

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

STATE OF MISSOURI

Respondent

v.

CHANE NUTT

Appellant

DOCKET NUMBER WD75765

DATE: March 25, 2014

Appeal From:

Circuit Court of Cooper County, MO
The Honorable Robert Lawrence Koffman, Judge

Appellate Judges:

Division Three
Anthony R. Gabbert, P.J., Victor C. Howard, and Thomas H. Newton, JJ.

Attorneys:

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Counsel for Appellant

Attorneys:

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Counsel for Respondent

**MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT**

STATE OF MISSOURI, Respondent, v.
CHANE NUTT, Appellant

WD75765

Cooper County

Before Division Three Judges: Gabbert, P.J., Howard, and Newton, JJ.

Nutt attacked a fellow inmate after the inmate called him a name. During the attack, Nutt choked the inmate. The choke lasted 15 to 30 seconds before a guard told him to stop. The inmate appeared red in the face and breathless during the choking. Afterward, the guard noticed red marks on the inmate's neck and a raspy voice. The inmate reported the incident, but did not state that he could not breathe. The red marks disappeared within 18 hours, and the inmate did not request or receive medical attention. Nutt, after being questioned, denied that he choked the inmate and claimed that his hands were on the inmate's shoulder and slipped to the inmate's neck.

The State charged Nutt with first-degree assault for attempting to cause serious physical injury to the inmate by choking him. During the instruction conference at the jury trial, Nutt tendered two instructions for the jury to find him guilty of the lesser included offense of third-degree assault. The court rejected both instructions, and instead submitted a second-degree assault instruction. The jury convicted him of first-degree assault. Nutt challenged the refusals of the third-degree assault instructions in a motion for new trial, which the trial court denied. A judgment for conviction of first-degree assault was entered against Nutt, and he was sentenced to ten years imprisonment to run concurrently with his current sentence. Nutt appeals.

REVERSED AND REMANDED.

Division Three Holds:

Nutt raises two points challenging the refusal of each instruction. In his first point, Nutt argues that the trial court erred in refusing his instruction because it was a lesser included offense of first- and second-degree assault. Nutt claims that as a lesser included instruction, under section 556.046, his instruction should have been submitted because a basis existed to acquit him of first- and second-degree assault, and a basis existed to convict him of the lesser included offense. We agree.

Under section 556.046.2, a defendant is entitled to have a lesser included instruction of the charged offense submitted to the jury if evidentiary bases exist that support an acquittal for the charged offense and support a conviction for the lesser included offense. The law recognizes that third-degree assault is a lesser included offense of first- and second-degree offense. The record supports evidentiary bases for acquitting Nutt of first-degree assault and for convicting Nutt of third-degree assault because the evidence that Nutt intended to cause serious physical injury to the inmate by choking him was questionable and the evidence that Nutt intended to cause physical injury to the inmate was sufficient. Thus, the trial court erred when it refused to submit the instruction for third-degree assault that asked the jury to find an attempt to cause physical injury by choking.

We are cognizant of the rule that generally, no prejudice or error is found when a jury finds a defendant guilty of a greater offense, although a lesser included offense was before it. The rationale behind the rule is the submitted instruction for the lesser included offense properly tested the elements of the submitted greater offense such that no reasonable basis exists that the jury would have found guilt for an even lesser offense. When the rationale is not applicable, we may find prejudice. The rationale does not apply here because the difference between first- and second-degree assault is not the degree of physical injury intended, but whether the attempt to cause serious physical injury was done in sudden passion. Consequently, the jury did not test the degree of physical injury. Thus, the failure to submit a third-degree assault instruction to test that element was prejudicial. Nutt's first point is granted. The second point is moot and will not be addressed.

Therefore, we reverse and remand.

Opinion by Thomas H. Newton, Judge

March 25, 2014

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