DA 22-0541

IN THE SUPREME COURT OF THE STATE OF MONTANA

2025 MT 31

STATE OF MONTANA,

Plaintiff and Appellee,

v.

BEAU AVIDIYA,

Defendant and Appellant.

APPEAL FROM: District Court of the Nineteenth Judicial District,
In and For the County of Lincoln, Cause No. DC-21-94
Honorable Matthew J. Cuffe, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Melanie C. D'Isidoro, Trapper Peak Law, PLLC, Hamilton, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Katie F. Schulz, Assistant Attorney General, Helena, Montana

Marcia Jean Boris, Lincoln County Attorney, Jeffrey Zwang, Deputy County Attorney, Libby, Montana

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Submitted on Briefs: January 8, 2025
Decided: February 11, 2025

Filed:

Clerk

Justice James Jeremiah Shea delivered the Opinion of the Court.

¶1 Beau Avidiya appeals from the Nineteenth Judicial District Court, Lincoln County's July 25, 2022 Judgment and Sentence. A jury convicted Avidiya of Aggravated Assault, Aggravated Burglary, and Criminal Destruction of or Tampering with a Communication Device.[1] Avidiya appeals the District Court's refusal to instruct the jury on the lesser-included offenses of Assault, Theft, and Trespass.

¶2 We restate the issue on appeal as follows:

> *Whether the District Court abused its discretion when it determined that the defense had not presented sufficient evidence to warrant instructions on lesser-included offenses.*

FACTUAL AND PROCEDURAL BACKGROUND

¶3 In the early morning of August 22, 2021, Avidiya broke into the home of his 87-year-old great-grandmother, Myrtle Anderson. Anderson woke up in bed to Avidiya on top of her. Avidiya told Anderson to roll onto her belly, and he forced her face into her pillow, making it difficult for her to breathe. During the assault, Anderson's finger was broken, and she suffered bruises and abrasions to her nose and jaw. When Anderson asked Avidiya what he wanted, he responded "you." Anderson testified that she believed Avidiya was going to rape and kill her. She told him that she had money in the house, and he asked where it was. She told him it was in her purse in the hall. Avidiya took Anderson's purse and left. Anderson waited to make sure that Avidiya had left the house, and then retrieved

[1] Avidiya does not challenge his conviction on appeal for Criminal Destruction of or Tampering with a Communication Device.

her emergency call button and called law enforcement at 4:00 a.m. Anderson told officers that she did not recognize her assailant.

¶4 Police found green paint splotches on Anderson's clothing, door, and outside of her home. Upon further investigation, officers learned from a Town Pump employee that a man covered in green paint had made a purchase with cash at approximately 4:05 a.m. After reviewing surveillance footage from the Town Pump, officers recognized the man as Avidiya. When officers located Avidiya later that day, he was asleep in his vehicle and covered in green paint. Officers recovered bags from Town Pump and cash with green paint on it from the vehicle.

¶5 Avidiya was charged with Aggravated Assault, Aggravated Burglary, and Criminal Destruction of or Tampering with a Communication Device. He pled not guilty, and a jury trial was held on March 31 and April 1, 2022. Among other witnesses, the State called Anderson to testify. The defense rested without calling any witnesses.

¶6 Avidiya submitted jury instructions on the lesser-included offenses of Assault, Theft, and Trespass. The State objected to the instructions, arguing, among other things, that Avidiya had not presented sufficient evidence to support the instructions. The District Court held that because "lesser included instruction[s were] not supported by the evidence," it would not provide the instructions to the jury.[2]

[2] Avidiya asserts that the District Court denied his lesser-included offense instructions because he had offered two defenses requiring acquittal: mistaken identity and involuntary intoxication. Setting aside the fact that Avidiya elicited no evidence during cross examination to support a defense of involuntary intoxication, even assuming for the sake of argument that the District Court rejected Avidiya's proposed instructions, at least in part, on the basis of his proposed acquittal defenses, Avidiya's argument would still fail. A district court may not reject a defendant's

¶7 The jury convicted Avidiya of all three charges. The District Court sentenced him to the Montana Department of Corrections for twenty years with fifteen years suspended, with several shorter sentences to run concurrently.

STANDARD OF REVIEW

¶8 We review a district court's refusal to give a jury instruction on a lesser-included offense for an abuse of discretion. *State v. Craft*, 2023 MT 129, ¶ 9, 413 Mont. 1, 532 P.3d 461 (citing *State v. Freiburg*, 2018 MT 145, ¶ 10, 391 Mont. 502, 419 P.3d 1234). A district court abuses its discretion if it acts "arbitrarily without conscientious judgment or exceeds the bounds of reason." *Craft*, ¶ 9 (quoting *State v. Jensen*, 2019 MT 60, ¶ 8, 395 Mont. 119, 437 P.3d 117). "Reversible error will occur only if the jury instructions prejudicially affect the defendant's substantial rights." *Craft*, ¶ 9 (quoting *Freiburg*, ¶ 10). A defendant is "prejudiced by the failure to give a requested lesser-included offense instruction when the evidence could warrant a jury finding the defendant guilty of a misdemeanor offense instead of a felony." *Craft*, ¶ 9 (quoting *Freiburg*, ¶ 10).

proposed lesser-included offense instructions *solely* because the defendant has also presented evidence of a defense that would require acquittal; defendants are entitled to present alternative theories in their defense. *State v. Freiburg*, 2018 MT 145, ¶ 19, 391 Mont. 502, 419 P.3d 1234. But in rejecting Avidiya's proposed instructions, the District Court specifically noted that Avidiya's "lesser included instruction[s were] not supported by the evidence." The fundamental infirmity with Avidiya's argument is not that he had relied upon defenses requiring acquittal; it is that Avidiya only presented evidence in support of his acquittal defenses, leaving his proposed lesser-included offense instructions without a sufficient evidentiary basis to present them to the jury.

DISCUSSION

¶9 *Whether the District Court abused its discretion when it determined that the defense had not presented sufficient evidence to warrant instructions on lesser-included offenses.*

¶10 Avidiya argues that the District Court abused its discretion when it refused his request to provide jury instructions on the lesser-included offenses of Assault, Theft, and Trespass. Criminal defendants are entitled to jury instructions that cover every issue or theory supported by the evidence. *Freiburg*, ¶ 13. A defendant is entitled to a lesser-included offense instruction when "there is a proper request by one of the parties and the jury, based on the evidence, could be warranted in finding the defendant guilty of a lesser included offense." Section 46-16-607(2), MCA.

¶11 Based on § 46-16-607(2), MCA, we enumerated a two-factor test to determine whether a lesser-included offense instruction is warranted: "(1) as a matter of law, the offense for which the instruction is requested is a lesser-included offense of the offense charged; and (2) the proposed lesser-included offense instruction is supported by the evidence." *Freiburg*, ¶ 13 (citing *State v. Daniels*, 2017 MT 163, ¶ 12, 388 Mont. 89, 397 P.3d 460). The second factor is satisfied when there is "some basis from which a jury could rationally conclude that the defendant is guilty of the lesser, but not the greater offense." *Freiburg*, ¶ 13 (citing *State v. Castle*, 285 Mont. 363, 369, 948 P.2d 688, 691 (1997)). But not just any quantity of evidence is necessarily sufficient to warrant a lesser-included offense instruction. *Craft*, ¶ 13. Rather, the evidence must provide "some basis from which a jury could rationally conclude that the defendant is guilty of the lesser, but not the greater offense." *Freiburg*, ¶ 13 (internal quotations and citation omitted).

¶12 The parties do not dispute that factor one is met as to each of the proposed lesser-included offenses. The dispositive issue is whether the record evinces "some basis from which a jury could rationally conclude that [Avidiya] is guilty of the lesser, but not the greater offense[s]." *Freiburg*, ¶ 13. Avidiya argues that he presented sufficient evidence through his cross-examination of the State's witnesses that the jury could have concluded that he was guilty of Assault rather than Aggravated Assault and Theft or Trespass rather than Aggravated Burglary.

¶13 A person commits Aggravated Assault if he or she "purposely or knowingly, with the use of physical force or contact, causes reasonable apprehension of serious bodily injury or death in another." Section 45-5-202(1), MCA. A person commits Assault if he or she "purposely or knowingly makes physical contact of an insulting or provoking nature with any individual." Section 45-5-201(1)(c), MCA. Avidiya argues that he presented sufficient evidence that he did not cause "reasonable apprehension of serious bodily injury," meaning that he could only be convicted of Assault, when he forced Anderson's face into the pillow, making it difficult for her to breathe, because Anderson admitted on cross-examination that he may have been doing so to prevent her from seeing him. But as the jury was instructed, "[a] person acts knowingly . . . when the person is aware that it is highly probable that the result will be caused by the person's conduct." Section 45-2-101(35), MCA. This was a violent assault on an 87-year-old woman, in which her finger was broken and she reasonably believed she was going to be raped and killed. Anderson's acknowledgement that Avidiya might have had another motive for forcing her face into a pillow, making it difficult for her to breathe, hardly provides sufficient evidence

for an instruction that Avidiya may have only been guilty of "physical contact of an insulting or provoking nature."

¶14 Avidiya next argues that he presented additional evidence in favor of an Assault instruction by challenging the sufficiency of the State's investigation and the credibility of Anderson's testimony. When a defendant challenges the credibility of the only evidence supporting both the lesser and greater offenses, he or she is not entitled to an instruction on the lesser offense. *State v. Martinez*, ¶ 15, 1998 MT 265, 291 Mont. 265, 968 P.2d 705. In *Martinez*, the defendant, Martinez, argued that he was entitled to a lesser-included offense instruction after presenting evidence that the only witness to his offense had made inconsistent statements to law enforcement, had previously lied to law enforcement, and had smoked marijuana on the day of the offense. *Martinez*, ¶ 12. We held that Martinez was not entitled to a lesser-included instruction because "a lesser included offense instruction is not supported by the evidence where the defendant's evidence or theory, if believed, would require an acquittal." *Martinez*, ¶ 15.

¶15 In this case, Avidiya argued at trial that the State failed to conduct several tests and interview several witnesses he considered relevant to the case, and that Anderson was not credible because she was hard of hearing and could not identify her attacker. As with the testimony of the sole witness in *Martinez*, if the jury had disbelieved the results of the State's investigation and Anderson's testimony, there would not have been sufficient evidence to support a conviction of either Assault or Aggravated Assault. The District Court did not abuse its discretion when it rejected Avidiya's proposed jury instruction on the lesser-included offense of Assault. *Martinez*, ¶ 15.

¶16 A person commits Aggravated Burglary if he or she "knowingly enters or remains unlawfully in an occupied structure," "knowingly or purposely commits any other offense within that structure," and "purposely, knowingly, or negligently inflicts or attempts to inflict bodily injury upon anyone." Section 45-6-204(2), MCA. A person commits Theft if he or she "purposely or knowingly obtains . . . property of the owner" and "purposely or knowingly . . . deprives the owner of the property." Section 45-6-301(1), MCA. Avidiya argues that he presented sufficient evidence that because he is Anderson's great-grandson he did not "knowingly enter or remain unlawfully" in Anderson's home, so he could only be convicted of Theft. But the only testimony Avidiya elicited regarding the nature of his relationship with Anderson is that he had not been in her home for several years. We are hard-pressed to conclude that a jury could have found that Avidiya lawfully entered Anderson's home, unannounced and unexpected, after 3:00 in the morning, after an absence of several years. Such a tenuous argument supported only by a single fact and undermined by several others is not sufficient to support a lesser-included offense instruction. *See Taylor v. State*, 2014 MT 142, ¶ 22, 375 Mont. 234, 335 P.3d 1218 (holding that defendant's isolated statement that he "might've brushed [the victim's breasts] with [his] pinky," did not support the lesser-included offense instruction).

¶17 A person commits Trespass if he or she "knowingly . . . enters or remains unlawfully in an occupied structure." Section 45-6-203(1), MCA. Avidiya argues that he presented sufficient evidence that he did not "commit any *other* offense" in Anderson's home, meaning that he could only be convicted of Trespass, because he demonstrated that the State's investigation did not sufficiently prove that he stole money from Anderson's home.

Because Anderson could not identify her assailant, the State's investigation is the only thing that placed Avidiya in her home. If the jury had disbelieved the results of the State's investigation, there would not have been sufficient evidence to support a conviction of either Trespass or Aggravated Burglary. As we discussed above, if a defendant's credibility argument would require acquittal on both offenses, he or she is not entitled to a lesser-included offense instruction. The District Court did not abuse its discretion when it rejected Avidiya's proposed jury instructions on the lesser-included offenses of Theft and Trespass.

CONCLUSION

¶18 The District Court did not abuse its discretion when it refused Avidiya's proposed lesser-included offense jury instructions. The District Court's July 25, 2022 Judgment and Sentence is affirmed.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ CORY J. SWANSON
/S/ KATHERINE M BIDEGARAY
/S/ INGRID GUSTAFSON
/S/ JIM RICE