

IN THE SUPREME COURT OF THE STATE OF NEVADA<sup>[BM1]</sup>

RODOLFO VARELA,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 50422  
**FILED**

MAY 29 2009  
TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of battery by a prisoner. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge. In the underlying case, after being handcuffed and instructed that he was under arrest, appellant Rodolfo Varela kicked the arresting police officer.

On appeal, Varela argues that he was not a “prisoner,” and therefore, his battery-by-a-prisoner conviction cannot stand. For the following reasons, we conclude that this and Varela’s remaining arguments fail,<sup>1</sup> and therefore, affirm the district court’s judgment of conviction. The parties are familiar with the facts and we do not recount them here except as necessary to our disposition.

Varela was a “prisoner” under NRS 200.481(2)(f)

Under NRS 200.481(2)(f), a person is guilty of battery by a prisoner if, during the commission of a battery, he was “a prisoner who

<sup>1</sup>Varela also argues that (1) the district court incorrectly instructed the jury as to who can be deemed a “prisoner” under NRS 200.481(2)(f), (2) the district court improperly rejected a jury instruction regarding his theory of the case, (3) there was insufficient evidence that he was a “prisoner,” and (4) the State’s charging document was imprecise and thus deprived him of due process. Having carefully reviewed these separate challenges, we conclude that they are all without merit.

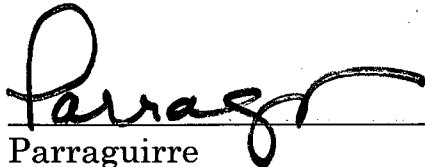
[was] in lawful custody or confinement.” For the purpose of this offense, a “prisoner” is defined as “any person held in custody under process of law, or under lawful arrest.” NRS 193.022.

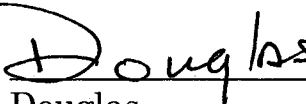
Here, because Varela had been placed in handcuffs and twice been instructed that he was under arrest, Varela was under the control of the arresting officer. See Dumaine v. State, 103 Nev. 121, 124-25, 734 P.2d 1230, 1232-33 (1987) (A prisoner in “lawful custody or confinement,” must either submit to the “control of the arresting officer or [be] captured, i.e., . . . taken and held in control.”). Accordingly, we conclude that Varela was a “prisoner” under NRS 200.481(2)(f) when he kicked the arresting officer.


Moreover, based on the evidence that Varela crashed a reportedly stolen car into a median, smelled of alcohol, fled the scene of the accident and refused officer commands to halt, there was probable cause for Varela’s arrest, and we reject Varela’s contention that he was merely being detained for officer safety. See Robinson v. State, 117 Nev. 97, 17 P.3d 420 (2001) (indicating that a person held in protective custody cannot be deemed a prisoner under NRS 200.481(2)(f)).

For the reasons set forth above, we conclude that Varela’s arguments on appeal lack merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
Parraguirre, J.

  
Douglas, J.

  
Pickering, J.

cc: Hon. Donald M. Mosley, 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