IN THE SUPREME COURT OF THE STATE OF NEVADA

CLAY R. BEAR,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35021

FILED

AUG 10 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 each of conspiracy to commit robbery, robbery with the use of a deadly weapon, attempted robbery with the use of a deadly weapon, and assault with the use of a deadly weapon. The district court sentenced appellant to a total of 140 to 624 months in prison. Appellant received credit for 326 days served prior to sentencing.

Appellant contends that his conviction for robbery (of the money) with the use of a deadly weapon and attempted robbery (of the car) with use of a deadly weapon constitutes double jeopardy in violation of the Fifth Amendment. Since appellant used the threat of force only one time, against one victim, he argues that only one robbery occurred. It would be ludicrous, appellant asserts, to allow multiple robbery convictions when more than one article of property is taken from a single victim by a single threat of force. He contends that it would be similarly ludicrous in this case to allow a conviction for the failed robbery of the car and a conviction for the successful robbery of the money, where only one threat of force was used against one victim. Because both the robbery and the attempted robbery were based on the identical set of facts (i.e., the State did not prove any additional or separate act that led to the attempted robbery of the car as

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opposed to the robbery of the money), appellant argues that the attempted robbery was necessarily a lesser-included offense of the robbery.

Appellant also contends that his conviction for robbery with the use of a deadly weapon and assault with the use of a deadly weapon are violative of the Fifth Amendment's prohibition against double jeopardy because both convictions are based on the exact same conduct. Appellant argues that the assault merged into the robbery, since it was committed as part of the ongoing robbery attempt. Because the assault, if any, occurred only for the purpose of completing the greater crime of robbery, appellant maintains that a conviction for both crimes constitutes double jeopardy.

The test articulated in Lisby v. State "to determine whether an offense is necessarily included in the offense charged" is "whether the offense charged cannot be committed without committing the lesser offense."[1] This test is met "where the elements of the greater offense include all of the elements of the lesser offense."[2] In other words, an offense is a lesser included offense if the greater offense "could not have been committed without the defendant having the intent and doing the acts which constitute the lesser offense, e.g., kidnapping involving false imprisonment, sale of narcotics involving possession, felonious assault involving simple assault."[3]

"Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his

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[1]82 Nev. 183, 187, 414 P.2d 592, 594 (1966); see also Blockburger v. United States, 284 U.S. 299, 304 (1932).

[2]Id. at 188, 414 P.2d at 595.

[3]Id.

will, by means of force or violence or fear of injury, immediate or future, to his person or property."[4] Robbery is a category B felony, for which the penalty is two to fifteen years in prison.[5] This penalty is enhanced with an equal and additional term of imprisonment, to be served consecutively, if the robbery is committed with the use of a deadly weapon.[6] An assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."[7] "If the assault is made with use of a deadly weapon, or the present ability to use a deadly weapon," the offense is a category B felony (instead of a misdemeanor), for which the penalty is one to six years in prison, or a $5,000 fine, or both a fine and imprisonment.[8]

Applying the Lisby test to appellant's first argument, we conclude that no double jeopardy has occurred. The robbery of the money could have been committed without the attempted robbery of the car, had the accomplice simply assisted in obtaining the money and not attempted to start the car. Likewise, the attempted robbery of the car could have occurred without the robbery of the money, had appellant and his accomplice simply tried to take the car and not demanded money from the victim. The two offenses involved a different element of intent -- intent to take the car and a separate and distinct intent to take the money. Moreover, the two offenses involved two distinct facts -- appellant's retrieval of the money from the victim and the accomplice's act of getting in

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[4]NRS 200.380(1).

[5]NRS 200.380(2).

[6]NRS 193.165(1).

[7]NRS 200.471(1).

[8]NRS 200.471(2)(b).

the car and trying to start it. Since either offense could have been committed without the other, we are satisfied that neither offense is a lesser included offense of the other. Therefore, appellant's conviction for robbery with the use of a deadly weapon and attempted robbery with the use of a deadly weapon does not constitute double jeopardy.

Examining appellant's second argument, we also conclude that no double jeopardy has occurred. Because appellant could have taken the victim's money without assaulting her, we conclude that the assault with a deadly weapon is not a lesser included offense to the robbery. One may commit a robbery by means of fear only, without actually attempting to commit violent injury. The intent to violently injure another, an element of assault with a deadly weapon, is not necessarily present in the crime of robbery. Further, not only could the robbery in the present case have been committed without commission of the assault with a deadly weapon, but the robbery did in fact occur without the assault. Under the facts of this case, a complete robbery occurred before the assault occurred and therefore the two offenses are distinguishable chronologically, albeit by a few seconds. The robbery was complete when appellant picked up the five or six dollars from the ground. Only after this did appellant lunge at the victim with the knife, thereby committing the assault. Of course, appellant's lunging induced the victim to hand over more money, but all the elements of robbery were established before the assault took place. Accordingly, we conclude that appellant's conviction for robbery with the use of a deadly weapon and assault with the use of a deadly weapon does not constitute double jeopardy.

Having examined all of appellant's contentions and concluded that they lack merit, we

ORDER the judgment of the district court AFFIRMED.

Young, J.

Leavitt, J.

cc: Hon. Donald M. Mosley, District Judge
Attorney General
Clark County District Attorney
Brent D. Percival
Clark County Clerk

BECKER, J., concurring in part and dissenting in part:

I concur in the majority's analysis that appellant's convictions for robbery with the use of a deadly weapon and assault with the use of a deadly weapon do not violate the Double Jeopardy Clause of the United States Constitution. However, I disagree with the conclusion that under the facts of this case both a robbery and an attempted robbery occurred. The appellant and his co-defendant used a deadly weapon to force the victim to part with her property. They wanted cash and a car. Fortunately the car would not start, so they were only able to escape with the cash. However, this does not constitute a robbery (the cash) and an attempted robbery (the car). The robbery was complete when any property was taken. The amount and number of items of property are irrelevant when the taking occurs in one continuous time span from a single victim. I would therefore reverse the conviction for attempted robbery.

Becker, J.
Becker