IN THE SUPREME COURT OF THE STATE OF NEVADA

DAVID A. ROHDE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 35876

FILED

AUG 18 2000

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

ORDER DISMISSING APPEAL

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of battery by a prisoner in lawful custody. The district court sentenced appellant to serve 24 to 60 months in the Nevada State Prison.

Appellant raises the following issues: (1) whether there was sufficient evidence to support the jury's verdict; (2) whether the district court erred in refusing to instruct the jury on misdemeanor battery as a lesser included offense; and (3) whether the sentence imposed violates the United States or Nevada constitutions. For the reasons set forth below, we conclude that each of appellant's contentions lacks merit.

Appellant contends that the evidence presented at trial was insufficient to support the jury's finding of guilt. In particular, appellant argues that there was insufficient evidence that his act of kicking at Deputy Smock was done willfully.[1] Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980).

[1]NRS 200.481(1)(a) defines "battery" as "any willful and unlawful use of force or violence upon the person of another."

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In particular, we note that Deputy Smock testified that as he and another deputy were escorting appellant from a segregation area in the jail to the general population housing area, appellant turned around and refused to go with them. Appellant became verbally combative and dropped to the ground to make it more difficult for the deputies to move him. The deputies continued using verbal commands to get appellant to move, but they were unsuccessful. The deputies then tried to place appellant's arms behind his back. Deputy Smock applied a wrist restraint in an attempt to force appellant's compliance. Appellant then kicked Deputy Smock three times in the lower leg.

The jury could reasonably infer from the evidence presented that appellant willfully used force upon Deputy Smock. It is for the jury to determine the weight and credibility of testimony, and the jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict. See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

Appellant next contends that the district court erred in refusing to instruct the jury on misdemeanor battery as a lesser included offense. We disagree.

We have held that a jury instruction on a lesser included offense is "mandatory" where "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." Lisby v. State, 82 Nev. 183, 187, 414 P.2d 592, 595 (1966). However, we have also held that:

> [W]here 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 is 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.

Id. at 188, 414 P.2d at 595; see also Davis v. State, 110 Nev. 1107, 881 P.2d 657 (1994); Holland v. State, 82 Nev. 191, 414 P.2d 590 (1966).

NRS 200.481(2)(a) provides that "[i]f the battery is not committed with a deadly weapon, and no substantial bodily harm to the victim results, except under circumstances where a greater penalty is provided in paragraph (d)," the offense is a misdemeanor. NRS 200.481(2)(d) provides that if the battery is committed upon "an officer . . . who is performing his duty and the person charged knew or should have known that the victim was an officer," the offense is a gross misdemeanor. NRS 200.481(2)(f) provides that if the battery is committed by a prisoner who is in lawful custody or confinement and the prisoner does not use a deadly weapon or cause substantial bodily harm, the offense is a category B felony.

It is clear that simple battery is a lesser included offense of battery by a prisoner in lawful custody because the latter offense could not be committed without the defendant also having the intent and committing the acts constituting simple battery. The only distinction between the misdemeanor offense and the felony is the additional element that appellant was a prisoner in lawful custody. However, prior to trial, appellant stipulated that at the relevant time he was a prisoner in lawful custody or confinement. The theory of the defense was that the State had failed to prove that appellant's conduct was willful. As discussed above, the evidence was sufficient to prove that appellant willfully used force upon Deputy Smock. Because the evidence clearly shows

guilt above the lesser offense, a lesser included offense instruction on simple battery was properly denied.[2]

Appellant emphasizes this court's statement in Lisby that "if there is any evidence at all, however slight, on any reasonable theory of the case under which the defendant might be convicted of a lower degree or lesser included offense, the court must, if requested, instruct on the lower degree or lesser included offense." 82 Nev. at 188, 414 P.2d at 595. However, appellant fails to cite any evidence presented at trial tending to reduce the offense. As noted above, under appellant's theory of defense, he would not even be guilty of simple battery. We conclude that under the circumstances of the instant case, the giving of jury instructions on simple battery as a lesser included offense would have served only to confuse the jurors in a case which clearly supported a finding of battery by a prisoner in lawful custody or confinement.

Appellant also argues that the district court erred in refusing to give the instruction because, even if there was sufficient evidence to find appellant guilty of the greater offense, the jury might have found appellant guilty of the lesser offense out of sympathy. We conclude that lenity is not a justifiable separate basis for requiring the district court to give a lesser included offense instruction.[3] See Graham v. State, 116 Nev. ___, ___ n.8, 992 P.2d 255, 260 n.8 (2000) (rejecting "lenity" as separate basis for giving

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[2]We note that the jury was instructed on battery upon an officer in violation of NRS 200.481(2)(d) as a lesser included offense of battery by a prisoner in lawful custody or confinement.

[3]Moreover, we note that appellant's assumption that the jury might have granted him some form of leniency and convicted him of simple battery is undercut by the fact that the jury found appellant guilty of the greater offense even when offered the option of convicting appellant of a gross misdemeanor offense--battery upon a peace officer.

instructions on second degree murder as lesser included offense of first degree murder).

Finally, appellant contends that the sentence constitutes cruel and unusual punishment in violation of the United States and Nevada constitutions because the sentence is disproportionate to the crime.[4] In particular, appellant points out that he grew up in a dysfunctional home, was abused by his stepfather as a child, has a history of alcohol and drug addiction, and was under great emotional stress at the time of the offense. Appellant also points out that Deputy Smock was not injured as a result of the incident. We conclude that appellant's contention lacks merit.

The Eighth Amendment does not require strict proportionality between crime and sentence, but forbids only an extreme sentence that is grossly disproportionate to the crime. Harmelin v. Michigan, 501 U.S. 957, 1000-01 (1991) (plurality opinion). Regardless of its severity, a sentence that is within the statutory limits is not "'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.'" Blume v. State, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting Culverson v. State, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979)); see also Glegola v. State, 110 Nev. 344, 348, 871 P.2d 950, 953 (1994).

This court has consistently afforded the district court wide discretion in its sentencing decision. See Houk v. State, 103 Nev. 659, 747 P.2d 1376 (1987). This court will refrain from interfering with the sentence imposed "[s]o long

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[4]Appellant primarily relies on Solem v. Helm, 463 U.S. 277 (1983).

as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." Silks v. State, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976).

In the instant case, appellant does not allege that the district court relied on impalpable or highly suspect evidence or that the relevant statute is unconstitutional. Further, we note that the sentence imposed was within the parameters provided by the relevant statute. See NRS 200.481(2)(f) (providing for sentence of not less than 1 year and not more than 6 years). We also conclude that the sentence imposed is not so unreasonably disproportionate to the offense as to shock the conscience. Accordingly, we conclude that the sentence imposed does not constitute cruel and unusual punishment.

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

ORDER this appeal dismissed.

Young, J.
Young

Agosti, J.
Agosti

Leavitt, J.
Leavitt

cc: Hon. Jerry V. Sullivan, District Judge
Attorney General
Humboldt County District Attorney
State Public Defender
Humboldt County Clerk