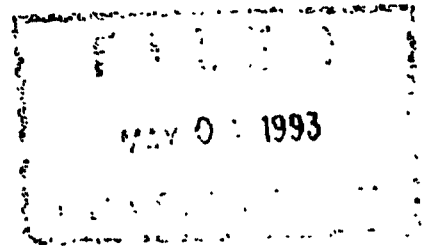


IN THE COURT OF APPEALS OF IOWA

No. 2-478 / 91-1467



STATE OF IOWA,

Appellee,

vs.

JACK LEE CARMER,

Appellant.

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Appeal from the Iowa District Court for Poweshiek
County, Phillip R. Collett and Richard J. Vogel, Judges.

Jack Lee Carmer appeals his conviction, following a
jury trial, of sexual abuse in the third degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and B. John
Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Richard J.
Bennett, Assistant Attorney General, and Michael W.
Mahaffey, County Attorney, for appellee.

Considered by Donielson, P.J., and Schlegel and
Sackett, JJ.

SCHLEGEL, J.

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Jack Lee Carmer appeals his conviction, following a jury trial, of sexual abuse in the third degree in violation of Iowa Code sections 709.1 and 709.4 (1991). Carmer contends his trial counsel rendered ineffective assistance by failing to obtain a jury instruction on the lesser-included offense of assault with the intent to commit sexual abuse, not causing bodily injury.

Carmer was charged with sexual abuse in the second degree, and the jury returned a verdict of guilty of sexual abuse in the third degree. The victim, Rebecca Lurvey, testified Carmer forced her to have sexual intercourse against her will, and she stated Carmer choked her during the incident, causing her to black out and to suffer bruises.

At the conclusion of the evidence, the court instructed the jury on sexual abuse in the second degree in accordance with Iowa Code section 709.3 (1991). It also instructed on the lesser-included offenses of sexual abuse in the third degree in accordance with Iowa Code section 709.4(1) (1991), assault with intent to commit sexual abuse causing bodily injury in accordance with Iowa Code section 709.11 (1991), and assault in accordance with Iowa Code section 708.1 (1991). The court did not instruct the jury on assault with intent to commit sexual abuse, not causing bodily injury under section 709.11. The jury returned a

verdict of guilty of third-degree sexual abuse. Carmer appeals.

The sole ground of Carmer's appeal is that trial counsel rendered ineffective assistance by failing to request an instruction on assault with intent to commit sexual abuse, not causing bodily injury. We affirm.

In State v. Jeffries, 430 N.W.2d 728 (Iowa 1988), the court addressed the legal issues of what constitutes a lesser-included offense and when a trial court should instruct on a lesser-included offense. Id. at 730. However, unlike the present case, these issues were addressed by the Jeffries court in the context of whether the court erred in failing to instruct on certain lesser-included offenses. Accordingly, the scope of appellate review in that case was for corrections of error at law.

Here, the issue of whether the jury should have been instructed on the lesser-included offense is raised in the context of ineffective assistance of trial counsel. Because Carmer's claim of ineffective assistance of counsel raises constitutional issues, our review is of the totality of the circumstances, the equivalent of a de novo evaluation of the case. Nichol v. State, 309 N.W.2d 468, 470 (Iowa 1981); Hinkle v. State, 290 N.W.2d 28, 30 (Iowa 1980). In this case, the defendant's conviction must be reversed if the record before us indicates: (1) counsel for the defendant failed to perform an essential duty, and

(2) prejudice resulted.¹

According to Jeffries, "the lesser offense is necessarily included in the greater offense if it is impossible to commit the greater offense without also committing the lesser offense." Id. at 740; see also State v. Redmon, 244 N.W.2d 792, 801 (Iowa 1976). "If the lesser offense contains an element not required for the greater offense, the lesser cannot be included in the greater." Jeffries, 430 N.W.2d at 740. The supreme court has further stated in Jeffries:

When [this] test is met, trial courts, with two exceptions, shall automatically instruct on a lesser-included offense. The first exception occurs when the defendant stipulates to the dissimilar elements in the greater offense. The second exception occurs when a statute makes an

1. Most often, it is stated that "the defendant bears the burden to prove such a claim." The State cites Taylor v. State, 352 N.W.2d 683, 684-85 (Iowa 1984) to support this proposition. Such is certainly the case in postconviction proceedings. However, in the case of a direct appeal, such a statement seems to be a non-sequitur; the defendant, as well as the State, must rely upon the record to either support the claim of ineffective assistance of counsel (or such other claim as may be made) or to refute that claim. To be sure, the defendant has the burden to point out in what manner his claim is supported in the record, but it seems inappropriate to refer to that duty as a burden of proof when the case is before us on direct appeal from the conviction. (The burden may be appropriate if there is a hearing in the court below on a motion for new trial, but in the case where the appeal is prosecuted by other counsel after notice of appeal has been given, the submission of new evidence is not possible without remand and is seldom, if ever, done). It would seem more realistic to say that whether the issue is raised by post-trial motions by trial counsel, or by appellate counsel after the time for post-trial motions has passed, the requirement should be that the defendant show, from the record, in what manner counsel failed to perform an essential duty and show that prejudice resulted.

offense, which is not necessarily included, a lesser-included offense.

Id. at 741.

Assault with intent to commit sexual abuse is a lesser-included offense of sexual abuse in the third degree. State v. McNitt, 451 N.W.2d 824, 825 (Iowa 1990). "Sexual abuse in the third degree cannot be committed without also committing the crime of assault with intent to commit sexual abuse." Id.

To preserve error, a defendant must request a lesser-included offense instruction or object to the court's failure to give it. See State v. Burkett, 357 N.W.2d 632, 634-35 (Iowa 1984); . . . We also retain the rule that a defendant may expressly waive a lesser-included offense instruction. (Citations omitted.)

Jeffries, 430 N.W.2d at 737.

Carmer claims that defense counsel's failure to request an instruction permitting the jury to consider the lesser-included offense of assault with intent to commit sexual abuse, not causing bodily injury--or defense counsel's failure to object to the court's omission of that instruction--constituted failure to perform an essential duty. In light of the supreme court's holdings in Jeffries and McNitt, it would appear that defense counsel has a duty to request the administration of such a lesser-included instruction, unless one of the exceptions to the automatic instruction rule applies in the case.

In the present case, the defendant stipulated to the fact that he committed a sex act upon the victim. In State v. Vargason, 462 N.W.2d 718 (Iowa App. 1990), we considered

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the issue of whether a third-degree sexual abuse defendant's admission that the parties had consensual intercourse constituted a stipulation to the greater offense of third-degree sexual abuse for purposes of determining whether the defendant was entitled to an instruction on the lesser-included offenses of assault with intent to commit sexual abuse and assault. We held such an admission did not constitute a stipulation to the greater offense since the greater offense requires a sex act to be done by force or against the will. We stated:

The focal issue is whether defendant's admission that the parties had consensual intercourse is a stipulation to the greater element. In addressing the issue we recognize the victim is an adult. We do not find an admission of consensual intercourse to be a stipulation or admission of the greater element of the crime. For in order for a sex act to meet the requirement of section 709.4, it must be done by force or against the will.

Id. at 719-20.

Accordingly, it is clear that Carmer's similar admission to the sex act in the present case is not sufficient to trigger an exception to the automatic instruction rule discussed in Jeffries. As a result, we determine Carmer's trial counsel breached an essential duty. However, after carefully considering the record before us, we do not find defense counsel's breach to be prejudicial to the defendant. The record reflects that the jury was instructed on the lesser-included offense of assault with intent to commit sexual abuse causing bodily

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injury in accordance with Iowa Code section 709.11. This section provides:

Any person who commits an assault, as defined in section 708.1, with the intent to commit sexual abuse is guilty of a class "C" felony if the person thereby causes serious injury to any person and guilty of a class "D" felony if the person thereby causes any person a bodily injury other than a serious injury. The person is guilty of an aggravated misdemeanor if no injury results.

Through jury instruction number sixteen, the jury was made aware of its option to conclude that the defendant assaulted Lurvey with the intent to commit a sex act (assault with intent to commit sexual abuse) as opposed to deciding the defendant actually performed a sex act with Lurvey with force or against her will (third-degree sexual abuse). Since the jury found Carmer guilty of third-degree sexual abuse, the jury obviously found Carmer had performed a sex act and, therefore, did not find that he had committed an assault with the mere intent to commit a sex act.

In light of this, we are not persuaded the jury would have found Carmer guilty of assault with intent to commit sexual abuse, not causing bodily injury, if the last portion of section 709.11 above had been included in the jury instructions. The fact is, the jury was made aware it had the choice of deciding the defendant committed assault with intent to commit sexual abuse as opposed to deciding the defendant actually performed the sex act. The jury did not choose to exercise the former option. Accordingly, we cannot say Carmer was prejudiced by defense counsel's

failure to request the court to give the lesser-included offense instruction or counsel's failure to object after the court did not give the instruction.

Defendant's conviction is affirmed.

AFFIRMED.