IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ABDIGANI B. HASSAN, Appellant.	NO. 63685-5 DIVISION ONE UNPUBLISHED OPINION FILED: June 7, 2010

Leach, A.C.J. — Abdigani Hassan appeals his criminal conviction for attempted second degree rape, arguing that he was entitled to a lesser included offense instruction on fourth degree assault. Because a person can commit attempted second degree rape without having committed an assault, the trial court properly denied Hassan's request for this lesser included instruction. We affirm.

Background

Hassan was charged with second degree rape. At trial, the State introduced evidence to show the following events. Late on the evening of July 4, 2008, V.P. sat alone on the patio of an apartment she shared with her boyfriend and daughter. Her daughter was visiting friends, and her boyfriend was upstairs sleeping. V.P. was smoking a cigarette and drinking a beer while listening to music and watching fireworks when Hassan walked by. They began talking.

After 30-45 minutes, V.P. invited him inside where they continued their conversation. They also danced, and she provided him something to eat and drink. Sometime later, she asked Hassan to leave.

After Hassan left through the front door, V.P. returned to her back patio for another cigarette. When she went back inside the apartment, she was surprised to see Hassan there. Although V.P. could not recall all of the events that followed, she did remember that at some point Hassan was on top of her, threatened her with a gun, hit her head against the floor, punched her in the face, and yelled, "Shut up, bitch."

V.P.'s screaming awoke her next-door neighbor, who dialed 911. When the two responding officers arrived at the apartment complex, they heard a woman screaming for help from an apartment with an open front door. As the officers entered, the first saw Hassan punch V.P. in the face with a closed fist. Both officers saw a fully naked Hassan straddling V.P., who was naked from the waist down. Hassan was handcuffed and read his Miranda[1] rights.

During the police interviews that followed, Hassan stated that V.P. invited him in, asked him to dance, and would not allow him to leave. He claimed that she forcibly removed his clothing, then her own clothing, and fondled his penis against his will. Afterwards, she asked him for a neck massage. He agreed, but while she lay on the floor with him straddling her back, she grew agitated and

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

started to hit him. He started hitting back in self-defense.

During the police interviews, bruising under V.P.'s left eye became visible. Because she was intoxicated and upset, the interviewing officer had difficulty obtaining a complete statement. In this initial statement V.P. indicated that Hassan had not penetrated her vagina. When interviewed again two days later, she reported vaginal penetration. At trial she testified consistent with her second interview.

At trial, the prosecution and defense counsel both proposed instructions on second degree rape and attempted second degree rape. Defense counsel requested an instruction on fourth degree assault as a lesser included offense but did not submit a proposed written instruction. The court instructed the jury on second degree rape and attempted second degree rape, but not on assault in the fourth degree. The jury acquitted Hassan of second degree rape but found him guilty of attempted second degree rape.

Hassan appeals, challenging the court's failure to instruct the jury on fourth degree assault.

Standard of Review

We review de novo a trial court's refusal to give a requested jury instruction based upon a matter of law.[2] Otherwise, a trial court's refusal to give a requested instruction is a matter of discretion and will not be disturbed absent an abuse of that discretion.[3]

[2] State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

Analysis

We must decide whether assault in the fourth degree is a lesser included offense of attempted rape in the second degree.[4] Hassan maintains that it is and that the court's denial of his requested jury instruction on fourth degree assault deprived him of a fair trial and his right to present his theory of the case.

A defendant is constitutionally entitled to be informed of the charges brought against him and to be tried only for the crimes charged.[5] At common law, a jury could find a defendant guilty of a lesser crime not charged if commission of that offense is necessarily included in the charged offense.[6] The Washington Legislature codified this rule in RCW 10.61.006, which reads, "In all other cases the defendant 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."

To find the accused guilty of a lesser included crime, a jury must be instructed on the elements of that offense.[7] An offense is a lesser included offense (1) if each of the elements of the lesser offense is a necessary element of the offense charged (the legal test) and (2) the evidence supports an

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[3] State v. Pesta, 87 Wn. App. 515, 524, 942 P.2d 1013 (1997).

[4] Hassan does not argue that assault in the fourth degree is a lesser included crime of second degree rape.

[5] Wash. Const., art. 1, § 22; State v. Crittenden, 146 Wn. App. 361, 365, 189 P.3d 849 (2008).

[6] State v. Berlin, 133 Wn.2d 541, 544, 947 P.2d 700 (1997) (citing Beck v. Alabama, 447 U.S. 625, 633, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980)).

[7] State v. Harris, 121 Wn.2d 317, 320, 849 P.2d 1216 (1993).

inference that the lesser crime was committed (the factual test).[8] "Stated differently, if it is possible to commit the greater offense without committing the lesser offense, the latter is not an included crime."[9]

Therefore, the question is whether each element of fourth degree assault is invariably included in attempted second degree rape. If not, then denial of his requested instruction was proper.

A person commits rape in the second degree, RCW 9A.44.050(1)(a), "when, under circumstances not constituting rape in the first degree, the person engages in sexual intercourse with another person . . . [b]y forcible compulsion." RCW 9A.28.020(1) states that "[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." An attempted crime is a lesser included offense of the completed crime;[10] thus, "the jury may convict a defendant of attempting to commit a crime charged, even though attempt was not specifically charged."[11]

RCW 9A.36.041(1) defines fourth degree assault as an assault not amounting to assault in the first, second, or third degree, or a custodial assault.

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[8] State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978) (citations omitted).

[9] Harris, 121 Wn.2d at 320; State v. Walden, 67 Wn. App. 891, 893, 841 P.2d 81 (1992) ("[O]ne is entitled to an instruction on the lesser offense only if the charged crime 'could not be committed' without also committing the lesser offense."); State v. Frazier, 99 Wn.2d 180, 191, 661 P.2d 126 (1983).

[10] RCW 10.61.003.

[11] State v. Gallegos, 65 Wn. App. 230, 234, 828 P.2d 37 (1992).

Assault is not statutorily defined. Absent a specific statutory definition, Washington courts apply the common law definition of the crime.[12] Three common law definitions of assault are recognized by Washington courts: "(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."[13] The common law also requires intent to create the apprehension of bodily harm or to cause bodily harm.[14]

In State v. Aumick, our Supreme Court applied the Workman test to determine whether fourth degree assault was a lesser included offense to attempted first degree rape.[15] Holding that it was not, the court observed that to be guilty of criminal attempt, "a person with the requisite intent need only take a substantial step towards the commission of the intended crime . . . . A 'substantial step' is conduct strongly corroborative of the actor's criminal purpose."[16] Thus, one can commit an attempted rape without also committing fourth degree assault, for instance,

> by lying in wait, while armed with a deadly weapon, with the intent to engage in forcible sexual intercourse with an intended victim whose appearance the perpetrator expects. Similarly, one could attempt first degree rape by breaking into a residence, with the intent to rape the occupant of that residence, only to discover that

[12] State v. Chester, 133 Wn.2d 15, 22, 940 P.2d 1374 (1997).
[13] State v. Stevens, 158 Wn.2d 304, 311, 143 P.3d 817 (2006).
[14] Walden, 67 Wn. App. at 894.
[15] 126 Wn.2d 422, 894 P.2d 1325 (1995).
[16] Aumick, 126 Wn.2d at 427.

no one is within the residence.[17]

In short, a person may take a substantial step towards the commission of first degree rape without committing assault.[18] As a result, the legal prong of Workman is not satisfied.

Aumick is dispositive. Like attempted first degree rape, a person may be guilty of attempted second degree rape when, for example, a person lies in wait in the victim's room with the intent of committing a rape but is discovered before assaulting the victim. Further, assault and attempted rape require different criminal intent. Assault requires intent to cause bodily harm or the apprehension of the same while attempted rape requires intent to engage in sexual intercourse. Therefore an element of fourth degree assault is not invariably an element of attempted rape in either the first or second degree.

Hassan acknowledges that Aumick controls this issue but maintains that its reasoning conflicts with State v. Berlin,[19] a more recent Supreme Court case, which held that the lesser included analysis applies to "the offenses as charged and prosecuted, rather than to the offenses as they broadly appear in [a] statute." In Hassan's words, Aumick "bar[s] a lesser included offense instruction . . . where under a hypothetical alternative means, the crime could have been attempted without an assault," whereas Berlin mandates "that the availability of lesser included offenses must turn on the prosecution's theory in the case at

[17] Aumick, 126 Wn.2d at 427.
[18] Aumick 126 Wn.2d at 427.
[19] State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997).

hand, not on a consideration of the offenses in the abstract."

We do not agree. Berlin makes no mention of Aumick, and our Supreme Court is presumed to not overrule binding precedent sub silentio.[20] But more fundamentally, Hassan misconstrues the significance of Berlin. The year before the court decided Berlin, it decided State v. Lucky.[21] In that case, the court departed from Workman and its progeny by requiring an "examin[ation of] the elements of the pertinent charged offenses as they appear[] in the context of the broad statutory perspective, and not in the more narrow perspective of the offenses as prosecuted."[22] Applying this rule, the court decided that the defendant in Lucky was not entitled to a lesser included instruction on the unlawful display of a weapon when charged with second degree assault, committed with a deadly weapon, because there are alternate means of committing second degree assault, only one of which includes as an element the unlawful display of a weapon.[23]

The Berlin court recognized that Lucky was wrongly decided.[24] The proper lesser included analysis examines the elements of the crime charged and prosecuted, not to the general statutory scheme, including all possible

[20] State v. Studd, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999).

[21] 128 Wn.2d 727, 912 P.2d 483 (1996), overruled by Berlin, 133 Wn.2d at 548-49.

[22] Lucky, 128 Wn.2d at 734.

[23] Lucky, 128 Wn.2d at 733.

[24] Berlin, 133 Wn.2d at 547-48 (explaining that Lucky was incorrect because it would "virtually eliminate the Legislature's codification of a common law rule" and harmful because "it precludes a lesser included offense instruction whenever a crime may be statutorily committed by alternative means").

alternative means.[25] In other words, the Lucky court should have determined whether each element of the unlawful display of a weapon was necessarily included in second degree assault, committed with a deadly weapon, not second degree assault in each possible alternative means.[26] So when the Berlin court stated that the lesser included analysis applies to "the offenses as charged and prosecuted, rather than to the offenses as they broadly appear in [a] statute,"[27] it did not mean that the availability of a lesser included instruction turned on whether the crime prosecuted, along with the evidence produced at trial, supported the hypothetical means by which the greater crime could have been committed. Rather, the court announced its return to an examination of the legal elements of the crime as actually charged and prosecuted.

In sum, where the elements of the lesser offense are invariably included in the greater offense as charged and prosecuted, the legal prong of Workman is met. Aumick conclusively holds that all of the elements of assault are not necessary elements in attempted rape. Therefore, assault in the fourth degree is not a lesser included offense to attempted rape in the second degree. We conclude that Hassan was not entitled to a lesser included instruction on fourth degree assault.

Finally, Hassan cites additional cases that, without exception, address the state and federal constitutional protections against multiple punishments for the

[25] Berlin, 133 Wn.2d at 547-48.
[26] Berlin, 133 Wn.2d at 547.
[27] Berlin, 133 Wn.2d at 548.

same offense. Since he makes no claim of a double jeopardy violation, these cases are inapposite.

Conclusion

For the foregoing reasons, we conclude that the trial court properly denied Hassan's request for an instruction on fourth degree assault.

Affirmed.

Leach, A.C.J.

WE CONCUR:

Grosse, J.

Spearman, J.