IN THE SUPREME COURT OF THE STATE OF DELAWARE

CECIL BROWNE,	§	
	§	No. 598, 1999
Defendant Below,	§	
Appellant,	§	
	§	Court Below—Superior Court
v.	§	of the State of Delaware,
	§	in and for New Castle County
STATE OF DELAWARE,	§	Cr.A. No. IN98-09-0970
	§	thru 0974
Plaintiff Below,	§	
Appellee.	§	

Submitted: October 24, 2000
Decided: November 29, 2000

Before **VEASEY**, Chief Justice, **WALSH** and **HOLLAND**, Justices.

O R D E R

This 29th day of November 2000, it appears to the Court that:

1) The defendant-appellant, Cecil Browne, was indicted in the Superior Court for the following offenses: Unlawful Sexual Intercourse in the First Degree, Possession of a Deadly Weapon During the Commission of a Felony, two counts of Unlawful Sexual Intercourse in the Second Degree, two counts of Attempted Unlawful Sexual Intercourse in the Second Degree, Aggravated Menacing, and two counts of non-compliance with conditions of bond.

2) At the close of the State's case, the trial judge granted Browne's motion for a judgment of acquittal on the two counts of non-compliance

with conditions of bond. The jury found Browne guilty of the following crimes: three counts of the lesser-included offense of Unlawful Sexual Intercourse in the Third Degree and two counts of the lesser-included offense of Attempted Unlawful Sexual Intercourse in the Third Degree. Browne was acquitted of Possession of a Deadly Weapon During the Commission of a Felony and Aggravated Menacing. Browne was sentenced to eleven years at Level V followed by probation.

3) Browne has raised two issues in this appeal. First, Browne challenges the Superior Court's denial of his motion for a judgment of acquittal as to the two counts of Attempted Unlawful Sexual Intercourse in the Second Degree. Second, Browne challenges the failure of the Superior Court to give a defense requested jury instruction on the offense of Unlawful Sexual Contact in the Third Degree, as defined in 11 *Del. C.* § 767, as a lesser-included offense of the two Attempted Unlawful Sexual Intercourse in the Second Degree charges.

4) In this appeal, Browne raises no claim concerning the propriety of his three convictions and sentences for Unlawful Sexual Intercourse in the Third Degree. Accordingly, the only convictions and sentences at issue in this appeal are Browne's two Attempted Unlawful Sexual Intercourse in the Third Degree convictions. Browne was sentenced to five years at Level V

incarceration suspended for twelve months at Level II probation for his first Attempted Unlawful Sexual Intercourse in the Third Degree conviction. For his second conviction for Attempted Unlawful Sexual Intercourse in the Third Degree, Browne was sentenced consecutively to five years Level V imprisonment, suspended for no additional sentence or probation. Accordingly, in this appeal, Browne is not challenging any conviction for which he is currently serving a prison sentence. His aggregate eleven-year Level V prison sentence was imposed for his first two convictions for Unlawful Sexual Intercourse in the Third Degree.

5) The record reflects that forty-year-old Browne lived with his girlfriend, fifty-year-old Brenda Saunders, at Saunders' home in Wilmington. The two had resided together for approximately four years. During the early morning of September 4, 1998, Browne invited a neighborhood acquaintance named Tony into the home to drink wine. When Saunders discovered Browne and Tony at 4:30 a.m. in the second floor bedroom of her home, she told Tony he was not welcome and asked him to leave.

6) Saunders testified that after Tony departed, Browne became enraged and began cursing at her. According to Saunders, Browne forced her to get on her knees in the dining room and made her perform oral sex on

him by threatening her with a knife. When Saunders bit Browne, he released her and she went upstairs to her bedroom. Saunders testified that in the bedroom, Browne hit her, spanked her, and tried to make her perform oral sex again. According to Saunders, she was struggling and fighting with Browne as he was attempting to put his non-erect penis in her rectum. After attempting anal intercourse, Saunders testified that Browne next tried to insert his non-erect penis in her vagina. Browne then tried to make Saunders perform oral sex a third time.

7) Testifying in his own defense at trial. Browne denied forcing Saunders to perform oral sex. He conceded that he had spanked Saunders hard. According to Browne, he and Saunders engaged in consensual sexual relations in the upstairs bedroom.

8) The first issue raised by Browne relates to the denial of his motion for a judgment of acquittal on the two counts of Attempted Unlawful Intercourse in the Second Degree. At the conclusion of the State's case-in-chief on the third day of trial, September 17, 1999, Browne moved for a partial judgment of acquittal as to Counts V and VI of the grand jury indictment alleging the offense of Attempted Unlawful Sexual Intercourse in the Second Degree.

Count V of Browne's grand jury indictment alleged that:

> CECIL BROWNE, on or about the 4th day of September, 1998, in the County of New Castle, State of Delaware, did intentionally attempt to engage in sexual intercourse with Brenda Saunders by attempting to place his penis in her anus without her consent and the defendant inflicted physical injury upon the victim on the occasion of the crime which acts, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct planned to culminate in the commission of Unlawful Sexual Intercourse in the Second Degree, in violation of 11 *Del. C.* Section 774.

Count VI of Browne's grand jury indictment alleges a second charge of Attempted Unlawful Sexual Intercourse in the Second Degree and states:

> CECIL BROWNE, on or about the 4th day of September, 1998, in the County of New Castle, State of Delaware, did intentionally attempt to engage in sexual intercourse with Brenda Saunders by attempting to place his penis in her vagina without her consent and the defendant inflicted physical injury upon the victim on the occasion of the crime which acts, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct planned to culminate in the commission of Unlawful Sexual Intercourse in the Second Degree, in violation of 11 *Del. C.* Section 774.

9) Unlawful Sexual Intercourse in the Second Degree is defined in 11 *Del. C.* § 774(1)a as intentionally engaging in sexual intercourse with another person without that person's consent and on the occasion of the crime the defendant inflicts physical, mental or emotional injury upon the victim. An attempt to commit a crime is defined in 11 *Del. C.* § 531(2), as follows: "A person is guilty of an attempt to commit a crime if the person: (2) intentionally does or omits to do anything which, under the

circumstances as the person believes them to be, is a substantial step in a course of conduct planned to culminate in the commission of the crime by the person." The term "substantial step" as used in 11 *Del. C.* § 531(2) is further defined in 11 *Del. C.* § 532 as "an act or omission which leaves no reasonable doubt as to the defendant's intention to commit the crime which the defendant is charged with attempting."

10) On appeal, Browne argues that "It is clear from the evidence that even if Saunders' testimony is accepted as true, that defendant's conduct did not amount to a substantial step toward the commission of the offense of unlawful sexual intercourse, either second or third degree, since he had no erection at the time and thus was incapable of performing intercourse."

11) Brenda Saunders testified during the State's case-in-chief that when she went to her upstairs bedroom, Browne hit her in the head and forced her to perform oral sex a second time. After the second episode of oral sex, Saunders recalled that "I somehow got away, and Cecil flipped me over and tried to put his penis in my rectum." This *attempted* anal intercourse occurred on the bed and Saunders testified that "I really started fighting because I didn't, I didn't want that. And I started fighting him, and he still kept trying and trying." When the prosecutor asked Saunders if

Browne had an erection, she said that she did not know, but "I could feel his penis against my rectum."

12) In addition to the attempted anal intercourse, Browne later attempted "to force his penis" into Saunders' vagina. While Saunders was lying on her stomach during the attempted anal intercourse, she recalled that she was lying on her back on the bed when Browne "was trying to force his penis into my vagina." Saunders knew that Browne was *attempting* vaginal intercourse "Because he was applying pressure with his penis. He was really trying to – it wasn't erect, so he was almost like trying to stuff it into my vagina."

13) At the conclusion of her direct examination at trial, Saunders stated that none of the sexual acts involving her and Browne on September 4, 1998, were consensual on her part. Saunders' sister, Annette Carter, testified that the following day she observed bruises on her sister's right shoulder, legs, and buttocks. Shortly after the September 4 incident, Saunders also went to the hospital complaining of rectal pain.

14) The trial testimony of Saunders was sufficient for a rational trier of fact to conclude that Browne was guilty of Attempted Unlawful Sexual Intercourse in the Second Degree in that he was *attempting* to have sexual intercourse (both anal and vaginal) with Saunders without her consent

and on the occasion of this crime, he inflicted physical injury upon Saunders. The difference between Second and Third Degree Attempted Unlawful Sexual Intercourse involves the element of physical injury. Although Saunders testified that she was struck several times by Browne in her upstairs bedroom and that he spanked her "like a child", the jury apparently concluded that there was not any physical injury to Saunders because the jury found Browne guilty of the lesser-included offense of Attempted Unlawful Sexual Intercourse in the Third Degree.

15) Nevertheless, the Superior Court properly declined to grant Browne's motion for judgment of acquittal as to the two counts of Attempted Unlawful Sexual Intercourse in the Second Degree. In ruling upon Browne's motion, the Superior Court was required to view the prosecution's evidence, including all reasonable inferences from that evidence, in the light most favorable to the State.[1] The record reflects that a rational trier of fact could have found each of the statutory elements of Attempted Unlawful Sexual Intercourse in the Second Degree beyond a reasonable doubt.[2]

---

[1] *Barnett v. State*, Del. Supr., 691 A.2d 614, 618 (1997).
[2] *See generally Seward v. State*, Del. Supr., 723 A.2d 365, 369 (1999); *Liket v. State*, Del. Supr., 719 A.2d 935, 939 (1998) (per curiam).

16) The second issue presented by Brown relates to his request for a jury instruction on Unlawful Sexual Contact in the Third Degree as a lesser-included offense of Attempted Unlawful Sexual Intercourse in the Second Degree. According to Browne, the jury might reasonably conclude "there was not a substantial step taken toward the commission of unlawful sexual intercourse, be it second or third."

17) A defendant is normally entitled to a lesser-included offense jury instruction if there is a rational basis in the evidence to support the request.[3] The standard of review for denial of a defense requested jury instruction is *de novo*.[4] The Superior Court denied this jury instruction request because the trial judge reasoned that under the facts of this case, if Browne committed unlawful sexual contact, such an action was "a substantial step in a course of conduct that was planned to culminate in unlawful sexual intercourse, second or third degree, or he's not guilty all together. His intention here, if it was a bad one, was not merely to have unlawful contact, his intention was either to have consensual sex or it didn't happen."

[3] 11 *Del. C.* § 206(c).
[4] *See Lunnon v. State*, Del. Supr., 710 A.2d 197, 199 (1998). *See also State v. Guthman*, Del. Supr., 619 A.2d 1175, 1177 (1993).

18) The Superior Court concluded that in Browne's case the trial evidence, including Browne's own testimony, was that there was either consensual or nonconsensual attempted unlawful sexual intercourse. The resolution of that issue depended upon which of the conflicting testimony the jury found credible, i.e., Saunders or Browne. In that regard the trial judge stated:

> And it seems to me from the evidence presented to this jury – and I emphasis the importance of the way the case went in front of the jury – if the jury is satisfied that the defendant committed an unlawful sexual contact that came within the course of conduct planned by him to culminate in an act or acts of intercourse. He was not setting out to have contact or merely to have sexual contact with the complaining witness, his intent, which he all but admitted from the witness stand, was to have completed acts of intercourse. And he did not back off because he perceived a lack of consent.
>
> His testimony, if it's believed, was that the complaining witness was consenting. So I think that from the way the case went to the jury, to find the defendant guilty merely of an unlawful sexual contact is to ask the jury to reach some sort of compromise, as opposed to ask the jury – or to ask the jury to speculate in a way that is not supported by the evidence, rather than to ask the jury to reach a verdict based on the evidence presented to the jury.

19) The record supports the Superior Court's determination that there was no rational basis in the evidence for a verdict acquitting Browne of either second or third degree attempted unlawful sexual intercourse and

convicting him of unlawful sexual contact.[5] The trial judge properly declined to give an Unlawful Sexual Contact in the Third Degree jury instruction as a lesser-included offense of the two counts of Attempted Unlawful Sexual Intercourse in the Second Degree charges.

NOW, THEREFORE, IT IS HEREBY ORDERED that the judgments of the Superior Court are AFFIRMED.

BY THE COURT:

Randy J. Holland
Justice

[5] *Bailey v. State*, Del. Supr., 521 A.2d 1069, 1093-94 (1987).