IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVIN FRYE,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 51576

FILED

MAY 12 2009

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 guilty plea, of one count each of conspiracy to commit battery with the use of a deadly weapon and conspiracy to commit assault with the use of a deadly weapon. Eighth Judicial District Court, Clark County; David B. Barker, Judge. The district court sentenced appellant Melvin Frye to serve two consecutive 12-month prison terms and pay restitution in the amount of $37,280.22.

First, Frye contends the district court erred by not apportioning the restitution based on his relative culpability for the victim's injuries. Specifically, Frye claims that he should not be required to pay "the full amount of restitution" because he did not personally harm the victim. We disagree.

"[A] defendant may be ordered to pay restitution only for an offense that he has admitted, upon which he has been found guilty, or upon which he has agreed to pay restitution." Erickson v. State, 107 Nev. 864, 866, 821 P.2d 1042, 1043 (1991). "Restitution . . . is a sentencing determination. On appeal, this court generally will not disturb a district court's sentencing determination so long as it does not rest upon impalpable or highly suspect evidence." Martinez v. State, 115 Nev. 9, 12-

13, 974 P.2d 133, 135 (1999). In calculating the amount of restitution, the district court must rely on reliable and accurate information. Id. at 13, 974 P.2d at 135. A defendant is entitled to challenge the district court's calculation "and may obtain and present evidence to support that challenge." Id.

Frye did not challenge the calculation of the amount of restitution in the district court, and he does not dispute that $37,280.22 is the correct amount of restitution due the victim. Frye does not cite to any authority to support his claim that the restitution should be reduced because he only handed the knife to the person who actually stabbed and cut the victim. Frye pleaded guilty to charges that he conspired to commit both battery with the use of a deadly weapon and assault with the use of a deadly weapon upon the victim, and he agreed that he would be ordered to make restitution. In fact, the district court explained to Frye at the plea canvass that (1) if "you agree to pay restitution, you agree to pay restitution [and t]he only thing to argue about is the amount," and (2) "if what you wanted me to do was some type of percentage, I probably wouldn't do that." To the extent that Frye argues the State breached an "offer to take into consideration [Frye's] relative lack of culpability for the actual injuries" when recommending restitution, we note that it was not a term of the guilty plea agreement and "neither [party] is bound by a plea offer until it is approved by the court." State v. Crockett, 110 Nev. 838, 843, 877 P.2d 1077, 1079 (1994). Based on the foregoing, we conclude that the district court did not abuse its discretion in determining the amount of restitution.

Second, Frye contends the district court erred by imposing consecutive sentences because it violates the Double Jeopardy Clause of the United States Constitution to impose "multiple punishments for the same offense . . . . to wit, handing over of the knife."

The Double Jeopardy Clause protects a criminal defendant from multiple punishments for the same offense. Garcia v. State, 121 Nev. 327, 342, 113 P.3d 836, 845 (2005); modified on other grounds by Mendoza v. State, 122 Nev. 267, 130 P.3d 176 (2006). However, "[i]t is well settled that a single transaction can give rise to distinct offenses under separate statutes without violating the Double Jeopardy Clause. This is true even though the 'single transaction' is an agreement or conspiracy." Id. at 344 n.51, 113 P.3d at 847 n.51 (internal quotes and citations omitted). The Double Jeopardy Clause does not prohibit the imposition of "consecutive sentences when the conspiracy charges stemmed from a single course of conduct," provided, however, that the sentences do not amount to "multiple punishments for the same offense." Id. at 344, 113 P.3d at 847 (internal quotes and citations omitted). We have adopted the double jeopardy test set forth in Blockburger v. United States, 284 U.S. 299 (1932), to determine whether sentences were imposed for the same offense. See Zgombic v State, 106 Nev. 571, 577-78, 798 P.2d 548, 552 (1990), superseded by statute on other grounds as stated in Steese v. State, 114 Nev. 479, 499 n.6, 960 P.2d 321, 334 n.6 (1998). When "the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Id. at 577-78, 798 P.2d at 552 (emphasis in original) (internal quotes and citations omitted).

Applying the test to the facts of this case, we conclude that conspiracy to commit battery with the use of a deadly weapon and conspiracy to commit assault with the use of a deadly weapon are separate offenses and do not pose a double jeopardy problem under Blockburger. Under NRS 200.481, battery requires proof of actual force or violence against the victim, while under NRS 200.471, assault requires no proof of

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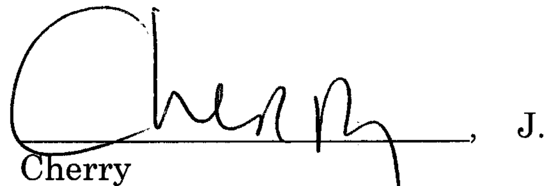
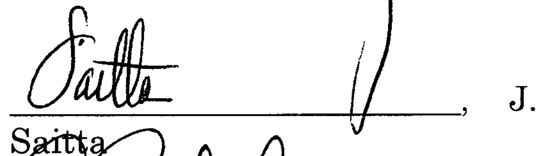
physical contact, only that the victim was placed in fear of injury. "The two crimes involve separate and distinct elements charged under [the two statutes] independently and in conjunction with Nevada's conspiracy statute, NRS 199.480," and, therefore, it is constitutionally permissible to impose a separate sentence for each conviction. See Garcia, 121 Nev. at 343, 113 P. 3d at 846 (convictions for conspiracy to commit robbery and conspiracy to commit burglary not redundant). Further, we note that Frye's contention lacks merit because he pleaded guilty to both charges, and the State was not required to prove the existence of two distinct agreements to commit the two crimes. See Rainsberger v. State, 81 Nev. 92, 96, 399 P.2d 129, 131, (1965) ("If the plea of guilty is not itself constitutionally infirm, it would appear that one who has so confessed may not rely upon the constitution to free him."). Finally, it was within the district court's discretion to impose consecutive sentences. See NRS 176.035(1); see generally Warden v. Peters, 83 Nev. 298, 302-03, 429 P.2d 549, 552 (1967).

Having considered Frye's contentions and concluded they are without merit, we

ORDER the judgment of conviction AFFIRMED.



_______________, J.
Cherry



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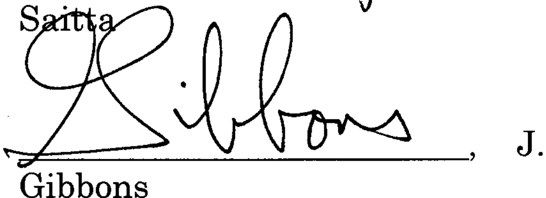

_______________, J.
Gibbons

cc: Hon. David B. Barker, District Judge
Bailus Cook & Kelesis
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk