

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIE ASHBY GRAVES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49609

FILED

FEB 07 2008

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is appeal from an order of the district court dismissing appellant Willie Ashby Graves' post-conviction petition for a writ of habeas corpus. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

On June 2, 2004, the district court convicted Graves, pursuant to a jury verdict, of one count each of sexual assault and false imprisonment. The district court sentenced Graves to serve a prison term of 10 to 25 years for sexual assault and a concurrent jail term of 12 months for false imprisonment. We affirmed the judgment of conviction.¹

On August 9, 2005, Graves filed a proper person post-conviction petition for a writ of habeas corpus. The district court appointed counsel to represent Graves, and counsel filed a supplement to Graves' petition. The State moved to dismiss the petition and supplement. Graves opposed the motion, and the State filed a reply.

On February 2, 2007, the district court granted the State's motion in part and denied it in part. The district court found that the

¹Graves v. State, Docket No. 43531 (Order of Affirmance, November 4, 2004).

claims raised in Graves' petition were procedurally barred, and that the claim raised in his supplement warranted an evidentiary hearing.

In the supplement, Graves claimed that trial and appellate counsel were ineffective for failing to object to a transition jury instruction which informed the jury that it must unanimously acquit Graves of sexual assault before it could consider the lesser-included offense of battery. Graves asserted that this instruction violated our holding in Green v. State.²

On April 25, 2007, after conducting a hearing on the claim raised in the supplement, the district court entered an order denying Graves' habeas petition. The district court specifically found that even if the trial court erroneously instructed the jury that it must unanimously acquit Graves of sexual assault before finding him guilty of battery, the error was harmless because battery is not a lesser-included offense of sexual assault.

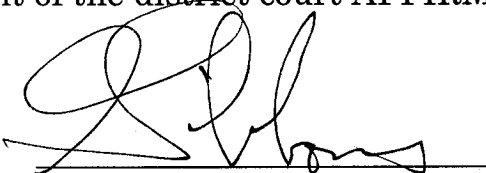
On appeal, Graves contends that the district court erred by finding that he was not prejudiced by counsels' failure to object to the transition jury instruction. He specifically claims that "the district court was legally incorrect in denying [his] post-conviction petition for a writ of habeas corpus on the ground that battery is not a lesser-included offense of sexual assault." And he argues that the elements necessary to prove battery are contained within the elements necessary to prove sexual

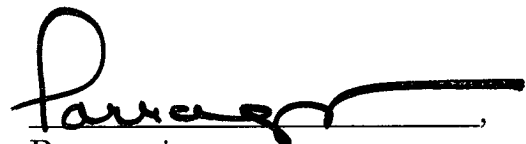
²119 Nev. 542, 547-48, 80 P.3d 93, 96-97 (2003) (rejecting the "acquittal first" instruction as a guideline for jury deliberations on lesser-included offenses).

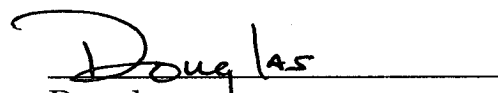
assault, and therefore battery is a lesser-included offense of sexual assault.

As the district court correctly noted in its order, we have previously addressed this issue and concluded that battery is not a lesser-included offense of sexual assault.³ Accordingly, we conclude that the district court properly found that counsels' failure to object to the transition jury instruction was not prejudicial and we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Gibbons


_____, J.
Parraguirre


_____, J.
Douglas

cc: Hon. Robert H. Perry, District Judge
Scott W. Edwards
Attorney General Catherine Cortez Masto/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk

³Estes v. State, 122 Nev. ___, ___, 146 P.3d 1114, 1127-28 (2006), cert. denied, ___ U.S. ___, 128 S.Ct 120 (2007).