IN THE SUPREME COURT OF THE STATE OF NEVADA

RONALD KWAME GAINES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 47547

FILED

MAR 05 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of attempted robbery and adjudication as a habitual criminal. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge.

This appeal stems from a physical altercation involving appellant Ronald Gaines during which Gaines allegedly reached for his victim's wallet. Gaines was tried and convicted of attempted robbery. At trial, the district court denied Gaines's request for an instruction on battery as a lesser included offense of attempted robbery. On appeal, Gaines argues that the district court improperly refused to give this instruction for two reasons. First, Gaines argues that battery is a lesser included offense of attempted robbery. Second, he asserts that battery was his theory of the case. Separately, Gaines contends that the district court denied him due process by adjudicating him a habitual criminal based exclusively on the number of his past convictions. The parties are familiar with the facts and we do not recount them except as necessary to our disposition.

Lesser included offense instruction

In this appeal, we directed full briefing on two issues.[1] First, we directed the parties to brief whether battery is a lesser included offense of robbery under the elements test of Blockburger v. United States.[2] Second, we requested full briefing on whether this court correctly applied the elements test of Blockburger in Zgombic v. State.[3] While Gaines concedes that battery is not a lesser included offense of attempted robbery under the elements test of Blockburger, and that Zgombic represents a correct application of that test, he argues that the elements test is not the correct test for settling lesser included offense jury instructions.

Instead, Gaines urges this court to adopt an accusatory pleading test, under which battery would be a lesser included offense of attempted robbery as the State originally charged that crime in the information. In doing so, however, Gaines overlooks our decision in Barton v. State, in which we rejected a similar version of his proposed test, and adopted the elements test as the exclusive test for settling lesser included offense jury instructions.[4]

Under NRS 175.501, a "defendant may be found guilty . . . of an offense necessarily included in the offense charged." Applying the

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[1]Gaines v. State, Docket No. 47547 (Order Directing Full Briefing, February 15, 2007).

[2]284 U.S. 299 (1932).

[3]106 Nev. 571, 798 P.2d 548 (1990).

[4]117 Nev. 686, 694-95, 30 P.3d 1103, 1108-09 (2001) (overruling Owens v. State, 100 Nev. 286, 288, 680 P.2d 593, 594-95 (1984)).

elements test of Blockburger to NRS 175.501, we clarified in Barton that a lesser offense is necessarily included under that statute "when all of the elements of the lesser offense are included in the elements of the greater offense."[5]

Applying Barton to this case, we conclude that battery is not a lesser included offense of attempted robbery. Under NRS 200.481, "'[b]attery' means any willful and unlawful use of force or violence upon the person of another." Under NRS 200.380, "[r]obbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property." Because "battery requires actual physical contact" while "robbery requires only fear of injury, with or without contact," the elements of battery are not an entirely included subset of the elements of robbery.[6] As such, a robbery may be committed without also committing a battery; thus, battery is not "necessarily included" in the offense of robbery.[7] Accordingly, the district court had no obligation to instruct the jury on battery as a lesser included offense of attempted robbery in this case.

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[5]Id. at 690, 30 P.3d at 1106.

[6]Zgombic, 106 Nev. at 578, 798 P.2d at 552; see also Owens, 100 Nev. at 288, 680 P.2d at 594-95, overruled on other grounds by Barton, 117 Nev. at 694-95, 30 P.3d at 1108-09.

[7]This analysis does not change if the greater offense is attempted robbery because attempted robbery, like robbery, may still be committed in more than one way: i.e., by the attempted use of force or coercion.

Theory of the case

Before we directed full briefing in this appeal, Gaines contended that the district court improperly refused to instruct the jury on battery because his defense theory at trial was tailored to obtaining a conviction on that lesser offense. According to Gaines, the State stipulated to include battery as an option on the verdict form, but later reneged and opposed a battery instruction at trial because battery was not a lesser included offense of attempted robbery.

In this case, the record reflects that Gaines requested the district court to instruct the jury on battery as a lesser included offense of attempted robbery. Notably, Gaines did not request the battery instruction on grounds that battery was his theory of the case. Thus, we review this issue for plain error.[8]

Under NRS 175.161(3), a party seeking an instruction must proffer the instruction and request that it be submitted to the jury. Thus, while a criminal defendant is entitled "to a jury instruction on his or her theory of the case, so long as there is some evidence, no matter how weak or incredible, to support it," a district court has no duty to give such an instruction unless the defendant requests it.[9] Moreover, absent a request, the district court was not required to infer Gaines's theory of the case nor

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[8]See Baltazar-Monterrosa v. State, 122 Nev. 606, ___, 137 P.3d 1137, 1142 (2006). Gaines argues that the State's alleged stipulation to place battery on the verdict form preserved this issue for appeal. Stipulations made during pretrial negotiations, however, are not a proper means of preservation unless accompanied by a specific objection at trial. See NRS 47.040(1)(a).

[9]Boykins v. State, 116 Nev. 171, 173-74, 995 P.2d 474, 476 (2000).

assume that Gaines was seeking the instruction on a different basis than he articulated at trial. Thus, because Gaines specifically requested an instruction on battery as a lesser included offense, we conclude that the district court did not commit plain error in failing to give the instruction on battery as a theory of the case instruction.

Habitual criminal

Gaines contends that the district court improperly adjudicated him a habitual criminal based exclusively on the number of his prior convictions. Under Nevada's habitual criminal statute, however, a district court may enhance the sentence of a defendant with two prior felony convictions as long as the record indicates that the district court exercised and appreciated its discretion.[10] Here, the district court noted on the record that it understood that its decision to sentence Gaines as a habitual criminal was discretionary despite Gaines' requisite number of prior felony convictions. Thus, we conclude that the district court did not

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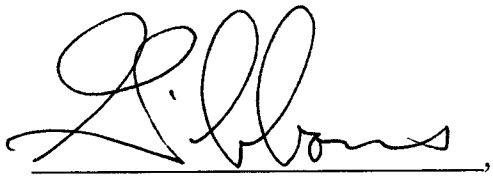
[10]NRS 207.010(1)(a); O'Neill v. State, 123 Nev. ___, ___, 153 P.3d 38, 42-43 (2007) (quoting Hughes v. State, 116 Nev. 327, 332-33, 996 P.2d 890, 893-94 (2000)).

improperly adjudicate Gaines a habitual criminal. Accordingly, we ORDER the judgment of the district court AFFIRMED.



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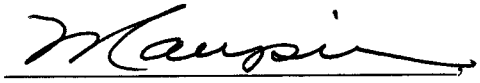
Gibbons



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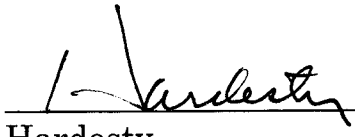

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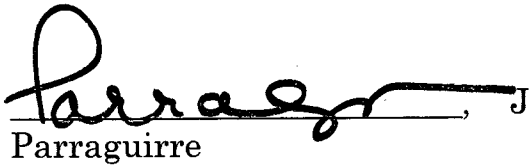

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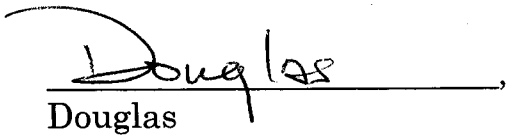

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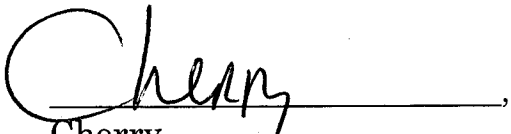

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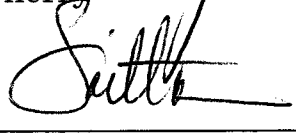
Cherry



_____, J.
Saitta

cc: Eighth Judicial District Court Dept. 6, District Judge
Amesbury & Schutt
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk