IN THE SUPREME COURT OF THE STATE OF NEVADA

FREDYS A. MARTINEZ A/K/A FREDDY MARTINEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49608

FILED

MAY 07 2008

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of burglary while in possession of a weapon, one count of battery with the use of a deadly weapon, and one count of first-degree kidnapping with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge.

On May 31, 2007, the district court sentenced appellant Fredys A. Martinez to serve concurrent prison terms of 5 to 15 years for burglary, 4 to 10 years for battery, and 5 years to life for first-degree kidnapping plus an equal and consecutive term for the deadly weapon enhancement.

Martinez raises three issues on appeal. First, he argues that the convictions for battery and kidnapping are redundant and impermissible under the Double Jeopardy Clause of the U.S. Constitution. This court has repeatedly affirmed that it will apply the test set forth in Blockburger v. United States[1] to determine whether multiple convictions

[1]284 U.S. 299 (1932).

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for the same act or transaction are permissible.[2] Under the Blockburger test, "if the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offenses."[3] If two convictions are found to be separate offenses under the Blockburger test, this court has stated that it will reverse "redundant convictions that do not comport with legislative intent."[4] However, when a defendant is convicted of numerous charges arising from a single act, redundancy does not necessarily arise.[5] The issue to be considered by this court in such cases "is whether the gravamen of the charged offenses is the same such that it can be said that the legislature did not intend multiple convictions."[6] "[A]n examination of whether multiple convictions are improperly redundant begins with an examination of the statute."[7]

Applying the Blockburger test in this case indicates that battery and kidnapping are separate offenses with elements unique to each, and therefore battery is not a lesser included offense of first-degree

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[2]Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003); see Williams v. State, 118 Nev. 536, 548, 50 P.3d 1116, 1124 (2002); Barton v. State, 117 Nev. 686, 694, 30 P.3d 1103, 1108 (2001).

[3]Barton, 117 Nev. at 692, 30 P.3d at 1107.

[4]Salazar, 119 Nev. at 227, 70 P.3d at 751 (citing State v. Koseck, 113 Nev. 477, 479, 936 P.2d 836, 838 (1997)).

[5]Skiba v. State, 114 Nev. 612, 616 n.4, 959 P.2d 959, 961, n.4 (1998).

[6]Salazar, 119 Nev. at 227, 70 P.3d at 751 (citing State v. Dist. Court, 116 Nev. 127, 136, 994 P.2d 692, 698 (2000)).

[7]Wilson v. State, 121 Nev. 345, 356, 114 P.3d 285, 293 (2005).

kidnapping.[8] Accordingly, this court must next consider whether the gravamen of the crimes of battery and kidnapping are such that it can be said that the legislature did not intend multiple convictions. The text of the respective statutes makes it clear that the two are intended to punish different behavior.[9] The battery statute is intended to protect a victim's bodily integrity interest, punishing the use of force or violence upon a person, while the kidnapping statute punishes a defendant for depriving a victim of his or her liberty interest. We conclude that Martinez's convictions for first-degree kidnapping with the use of a deadly weapon and battery with the use of a deadly weapon are not redundant.

Next, Martinez asserts that the prosecutor committed misconduct by disparaging the defense when the following underlined statement was made during closing argument:

> MR. BATEMAN: . . . And it doesn't make a whole heck of a lot of sense, ladies and gentleman why someone who has been kidnapped would have been taken all this way at knifepoint would suddenly feel aroused enough at this point, well, I think I'm going to have sex. Let's pull over on the side of the freeway. If you believe that, if you believe that's the case, find Freddy Martinez not guilty. Mark that box. That makes absolutely no sense, and it's offensive."

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[8]See NRS 200.481(1)(a) (defining battery as "any willful and unlawful use of force or violence upon the person of another); NRS 200.310(1) (stating that first-degree kidnapping occurs when a person "willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away a person by any means whatsoever with the intent to hold or detain, or who holds or detains, the person" for various statutorily enumerated purposes).

[9]See id.

Defense counsel objected, and the district court, while finding that the statement was not meant to be disparaging to the defense, struck the words "it's offensive."

It is improper to ridicule or denigrate a defense theory.[10] However, "[an] appellant must have been prejudiced in respect to a substantial right before this court will reverse the judgment of the lower court."[11] On several occasions, this Court has declined to reverse a conviction despite prosecutorial misconduct far in excess of the comment quoted above.[12] In the present case, there was only one allegedly disparaging remark, and the district court immediately struck the challenged comment from the record. Nor can the prosecutor's comment be said to have been prejudicial, as the jury found Martinez not guilty of sexual assault. We conclude that if there was error in this case, it was harmless.[13]

Finally, Martinez complains that there was insufficient evidence to support a conviction for first-degree kidnapping. The standard

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[10]U.S. v. Sanchez, 176 F.3d 1214, 1225 (9th Cir. 1999).

[11]Polito v. State, 71 Nev. 135, 140, 282 P.2d 802, 803 (1955).

[12]See Barron v. State, 105 Nev. 767, 779-80, 783 P.2d 444, 451-53 (1989) (several instances of misconduct by the prosecutor did not warrant reversal); Pickworth v. State, 95 Nev. 547, 550, 598 P.2d 626, 627-28 (1979) (prosecutor's remark in closing that defendant's drug intoxication defense to homicide was a "red herring" was highly improper, but defendant was not prejudiced).

[13]See Yates v. State, 103 Nev. 200, 206, 734 P.2d 1252, 1256 (1987) ("When a guilty verdict is free from doubt, even aggravated prosecutorial remarks will not justify reversal.").

of review when analyzing the sufficiency of evidence in a criminal case is whether, after viewing the evidence in the light most favorable to the prosecution, "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[14] Martinez was charged with first-degree kidnapping, rather than second-degree, because he had allegedly kidnapped the victim "for the purpose of committing sexual assault."[15] Martinez argues that because he was acquitted of sexual assault, the first-degree kidnapping conviction cannot stand. Martinez's argument is without merit.

"When a defendant is charged with committing two criminal offenses that involve different elements, a jury may find him guilty of one crime and not guilty of the other."[16] The elements of first-degree kidnapping[17] differ from the elements of sexual assault.[18] Therefore, the jury's verdict acquitting Martinez of sexual assault, but convicting him of first-degree kidnapping, is not inconsistent. Even if the verdicts were inconsistent, we have held that inconsistent verdicts are permissible in Nevada.[19]

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[14]McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

[15]See NRS 200.310.

[16]Burks v. State, 92 Nev. 670, 672, 557 P.2d 711, 712 (1976) (citing State v. Amerson, 518 S.W.2d 29 (Mo. 1975)).

[17]See NRS 200.310(1).

[18]See NRS 200.366(1).

[19]See Bollinger v. State, 111 Nev. 1110, 1116-17, 901 P.2d 671, 675 (1995).

Furthermore, review of the record finds sufficient evidence to support a conviction for first-degree kidnapping. In particular, testimony was given that on the morning of April 16, 2006, Martinez was waiting outside Bianca Hernandez's home. Martinez was the brother of Hernandez's ex-husband. As Hernandez was warming up the car, Martinez jumped out of a tree in the yard, got into the passenger seat of Hernandez's car, poked her in the leg with a knife, and told her to drive off. Shortly thereafter Martinez threw Hernandez in the back seat of the car by her hair, and drove the car himself. He later pulled her back into the front seat by her hair. Hernandez testified that during the trip she tried to get the attention of a nearby police car and Martinez struck her in the face. Martinez then drove the car onto the freeway and headed north. During the trip, Martinez told Hernandez to forget about her son and her boyfriend because she was not going to be returning to Las Vegas.

Hernandez testified that at some point Martinez turned off the freeway, threw Hernandez in the back seat of the car, took off Hernandez's clothes, and, with the knife still in his hand, had sexual intercourse with her. Hernandez testified that she did not want to have sex with Martinez, but that she was afraid to say anything. DNA evidence proved that sex had occurred, but Martinez claimed it was consensual. Martinez stopped and got out of the car in Mesquite, Nevada, and Hernandez was able to ask someone to contact police.

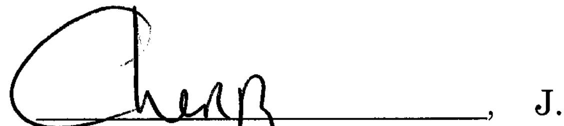
The officer who subsequently interviewed Martinez testified that Martinez told the police that he was not acting out of anger toward Hernandez, but toward Hernandez's boyfriend, Jose Quiroz-Castillo. Martinez expressed his frustration that Hernandez had not told him about Quiroz and his anger about the fact that he did not know anything about Quiroz. Martinez admitted the purpose of his actions was to get a reaction

from Quiroz. Specifically, Martinez stated, "[w]hen a man has sexual relations with a woman, you have to react when another rooster comes and takes a woman when she is with you. He has to respond, react . . . [a]nd I did it, but he did not react." We conclude that based on the evidence presented at trial, a rational trier of fact could have found the essential elements of first-degree kidnapping beyond a reasonable doubt.

Having considered Martinez's arguments and concluded that they are without merit, we

ORDER the judgment of the district court AFFIRMED.

_____________________, J.
Maupin


_____________________, J.
Cherry

_____________________, J.
Saitta

cc: Hon. Stewart L. Bell, 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