STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2024

State of Minnesota,
Respondent,

vs.

Sadik Y. Hussein,
Appellant.

Filed January 20, 2009
Affirmed
Connolly, Judge
Concurring specially, Ross, Judge

Olmsted County District Court
File No. K0-04-4231

Lori Swanson, Attorney General, Rita Coyle De Meules, Assistant Attorney General, 445 Minnesota Street, Bremer Tower, Suite 1800, St. Paul, MN 55101; and

Mark A. Ostrem, Olmsted County Attorney, Third Floor, Olmsted County Courthouse, 151 Fourth Street Southeast, Rochester, MN 55904-3712 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, Anna Richey, Certified Student Attorney, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Connolly, Presiding Judge; Ross, Judge; and Bjorkman, Judge.

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

CONNOLLY, Judge

Appellant challenges his convictions of felony attempted third-degree criminal sexual conduct and felony fourth-degree criminal sexual conduct after a jury trial. He argues that the district court improperly treated these offenses as lesser-included offenses of the original charge of third-degree criminal sexual conduct rather than as a constructive amendment to the complaint. Appellant also argues that the district court erred by failing to conduct an inquiry into whether appellant would be prejudiced by such instructions. Finally, appellant argues that his trial attorney provided ineffective assistance of counsel by inappropriately conceding his guilt of the lesser-included offenses without his consent. We affirm.

FACTS

Appellant Sadik Y. Hussein was charged with one count of criminal sexual conduct in the third degree.[1] In his opening statement at trial, appellant's trial counsel said, "I'm gonna tell you in this case that if you believe the victim, you're not going to like [appellant's] actions." Following the close of the state's case and in opposition to appellant's motion for judgment of acquittal, the prosecutor argued, "the Court really is obligated when the issues of fairness and the record allow it . . . the Court . . . has a duty to use its discretion to instruct a jury on lesser-included offenses." After waiving his right to testify on his own behalf, appellant rested without calling any witnesses.

[1] Minn. Stat. § 609.344, subd. 1(c) (2004).

The district court then considered the state's request that the jury be instructed on the additional lesser-included offenses of attempted criminal sexual conduct in the third degree and fourth-degree criminal sexual conduct. The prosecutor also expressed concern that appellant's trial counsel may have inappropriately conceded appellant's guilt on the lesser-included offenses. Appellant's trial counsel denied that he had admitted appellant's guilt, arguing that his statement had been prefaced by the phrase, "if you believe the victim."

The district court submitted the instructions on the two lesser-included offenses to the jury. The jury returned a verdict of not guilty on the charge of third-degree criminal sexual conduct, and verdicts of guilty on both the charge of attempted criminal sexual conduct in the third degree and the charge of fourth-degree criminal sexual conduct. Appellant was sentenced to 24 months in prison. This appeal follows.

D E C I S I O N

I. The district court properly submitted the instructions on the lesser-included offenses to the jury.

Appellant argues that the district court improperly relied on the *Dahlin* test for lesser-included offenses rather than the rule for constructive amendment of a criminal complaint[2] when it instructed the jury on the offenses of attempted criminal sexual conduct in the third degree and fourth-degree criminal sexual conduct. *State v. Dahlin*, 695 N.W.2d 588 (Minn. 2005). Appellant argues that the addition of the new charges was a constructive amendment of the criminal complaint, and that the *Dahlin* test does

[2] Minn. R. Crim. P. 17.05 states: "The court may permit an indictment or complaint to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."

not sufficiently protect a criminal defendant from prejudice that may result from the late addition of additional offenses at trial.

"The determination of what, if any, lesser offense to submit to the jury lies within the sound discretion of the trial court, but where the evidence warrants an instruction, the trial court must give it." *Bellcourt v. State*, 390 N.W.2d 269, 273 (Minn. 1986) (citations omitted).

A lesser-included offense is defined as

> (1) *A lesser degree of the same crime*; or
> (2) *An attempt to commit the crime charged*; or
> (3) An 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 (2004) (emphasis added).

> Upon an indictment or complaint for an offense consisting of different degrees, the jury may find the defendant not guilty of the degree charged in the indictment or complaint, and guilty of any degree inferior to that. Upon an indictment or complaint for an offense, the jury may find the defendant not guilty of committing it, and guilty of an attempt to commit it. . . . In all other cases, the defendant may be found guilty of any offense necessarily included in that offense with which the defendant is charged in the indictment or complaint.

Minn. Stat. § 631.14 (2004).

> [W]hen evaluating whether to give a lesser-included offense instruction, trial courts must determine whether 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. "In determining whether a lesser-included offense instruction should be given, trial courts must consider only whether a rational basis exists in the evidence to acquit of the greater charge and convict of the lesser—without considering either the strength of the evidence or the credibility of the witnesses." *Id.* at 596. "Where such is the state of the evidence, it is the duty of the trial court to submit such lesser degrees as it determines the evidence warrants in order that the jury may properly carry out its deliberations." *State v. Leinweber*, 303 Minn. 414, 422, 228 N.W.2d 120, 126 (1975).

The additional charges sought by the prosecution here clearly meet the definition of lesser-included offenses, as defined by Minn. Stat. § 609.04. Attempted criminal sexual conduct in the third degree is a charge of an attempt to commit the crime originally charged. Criminal sexual conduct in the fourth degree is a lesser degree of the same crime. The additional offenses the district court instructed the jury on were lesser-included offenses, and the district court properly analyzed these charges under the *Dahlin* test.

Appellant argues that *State v. DeVerney* instructs that district courts should analyze lesser-included offenses under the guidelines set forth in Minn. R. Crim. P. 17.05. *See State v. DeVerney*, 592 N.W.2d 837, 845-47 (Minn. 1999). In *DeVerney*, our supreme court applied the rule 17.05 test to an additional charge of liability for the crimes of another,[3] or aiding and abetting, when the original indictment was for first-degree murder. *DeVerney* is distinguishable from the case here because, while aiding and

[3] Minn. Stat. § 609.05.

abetting is not a "new or different offense" or even a separate, substantive offense, neither is it a lesser-included offense under the statutory definition. Aiding and abetting does not fit the definition of a lesser-included offense under Minn. Stat. § 609.04, as the additional charges here do. A lesser-included offense is one that is necessarily proven if the original charge is proven, Minn. Stat. § 609.04, where a charge of aiding and abetting requires the state to prove that a defendant knew that his accomplice was going to commit and crime and intended his presence to assist in the commission of that crime. *See* Minn. Stat. § 609.05 (2004); *State v. Mahkuk*, 736 N.W.2d 675, 682 (Minn. 2007).

Appellant argues that, under *DeVerney*, "lesser-included offenses should be deemed amendments under Rule 17.05 just as adding an aiding and abetting liability theory is an amendment." As already noted, this case is clearly distinguishable from *DeVerney*, as the additional offenses here meet the definition of a lesser-included offense. Moreover, the application of rule 17.05 to all lesser-included offenses would obviate the *Dahlin* test, which the *DeVerney* court did not address, let alone overrule. Such expansion of the interpretation of rule 17.05 is beyond the role of this court. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) ("The function of the court of appeals is limited to identifying errors and then correcting them.") (citations omitted).

Appellant also argues that the state may not request instruction on lesser-included offenses under *Dahlin* because the *Dahlin* standard is intended for use by the defense alone. Appellant's argument is contrary to caselaw.

In *Dahlin*, our supreme court expressed its concern that "[w]here one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of

some offense, the jury is likely to resolve its doubts in favor of conviction." 695 N.W.2d at 596 (quotation omitted). In response to this concern, the supreme court adopted the rule that, "in evaluating whether a rational basis exists in the evidence for a jury to acquit a defendant of a greater charge and convict of a lesser, trial courts must henceforth view the evidence in the light most favorable to *the party requesting the instruction*." *Id.* at 597 (emphasis added).

"A trial court may, even over a defendant's wishes, submit lesser offenses which are justified by the evidence." *State v. Reynolds*, 386 N.W.2d 828, 831 (Minn. App. 1986). "Neither the prosecution nor the defense can limit the submission of such lesser degrees as the trial court determines should be submitted." *Leinweber*, 303 Minn. at 421-22, 228 N.W.2d at 125 (citing *State v. Pankratz*, 238 Minn. 517, 57 N.W.2d 635 (1953)).

> In determining what, if any, lesser degrees should be submitted, the test should be whether the evidence would reasonably support a conviction of the lesser degree and at the same time is such that a finding of not guilty of the greater offense would be justified. Where such is the state of the evidence, it is the duty of the trial court to submit such lesser degrees as it determines the evidence warrants in order that the jury may properly carry out its deliberations.

Id. at 422, 228 N.W.2d at 125-26.

> Where it is clear that a particular crime has been committed and there is no evidence justifying a verdict of any lesser degree than the one charged in the indictment, it is the duty of the court to instruct the jury that it is their duty to convict of the particular crime or acquit. Where there is no evidence to justify a verdict in a lesser degree, it should not be submitted to the jury. Where, however, the evidence may be construed as covering a lesser degree of a crime charged, it is the duty of the court to submit that degree.

State v. Pankratz, 238 Minn. 517, 538, 57 N.W.2d 635, 647 (1953) (quotations omitted). "[A] defendant may not demand as a matter of right that the court submit only the degree of the crime charged in the indictment." *Id.* at 539, 57 N.W.2d at 467. The district court is not "compelled to submit, at the request of defendant, only the degree of the crime charged in the indictment where the evidence will justify a verdict of guilty on a lesser degree of that crime." *Id.* at 539, 57 N.W.2d at 648. "Lesser included offenses are both common and important. For the prosecution they provide an increased opportunity to obtain a conviction for some offense, even if the jury is unpersuaded on all the elements of the greater offense." 9 Henry V. McCarr & Jack S. Nordby, *Minnesota Practice* § 33.4 (3d. ed. 2001).

Pankratz provides a very close parallel to the facts of this case. In *Pankratz*, the defendant was charged with murder in the second degree. Over the defendant's objection, the district court included an instruction on manslaughter in the second degree. In affirming the district court's decision, our supreme court cited *State v. Stevens*, 184 Minn. 286, 291, 238 N.W. 673, 675 (1931), another decision where an instruction on a lesser-included offense was warranted by the evidence of the case and was given to the jury over the objection of the defendant. As is demonstrated in both *Pankratz* and *Stevens*, even where a defendant objects to a lesser-included-offense instruction, such an instruction may still be properly given if the district court, in its discretion, finds such an instruction is warranted by the evidence.

While appellant may enjoy the right to request that instructions on lesser degrees of the crime charged be submitted to the jury, that right is not absolute or exclusive.

Appellant has cited no authority in support of his argument that the state may not request instructions on lesser-included offenses.

The district court properly applied the *Dahlin* test for lesser-included offenses to the additional charges in this case at the state's request.

II. The district court did not err by not inquiring into the possible prejudice to appellant before it gave the lesser-included-offense instructions because *Dahlin* does not require such inquiry.

Appellant next argues that the district court abused its discretion in giving the lesser-included-offense instructions without first considering the prejudice appellant would suffer because he was unable to present a defense to the additional charges.

District courts are allowed "considerable latitude" in the selection of language for the jury instructions. *State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002). "[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explain the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988).

Appellant argues that a district court must inquire into the possible prejudicial effect of lesser-included-offense instructions under either rule 17.05 or *Dahlin*. But *Dahlin* includes no such requirement. Rather, the rational-basis test set forth in *Dahlin* states that a district court must give an instruction on a lesser-included offense "when 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." 695 N.W.2d at 598. While our supreme court in *Leinweber* did discuss concerns of possible

prejudicial effects on a criminal defendant, 303 Minn. at 422, 228 N.W.2d at 126, it did so in a context different from the one presented by this case. In *Leinweber*, our supreme court discussed the possible prejudicial effect on a defendant of a district court's failure to give an instruction on a lesser offense where one was warranted by the evidence. *Id.* The court stated that failure to give an instruction on a lesser degree where one was warranted by the evidence was error, but that a district court could refuse such an instruction where such refusal was a proper exercise of the district court's discretion and no prejudice to the defendant resulted from such refusal. *Id.* But the supreme court has not required district courts to consider possible prejudice to defendants prior to giving instructions on lesser-included offenses. "[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court." *Terault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987).

Appellant argues that his defense strategy would likely have changed had he known of the possibility that instructions on lesser-included offenses might be given to the jury. The record, however, undercuts appellant's argument that he lacked notice. The prosecutor first raised the possibility of instructing the jury on the lesser-included offenses after the close of the state's case. Arguing against appellant's motion for acquittal, the prosecutor acknowledged that there may have been an inconsistency in the testimony of one of his witnesses, but that there was "a record upon which a jury could find that there was penetration." The prosecutor also noted "the Court is obligated, has a duty to use its discretion to instruct a jury on lesser-included offenses." After this exchange, appellant waived his right to testify on his own behalf and rested his case

without calling a single witness. Appellant had an opportunity to change his defense after the subject of lesser-included offenses was introduced. He also could have requested that the district court reopen cross-examination of the state's witnesses. Appellant's argument that he was not given notice of the possibility of lesser-included offenses until after he rested his case is not supported by the record.

Appellant has failed to provide this court with any authority to support his argument that a prejudice inquiry is required before a district court can instruct a jury on lesser-included offenses. The district court did not err here in giving the lesser-included-offense instructions without first determining whether those instructions would prejudice appellant because no such prejudice analysis is required under *Dahlin*.

III. Because appellant acquiesced to any concession of guilt made by appellant's counsel, appellant was not deprived of effective assistance of counsel at his trial.

Appellant argues that, if the lesser-included offenses were properly submitted to the jury, his counsel did not provide effective assistance because he conceded appellant's guilt without appellant's consent during opening statement.

"The defendant must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)).

"The decision whether or not to admit guilt at trial belongs to the defendant, and a new trial will be granted where defense counsel, explicitly or implicitly, admits a defendant's guilt without permission or acquiescence." *State v. Pilcher*, 472 N.W.2d 327, 337 (Minn. 1991).

In his opening statement, appellant's trial counsel said:

> I'm gonna tell you in this case that if you believe the victim, you're not going to like [appellant's] actions. What he did was probably wrong, morally wrong, reprehensible, but he's been charged with a specific crime: criminal sexual conduct in the third degree. That crime requires that he committed sexual penetration on the victim.
>
> . . . .
>
> The evidence in this case will show that he is not guilty of the crime he's been charged with.

It was the prosecutor who brought appellant's trial counsel's statements to the court's attention, saying, "what [counsel] essentially conceded in opening statements is that [appellant] committed attempted crim sex third degree and committed a completed crime of criminal sexual conduct in the fourth degree." The prosecutor also said:

> I will admit that when counsel gave his opening statement this morning I was taken aback, and just to recap it, defense counsel basically conceded that this incident happened and happened largely in the way described by the alleged victim.
>
> . . . .
>
> And I became very concerned at that moment and still am to this point that defense counsel went too far in trial strategy. Defense counsel may admit a defendant's guilt as a valid trial strategy, but he cannot do so without his client's consent, and from the State's perspective what counsel did during opening statement was concede [appellant's] guilt to two lesser-included offenses.

Appellant's trial counsel objected to the prosecutor's characterization of his opening statement saying, "I believe the State, counsel has mischaracterized the nature of my opening statement. It was prefaced by 'if you believe the [victim].'[4] They were not concessions made by the defendant that he committed these lesser-included offenses." At another point, appellant's trial counsel reaffirmed "[the d]efense has not made any admissions."

The district court did not inquire of appellant to determine whether he had acquiesced in the trial strategy employed by his counsel.

Appellate courts "must exercise great caution when defining an implied concession lest the semantics of every questioned word, statement or misstatement of counsel by inadvertence, negligence or perhaps cleverness become an automatic ground for a new trial." *Torres v. State*, 688 N.W.2d 569, 573 (Minn. 2004) (quotation omitted). "We will find an implied concession only where a reasonable person viewing the totality of the circumstances would conclude that counsel conceded the defendant's guilt." *Id.* (quotations omitted). Even where a concession can be found, if a defendant fails to object to his counsel's statement, then the defendant can be found to have acquiesced to the trial strategy. *See State v. Provost*, 490 N.W.2d 93, 97 (Minn. 1992) (holding that defendant had acquiesced in trial strategy where his counsel maintained throughout trial that defendant had caused the victim's death and defendant raised no objection). *But cf. State v. Wiplinger*, 343 N.W.2d 858, 860-61 (Minn. 1984) (holding that defendant had

[4] Appellant's trial counsel initially said "if you believe the defendant," but clarified that he meant to say "victim" after the district court asked if he intended to say "defendant."

not acquiesced in trial strategy where he objected to his counsel's statements); *State v. Moore*, 458 N.W.2d 90, 95-96 (Minn. 1990) (same).

The district court determined that appellant's counsel did not make any concessions of appellant's guilt because his statement was prefaced with the phrase "if you believe the victim," thereby leaving the determination with the jury. Appellant's trial counsel's statement could be seen as an implied concession of guilt to the uncharged lesser-included offenses, but appellant acquiesced to any such implied concession by his failure to object. The record indicates that appellant was present in the courtroom throughout the proceedings, and that, even though he was not asked directly whether he acquiesced to his attorney's strategy, the district court addressed him directly on at least two occasions after the prosecutor initially voiced his concern that appellant's trial counsel had conceded of appellant's guilt.[5] Appellant raised no objection to his trial counsel's statements. We, therefore, conclude that appellant, by failing to object to his attorney's statements, acquiesced.

Affirmed.

[5] The district court did not directly ask appellant if he had any objection to his counsel's statements. Rather, the district court inquired of appellant regarding the knowing and voluntary waiver of his right to testify and whether appellant wished for the district court to read instruction 3.17 from the Minnesota Jury Instruction Guides regarding his right not to testify.

ROSS, Judge (concurring specially)

I concur in the majority's decision to affirm Sadik Hussein's conviction, but I write separately to express the limit of my concurrence. As the majority indicates, because Hussein had notice of the state's intent to seek the lesser-included offense instruction before he rested his defense at trial, there is no basis in fact to support Hussein's contention that the state unfairly prejudiced his defense by failing to seek the instruction until after Hussein rested his case. I would end the analysis on that holding, affirming on the ground that Hussein failed to demonstrate any prejudice.

The majority goes further, however, to the broader, implied proposition that a bright line actually precludes the district court from undertaking any analysis of unfair prejudice to the defendant before it may issue a lesser-included offense instruction. We need not reach so broadly in this case. And I am not convinced that the majority has found solid enough support for that proposition on the fact that the right to ask for a lesser-included instruction is a right that the defendant shares with the state, or on the fact that the district court has a general duty to give the instruction when the facts support it. The caselaw leads me to question the unnecessary bright-line holding.

I agree with the majority that *State v. Dahlin*, 695 N.W.2d 588, 590–92 (Minn. 2005), does not *require* the district court to weigh unfair prejudice to a defendant before issuing a jury instruction on a lesser-included offense. But *Dahlin* also does not *prohibit* the district court from disallowing the instruction if issuing it would work an unfair prejudice to the defendant. Nor did *Dahlin* suggest that the district court acts within its discretion if it issues an otherwise valid instruction under circumstances that are unfairly

prejudicial to the defendant. And it is not surprising that *Dahlin* did not hold that district courts should also weigh unfair prejudice to the defendant when evaluating whether to give a lesser-included offense instruction; it was the defendant, not the state, who sought the instruction in that case, so the issue was not before the *Dahlin* court. *Id*. at 592–93.

In combination with its general duty to give the lesser-included offense instruction, the district court also has the authority and broad discretion to decide what, if any, lesser offense should reach the jury. *Bellcourt v. State*, 390 N.W.2d 269, 273 (Minn. 1986). Without clearer precedent than the cases discussed by the majority, I believe that the district court may exercise that authority in a way that avoids inadvertently encouraging prosecutors to unfairly surprise—and consequently unduly prejudice—defendants when circumstances surrounding the instruction should counsel against including it in the interests of justice. What if, for example, the state charges a defendant with first-degree murder, advises the defendant expressly that the state will not seek a conviction of any lesser offense, conducts the trial entirely on the express and repeated elements only of first-degree murder such that the defendant defends only on those elements, but then, without notice, for the first time during its closing argument, urges the jury to convict instead on the alternative theory of second-degree murder and then asks the trial court to include the lesser-included offense instruction? Does a bright line in the law prohibit the district court from weighing the unfair prejudice when considering whether to grant the state's late request?

I am not convinced that the caselaw discussed by the majority directs the affirmative answer that the majority gives to this question. More critically, I think the

answer contradicts supreme court precedent. When the supreme court generalized that "[n]either the prosecution nor the defense can limit the submission of such lesser degrees as the trial court determines should be submitted," it specifically restricted this authority to cases in which, in "[the] proper exercise of the [district] court's discretion," the district court determines that "no prejudice to defendant results." *State v. Leinweber*, 303 Minn. 414, 421–22, 228 N.W.2d 120, 125–26 (1975). The majority has found a bright line that is inconsistent with this restriction announced in *Leinweber* and that overlooks the district court's duty to weigh the circumstances and to apply its discretion to withhold the lesser-included instruction in every case in which "prejudice to defendant results." *Id*. But because we need not reach the question on our facts, I would reserve it for another day, and I do not join that part of the majority's analysis.