SUMMARY
February 15, 2024

2024COA13

No. 21CA1581, *People v. Wade* — Crimes — Harassment — Assault in the Second Degree — Assault in the Third Degree — Child Abuse; Criminal Law — Prosecution of Multiple Counts for Same Act — Lesser Included Offenses

A division of the court of appeals considers whether harassment, as defined in section 18-9-111(1)(a), C.R.S. 2023, is a lesser included offense of second degree assault, as defined in section 18-3-203(1)(i), C.R.S. 2023, or third degree assault, as defined in section 18-3-204(1)(a), C.R.S. 2023. The division also considers whether third degree assault, as defined in section 18-3-204(1)(a), is a lesser included offense of child abuse, as defined in section 18-6-401(1)(a), (7)(a)(V), C.R.S. 2023.

Applying the tests for lesser included offenses articulated in section 18-1-408(5)(a), (5)(c), C.R.S. 2023, the division concludes that harassment is not a lesser included offense of second or third

degree assault. The division also concludes that third degree assault is a lesser included offense of child abuse. However, because the defendant's convictions for third degree assault and child abuse arise from two separate acts, the division ultimately concludes that none of the convictions merge.

The division further rejects the defendant's contention that the district court erred by not sua sponte instructing the jury on self-defense, and it affirms the judgment of conviction.

COLORADO COURT OF APPEALS **2024COA13**

Court of Appeals No. 21CA1581
Garfield County District Court No. 17CR368
Honorable James B. Boyd, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Michael William Wade,

Defendant-Appellant.

JUDGMENT AFFIRMED

Division III
Opinion by JUDGE TAUBMAN*
Pawar and Graham*, JJ., concur

Announced February 15, 2024

Philip J. Weiser, Attorney General, Emmy A. Langley, Senior Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Megan A. Ring, Colorado State Public Defender, Kira L. Suyeishi, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2023.

¶ 1 Defendant, Michael William Wade, appeals the judgment of conviction entered on jury verdicts finding him guilty of (1) second degree assault of his wife, A.C.; (2) third degree assault of A.C. and his daughter, H.W.; (3) misdemeanor child abuse of H.W.; (4) harassment of A.C., H.W., and his son, D.W.; (5) misdemeanor menacing; and (6) telephone service obstruction. We disagree with his double jeopardy arguments under both subsections (5)(a) and (5)(c) of section 18-1-408, C.R.S. 2023, as well as his contention that he was entitled to a self-defense instruction, and therefore affirm.

I. Background

¶ 2 According to the prosecution's evidence, Wade engaged in the conduct underlying his convictions over several hours one night in the family's apartment. First, while alone in their bedroom, Wade repeatedly made the bed, then made A.C. sit on the bed and "forced" her legs into a certain position, and then made her get up so he could remake the bed. During this time, Wade punched A.C. in her shoulder and her back. At one point, he put a pillow over A.C.'s face, sat on her chest, and placed two hands around her neck, obstructing her breathing. Wade continued to intermittently

strangle A.C. for thirty to forty-five minutes. His fingernails broke the skin on her neck and shoulder, and A.C. was bruised around her neck and face. He also threatened to kill her. At some point, Wade took either A.C.'s phone or her SIM card to keep her from calling for help.

¶ 3 When ten-year-old D.W. eventually entered the bedroom, screaming, "Please leave my mom alone," Wade pulled him into the room by his ear, threw him across the room, and then picked him up and shoved him into a chair. Wade threatened to shoot D.W. and H.W. with a BB gun.

¶ 4 Twelve-year-old H.W. was recording the sound of these events on her phone when Wade came into her bedroom and attempted to take the phone away. Wade slapped H.W.'s face, pushing her cheek into her braces. Then he warned H.W. that she "doesn't know what a real hit feels like," grabbed her wrist and ankle, and pulled her off the bed.

¶ 5 At least once during the night, A.C. armed herself with a steak knife to defend herself and the children. When Wade returned A.C.'s phone, at about 3 a.m., she called 911.

¶ 6 A.C., H.W., and D.W. testified at trial. The prosecution presented photographs of the family's injuries and played for the jury both a recording of A.C.'s 911 call and H.W.'s hour-long phone recording. Wade did not testify. The jury found Wade guilty of the crimes listed above, and the district court sentenced him to five years of supervised probation for second degree assault, plus concurrent jail terms ranging between six months to two years on each of the remaining counts.

II. Self-Defense Instruction

¶ 7 Wade contends that the court erred by failing to sua sponte instruct the jury on the affirmative defense of self-defense, based on evidence presented by prosecution witness Officer Travis Westcott, the first officer on the scene. We reject this contention.

A. Additional Background

¶ 8 Officer Westcott testified as follows:

> [Wade] said that him and his wife had gotten into an argument over the living conditions of the family, and that she had taken a knife with her to bed. He woke up and she had the knife, and she choked him, and things escalated.
>
> He took off his shirt to show me where he had — she had stabbed him. I didn't see anything that was noticeably consistent with that.

¶ 9 A year and a half before trial, Wade filed an endorsement of two affirmative defenses: self-defense and special relationship. *See* § 18-1-703, C.R.S. 2023; § 18-1-704, C.R.S. 2023. However, self-defense appeared to be, at best, only a tentative theory of the case at trial. Defense counsel did not mention self-defense during his opening statement. He inquired about A.C.'s use of a knife and her hands on Wade's neck during cross-examination of A.C. and Officer Westcott, but he was unable to elicit any further evidence that Wade acted in self-defense. He did not request or tender a self-defense instruction, although he tendered a special relationship instruction as to the alleged crimes against H.W. He did not mention self-defense or refer to the testimony quoted above during closing argument.

B. Applicable Law and Standard of Review

¶ 10 "Trial courts have a duty to instruct the jury on all matters of law applicable to the case." *Roberts v. People*, 2017 CO 76, ¶ 18, 399 P.3d 702, 704-05. "We review jury instructions de novo to determine whether the instructions accurately informed the jury of the governing law." *Id.* at ¶ 18, 399 P.3d at 705.

¶ 11 However, the trial court "is not an advocate and need not serve as counsel for either party." *Hansen v. State Farm Mut. Auto. Ins. Co.*, 957 P.2d 1380, 1384 (Colo. 1998). A court's general duty to instruct does not extend to crafting theory of the case instructions when defense counsel fails to do so. *Id.*; *see People v. Garcia*, 28 P.3d 340, 343-44 (Colo. 2001). The jury needs to be instructed on self-defense "only if some evidence presented at trial supports it *and the defendant requests it*." *People v. Lee*, 30 P.3d 686, 689 (Colo. App. 2000) (emphasis added); *see People v. Speer*, 255 P.3d 1115, 1119 (Colo. 2011) ("[A] trial court is obliged to instruct the jury on a *requested* affirmative defense if there is any credible evidence . . . supporting it.") (emphasis added).

¶ 12 Because Wade did not request a self-defense instruction at trial or object to the instructions given, reversal is not warranted in the absence of plain error. *See People v. Martinez*, 2022 COA 111, ¶ 32, 522 P.3d 725, 731 (*cert. granted in part* July 17, 2023). We will reverse a conviction for plain error in the jury instructions only when (1) an error occurred; (2) the error was obvious; and (3) the defendant demonstrates "not only that the instruction[s] affected a substantial right, but also that the record reveals a reasonable

possibility that the error contributed to his conviction." *Garcia*, 28 P.3d at 344 (citation omitted); *accord Hoggard v. People*, 2020 CO 54, ¶ 13, 465 P.3d 34, 38.

C. Analysis

¶ 13 To the extent Officer Westcott's testimony supports a self-defense instruction, it would be applicable only to the offenses perpetrated against A.C. As best we understand Wade's closing argument, his theory of defense for the alleged crimes against A.C. was a general denial.

¶ 14 Our review of the record reveals only tenuous support for Wade's claim that he acted in self-defense against A.C. Officer Westcott testified that his investigation uncovered no evidence to support Wade's claims that he had been choked and stabbed. Further, no exhibits presented at trial supported those claims.

¶ 15 A.C.'s testimony provided only a modicum of support. She testified that she put her hands on Wade's neck that night, but she explained that she "was trying to fight back to be able to breathe" — she "was trying to push him back . . . [s]o that he would let go." This testimony was corroborated by statements A.C. made to a defense witness shortly after the event. A.C. admitted that she had

a knife "to keep him away from [her]," but she testified that she did not threaten Wade with the knife until shortly before the police arrived. This testimony was corroborated by H.W., who testified that A.C. "obviously [had] the knife to defend herself" but that "[s]he never used it; it was not even close." A.C. further testified that Wade could not have strangled her in self-defense because he was sitting on her and she "had no way to move."

¶ 16 In light of this unfavorable evidence, the lack of a self-defense argument, and Wade's tender of only one of two endorsed affirmative defense instructions, the record does not plainly suggest that a self-defense instruction was warranted. Further, it appears to us that defense counsel made a tactical decision not to submit a self-defense instruction. When the defense makes a tactical decision not to submit an alternative defense instruction, a trial court's failure to sua sponte offer the instruction does not constitute error, much less plain error. *See People v. Close*, 867 P.2d 82, 90-91 (Colo. App. 1993) (concluding that there was no error in failing to give an affirmative defense instruction where the asserted defense was a partial denial and defense counsel made only passing reference to the affirmative defense in opening

statement and closing argument), *disapproved of on other grounds by Bogdanov v. People*, 941 P.2d 247 (Colo. 1997); *cf. People v. Stewart*, 55 P.3d 107, 119 (Colo. 2002) ("[A] *nontactical* instructional omission generally should be reviewed for plain error.") (emphasis added).[1]

¶ 17 Even if we assume that the district court erred in not giving a self-defense instruction, we conclude that any error was neither obvious nor likely to contribute to Wade's convictions because the defense appeared to abandon any assertion of self-defense and the evidence supporting the defense was thin.

¶ 18 We therefore conclude that the district court did not err, plainly or otherwise, by failing to sua sponte instruct the jury on self-defense.

III. Double Jeopardy

¶ 19 Next, Wade contends that some of his convictions should have merged as lesser included offenses based on identical conduct. We disagree.

---

[1] Because the People did not contend that this issue was waived, we do not address waiver.

A. Standard of Review

¶ 20 The parties agree that Wade did not preserve this contention in the district court, and thus we review for plain error. We will reverse if any error in not merging convictions is obvious and substantial, *Hagos v. People*, 2012 CO 63, ¶ 14, 288 P.3d 116, 120, and so undermined the fundamental fairness of the trial as to cast serious doubt on the reliability of the judgment of conviction, *People v. Price*, 2023 COA 96, ¶ 32, ___ P.3d ___, ___. We also review Wade's double jeopardy claims de novo. *People v. Lowe,* 2020 COA 116, ¶ 38, 486 P.3d 397, 408.

B. Lesser Included Offenses and Merger

¶ 21 Wade argues that several of his convictions are lesser included offenses under both the strict elements test in section 18-1-408(5)(a) and the substantially broader test in section 18-1-408(5)(c). *See People v. Rock*, 2017 CO 84, ¶ 12, 402 P.3d 472, 476-77. The People argue only that the convictions are not lesser included offenses under the strict elements test. To address the parties' arguments, we consider both tests. *See Pellegrin v. People*, 2023 CO 37, ¶ 45, 532 P.3d 1224, 1232 (noting that section 18-1-408(5) describes "three independent methods of establishing a

lesser included offense"); *cf. id.* at ¶¶ 74, 86, 89-90, 532 P.3d at 1235, 1237-38 (Márquez, J., concurring in part and concurring in the judgment) (suggesting that to determine whether an offense is lesser and included, subsection (5)(a) and subsection (5)(c) should be read in combination; a lesser included offense may be established by either test).

¶ 22 Under the strict elements test, an offense is a lesser included offense of another "if the elements of the lesser offense are a subset of the elements of the greater offense, such that the lesser offense contains only elements that are also included in the elements of the greater offense." *Reyna-Abarca v. People*, 2017 CO 15, ¶ 64, 390 P.3d 816, 826.

¶ 23 Under the broader test provided in section 18-1-408(5)(c), an offense is a lesser included offense of another if it differs *only* in the respect that it may be established by (1) "a less serious injury or risk of injury" to the same victim; (2) "a lesser kind of culpability"; or (3) both a less serious risk of injury and a lesser kind of culpability, *but in no other way*. *Pellegrin*, ¶ 30, 532 P.3d at 1229-30. The culpable mental states are, from greatest to least, are (1) with intent, (2) knowingly, (3) recklessly, and (4) with criminal

negligence. *People v. Rigsby*, 2020 CO 74, ¶ 21, 471 P.3d 1068, 1074-75; *see* § 18-1-503(3), C.R.S. 2023.

¶ 24 A lesser included offense merges into a greater offense when both offenses are based on the defendant's same conduct against the same victim. *See* § 18-1-408(1), (3); *Page v. People*, 2017 CO 88, ¶ 9, 402 P.3d 468, 470; *People v. Espinoza*, 2020 CO 43, ¶ 9, 463 P.3d 855, 857.

¶ 25 We address Wade's merger contentions regarding his crimes against A.C. before turning to those concerning H.W.

C. Harassment and Assaults of A.C.

¶ 26 Wade first contends that his harassment of A.C. conviction must merge into his conviction for either second or third degree assault of A.C. We disagree.

1. The Convictions

¶ 27 The charging document, the jury instructions, and the verdict form are all silent as to which of Wade's actions formed the basis of his harassment conviction. But in closing argument, the prosecution asserted that Wade's conduct in "moving [A.C.] off of the bed, telling her to get back on the bed, making the bed, [and] unmaking the bed" established harassment. Harassment, under

section 18-9-111(1)(a), C.R.S. 2023, is committed when a person "[s]trikes, shoves, kicks, or otherwise touches" another person or subjects the person to physical contact, "with intent to harass, annoy, or alarm."

¶ 28 Wade's second degree assault conviction is based on evidence that he strangled A.C. Second degree assault – strangulation occurs when a person applies sufficient pressure to impede or restrict breathing or blood circulation, by applying pressure to the neck or by blocking the other person's nose or mouth, and thereby causes bodily injury, with the intent to cause bodily injury. § 18-3-203(1)(i), C.R.S. 2023.

¶ 29 Wade's third degree assault conviction is based on evidence that he punched A.C. in her shoulder and her back. Third degree assault occurs when a person either (1) knowingly or recklessly causes bodily injury to another person; or (2) with criminal negligence, causes bodily injury to another person by means of a deadly weapon. § 18-3-204(1)(a), C.R.S. 2023.

2. No Merger Required

¶ 30 First, we conclude that under the strict elements test, harassment is not a lesser included offense of either second or third

degree assault because "one offense is not a lesser included offense of another if the lesser offense requires an element not required for the greater offense." *Reyna-Abarca*, ¶ 60, 390 P.3d at 826. Harassment contains a culpable mental state element — intent to harass, annoy, or alarm — that is not required by the elements of either second degree assault (intent to cause bodily injury) or third degree assault (knowingly or recklessly or with criminal negligence).

¶ 31 Next, we consider whether harassment is a lesser included offense of second or third degree assault under the section 18-1-408(5)(c) test. Because harassment and second degree assault require two different, equally culpable intents, those two offenses do not differ *only* in one of the three possible respects provided in section 18-1-408(5)(c). Thus, those convictions do not merge.

¶ 32 Harassment and third degree assault pose a slightly more difficult question. We conclude they do not merge because although third degree assault requires a lesser kind of culpability than harassment, it requires a *more* serious risk of injury. Harassment may be established with nothing more than "touch" or "contact," § 18-9-111(1)(a), like Wade's movement of A.C. on and off the bed, while third degree assault requires "bodily injury," § 18-3-

203(1)(a) — a term defined as "physical pain, illness, or any impairment of physical or mental condition." § 18-1-901(3)(c), C.R.S. 2023. In other words, although third degree assault requires a lesser kind of culpability than harassment, thereby meeting one of the three ways to establish merger under section 18-1-408(5)(c) (as interpreted by *Pellegrin*), third degree assault nevertheless fails to merge into harassment because it differs in an additional way — namely, it requires a *greater* risk of injury. Conversely, although harassment requires a lesser risk of injury, thereby meeting one of the three ways to establish merger under section 18-1-408(5)(c), harassment nevertheless fails to merge into third degree assault because it differs in an additional way — namely, it requires a *greater* kind of culpability. We thus conclude that neither offense is a lesser included offense of the other. *See Pellegrin*, ¶ 30, 532 P.3d at 1229-30.

¶ 33 Because we conclude that none of Wade's offenses against A.C. is a lesser included offense, we need not inquire into whether the offenses are factually distinct to conclude that the offenses do not merge. *See People v. Whiteaker*, 2022 COA 84, ¶¶ 18-19, 519 P.3d 1127, 1132 (*cert. granted in part* Apr. 17, 2023).

D. Harassment, Third Degree Assault, and Child Abuse of H.W.

¶ 34 Next, Wade asserts that his child abuse and harassment of H.W. convictions must merge into his conviction for third degree assault. Again, we disagree.

1. The Convictions

¶ 35 Like with A.C., the charging document, the jury instructions, and the verdict form do not indicate which of Wade's actions underlie his harassment conviction. The elements of the conviction are the same as those listed in Part III.C.1.

¶ 36 Wade's third degree assault conviction is based on evidence that he slapped H.W. in the face. The elements of that conviction also mirror those in Part III.C.1.

¶ 37 Wade's child abuse conviction is based on evidence that he grabbed H.W. by the ankle and wrist and pulled her off the bed. Child abuse, as relevant to Wade's conviction, occurs when a person acts knowingly or recklessly and that person's actions[2]

---

[2] Such actions include "caus[ing] an injury to a child's life or health," "permit[ting] a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health," and "engag[ing] in a continued pattern of conduct" that ultimately results in the death of or serious bodily injury to a child. § 18-6-401(1)(a), C.R.S. 2023.

result in any injury, other than serious bodily injury, to a child. *See* § 18-6-401(1)(a), (7)(a)(V), C.R.S. 2023.

2. No Merger Required

¶ 38 Like with A.C., and for the same reasons discussed in Part III.C.2, harassment is not a lesser included offense of third degree assault. Those convictions do not merge under the strict elements test or the test in section 18-1-408(5)(c). However, we must consider whether convictions for child abuse and third degree assault merge.

¶ 39 As charged, the elements of third degree assault are included in the elements of child abuse. The culpable mental state is identical — knowingly or recklessly. And the "bodily injury" element of third degree assault, § 18-3-204(1)(a), is both a subset of (under the strict elements test) and involves a less serious risk of injury (under section 18-1-408(5)(c)) than the "any injury other than serious bodily injury" element of child abuse, § 18-6-401(7)(a)(V).[3] *See Rock*, ¶ 12, 402 P.3d at 477 ("[A] lesser offense must be a

[3] We conclude that third degree assault poses a less serious risk of injury than child abuse because a child is a more vulnerable victim than an adult. *See, e.g., Gonzales v. Cty. Ct.*, 2020 COA 104, ¶ 73, 477 P.3d 752, 764 (describing children as "vulnerable victims").

'subset' of [a greater] offense to be considered 'included,' within the . . . strict elements test embodied in section 18-1-408(5)(a)."). Thus, under both the strict elements test and section 18-1-408(5)(c), if the two convictions arise from a single act against the same victim, they must merge into a single conviction for child abuse — not a single conviction for third degree assault, as Wade contends. *See People v. Valera-Castillo*, 2021 COA 91, ¶ 52, 497 P.3d 24, 37 (holding that two assault convictions merge into one "where only a single act constituting one crime occurred").

¶ 40 But here, there were two acts: (1) slapping H.W. in the face and (2) grabbing her wrist and ankle and pulling her off the bed. Although "determining precisely when conduct supporting one commission of a particular offense is factually distinct from conduct supporting another commission of the *same* offense is not always so clear," *Schneider v. People*, 2016 CO 70, ¶ 14, 382 P.3d 835, 839 (emphasis added), here, there are two *separate* offenses and two separate acts. Multiple convictions for two separate offenses — one a lesser included of the other — "can clearly stand if the offenses were committed by distinctly different conduct," as they were here. *Rock*, ¶ 17, 402 P.3d at 478.

¶ 41 Accordingly, we conclude that Wade's offenses do not merge.

IV. Disposition

¶ 42 The judgment is affirmed.

JUDGE PAWAR and JUDGE GRAHAM concur.