

and slapped him several times. Ex. 47. Hassan fought back. It was at this point that the police entered. Id.

Based on these events, the King County Prosecuting Attorney charged Hassan with one count of rape in the second degree. At trial, Hassan theorized that Parker had blacked out and been alarmed to find herself about to have intercourse with a virtual stranger. He pointed out that his total nudity was inconsistent with an allegation of forcible intercourse. 4/15/09 RP 41-42. He contended that his use of force, while possibly excessive, was not done with the intention of overcoming her will to resist. 4/15/09 RP 42.

In order to argue his theory, Hassan requested the jury be instructed on two lesser-included offenses: attempted rape in the second degree and assault in the fourth degree. 4/15/09 RP 58, 61-62. The court issued the attempted rape in the second degree instruction but refused to instruct the jury on assault in the fourth degree.

The jury acquitted Hassan of rape in the second degree and convicted him of attempted rape in the second degree. CP 75-76. Hassan appeals. CP 88-99.

D. ARGUMENT

ASSAULT IN THE FOURTH DEGREE WAS
LEGALLY AND FACTUALLY A LESSER INCLUDED
OF ATTEMPTED RAPE IN THE SECOND DEGREE
AND THE DENIAL OF INSTRUCTIONS ON THIS
OFFENSE DEPRIVED HASSAN OF A FAIR TRIAL
AND HIS RIGHT TO PRESENT A DEFENSE.

1. Where it is supported by affirmative evidence, an accused person is entitled to a jury instruction on a lesser offense.

Generally, an accused may only be convicted of offenses contained in the indictment or information. Schmuck v. United States, 489 U.S. 705, 717-18, 109 S.Ct. 2091, 103 L.Ed. 734 (1988). Pursuant to statute, however, an accused “may be found guilty of an offense the commission of which is necessarily included within that with which he is charged in the indictment or information.” RCW 10.61.006.

Where requested, a party is entitled to an instruction on a lesser included offense where: (1) each element of the lesser offense must be proved to establish the greater offense as charged (legal prong); and (2) the evidence in the case supports an inference that the lesser offense was committed (factual prong). Keeble v. United States, 412 U.S. 205, 214, 93 S.Ct. 1993, 36

L.Ed.2d 844 (1973); State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997) (overruling State v. Lucky, 128 Wn.2d 727, 912 P.2d 483 (1996)); accord State v. Warden, 133 Wn.2d 559, 562-63, 947 P.2d 708 (1997); State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

2. The requested instructions satisfied both the legal and factual prongs of the *Workman* test. The trial court refused to issue an instruction on the lesser included offense of fourth degree assault because the court reasoned that rape in the second degree, the crime charged by the State, did not contain an intent element. 4/15/09 RP 61. While conceding that this was so, Hassan contended that he was entitled to the instruction because the court had consented to instruct the jury on attempted second degree rape, and assault in the fourth degree “should be a lesser of at a minimum attempted rape.” 4/15/09 RP 62.

The trial court’s ruling was incorrect. The requested fourth-degree assault instruction satisfied the legal prong of the Workman test because each element of fourth-degree assault had to be proved to establish attempted second degree rape as the crime

was prosecuted by the State. Thus, the trial court erred in refusing the instruction.

a. Fourth-degree assault is legally a lesser included offense of attempted rape in the second degree. Pursuant to RCW 9A.44.050,

(1) A person is guilty of rape in the second degree when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person:

(a) By forcible compulsion[.]

RCW 9A.44.050(1)(a).

Criminal attempt is defined by statute as follows: “A person is guilty of an attempt to commit a crime if, with intent to commit a specific crime, he or she does any act which is a substantial step toward the commission of that crime.” RCW 9A.28.020.

Consistent with these definitions, the trial court instructed the jury:

A person commits the crime of attempted rape in the second degree when, with intent to commit rape in the second degree, he or she does any act that is a substantial step toward the commission of that crime.

CP 65 (emphasis added).

The “to convict” instruction read:

To convict the defendant of the crime of attempted rape in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

(1) That on or about July 5, 2008, the defendant did an act that was a substantial step toward the commission of rape in the second degree;

(2) That the act was done with the intent to commit rape in the second degree; and

(3) That the acts occurred in the State of Washington.

CP 67.

Because the term, "assault," is not statutorily defined, courts in Washington apply the common law definition to the crime. State v. Aumick, 126 Wn.2d 422, 426 n. 7, 894 P.2d 1325 (1995). Three definitions of assault are recognized in Washington:

(1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor intends to inflict or is incapable of inflicting that harm.

Id. (citing State v. Walden, 67 Wn. App. 891, 893-94, 841 P.2d 81 (1992)).

In Aumick, a decision which predated Berlin and Warden, the Washington Supreme Court held assault in the fourth degree was

not a lesser included offense of attempted rape in the first degree because it was hypothetically possible to attempt to commit rape – for example, by lying in wait – without committing an actual assault. Aumick, 121 Wn.2d at 427. The opinion has since been cited for the proposition that substantive offenses are not lesser included offenses of inchoate crimes, but without significant analysis. See e.g. State v. Porter, 150 Wn.2d 732, 737, 82 P.3d 234 (2004). However, an abstract inquiry into hypothetical means cannot be reconciled with Berlin's requirement that the availability of lesser included offenses must turn on the prosecution's theory in the case at hand, not on a consideration of the offenses in the abstract.

In Berlin, the Court first considered the history of the lesser included offense doctrine as it existed at common law:

This rule originally developed as an aid to the prosecution when the evidence introduced at trial failed to establish an element of the crime charged. Thus, the rule gave the prosecution the flexibility to instruct the jury consistent with the evidence actually presented. The rule also benefited the defendant by providing a third alternative to either conviction for the offense charged or acquittal. Thus, the rule allowed the defendant to instruct the jury on an alternative theory of the case, a lesser crime than that charged by the State.

Berlin, 133 Wn.2d at 544-45 (citing Beck v. Alabama, 447 U.S 625, 633, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980)).

The Court next reviewed its own recent decision in Lucky and found it erroneous, in pertinent part, because it “virtually eliminate[d] the Legislature’s codification of a common-law rule,” and inequitable to both the prosecution and the defense in that it “preclude[d] a lesser included offense instruction whenever a crime may be statutorily committed by alternative means.” Berlin, 133 Wn.2d at 547. The Court accordingly held,

Only when the lesser included offense analysis is applied to the offenses as charged and prosecuted, rather than to the offenses as they broadly appear in statute, can both the requirements of constitutional notice and the ability to argue a theory of the case be met. This is fair to both the prosecution and the defense.

Id. at 548 (emphasis added).

The reasoning of Aumick conflicts with Berlin by barring a lesser included offense instruction on a substantive crime where under a hypothetical alternative means, the crime could have been attempted without an assault, but neither the crime as it was charged and prosecuted by the State nor the court’s instructions support the hypothetical means.

Here, the State charged Hassan with rape in the second degree, but the jury rejected that charge in favor of attempted rape in the second degree. CP 75-76. Intent to commit the crime of rape is an essential element of that offense. Aumick, 126 Wn.2d at 429-30; RCW 9A.28.020. Under Berlin, as the crime was prosecuted here, assault in the fourth degree was a lesser included offense of attempted rape in the second degree.

The conclusion that the assault in the fourth degree was a lesser included offense of attempted rape as it was prosecuted here is consistent, too, with Washington's double jeopardy and merger analysis in the same context, and with United States Supreme Court decisions explaining the correlation between double jeopardy violations and lesser included offenses. In United States v. Dixon, 509 U.S. 688, 113 S.Ct. 2349, 125 L.Ed.2d 556 (1993), discussing Harris v. Oklahoma, 433 U.S. 682, 53 L.Ed.2d 1054, 97 S.Ct. 2912 (1977) (per curiam), the Court explained,

There we held that a subsequent prosecution for robbery with a firearm was barred by the Double Jeopardy Clause, because the defendant had already been tried for felony murder based on the same underlying felony. We have described our terse per curiam in Harris as standing for the proposition that, for double jeopardy purposes, "the crime generally

described as felony murder” is not “a separate offense distinct from its various elements.” [Internal citation omitted.] So too, here, the “crime” of violating a condition of release cannot be abstracted from the “element” of the violated condition. The Dixon court order incorporated the entire governing criminal code in the same manner as the Harris felony-murder statute incorporated the several enumerated felonies. Here, as in *Harris*, the underlying substantive criminal offense is a “species of lesser-included offense.”

Dixon, 509 U.S. at 698 (emphasis added).

The Washington Supreme Court’s opinion in Personal Restraint of Orange, 152 Wn.2d 795, 100 P.3d 291 (2004), also identifies the correct analysis where an attempt to commit a crime is at issue. The Court stated,

That the test has been alternatively called the “same elements” and the “same evidence” test underscores that the Blockburger^[2] test requires the court to determine “whether each provision requires proof of a fact which the other does not.” . . . Unless the abstract term “substantial step” is given a factual definition, there is simply no way to assess whether attempted murder requires proof of a *fact* not required in proving the assault. The Valentine^[3] court’s belief that the “substantial step” element had to remain a generic term for purposes of the “same elements” test ignores the reality that the term “substantial step” is a placeholder in the attempt statute, having no meaning with respect to any particular crime and acquiring

² Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

³ State v. Valentine, 108 Wn. App. 24, 29 P.3d 42 (2001), review denied, 145 Wn.2d 1022 (2002).

meaning only from the facts of each case. See [Harris], (holding double jeopardy violated by convictions for felony murder and underlying crime); Dixon, 509 U.S. at 717 (observing that, in Harris, Court did not “depart[] from Blockburger’s focus on the statutory elements of the offenses charged” when it “construed th[e] generic reference to some felony as incorporating the statutory elements of the various felonies upon which a felony-murder conviction could rest”).

Orange, 152 Wn.2d at 818-19 (emphasis in original).

The double jeopardy analysis illustrates the flaw in Aumick’s reasoning on the lesser included offense issue: if convictions on both assault and attempted second degree rape would result in a double jeopardy violation, as a matter of law they are indistinguishable acts and crimes. Hence, assault is a lesser included crime of the greater offense. In sum, as the crime was prosecuted, and based on the jury verdict, Hassan allegedly attempted the crime of second-degree rape by committing the crime of fourth-degree assault. Hassan was therefore entitled to have the jury instructed on this lesser included offense.

b. The evidence satisfied the factual prong of the Workman test. According to the evidence adduced at trial and the defense theory, the evidence met the factual prong of the Workman

analysis. In applying the factual prong of the Workman test, a court must view the supporting evidence in the light most favorable to the party requesting the instruction. State v. Fernandez-Medina, 141 Wn.2d 448, 455-56, 6 P.3d 1150 (2000). The instruction should be given “[i]f the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater.” Warden, 133 Wn.2d at 563 (citing Beck, 447 U.S. at 635).

Viewed in the light most favorable to Hassan, the evidence supported the inference that only a fourth-degree assault was committed. According to Hassan, Parker initially was interested in a sexual encounter with him, but changed her mind and began to struggle with him. Parker’s rug burns corroborated Hassan’s version of how events transpired, as Hassan asserted that Parker initially was on top of him. Although Hassan admitted to striking Parker, he told law enforcement that he did so not to overcome her resistance to a sexual assault, but because she was hitting him. He conceded in closing argument that his response was excessive, but maintained his interest was not sexual at that time. 4/15/09 RP 40-41. This evidence would rationally permit the jury to convict

Hassan of only fourth-degree assault, and not the greater crime of attempted rape in the second degree.

3. Failure to give the lesser-included offense instruction prejudiced Hassan. Error from the failure to give a lesser-included offense instruction is only harmless where, although the trial court wrongly fails to give a lesser-included offense instruction, a jury is instructed on an intermediate offense but convicts the defendant of the greater crime. See e.g. State v. Guilliot, 105 Wn. App. 355, 368-69, 22 P.3d 1266, review denied, 145 Wn.2d 1004 (2001); State v. Hansen, 46 Wn. App. 292, 296-97, 730 P.2d 706 (1986), opinion modified by 737 P.2d 670 (1987). For example, if in a first-degree murder prosecution the court instructs the jury on both first- and second-degree murder, but declines to issue a manslaughter instruction, the failure to give the manslaughter instruction would be harmless if the jury rejected second-degree murder and rendered a conviction on the greater crime. Guilliot, 105 Wn. App. at 368-69. The rationale for this rule is that if the jury had believed the accused was less culpable, it would have convicted on the intermediate offense, thus issuance of the requested lesser included offense instruction would not have affected the verdict.

The test for whether an error in failing to instruct on a lesser included offense requires reversal is whether “the factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions.” Hansen, 46 Wn. App. at 297. In this case, the answer to this question must be “no.” The jury affirmatively found Hassan was not guilty of the crime with which the State charged him. Thus, this Court is not presented with the circumstance where the jury has rejected an intermediate crime in favor of the greater. Rather, the jury may have been troubled by the fact that Hassan was guilty of something – because the evidence showed he had assaulted Parker – and thus compromised their verdict by convicting him of the intermediate offense of attempted rape in the second degree.

An accused person has the right under the Sixth and Fourteenth Amendments to present a complete defense to the jury.

Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process and Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants ‘a meaningful opportunity to present a complete defense.’”

Crane v. Kentucky, 476 U.S. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d

636 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984)).

Here the failure to issue the lesser included offense instruction prevented Hassan from having his defense theory considered by the jury. This Court should conclude that Hassan was prejudiced by the failure to instruct on assault in the fourth degree. This Court should reverse Hassan's conviction and remand with direction that the jury be instructed to consider the lesser included offense of assault in the fourth degree.

E. CONCLUSION

For the foregoing reasons, this Court should reverse Abdigani Hassan's conviction and remand for a new trial at which the jury will be instructed on the offense of assault in the fourth degree.

DATED this 5th day of October, 2009.

Respectfully submitted:



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