

IN THE SUPREME COURT OF THE STATE OF NEVADA

GLEEND MARTINEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47293

FILED

JUL 09 2008

TRACIE W. WINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

ORDER GRANTING EN BANC RECONSIDERATION, RECALLING
REMITTITUR, AND REVERSING AND REMANDING

This is a petition for en banc reconsideration of the panel's decision, entered on December 11, 2007, affirming appellant Gleend Martinez's judgment of conviction.¹

Martinez seeks en banc reconsideration of the panel's conclusions that his claims of instructional error had not been preserved for appellate review because defense counsel failed to object or to request special jury instructions and that the district court did not commit plain error when it failed to provide an instruction on the unlawful taking of a vehicle.² It appears that the panel may have overlooked Martinez's request for a special instruction on the unlawful taking of a vehicle.³ In

¹The panel denied Martinez's petition for rehearing on March 3, 2008.

²See Bonacci v. State, 96 Nev. 894, 899, 620 P.2d 1244, 1247 (1980) (citing McCall v. State, 91 Nev. 556, 557, 54 P.2d 95, 95 (1975)).

³While we do not approve of counsel's failure to raise an objection to the jury instructions during trial, reconsideration of this issue is
continued on next page . . .

overlooking this special instruction, the panel's conclusion conflicts with this court's decision in Richmond v. State.⁴ In Richmond, this court concluded that an objection raised in a motion in limine was sufficient to preserve an issue for appeal, despite the defense counsel's failure to renew the objection during trial.⁵ Based on Richmond, Martinez's request for a special instruction on the unlawful taking of a vehicle was sufficient to preserve the issue for appeal. Therefore, having carefully reviewed the petition for en banc reconsideration, the answer to the petition, and the panel's decision, we conclude that en banc reconsideration is warranted.⁶ Accordingly, we grant Martinez's petition for en banc reconsideration. We therefore recall the remittitur previously issued on March 28, 2008.

On reconsideration, we conclude that the district court erred in rejecting Martinez's proposed jury instruction on the unlawful taking of a vehicle.

"A criminal defendant is entitled to jury instructions on the theory of his case. If the defense theory is supported by at least some evidence which, if reasonably believed, would support an alternate jury

... continued

warranted because the panel overlooked Martinez's request for a special instruction.

⁴118 Nev. 924, 59 P.3d 1249 (2002).

⁵Id. at 932, 59 P.3d at 1254.

⁶See NRAP 40A(a).

verdict, the failure to instruct on that theory constitutes reversible error.”⁷ Here, the defense theory was that Courtesy Mitsubishi had consented to Martinez’s use of the vehicle but that Martinez’s taking of the vehicle exceeded the scope of that consent. Under this theory, the jury could find him guilty of unlawful taking of a motor vehicle rather than attempted grand larceny.⁸ We conclude that this defense theory was supported by at least some evidence. Accordingly, Martinez was entitled to an instruction on the unlawful taking of a vehicle. The failure to give the instruction in this case was not harmless.

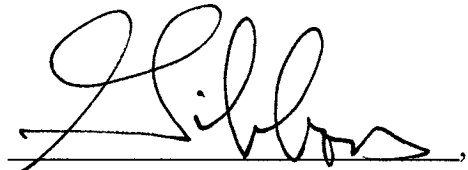
Having reconsidered the panel’s decision with respect to the district court’s failure to give an instruction on the unlawful taking of a vehicle and concluded that Martinez’s claim has merit, we reverse the

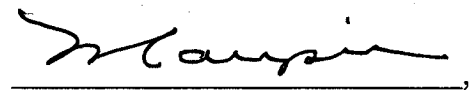
⁷Honeycutt v. State, 118 Nev. 660, 669, 56 P.3d 362, 368 (2002).

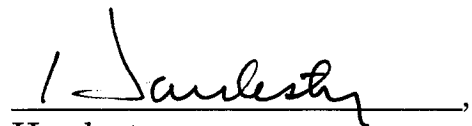
⁸See NRS 205.2715(1) (“Every person who takes and carries away or drives away the vehicle of another without the intent to permanently deprive the owner thereof but without the consent of the owner of such vehicle is guilty of a gross misdemeanor.”).

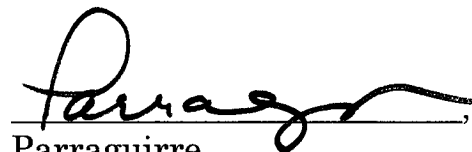
judgment of conviction and remand for further proceedings consistent with this order.

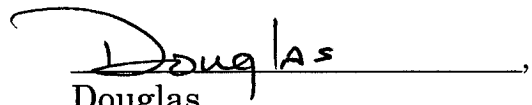
It is so ORDERED.⁹

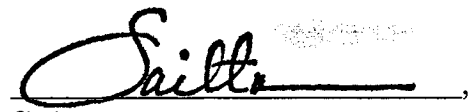

_____, C.J.
Gibbons


_____, J.
Maupin


_____, J.
Hardesty


_____, J.
Parraguirre


_____, J.
Douglas


_____, J.
Saitta

cc: Hon. Michael Villani, District Judge
Clark County Public Defender Philip J. Kohn
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk

⁹The Honorable Michael A. Cherry, Justice, voluntarily recused himself from participation in the decision of this matter.