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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0069

Verdell Renee Shannon, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed August 25, 2009
Affirmed
Lansing, Judge

Hennepin County District Court
File No. 27-CR-06-072727

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Michael O. Freeman, Hennepin County Attorney, Alan J. Harris, Assistant County Attorney, C-2000 Government Center, 300 South Sixth Street, Minneapolis, MN 55487 (for respondent)

Considered and decided by Lansing, Presiding Judge; Shumaker, Judge; and Hudson, Judge.

U N P U B L I S H E D   O P I N I O N

LANSING, Judge

In a petition for postconviction relief, Verdell Shannon argued that the district court abused its discretion when it denied his request to instruct the jury on a lesser-included offense. Because third-degree assault is not included in the offense of attempted first-degree criminal sexual conduct, the district court properly denied Shannon's request for the instruction, and we affirm the postconviction court's denial of relief.

F A C T S

The state charged Verdell Shannon with two counts of attempted first-degree criminal sexual conduct for an October 2006 incident that involved LG, who was an overnight guest of TC, the woman with whom Shannon lived. LG, a friend of TC's daughter who lived in Texas, was spending the night at TC's house in Brooklyn Center.

At the jury trial, LG testified that, at approximately 8:00 a.m. on October 17, she was awakened when Shannon jumped on her bed. LG recognized Shannon as TC's boyfriend. Shannon was naked. LG was startled and asked Shannon, "What the f--k are you doing?" Shannon replied, "Shut the f--k up, bitch." He grabbed LG by her neck, threw her off the bed, and slammed her head on the floor, saying, "Give me that sweet pussy. You're talking too much. Just pass out. Shut the f--k up." LG fought back by scratching and biting Shannon. She said it was hard to talk "because his thumb was in [her] throat," but she was able to bite his arm "as he was strangling [her]." In the midst of the fighting, LG urinated on the floor. Shannon slipped on the urine, and LG "took his head and kind of hit it on the metal part of the bed." At that point, Shannon backed up

and said, "You win, I guess I'm going back to jail now." Shannon left the room, and LG ran to shut the door. She collapsed on the bedroom floor where she lost control of her bodily functions and had a bowel movement. When she was able to regain control of herself, she dressed, ran to her car, and drove away to get help.

A physician, who was a witness for the prosecution, testified that, when a person's neck is grabbed, the person "can lose control of their bowel or bladder." After observing photographs of the injuries LG sustained on October 17, the physician stated that the redness, bruising, and abrasions are "something that you can see in an individual who has been strangled."

Shannon testified in his own defense and acknowledged that he had been drinking on the morning of October 17 and became involved in a physical altercation with LG. He said that the altercation started when he saw LG come out of the bathroom and reprimanded her for not being properly clothed. He denied that the physical altercation was sexual in nature.

Before the case was submitted to the jury, Shannon requested, consistent with his testimony, that the district court instruct the jury on fifth-degree assault and also requested an instruction on third-degree assault as a lesser-included offense of first-degree criminal sexual conduct. The district court granted Shannon's request for the instruction on fifth-degree assault but denied his request for an instruction on third-degree assault.

The jury found Shannon guilty of both attempted first-degree criminal sexual conduct (fear of great bodily harm) and attempted first-degree criminal sexual conduct

(force and coercion). The district court concluded that the two counts merged and sentenced Shannon to 180 months in prison. Shannon did not file a direct appeal, but he petitioned for postconviction relief, arguing that the district court committed reversible error by refusing to instruct the jury on third-degree assault. Shannon appeals the postconviction court's denial of relief.

D E C I S I O N

This appeal raises the single question of whether the district court abused its discretion by denying Shannon's request for an instruction on third-degree assault as a lesser-included offense. We review the denial of a lesser-included-offense instruction under an abuse-of-discretion standard. *State v. Dahlin*, 695 N.W.2d 588, 597 (Minn. 2005). But if "the evidence warrants a requested lesser-included offense instruction, the district court must give it." *State v. Hannon*, 703 N.W.2d 498, 509 (Minn. 2005).

A lesser-included-offense instruction is warranted if "(1) the lesser offense is included in the charged offense; (2) the evidence provides a rational basis for acquitting the defendant of the offense charged; and (3) the evidence provides a rational basis for convicting the defendant of the lesser-included offense." *Dahlin*, 695 N.W.2d at 595. Unless all three prongs are satisfied, an instruction is not warranted under a lesser-included-offense theory. *See Hannon*, 703 N.W.2d at 513 (holding that district court properly denied instruction on lesser-included offense of second-degree unintentional felony murder because third prong was not satisfied); *State v. Gisege*, 561 N.W.2d 152, 157 (Minn. 1997) (holding that district court has no discretion to grant request for jury instruction when first prong is not satisfied).

We begin our analysis with the threshold prong of whether the lesser offense is included in the charged offense. Under this first prong, a lesser offense is an included offense if it is "(1) [a] lesser degree of the same crime; or (2) [a]n attempt to commit the crime charged; or (3) [a]n attempt to commit a lesser degree of the same crime; or (4) [a] crime necessarily proved if the crime charged were proved; or (5) [a] petty misdemeanor necessarily proved if the misdemeanor charge were proved." Minn. Stat. § 609.04, subd. 1 (2006).

We can readily exclude four of the five possible bases for qualifying third-degree assault as an "included offense" of first-degree criminal sexual conduct. Third-degree assault is not a lesser degree of attempted first-degree criminal sexual conduct, an attempt to commit attempted first-degree criminal sexual conduct, an attempt to commit a lesser degree of attempted first-degree criminal sexual conduct, or a petty misdemeanor. Thus the question narrows to whether, under Minn. Stat. § 609.04(4), third-degree assault is a crime *necessarily proved* if attempted first-degree criminal sexual conduct is proved.

To determine whether an offense is necessarily proved by proving a greater charge, we examine the offense's statutory elements rather than the facts of the particular case. *Gisege*, 561 N.W.2d at 156. "A lesser offense is necessarily included in a greater offense if it is impossible to commit the latter without also committing the former." *State v. Roden*, 384 N.W.2d 456, 457 (Minn. 1986). Consequently, the analysis turns on a comparison of the elements of third-degree assault to the elements of attempted first-degree criminal sexual conduct.

A person commits third-degree assault when that person assaults another and inflicts substantial bodily harm, which is defined as "bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily member or organ, or which causes a fracture of any bodily member." Minn. Stat. §§ 609.02, subd. 7a, .223, subd. 1 (2006). Because assault is a specific-intent crime, the intent element of third-degree assault requires the state to prove that the defendant had the intent to inflict bodily harm. *See State v. Vance*, 734 N.W.2d 650, 656 (Minn. 2007) (stating that it is unnecessary for state to prove intent to inflict *substantial* bodily harm).

A person commits attempted first-degree criminal sexual conduct if that person intends to commit first-degree criminal sexual conduct and takes "a substantial step toward" the commission of the crime. Minn. Stat. § 609.17, subd. 1 (2006). As charged in this case, first-degree criminal sexual conduct requires "engag[ing] in sexual penetration with another person" when the "circumstances existing at the time of the act cause [that person] to have a reasonable fear of imminent great bodily harm" or "engag[ing] in sexual penetration with another person" by using force or coercion and causing personal injury to that person. Minn. Stat. § 609.342, subd. 1(c), (e)(i) (2006). Personal injury means "physical pain or injury, illness, or any impairment of physical condition" or "severe mental anguish or pregnancy." Minn. Stat. §§ 609.02, subd. 7, .341, subd. 8 (2006). First-degree criminal sexual conduct requires only the general intent to do the acts prohibited. *State v. Bookwalter*, 541 N.W.2d 290, 296 (Minn. 1995); *State v. Gerring*, 378 N.W.2d 94, 98 (Minn. App. 1985); *see also Vance*, 734 N.W.2d at

656 (explaining that general intent means "that the defendant intentionally engaged in prohibited conduct," as opposed to acting "with the intent to produce a specific result").

A comparison of the elements of the two crimes demonstrates that it is possible to commit attempted first-degree criminal sexual conduct without also committing third-degree assault: it is possible to commit attempted first-degree criminal sexual conduct without inflicting substantial bodily harm and without the specific intent to inflict bodily harm—two elements that are required for third-degree assault. *See Gisege*, 561 N.W.2d at 156 (holding that, because first-degree assault requires proof of "great bodily harm" unlike attempted first-degree murder and attempted second-degree murder, first-degree assault is not lesser-included offense); *Gerring*, 378 N.W.2d at 98 (holding that, because assault requires proof of criminal intent, it is not included in offense of first-degree criminal sexual conduct). We therefore conclude that third-degree assault is not included in the charge of attempted first-degree criminal sexual conduct.

Because third-degree assault is not a lesser-included offense of attempted first-degree criminal sexual conduct, the district court properly denied Shannon's request to instruct the jury on third-degree assault.

Affirmed.