IN THE SUPREME COURT OF THE STATE OF NEVADA

CARLOS NOGUERA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 48609

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of sexual assault of a minor under 14 years of age. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

Appellant Carlos Noguera challenges his conviction based on the district court's denial of his proposed jury instruction on the defense of consent and the structure of the verdicts, as well as numerous other grounds. For the following reasons, we conclude that Noguera's various challenges fail and therefore affirm the district court's judgment of conviction. The parties are familiar with the facts and we do no recount them here except as necessary to our disposition.

Consent instruction

Noguera contends that the district court abused its discretion in denying his proposed jury instruction on the defense of reasonable mistaken belief in consent. See Crawford v. State, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (district courts have broad discretion to settle jury instructions). We disagree for two reasons.

First, Noguera sought his instruction under Honeycutt v. State, 118 Nev. 660, 56 P.3d 362 (2002), overruled on other grounds by Carter v. State, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005), a forcible rape case, and proffered a replica of the reasonable-mistaken-belief-in-

consent instruction given there—instruction 10.65 of the California Jury Instructions for Criminal Cases (CALJIC). However, as the district court correctly recognized, and as the comment to CALJIC 10.65 confirms, Noguera's instruction, as proposed, was designed for use against a charge of forcible rape, and only in the limited circumstance when there is substantial conflicting evidence respecting actual consent, i.e., equivocal conduct suggesting consent was manifested. See 1 California Jury Instructions, Criminal 10.65, at 693-94 (7th ed. 2003); see also Honeycutt, 118 Nev. at 671, 56 P.3d at 369 (citing the comment to CALJIC 10.65 and recognizing this instruction's limits). Here, everyone agreed the alleged victim ostensibly consented; indeed, she testified she was in love with Noguera. The issue was whether this eleven year old girl had the capacity to consent, a different issue. Thus, while Noguera's full reproduction of CALJIC 10.65 may have offered an appropriate defense in a forcible rape case, it raised an inapposite defense to a charge of nonforcible sexual assault where capacity to consent, as distinguished from actual consent, formed the contest.[1]

Second, we reject Noguera's contention that, absent his proposed instruction, the jury was prevented from evaluating his defense

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[1]The distinction inheres in Nevada's sexual assault statute, which penalizes both forcible and non-forcible assault, depending on the circumstances, and provides, "A person who subjects another person to sexual penetration . . . against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct, is guilty of sexual assault." (Emphasis added.) The defendant in Honeycutt, was prosecuted under the first clause of this sentence; Noguera, under the second.

that he reasonably believed in the 11-year-old victim's capacity to effectively consent to sexual intercourse because she was unusually mature and understood sex. Here, the jury was not instructed, as the dissent insists, that the victim was too young to consent as a matter of law. On the contrary, the jury was told, as NRS 200.366(1) provides, that it could not find Noguera guilty of sexual assault unless it found, beyond a reasonable doubt, that the sexual penetration occurred "under conditions in which the defendant knew or should have known that the alleged victim was either mentally or physically incapable of resisting or understanding the nature of his conduct, or of knowingly and intelligently consenting or understanding the nature of the act." Amplifying the capacity to consent issue that the jury was tasked to decide, instruction 5 advised:

> Physical force is not necessary in the commission of sexual assault. The crucial question is not whether a person was physically forced to engage in a sexual assault but whether the act was committed without her consent or under conditions in which the defendant knew or should have known, the person was incapable of giving her consent or understanding the nature of the act. To determine whether the acts occurred against the will of the victim or under conditions in which the victim was incapable of giving consent, factors to be considered include the relationship between the perpetrator and the victim, the victim's age and maturity level, and indications of the victim's expression of unwillingness.

Accordingly, despite not receiving his proposed instruction, which failed to properly capture his own theory of defense, the jury was nevertheless allowed an adequate opportunity to consider Noguera's defense under the instructions as submitted. Cf. Rose v. State, 123 Nev. 194, 205, 163 P.3d 408, 415 (2007) ("It is not error for a court to refuse an

instruction when the law in that instruction is adequately covered by another instruction given to the jury." (quotation omitted)).

Structure of verdicts

Noguera challenges jury instruction 14, which he contends improperly directed a verdict for either sexual assault or lewdness, and thereby diverted the jury from possibly rendering a verdict for statutory sexual seduction. As discussed below, we disagree with Noguera's characterization of this instruction.

According to instruction 14, consistent with its view that only two verdicts existed in this case (a verdict for sexual assault or verdict for lewdness), the district court instructed the jury as follows:

> [C]onsent is never a defense to a charge of lewdness with a minor under fourteen (14) years of age. Therefore, if the jury finds beyond a reasonable doubt that the defendant had sexual intercourse with the alleged victim while she was less than fourteen (14) years of age with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of himself or the alleged victim, but finds such did not amount to sexual assault under the law for any reason, then the offense of lewdness with a minor under fourteen (14) years of age has been committed and the jury should so find (whether or not the defendant was found guilty of statutory sexual seduction or not guilty as to each allegation of sexual assault).

Nevertheless, while this instruction assumes that only verdicts for sexual assault or lewdness were possible and, indeed, the district court privately informed counsel that it would dismiss a verdict for statutory sexual seduction, the jury was separately instructed on the elements of statutory sexual seduction, was advised that it could consider a verdict for this lesser offense in case it acquitted Noguera of sexual

assault, and was given the option to convict Noguera of statutory sexual seduction on the verdict form. Thus, contrary to Noguera's characterization of instruction 14, and despite the district court's unrealized threat to dismiss a verdict for statutory sexual seduction, we conclude that the jury was able to meaningfully consider Noguera's possible guilt of this offense.[2]

Based on the above, we reject all of Noguera's challenges to his conviction. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, C.J.
Hardesty

_____, J.
Parraguirre

_____, J.
Douglas

_____, J.
Gibbons

_____, J.
Pickering

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[2]Separately, Noguera also asserts that he was improperly prevented from exploring jurors' beliefs regarding an 11-year-old's ability to consent during voir dire, challenges his conviction based on several instances of alleged prosecutorial misconduct, challenges the decision to admit evidence of the victim's pregnancy and the subsequent birth of her child but to exclude evidence of the child's death, and challenges the sufficiency of the evidence, the proportionality of his sentence, and the denial of a number of jury instructions as well as the submitted instructions' use of the term "victim." After careful review, we conclude that each of Noguera's separate challenges fails.

cc: Eighth Judicial District Court Dept. 7, 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

SAITTA, J., concurring in part and dissenting in part:

I concur with the majority in the result and in its decision that jury instruction 5, regarding the victim's capacity to consent, allowed the jury an opportunity to consider Noguera's defense of reasonable mistaken belief in the victim's capacity to consent. I write separately, however, to emphasize that the district court should have allowed Noguera's more explicit proposed instruction on the defense theory of the case. As noted, Noguera's proposed instruction was a correct statement of the law. The district court rejected Noguera's instruction as to whether he had a reasonable and good faith belief that the victim voluntarily consented because it found that the issue of reasonable belief only applied to situations in which the victim refuted consent. Here, since the victim testified that she consented, the district court reasoned that Noguera's reasonable-mistaken-belief defense was not at issue. I disagree.

This court has long held that in criminal proceedings, a defendant, upon request, is entitled to a jury instruction on his or her theory of the case so long as there is the slightest evidence which supports that theory. Rosas v. State, 122 Nev. 1258, 1262, 147 P.3d 1101, 1104 (2006). We have held that the test for whether the defendant is entitled to have his or her jury instruction presented to the jury is whether there is any foundation in the record for the theory. Id. I believe that the circumstances of this case are squarely within those parameters. The unique circumstances of this case, including the fact that the victim testified that she consented to having sexual relations because she loved Noguera and thought of him as her boyfriend, made it essential for the jury to be carefully instructed on the issue of whether Noguera's belief in the victim's capacity to consent was reasonable. In order to have done so,

the district court should have given the jury clear, unambiguous, and straightforward instructions. As this court observed in Crawford v. State, 121 Nev. 744, 754, 121 P.3d 582, 588 (2005), "[j]urors should neither be expected to be legal experts nor make legal inferences with respect to the meaning of the law; rather, they should be provided with applicable legal principles by accurate, clear, and complete instructions specifically tailored to the facts and circumstances of the case." I believe that instruction 5 was anything but clear and, in fact, may have served to confuse the jury.

Further, I conclude that the district court judge improperly interjected his opinion regarding the eventual outcome of the case in instruction 14. In crafting the jury instruction, the district court judge effectively made lewdness arising from acts of alleged sexual assault a strict liability offense—a resolution our Legislature has not yet seen fit to enact. See NRS 200.366(1). Until the Legislature enacts a law making lewdness with a minor of a certain age a strict liability crime, the reasonable-mistaken-belief defense in cases dealing with the issue of capacity to consent is a significant issue for the fact finder. See, e.g., People v. Young, 235 Cal. Rptr. 361, 366 (Ct. App. 1987) (explaining that whether a child victim below the age of consent for purposes of statutory rape has the capacity to consent to an act of sexual intercourse for purposes of the greater offense of forcible rape is a question of fact).

I also note that the district court judge improperly threatened to dismiss a verdict for statutory sexual seduction should the jury have returned such a verdict. While the threat was unfulfilled, I would stress that such conduct is inappropriate.

Finally, I am not convinced that Honeycutt v. State, 118 Nev. 660, 56 P.3d 362 (2002), overruled on other grounds by Carter v. State, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005), is limited in its application to forcible rape cases. I believe that Honeycutt stands for the proposition that the reasonable-mistaken-belief defense should be allowed in cases in which the evidence, no matter how slight, supports such a theory. While I acknowledge that the facts of Honeycutt were based upon the charge of forcible rape, a careful reading of the opinion suggests that the Honeycutt defense could apply in other circumstances. In that regard, I agree with the dissent.

_____, J.
Saitta

CHERRY, J., dissenting:

I respectfully dissent from my colleagues and would reverse appellant's convictions and order a new trial.

The State charged appellant Carlos Noguera, in the alternative, with two counts of sexual assault with a minor under 14 years of age and two counts of lewdness with a child under the age of 14, for two acts of sexual intercourse with an 11-year-old girl. Since the minor claimed to have willingly engaged in both acts of sexual intercourse, the State prosecuted these sexual assaults under NRS 200.366(1) on the theory that Noguera knew or should have known that the minor was incapable of giving effective consent.

Responding to the State's theory of prosecution at trial, Noguera claimed that he reasonably and in good faith believed that the minor was capable of effective consent and asserted his right to a jury instruction on this defense under Honeycutt v. State, 118 Nev. 660, 56 P.3d 362 (2002), overruled on other grounds by Carter v. State, 121 Nev. 759, 765, 121 P.3d 592, 596 (2005). However, reasoning that Honeycutt did not apply in cases of nonforcible sexual assault, and that an 11-year-old was incapable of consent as a matter of law, the district court denied Noguera's requested instruction on his theory of defense.

First, I would conclude that a minor's capacity to consent for purposes of sexual assault is a question for the trier of fact. Second, assuming that supporting evidence exists, I conclude that Honeycutt entitles a defendant, upon request, to an instruction on the defense of reasonable mistaken belief in consent in cases of nonforcible sexual

assault. Accordingly, because he presented at least some evidence to support its consideration, I conclude that Noguera should have been given the benefit of his proposed instruction on this defense. Finally, I conclude that by depriving Noguera of this instruction, and narrowing the possible verdicts in this case to sexual assault or lewdness, the jury was improperly precluded from considering a verdict for the lesser offense of statutory sexual seduction.

In this appeal, Noguera challenges each of the district court's reasons for denying his proposed instruction on his reasonable-mistaken-belief-in-consent defense. Considering these reasons in turn, I clarify that a minor's capacity to consent under NRS 200.366(1) is a question for the trier of fact, and conclude that a defense of reasonable mistaken belief in consent may be raised under Honeycutt in cases of nonforcible sexual assault. Separately, I address the propriety of the district court's structuring of the possible verdicts in this case.

Capacity to consent is a factual question

Raising separation-of-powers concerns, Noguera challenges the district court's ruling that an 11-year-old is incapable of effective consent for purposes of sexual assault, because such a view infuses NRS 200.366(1) with a presumptive minimum age of consent and converts sexual assault into a strict liability crime. I agree.

As the State concedes, given that S.G. was 11 years old, and thus below the age of consent for purposes of statutory sexual seduction, to which consent is not a defense, it viewed these sexual assaults as "essentially . . . strict liability crime[s]." In harmony with this view, the district court assumed that S.G. was incapable of effective consent as a matter of law and, as a result, considered a consent defense to be foreclosed to Noguera under these facts.

However, contrary to the district court's assumption, the age of consent for statutory sexual seduction does not operate as a global age of consent for sex crimes involving minors. Rather, similar to incapacity for reasons other than age, see generally K. H. Larsen, Annotation, Rape or Similar Offense Based on Intercourse with Woman Who is Allegedly Mentally Deficient, 31 A.L.R.3d 1227, § 2(a) (1970), unless the Legislature prescribes otherwise, I conclude that a minor's capacity to consent for purposes of sexual assault is a question for the trier of fact. See People v. Young, 235 Cal. Rptr. 361, 366 (Ct. App. 1987).

As a factual question, a minor's capacity to consent for purposes of NRS 200.366(1) must be proven beyond a reasonable doubt and cannot be conclusively presumed by mere reference to the age of consent prescribed for the separate offense of statutory rape. See Young, 235 Cal. Rptr. at 366. In this way, statutory sexual seduction remains a viable alternative in cases of noncoercive sexual intercourse with a minor. Cf. People v. Giardino, 98 Cal. Rptr. 2d 315, 324 n.6 (Ct. App. 2000) ("[T]he jury must set aside the statutory presumption that a person under 18 years of age is incapable of giving legal consent and must determine whether the elements of the more serious crime [e.g., sexual assault] are met.").

Honeycutt v. State in cases of nonforcible sexual assault

I next consider whether Honeycutt v. State extends to nonforcible sexual assault prosecutions. For the following reasons, I conclude that, under Honeycutt, a reasonable-mistaken-belief-in-consent defense may be interposed to a charge of nonforcible sexual assault and that a defendant is entitled to a proposed instruction on this defense, upon request, as long as some evidence supports its consideration.

In Honeycutt, as a logical consequence of the elements of sexual assault, a majority of this court recognized a reasonable mistaken belief in consent to be a generic defense to sexual assault and, in the following terms, clarified the circumstances under which an accused would be entitled to an instruction on that defense: "because a perpetrator's knowledge of lack of consent is an element of sexual assault, . . . a proposed instruction on reasonable mistaken belief of consent must be given when requested as long as some evidence supports its consideration." Honeycutt, 118 Nev. at 670, 56 P.3d at 369. Three years later, in Carter v. State, a unanimous court reaffirmed Honeycutt in this respect, and reiterated that "a reasonable mistaken belief as to consent is a defense to a sexual assault charge." 121 Nev. 759, 766, 121 P.3d 592, 596 (2005).

Notably, in Honeycutt and Carter this court addressed the availability of this consent defense only generically, and then only as it related to a charge of forcible rape. Accordingly, I acknowledge that neither decision definitively addresses whether the defense extends to prosecutions for nonforcible sexual assault involving an accused's knowledge of a victim's incapacity to consent for reasons of age, mental disability, intoxication, or helplessness. See generally Larsen, 31 A.L.R.3d 1227, at § 2(a).

Nevertheless, despite this court's past pronouncements about the general availability of this defense to a charge of sexual assault, the district court interpreted Honeycutt and Carter as extending the defense only in the context of forcible rape, and denied Noguera's proposed instruction on his theory of the case on grounds that a reasonable mistaken belief in consent defense could not be interposed in a prosecution

for nonforcible sexual assault. I disagree with such a narrow interpretation of the defense.

In contrast to a charge of forcible rape, which requires proof of the absence of actual consent, see McNair v. State, 108 Nev. 53, 57, 825 P.2d 571, 574 (1992), in a prosecution for nonforcible sexual assault, actual consent is irrelevant to determining whether the accused acted with the requisite criminal intent. See Giardino, 98 Cal. Rptr. 2d at 320; State v. Collins, 583 N.W.2d 341, 348 (Neb. Ct. App. 1998). Rather, based on the wording of NRS 200.366(1), a person acts with the wrongful intent necessary to commit this species of sexual assault if he or she had actual or constructive knowledge that the victim was incapable of effectively consenting to sexual intercourse. See NRS 193.190 (every crime requires a unity of act and intent); Larsen, 31 A.L.R.3d 1227, at § 6(a).

In my view, since both theories of sexual assault under NRS 200.366(1) require proof of intent, no principled reason exists for permitting a defendant to raise the defense of reasonable mistaken belief in consent to a charge of forcible rape, while precluding defendants from raising the same defense in prosecutions for nonforcible sexual assault. In either case, the defense of reasonable mistaken belief in consent defeats the element of intent, cf. People v. Williams, 841 P.2d 961, 968-69 (Cal. 1992) (Mosk, J., concurring), and should be available as a logical correlate of the State's burden under NRS 200.366(1) to prove that element beyond a reasonable doubt. See Paul H. Robinson, Criminal Law Defenses § 22, at 72, § 66(h), at 318-19 (1984); see also Batin v. State, 118 Nev. 61, 64, 38 P.3d 880, 883 (2002).

For these reasons, I would clarify that Honeycutt entitles a defendant, upon request, to a proposed instruction on the defense of

reasonable mistaken belief in consent in a prosecution for nonforcible sexual assault as long as some evidence supports its consideration.[1] Because standard instructions in criminal cases generally articulate the State's theory of the case, extending the defense of reasonable mistaken belief in consent in this way levels the playing field in nonforcible sexual assault cases by offering the accused a realistic means of showing a reasonable doubt about his or her criminal intent. Cf. Carter, 121 Nev. at 767 n.21, 121 P.3d at 597 n.21.

Noguera was entitled to his proposed instruction

Having clarified the scope of this defense in cases of nonforcible sexual assault, I next consider whether Noguera was entitled to his proposed instruction. According to Noguera, his proposed instruction was legally correct and supported by sufficient evidence to justify submitting it to the jury. I agree. As a consequence, notwithstanding the challenge that his theory of defense presents in terms of social mores in these circumstances, I conclude that, under Honeycutt, Noguera was entitled to his proposed instruction.

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[1]Although Honeycutt may technically require an instruction in most cases, obvious cases exist in which a defendant would not be able to satisfy the evidentiary predicate for an instruction on this defense, in particular, when a child victim is of such a young age that the defendant's conduct is an unmistakable departure from societal norms. See 2 Wayne R. LaFave, Substantive Criminal Law § 17.4(c), at 651 (2d ed. 2003). In such a case, the defendant would be unable to muster the evidence needed to demonstrate the necessary maturity of the victim to support the reasonableness of his or her point of view. See id.

Anticipating that the State would pursue a theory of nonforcible sexual assault, before trial commenced, Noguera proposed the following instruction:

> In the crime of sexual assault, criminal intent must exist at the time of the commission of the crime charged.
>
> There is no criminal intent if the defendant had a reasonable and good faith belief that the other person voluntarily consented to engage in sexual intercourse. Therefore, a reasonable and good faith belief that there was voluntary consent is a defense to such a charge, unless the defendant thereafter became aware or reasonably should have been aware that the other person no longer consented to the sexual activity.
>
> However, a belief that is based upon ambiguous conduct by an alleged victim that is the product of conduct by the defendant that amounts to force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person of the alleged victim or another is not a reasonable good faith belief.
>
> If after consideration of all the evidence you have a reasonable doubt that the defendant had criminal intent at the time of the accused sexual activity, you must find him not guilty of the crime.

Notably, this instruction was not only a correct statement of the defense of reasonable mistaken belief in consent—it was charitable to the State. Regarding its form, the instruction was modeled after instruction 10.65 of the California Jury Instructions for Criminal Cases, which has been endorsed as a blueprint for this defense. See Honeycutt, 118 Nev. at 671, 56 P.3d at 369; Carter, 121 Nev. at 764 n.10, 121 P.3d at 596 n.10. Moreover, although no obligation existed to include the proviso, the instruction cautioned the jury that the defense would fail if it found

that Noguera's belief in S.G.'s apparent capacity to consent was based upon conduct produced by violence or fear. See Carter, 121 Nev. at 764-65, 121 P.3d at 595-96.

Consistent with his defense theory, Noguera actively tried the issue of S.G.'s apparent capacity to consent to the jury, as well as the reasonableness of his belief that her consent was effective. To this end, Noguera developed evidence at trial to suggest that S.G.'s level of maturity exceeded her chronological age and that he genuinely believed that S.G. voluntarily consented to both acts of sexual intercourse.

According to S.G.'s trial testimony, she was often responsible for caring for her two younger brothers, had discussed sex education with her mother, knew that pregnancy was a consequence of sex, and knew that adults engage in sex "[b]ecause they're attracted to each other" and "[b]ecause they love [one another]." At a minimum, this evidence supported Noguera's assertion that S.G. was unusually mature and had more than a rudimentary understanding of sex.

Moreover, S.G. echoed her own understanding of adult motivations for sex when she explained the incidents themselves. According to S.G., she had sex with Noguera the first time "[b]ecause [she] liked him" and wanted to have sex on the second occasion "[b]ecause she felt something for him," or as she more directly stated later, "[b]ecause [she] loved him, and still d[id]."

Presumably because of these sentiments, S.G. claimed to have voluntarily agreed to both acts of sexual intercourse. Indeed, although she understood that she could have refused to have sexual intercourse with Noguera, and believed that he would have complied had she told him to stop, S.G. never discouraged him. Rather, at least on the first occasion,

S.G. undressed on her own, unprompted by Noguera. From that point forward on this occasion, S.G. stated that she understood "what was going to happen" because "it happened to [her] before."

For his part, the evidence suggests that Noguera attempted to pursue something of a relationship with S.G., asking her first to be his girlfriend, then later telling S.G. that he loved her and confessing the same to police before offering to marry her. Despite the State's cynical view of Noguera's defense, this evidence suggests, at a minimum, that Noguera may have genuinely and in good faith believed in S.G.'s capacity to consent to a sexual relationship.

Given the above, Noguera proffered a technically correct instruction on the defense of reasonable mistaken belief in consent and developed sufficient evidence at trial to support its consideration. Accordingly, regardless of the controversial nature of Noguera's defense theory, that theory is a matter for the jury to weigh in reaching an ultimate determination of guilt, and I conclude that the district court improperly denied Noguera's proposed defense instruction.[2]

Structure of verdicts

Finally, I consider the propriety of the district court's view that only two possible verdicts existed in this case—a verdict for sexual assault or a verdict for lewdness.

Although a jury instruction on the lesser offense of statutory sexual seduction was given, and that offense was included on the verdict

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[2]I further conclude that the district court's failure in this regard is not harmless, and therefore, reversible error. See Carter, 121 Nev. at 767 n.23, 121 P.3d at 598 n.23; Honeycutt, 118 Nev. at 669, 56 P.3d at 368.

form, the district court directed the jury to a lewdness verdict in the event that it acquitted of sexual assault. As the district court provided in the relevant jury instruction:

> if the jury finds . . . that the defendant had sexual intercourse with the alleged victim . . . with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of himself or the alleged victim, but finds such did not amount to sexual assault under the law for any reason, then the offense of lewdness with a minor under fourteen (14) years of age has been committed and the jury should so find (whether or not the defendant was found guilty of statutory sexual seduction or not guilty as to each allegation of sexual assault).

Here, sexual assault and lewdness were predicated on the same two instances of sexual penetration. Thus, because lewdness may occur despite a victim's consent, see NRS 201.230(1), and sexual assault occurs when consent is proven to be absent, the district court assumed that Noguera was necessarily guilty of either sexual assault or lewdness since, under the circumstances, "[Noguera] can never be not guilty of both." Because statutory sexual seduction was still a meaningful option under these facts, I disagree.

Notably, the district court's reasoning rests on the flawed assumption that because lewdness precludes a consent defense, it is a strict liability crime. On the contrary, NRS 201.230(1) contains an express intent element. Id. (requiring proof that a person acted "with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child" (emphasis added)). Thus, even though proving mens rea under the lewdness statute may entail a particularly easy showing, since a mens rea is nonetheless specified, lewdness is not

technically a strict liability crime. See 21 Am. Jur. 2d Criminal Law §§ 132, 135 (2008) (strict liability offenses require no mental element, typically involve light penalties, and are generally not implied absent clear legislative intent).

Accordingly, since lewdness requires proof of lewd intent, Noguera could have technically been acquitted of lewdness if for some reason the State failed to carry its burden on this element. In that event, had the jury been properly instructed under Honeycutt, and thus been given a realistic option of acquitting Noguera of sexual assault, then it would have been able to reach a verdict for statutory sexual seduction as the only remaining option in this case.

CONCLUSION

I would clarify that a minor's capacity to consent for purposes of sexual assault is a question for the trier of fact. I further conclude that Honeycutt entitles a defendant, upon request, to an instruction on the defense of reasonable mistaken belief in consent in cases of nonforcible sexual assault as long as some evidence supports its consideration. Accordingly, in view of the evidence presented at trial, Noguera should have been given the benefit of his proposed instruction on this defense. By denying this instruction, and narrowing the possible verdicts in this case to sexual assault or lewdness, the jury was prevented from considering a possible verdict for statutory sexual seduction. I would therefore reverse the district court's judgment of conviction and remand this matter for a new trial with instructions to provide Noguera the benefit of his proposed Honeycutt instruction.

Cherry, J.

Cherry