IN THE SUPREME COURT OF THE STATE OF NEVADA

ANTHONY LAMAR MARTIN,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 34831

FILED

DEC 05 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of robbery and one count of battery with intent to commit a crime. The district court sentenced appellant Anthony Lamar Martin to serve consecutive terms of imprisonment of seventy-two to one hundred and eighty months for the robbery count, and forty-eight to one hundred and twenty months for the battery with intent to commit a crime count. Martin now appeals his judgment of conviction, raising numerous issues. After considering Martin's arguments, we conclude that none have merit; accordingly, we affirm the judgment of conviction.

As his first assignment of error, Martin contends that insufficient evidence was adduced at trial to support his conviction. To decide whether sufficient evidence exists, this court determines "'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.'"[1] And when conflicting evidence is presented at trial, the jury, and not this court, determines what weight and credibility to give it.[2]

In regard to the robbery, although conflicting evidence was presented at trial regarding what exactly occurred in the victim's apartment on February 8, 1999, evidence was presented, in the form of the

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[1]Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)); Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980) (determining that sufficient evidence is evidence that establishes guilt beyond a reasonable doubt as determined by a rational trier of fact).

[2]Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

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victim's testimony, that Martin demanded money from her, and that when she refused, Martin choked her. The victim further testified that as a result of the choking, she eventually acquiesced to Martin's demands for money. This testimony was sufficient to support Martin's conviction for robbery.[3]

As to the battery with intent to commit a crime, the victim's testimony showed that Martin placed his hands around her neck, choked her and demanded she give him money. Such testimony demonstrated that Martin committed a battery upon the victim, by placing his hands around her neck, with the intent to commit a robbery.[4] Accordingly, a rational trier of fact could have found the essential elements of battery with the intent to commit a crime beyond a reasonable doubt, and Martin's contention that insufficient evidence was adduced at trial to support his conviction is without merit.

Next, Martin argues that the Double Jeopardy Clause of the United States Constitution prohibits him from being convicted of both battery with an intent to commit a crime and robbery. Martin contends that because battery with intent to commit a crime is a lesser included offense of robbery, and because the State prosecuted him for these two offenses stemming from the same event, his conviction is barred by the Double Jeopardy Clause. We disagree.

This court utilizes the test articulated in Blockburger v. United States[5] to determine whether separate offenses exist for double jeopardy purposes.[6] Pursuant to Blockburger, a defendant may not be convicted of two offenses premised on the same facts unless each offense "requires proof of an additional fact which the other does not."[7]

Robbery requires proof that the defendant (1) unlawfully took personal property; (2) from the person of another, or from his or her presence; (3) against his or her will; (4) by means of force or violence or fear of injury, immediate or future, to his or her person or property, or the

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[3]See NRS 200.380.

[4]See NRS 200.400.

[5]284 U.S. 299 (1932).

[6]Barton v. State, 117 Nev. ___, 30 P.3d 1103 (2001).

[7]Blockburger, 284 U.S. at 304.

person or property of a member of his family, or of anyone in his company at the time of the robbery.[8] Battery with the intent to commit a crime, on the other hand, requires proof that the defendant (1) willfully and unlawfully used force or violence; (2) upon the person of another; (3) with the intent to commit one of an enumerated list of offenses.[9] Thus, each offense requires proof of a fact that the other does not. Accordingly, Martin's conviction for both battery with the intent to commit a crime and robbery does not violate the Double Jeopardy Clause.

Martin also argues that by charging him with both battery with intent to commit a crime and robbery, the State violated the rule against multiplicity.[10] As with Martin's contention regarding the Double Jeopardy Clause, we conclude that this argument is without merit.

"Multiplicity concerns the charging of a single offense in several counts."[11] The "vice" resulting from such a charge is that it may lead to multiple sentences for the same offense.[12] To determine whether an indictment violates the rule against multiplicity, the offenses charged must be examined, as under Blockburger, to determine whether each offense requires proof of an additional fact that the other does not.[13]

Under the Blockburger analysis employed above, each offense for which Martin was charged and subsequently convicted requires proof of an additional fact that the other does not. Accordingly, Martin's contention that by charging him with robbery and battery with intent to

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[8]NRS 200.380.

[9]NRS 200.400. Robbery is one of the listed offenses.

[10]The rule of multiplicity should be distinguished from the rule of duplicity. Duplicity means charging more than one crime in the same count; multiplicity means charging one crime in various counts. See Gordon v. District Court, 112 Nev. 216, 227-28, 913 P.2d 240, 247-48 (1996).

[11]Gordon, 112 Nev. at 229, 913 P.2d at 248 (citing 1 Charles A. Wright, Federal Practice and Procedure § 142 (2d ed. 1982)); see also State v. Woods, 825 P.2d 514, 521-23 (Kan. 1992); see also 1A Charles A. Wright, Federal Practice and Procedure § 142 (3d ed. 1999).

[12]1A Wright, supra note 11, § 142.

[13]Gordon, 112 Nev. at 229, 913 P.2d at 248 (citing 1A Wright, supra note 11, § 142).

commit a crime the State violated the rule against multiplicity is without merit.

Martin next claims that his trial counsel provided ineffective assistance. Claims of ineffective assistance of counsel, however, may not be raised on direct appeal unless the claims have already been subject to an evidentiary hearing.[14] Such claims are more properly dealt with in post-conviction proceedings.[15] In this case, no evidentiary hearing has been held regarding Martin's counsel's effectiveness. Martin's claim, therefore, is more appropriately raised in a post-conviction proceeding than in this direct appeal. Accordingly, we need not consider Martin's contention that his trial counsel was ineffective.

Martin also contends that evidence in the form of hearsay testimony was admitted at trial over his trial counsel's objection. The testimony Martin complains of consists of part of the victim's testimony. Martin argues that the admission of this evidence constituted "gross error" by the district court and resulted in "extreme prejudice" to his defense. Martin thus argues that the admission of this testimony into evidence constitutes reversible error. We disagree.

Initially, Martin makes the nonsensical argument that the testimony improperly impeached a defense witness. We are unable to discern how the testimony complained of constituted impeachment, and, if the evidence does impeach another witness, we are unable to determine which defense witness was impeached. Therefore, this argument is without merit.[16]

However, in addition to arguing that these statements somehow impeached a defense witness, Martin makes several conclusory arguments regarding how the introduction of these statements into

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[14]Elvik v. State, 114 Nev. 883, 893, 965 P.2d 281, 288 (1998); Feazell v. State, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995); see also Franklin v. State, 110 Nev. 750, 751-52, 877 P.2d 1058, 1059 (1994), overruled on other grounds by Thomas v. State, 115 Nev. 148, 148, 979 P.2d 222, 223-24 (1999).

[15]Feazell, 111 Nev. at 1449, 906 P.2d at 729.

[16]See Maresca v. State, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (stating that "[i]t is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court").

evidence (1) violates the hearsay rule; (2) constitutes improper prior bad act testimony; (3) violates Martin's Sixth Amendment right to confront witnesses; and (4) violates the rule against the improper admission of character evidence. All of these assignments of error are subject to harmless error analysis.[17] Although the statement Martin complains about probably constitutes hearsay and evidence relating to a prior bad act of Martin's, it seems clear that the statement did not prejudice Martin or affect the jury's verdict in any way. The jury in this case relied on the testimony of the victim that Martin had choked her and taken nine dollars from her. Therefore, even if we assume that the district court erred by admitting the statements, any error that may have resulted was harmless.

Next, Martin argues that the district court erred by failing to instruct the jury regarding misdemeanor battery. Martin contends that notwithstanding the fact that he did not request such an instruction, misdemeanor battery is a lesser included offense of the felony crime of battery with intent to commit a crime, and therefore the district court was obligated to so instruct the jury. We reject Martin's argument.

Martin was charged with battery with the intent to commit a crime, a felony.[18] At the conclusion of the trial, the jury was instructed on the felony charge; however, the jury was not instructed regarding the

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[17]See Franco v. State, 109 Nev. 1229, 1237, 866 P.2d 247, 252 (1993) (Confrontation Clause); Deutscher v. State, 95 Nev. 669, 683, 601 P.2d 407, 418 (1979) (hearsay)); Kazalyn v. State, 108 Nev. 67, 73, 825 P.2d 578, 582 (1992) (determining that the admission of prior bad act testimony is harmless error); Byford v. State, 116 Nev. 215, 226, 994 P.2d 700, 708 (2000) (concluding that although admission of evidence of the defendant's past criminal history constituted impermissible character evidence and was error, error resulting from the admission of the evidence was harmless). NRS 178.598 defines harmless error as an error that does not affect a substantial right of the defendant. This court has stated that although this statutory pronouncement does not provide a standard for determining when errors are harmless, factors to be taken into account when determining when an error is harmless include: (1) whether the issue of innocence or guilt is close; (2) the quality and character of the error; and (3) the gravity of the offense charged. Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985); Weakland v. State, 96 Nev. 699, 701, 615 P.2d 252, 254 (1980).

[18]Battery with intent to commit a crime is punishable as a felony, while simple battery is punishable as a misdemeanor. Compare NRS 200.400, with NRS 200.481(2)(a).

lesser included offense of simple battery, a misdemeanor, nor was such an instruction requested by the defense.[19]

We have held that "[w]here 'there is evidence which would absolve the defendant from guilt of the greater offense or degree but would support a finding of guilt of the lesser offense or degree,' an instruction on the lesser-included offense is mandatory even if not requested."[20] However, we have also stated that lesser included offense instructions are not warranted when evidence adduced at trial "clearly showed guilt above the lesser offense."[21] Thus,

> where the elements of the greater offense include all of the elements of the lesser offense because it is the very nature of the greater offense that it could not have been committed without the defendant having the intent and doing the acts which constitute the lesser offense . . . [and where] the prosecution has met its burden of proof on the greater offense and there is no evidence at the trial tending to reduce the greater offense, an instruction on a lesser included offense may properly be refused.[22]

Recently, in Rice v. State,[23] we applied this rule and concluded that because evidence had been adduced at trial clearly showing guilt above the lesser offense, the district court need not instruct the jury regarding the lesser offense.[24]

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[19]Clearly, simple battery is a lesser included offense of battery with intent to commit a crime because the latter offense could not be committed without the defendant also having the intent and committing the acts constituting simple battery. Peck v. State, 116 Nev. 840, 844, 7 P.3d 470, 472 (2000) (setting forth the test to determine whether an offense is a lesser included offense); Walker v. State, 110 Nev. 571, 574-75, 876 P.2d 646, 648 (1994); Lisby v. State, 82 Nev. 183, 187, 414 P.2d 592, 594 (1966). The only distinction between the misdemeanor offense and the felony is the additional element that the defendant have the intent to commit a crime.

[20]Peck, 116 Nev. at 844, 7 P.3d at 473 (2000) (quoting Lisby, 82 Nev. at 187, 414 P.2d at 595.

[21]Rice v. State, 113 Nev. 1300, 1310, 949 P.2d 262, 268 (1997).

[22]Davis v. State, 110 Nev. 1107, 1115, 881 P.2d 657, 662 (1994) (citing Lisby, 82 Nev. at 188, 414 P.2d at 595).

[23]113 Nev. 1300, 949 P.2d 62 (1997).

[24]Id. at 1310, 949 P.2d at 268-69.

Just as in Rice, evidence was adduced at Martin's trial showing Martin was clearly guilty of the greater offense, battery with the intent to commit a crime. The victim's testimony clearly showed that Martin had battered her with the intent to rob her. Thus, an instruction regarding simple battery was not mandatory. Accordingly, Martin's argument that the district court erred by failing to instruct the jury regarding misdemeanor battery is without merit.

Finally, Martin argues that the district court abused its discretion during sentencing by relying on a 1990 conviction. We disagree.

At sentencing, the State attempted to have Martin adjudicated as a habitual criminal and sentenced to life in prison.[25] In arguing that Martin was a habitual criminal, the State relied on Martin's 1990 conviction for robbery with the use of a deadly weapon. The State apparently argued that the violent nature of the 1990 conviction, along with Martin's other convictions,[26] necessitated that Martin be adjudicated as a habitual criminal. In support of this argument, the State presented graphic pictures of the robbery victim's injuries. In sentencing Martin for the instant conviction, the district court, however, declined to adjudicate Martin as a habitual criminal, and, instead, sentenced Martin to serve the maximum term allowed for the charged offenses.[27]

District courts are afforded wide discretion when sentencing defendants.[28] Such discretion is afforded to district courts, in part, because ""judges spend much of their professional lives separating the wheat from the chaff and have extensive experience in sentencing, along with the legal training necessary to determine an appropriate sentence.""[29] Furthermore, this discretion enables the sentencing judge to

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[25]See NRS 207.010.

[26]Although the record is unclear, it appears that Martin had previously been convicted for burglary.

[27]See NRS 200.380(2); NRS 200.400(2). We note that the district court's sentence within the limits proscribed by statute, lends further support to our conclusion that the district court did not abuse its discretion.

[28]Parrish v. State, 116 Nev. __, __, 12 P.3d 953, 957 (2000).

[29]Id. (quoting Randell v. State, 109 Nev. 5, 7-8, 846 P.2d 278, 280 (1993) (quoting People v. Mockel, Cal. Rptr. 559, 563 (Ct. App. 1990))).

consider a wide variety of information to insure that the punishment fits not only the crime, but also the individual defendant.[30] Thus, absent an abuse of discretion, the district court's determination regarding sentencing will not be disturbed on appeal.[31]

Clearly, because the State in this case was attempting to have Martin adjudicated as a habitual criminal, the district court could properly consider prior convictions. Even if the State had not sought to have Martin adjudicated as a habitual criminal, the district court could properly consider Martin's prior convictions when sentencing him. And simply because one of Martin's prior convictions was for an apparently violent crime, and because the district court considered this information when sentencing Martin, does not mean the district court abused its discretion when sentencing Martin to the maximum term proscribed by statute. Therefore, Martin's argument is without merit.

After reviewing the record on appeal, we conclude that none of Martin's arguments have merit. Accordingly, we

ORDER the judgment of the district court AFFIRMED.

_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Donald M. Mosley, District Judge
Attorney General
Michael V. Cristalli
Clark County District Attorney
Clark County Clerk

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[30]Norwood v. State, 112 Nev. 438, 440, 915 P.2d 277, 278 (1996).

[31]Deveroux v. State, 96 Nev. 388, 390, 610 P.2d 722, 723 (1980).