ASSAULT-HARM AFTER STATE V. DORN

13TH ANNUAL SUBURBAN HENNEPIN COUNTY PROSECUTORS ASSOCIATION CLE

ASSAULT-FEAR AND ASSAULT-HARM: THE STATUTE

"Assault" is:

(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

"WITH INTENT" V. "INTENTIONAL" (THERE IS BIG A DIFFERENCE)

- **"With intent to"** or **"with intent that"** means that the actor either has a purpose to do the thing or cause the result specified or believes that the act, if successful, will cause that result. **Minn. Stat. § 609.02, subd. 9(4); CRIMJIG 13.01 (Assault-Fear)**

- **"Intentionally"** means that the actor either has a purpose to do the thing or cause the result specified or believes that the act performed by the actor, if successful, will cause that result. In addition… the actor must have knowledge of those facts which are necessary to make the actor's conduct criminal and which are set forth after the word "intentionally." **Minn. Stat. § 609.02, subd. 9(3); CRIMJIG 13.02 (Assault-Harm)**

STATE V. FLECK, 810 N.W.2D 303 (MINN.2012)

K.W. returned to her home in Alexandria to find Fleck deep in liquor (according to K.W., Fleck had been drinking for "seven days straight".). Fleck called K.W.'s name. K.W. turned around and saw Fleck holding a large butcher knife. Fleck then stabbed K.W. near her shoulder via an overhand motion. K.W. locked herself in the bathroom and called 911. For his part, Fleck called his brother and sister-in-law, confessed to the stabbing, and conveyed designs on his life.

Fleck was later charged with second-degree assault with a dangerous weapon, which incorporates the definitions of assault-fear and assault-harm (Minn. Stat. § 609.02, subd. 10)

FLECK CONTINUED

At trial, Fleck raised voluntary intoxication as a defense. Because voluntary intoxication is appropriate only for specific-intent crimes, the trial court submitted a voluntary intoxication instruction for the charge of assault-fear but not for the charge of assault-harm. The jury found Fleck not guilty of assault-fear and guilty of assault-harm.

On direct review, the court of appeals reversed Fleck's conviction, finding that assault-harm is a specific-intent crime, and that denying Fleck a voluntary intoxication instruction as to that offense constituted reversible error.

The State petitioned for, and was granted, review by the Minnesota Supreme Court.

FLECK AT THE MINNESOTA SUPREME COURT

- Attempts to harmonize the cases discussing specific intent in the context of assault-harm.
- "Expressly reject[s] erroneous discussion of specific-intent and general-intent crimes" in State v. Vance, 734 N.W.2d 650 (Minn.2007) (note: not an old case)
- Expressly holds that assault-fear is a specific-intent crime and that assault-harm is a general intent crime.
- Reverses court of appeals and reinstates Fleck's conviction.

WHY FLECK MATTERS

The Nugget:

"The forbidden conduct is a physical act, which results in bodily harm upon another. Although the definition of assault-harm requires the State to prove that the defendant intended to do the physical act, nothing in the definition requires proof that the defendant meant to violate the law or cause a particular result."

Fleck, 810 N.W.2d at 309.

LANGUAGE AT ODDS

- "Intentionally" means that the actor either has a purpose to do the thing or **cause the result specified** or believes that the act performed by the actor, **if successful, will cause that result**. In addition… the actor **must have knowledge of those facts which are necessary to make the actor's conduct criminal** and which are set forth after the word "intentionally." **Minn. Stat. § 609.02, subd. 9(3); CRIMJIG 13.02 (Assault-Harm)**

- Although the definition of assault-harm requires the State to prove that the defendant intended to do the physical act, **nothing in the definition requires proof that the defendant meant to violate the law or cause a particular result**." **Fleck**

STRICT LIABILITY?

Assault-harm elements following Fleck:

- Intentional Physical Act (or Volitional Act)
- Resulting in Harm to Another
- Do Not Need Proof that Defendant Meant to Violate Law
- Do Not Need Proof that Defendant Meant to Cause Particular Result

AN ILLUSTRATION OF THE PROBLEM ARISING FROM STATE V. FLECK

"Assume a defendant is walking through a crowded shopping mall and trying to pass a slower customer. The defendant pushes past the slower customer, who is caught off-balance and falls, breaking his or her leg. Had the customer not fallen, the defendant's conduct would have been lawful. But pursuant to Fleck, the defendant committed assault-harm; depending on the amount of harm the customer suffered, the defendant could be charged with first-, third-, or fifth-degree assault. It is irrelevant whether the defendant intended to cause injury to the other customer; it may even be irrelevant whether the defendant intended to push the other customer, so long as the defendant was walking past the customer of his or her own volition."

Theodora Gaïtas and Emily Polachek, *State v. Fleck: The Intentional Infliction of General Intent upon Minnesota's Assault Statutes*, 39 Wm. Mitchell Law Rev. 1480, 1496 (2013).

STATE V. DORN

Allie Dorn and others were at a large outdoor drinking party in Thief River Falls. Dorn was near a bonfire, as were two other men, one of whom had his back to the fire. The man joked about Dorn looking like a drug dealer. Dorn overheard him, said "What?", and then pushed the man with two hands. The man lost his balance, and Dorn pushed him again, causing him to land on the embers of the fire. He sustained third-degree burns requiring skin-grafting surgery.

Dorn gave a statement in which she told police that after she pushed the man, he came at her, so she pushed him again. Dorn stated that the man "tripped" and that she "did not intentionally push him in the fire."

Following a bench trial, the trial court convicted Dorn of first-degree assault. The court found that while Dorn did not intentionally push the victim into the fire, she did push him, which was sufficient to satisfy the intent requirement for assault-harm under Fleck.

DORN AT THE COURT OF APPEALS 875 N.W.2D 357 (MINN.APP.2016)

At the court of appeals, Dorn argued that if all that is required is a physical act, assault-harm is a strict liability crime.

The court of appeals disagreed, citing to language from a 1981 decision in State v. Lindahl, 309 N.W.2d 763 (Minn.1981):

"[A]n assault involving infliction of injury of some sort requires no abstract intent to do something further, only an intent to do the prohibited physical act of committing a battery."

DORN CONTINUED

Of note, the court of appeals went so far as to incorporate the Black's Law Dictionary definition of "battery" into the decision:

"Of noteworthy significance to the facts and arguments in this appeal, a battery is defined as

'[T]he actual application of force to the body of the prosecutor…. [T]he slightest degree of force is sufficient, provided that it be applied in a hostile manner; as by pushing a man or spitting his face. Touching a man to attract his attention to some particular matter, or a friendly slap on the back is not a battery, owing to the lack of hostile intention."

Dorn, 875 N.W.2d 357, 361-62 (Minn.App.2016)

POST-DORN (COURT OF APPEALS)

- Before Dorn:
    1. Intentional physical act
    2. Resulting in harm to another
- After Dorn:
    1. Intentional physical act
    2. Hostile intent
    3. Resulting in harm to another

So even though the Supreme Court just clarified in Fleck what the definition of assault-harm is, we might have to go back for more.

DORN AT THE MINNESOTA SUPREME COURT 887 N.W.2D 826 (MINN.2016)

"In characterizing the mens rea requirement as the 'intent to commit a battery,'… the court of appeals conflated the mens rea and actus reus elements of assault-harm."

"We affirm out statement in Fleck that the mens rea element of assault-harm, 'intentional,' requires only the general intent to do the act that results in bodily harm."

- Before Dorn:
  1. Physical act
  2. Resulting in harm to another
- After Dorn:
  1. Physical act
  2. Hostile intent
  3. Resulting in harm to another

Dorn at the Minnesota Supreme Court (continued)

The Nugget (kind of):

"… a defendant need only intend 'to do the prohibited physical *act* of committing a battery.' Nothing in *Lindahl* suggests that the defendant must intend *to commit* a battery; rather, the defendant need only intend to commit an act that *constitutes* a battery…. Specifically… a defendant must intend the act that makes her conduct a battery; in other words, she must intentionally apply force to another person without his consent."

Dorn, 887 N.W.2d at 831 (emphases in original).

DORN'S HOLDING

"Specifically, the definition of assault-harm under Minn. Stat. § 609.02, subd. 10(2) is satisfied because (1) Dorn's application of force to D.E. was 'intentional,' (2) her conduct constituted a battery and was therefore an 'infliction' of harm, and (3) her conduct was the direct cause of D.E.'s injuries."

DORN'S THORNS

If "a defendant must [only] intend the act that makes her conduct a battery," then it follows that her conduct must in fact be *a battery*. If the prohibited conduct is a battery, then one cannot escape the intent element imposed by the definition of a battery:

> "A battery occurred if it is proved that *(defendant)* intentionally caused harmful or offensive contact with *(plaintiff)(or anything worn or held by or closely connected to (plaintiff))*." **CIVJIG 60.25**

DORN'S THORNS

Because Dorn incorporates the civil tort of a battery into the assault-harm offense, courts now must determine what a battery is in the context of assault-harm.

- CIVJIGs?
- *Black's Law Dictionary*?
- Dorn itself?

CIVJIGS

"A battery occurred if it is proved that *(defendant)* intentionally caused harmful or offensive contact with *(plaintiff)(or anything worn or held by or closely connected to (plaintiff))*." **CIVJIG 60.25**

Problems:

- Merely restates the general-intent element of assault-harm
- Repetitious
- Replaces "bodily harm" with "harmful or offensive contact"

BLACK'S LAW DICTIONARY
(RELIED ON BY COURT OF APPEALS IN DORN)

'[T]he actual application of force to the body of the prosecutor…. [T]he slightest degree of force is sufficient, provided that it be applied in a hostile manner; as by pushing a man or spitting his face. Touching a man to attract his attention to some particular matter, or a friendly slap on the back is not a battery, owing to the lack of hostile intention."

Problems:

- References the body of the prosecutor
- Imposes a "hostile intention" element that would compete with the general-intent element
- Would confuse jurors

DORN'S DEFINITION OF "BATTERY"

"Specifically… a defendant must intend the act that makes her conduct a battery; in other words, she must intentionally apply force to another person without his consent."

Problems:

- Requires only a showing of non-consensual force, however slight, to another person
- Would include a friendly slap on the back or a jostle in a crowded area
- Would confuse jurors
- Too much prosecutorial discretion

THE WAY THINGS STAND POST-DORN

Given that the Minnesota Supreme Court excised the "hostile intent" element added to the crime of assault-harm by the court of appeals, it is arguable that we have simply returned to a post-Fleck, pre-Dorn landscape.

On the other hand, there is a case to be made that the assault-harm jury instructions are deficient for their want of a "battery" definition, given the pronouncements made in Dorn.

In a close case (one involving tenuous intent and conduct), it is likely that the issue of intent will again cause a stir.