

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1440**

State of Minnesota,
Respondent,

vs.

Christopher Stephen Prince,
Appellant.

**Filed October 3, 2022
Affirmed in part, reversed in part, and remanded
Wheelock, Judge**

Steele County District Court
File No. 74-CR-20-1348

Keith Ellison, Attorney General, Lisa Lodin Peralta, Assistant Attorney General, St. Paul, Minnesota; and

Dan McIntosh, Steele County Attorney, Owatonna, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Charles F. Clippert, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Cochran, Judge; and
Wheelock, Judge.

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

In this direct appeal from the judgments of conviction for domestic assault by strangulation and domestic assault with intent to cause fear, appellant argues that the district court abused its discretion by excluding testimony as inadmissible hearsay and that

his conviction for domestic assault with intent to cause fear must be vacated because it is a lesser-included offense of domestic assault by strangulation. Because appellant failed to preserve a record of the excluded testimony, we affirm on that issue. But because appellant's domestic-assault-with-intent-to-cause-fear conviction is for a lesser-included offense of domestic assault by strangulation, we reverse on that issue and remand to allow the district court to vacate the conviction for domestic assault with intent to cause fear.

FACTS

Respondent State of Minnesota charged appellant Christopher Stephen Prince with felony terroristic threats under Minn. Stat. § 609.713, subd. 1 (2020), felony domestic assault by strangulation under Minn. Stat. § 609.2247, subd. 2 (2020), misdemeanor domestic assault with intent to cause fear of bodily harm under Minn. Stat. § 609.2242, subd. 1(1) (2020), and misdemeanor domestic assault by intentionally inflicting bodily harm in violation of Minn. Stat. § 609.2242, subd. 1(2) (2020). A jury found Prince guilty of domestic assault by strangulation and domestic assault with intent to cause fear. The following facts summarize the evidence provided at Prince's trial.

Prince and the victim briefly dated in the beginning of August 2020. On August 15, Prince messaged the victim and asked if he could stay at her home for the weekend. The victim agreed, and Prince arrived that afternoon.

After dinner on the same day, Prince asked the victim whether she had sex with someone during the previous night. When she told him that she had, he became angry. Prince yelled at the victim, called her names, and threw his phone, breaking it. Prince questioned the victim about the individual with whom she had sex and grabbed a knife,

saying that he “wanted to kill him.” The victim tried to calm Prince down. Prince then took the victim’s phone, locked himself in the victim’s bedroom, and tried to call the individual. When Prince came out of the bedroom, he and the victim wrestled over the phone, and Prince pushed the victim to the floor before throwing the phone at her. The struggle over the phone lasted about an hour, but eventually, the victim got her phone back, and Prince became calmer, setting down the knife. For the rest of the night, Prince vacillated between being upset and calling the victim names and being calm and apologizing.

At some point in the night, the victim went outside to smoke a cigarette and make a phone call. Prince found her and accused her of trying to contact the individual. The victim began recording Prince on her phone. Prince was on the porch at that time, and he demanded that the victim stop recording him. When she refused, he grabbed her, threw her into a chair, and pushed her against the porch railing. The victim then went inside to the kitchen, and Prince followed her, continuing to argue. She reached the refrigerator, and “the next thing [she] knew his arm was around [her] neck and he was behind [her] and lifted [her] up off [her] feet and [she] couldn’t breathe, then he threw [her] across the kitchen.”

Afterwards, the situation calmed down until the next day when Prince returned from a visit to his mother. Prince had had an altercation with his mother while at her home, and his aunt called the police and sent them to the victim’s home. Before the police arrived, the victim received a message on her phone and attempted to hide the message from Prince to avoid upsetting him. Prince tried to grab her phone, and they struggled over it again.

Prince shoved her against the kitchen counter and walked away. Shortly after Prince shoved the victim, the police arrived at the victim's home and arrested Prince.

At the jury trial, the victim and the responding officer testified. Prince testified in his own defense and contested the victim's version of the facts. He testified that he called her names after learning she had sex with someone the night before he arrived at her home, but he denied choking or otherwise harming her. During Prince's testimony, the state objected four times to hearsay statements that Prince alleged the victim made to him. Prince's counsel never made an offer of proof about what the victim's statements would have been, and the district court excluded the statements as inadmissible hearsay.

The jury found Prince guilty of two separate crimes—domestic assault by strangulation and domestic assault with intent to cause fear. The district court entered convictions for both offenses and sentenced Prince to prison for one year and one day on the strangulation charge.

Prince appeals.

DECISION

I. Prince did not preserve the excluded-testimony issue for appeal.

Prince argues that the district court abused its discretion when it sustained the prosecutor's hearsay objections to his counsel's questions to him about statements that he alleged the victim made to him. Appellate courts generally defer to a district court's evidentiary rulings and will not reverse unless the district court clearly abused its discretion. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). When a district court's evidentiary ruling results in the erroneous exclusion of defense evidence in violation of the

defendant's constitutional right to present a complete defense, the verdict must be reversed if "there is a reasonable possibility that the verdict might have been different if the evidence had been admitted." *State v. Graham*, 764 N.W.2d 340, 351 (Minn. 2009) (quotation omitted). "In other words, the reviewing court must be satisfied beyond a reasonable doubt that if the evidence had been admitted and the damaging potential of the evidence fully realized, an average jury (i.e., a reasonable jury) would have reached the same verdict." *State v. Post*, 512 N.W.2d 99, 102 (Minn. 1994) (footnote omitted).

Hearsay is a statement, other than one made by the declarant while testifying at trial, that is offered into evidence to prove the truth of the matter asserted. Minn. R. Evid. 801(c). Hearsay is generally inadmissible. Minn. R. Evid. 802. But a witness's prior statement is not hearsay if "[t]he declarant testifies at the trial . . . and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility as a witness." Minn. R. Evid. 801(d)(1)(B). When a witness's prior statement "contains assertions about events that have not been described by the witness in trial testimony, those assertions are not helpful in supporting the credibility of the witness and are not admissible." *State v. Farrah*, 735 N.W.2d 336, 344 (Minn. 2007).

Prince contends that the victim's statements were not hearsay because they either were not offered for the truth of the matter asserted or were prior consistent statements. The state, citing to *State v. Wolf*, 605 N.W.2d 381, 385 (Minn. 2000), contends that because Prince did not make an offer of proof, this court cannot review the district court's decision. We agree with the state.

In order to preserve for appellate review an objection to the district court's decision to exclude evidence, the party offering the evidence must ensure that "the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked." Minn. R. Evid. 103(a)(2). Unless the substance of the evidence is apparent from the context, or there is an offer of proof, "an appellate court cannot assess the significance of the excluded testimony." *State v. Harris*, 713 N.W.2d 844, 848-49 (Minn. 2006).

In this case, Prince did not make an offer of proof on any of the four occasions that the state objected to hearsay. And we cannot speculate about what the record might have shown if he had made the offer of proof because the substance of the excluded testimony is not apparent from context. *See State v. Lee*, 494 N.W.2d 475, 479 (Minn. 1992) (determining that a defendant did not preserve the claimed errors for review when he failed to make an offer of proof showing the nature of the evidence excluded). Prince's failure to make an offer of proof prevents us from assessing the substance or significance of the excluded testimony. Because Prince did not preserve this issue by making an offer of proof, we decline to review it on appeal.

II. The district court erred when it convicted Prince of both offenses because domestic assault is necessarily proved when domestic assault by strangulation is proved.

Prince argues next that his conviction for misdemeanor domestic assault must be vacated because it is an included offense of his conviction for felony domestic assault by strangulation, and thus is prohibited by Minn. Stat. § 609.04, subd. 1 (2020). We agree.

“Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both.” *Id.* Whether a conviction violates section 609.04 is a legal question that we review de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012). Relevant to the analysis here, the term “included offense” includes “a crime necessarily proved if the crime charged were proved.” Minn. Stat. § 609.04, subd. 1(4). “In analyzing whether an offense is a lesser included offense, the court must look at the statutory elements of the relevant offenses rather than at the facts of a particular case.” *State v. Coleman*, 373 N.W.2d 777, 780-81 (Minn. 1985); *see also State v. Degroot*, 946 N.W.2d 354, 364 (Minn. 2020) (citing *Coleman* for this premise). If a person is unable to commit the greater offense without necessarily committing the lesser offense, then the lesser offense is an included offense of the greater offense. *Coleman*, 373 N.W.2d at 781.

A person commits felony domestic assault by strangulation if he “assaults a family or household member by strangulation.” Minn. Stat. § 609.2247, subd. 2. The term “assault,” moreover, has a specific definition in chapter 609: “(1) an act done with intent to cause fear in another of immediate bodily harm or death; or (2) the intentional infliction of or attempt to inflict bodily harm upon another.” Minn. Stat. § 609.02, subd. 10 (2020). And a person commits misdemeanor domestic assault if he commits an assault against a family or household member by either (1) committing an act with the intent to cause fear of immediate bodily harm or death, or (2) intentionally inflicting or attempting to inflict bodily harm. Minn. Stat. § 609.2242, subd. 1(1), (2).

Based upon these statutory definitions, misdemeanor domestic assault is an included offense of felony domestic assault by strangulation because it is impossible to commit the

latter without also having committed the former. If a person is convicted of domestic assault by strangulation, the state has proved beyond a reasonable doubt that the person assaulted a family or household member, either by intending to cause fear of immediate harm or death or by intending or attempting to cause bodily harm. Having proved this, the state will necessarily have proved a misdemeanor domestic assault, making it an included offense of domestic assault by strangulation. Accordingly, section 609.04, subdivision 1, precludes a conviction for both offenses.

The state argues, however, that two convictions are permissible because the domestic-assault offense of which Prince was convicted was based on causing fear and not the intentional infliction of harm. It asserts that because it is possible to commit a domestic assault by strangulation without also intending to cause the victim to fear harm or death, a domestic assault based on fear is not a crime necessarily proved when domestic assault by strangulation is proved, and therefore entering convictions for both offenses does not violate section 609.04. The state's argument fails, however, because it erroneously presumes that a domestic assault based on intending to cause fear of harm is a distinct offense from a domestic assault based on the intentional attempt to inflict or infliction of harm. It is not.

In *State v. Dalbec*, 789 N.W.2d 508, 510 (Minn. App. 2010), *rev. denied* (Minn. Dec. 22, 2010), the defendant was charged with one count of gross-misdemeanor domestic assault. When instructing the jury on the charge, the district court said that the state had to prove either that the defendant intended to cause fear of immediate bodily harm or death or that the defendant intended to inflict or attempted to inflict bodily harm on the victim.

Id. On appeal, Dalbec argued that this instruction was in error because he was entitled to have the jury decide unanimously which of his alleged acts constituted the offense. *Id.* at 511. In resolving this question, this court stated the following:

[T]he act of assault is the element of the crime of domestic assault, and an assault can be committed in any of three ways. In theory, each of appellant's acts over the course of [the offense date] could be one of these disparate means of accomplishing this element. The jury could agree, therefore, that appellant intended to assault [the victim], but need not agree on whether the assault was accomplished by causing fear or inflicting or attempting to inflict bodily harm.

Id. at 513. Accordingly, “fear” and “harm” do not delineate separate domestic-assault offenses but are merely alternative means of satisfying the “assault” element of a single offense—domestic assault. And because a jury need not unanimously decide whether a domestic assault was accomplished by fear or by harm, a determination of the specific *means* by which the crime was committed is not a determination of whether the state has proved a separate offense. *See State v. Stempf*, 627 N.W.2d 352, 355 (Minn. 2001) (noting that “certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime” (quotation omitted)).

As noted, the determination of whether one crime is an included offense of another is restricted to an evaluation of the respective elements of the offenses. *Coleman*, 373 N.W.2d at 780-81. As this court noted in *Dalbec*, the actual *element* of domestic assault that the jury must unanimously find beyond a reasonable doubt is an assault against a family or household member. 789 N.W.2d at 513. It is therefore irrelevant that the state chose to charge the offense by specifying that the assault was predicated on causing fear,

that the district court chose to instruct the jury in this manner, or that the jury expressly found Prince guilty on this theory. That the jury found that Prince accomplished misdemeanor domestic assault by means of causing fear is merely a factual particularity of his case; it does not affect the elements-based application of section 609.04.

We therefore conclude that misdemeanor domestic assault is an included offense of felony domestic assault by strangulation. Because the district court's warrant of commitment indicates convictions for both offenses, we reverse Prince's conviction for misdemeanor domestic assault but leave the jury's guilty verdict intact. *See Loving v. State*, 891 N.W.2d 638, 649-50 (Minn. 2017) (describing the procedure for reversing convictions pursuant to section 609.04). We also remand to the district court to issue an amended warrant of commitment indicating that Prince is convicted only of felony domestic assault by strangulation.

Affirmed in part, reversed in part, and remanded.