

IN THE SUPREME COURT OF THE STATE OF NEVADA

WILLIAM E. CHOTO,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 42517

**FILED**

**JUL 8 2004**

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Bloom*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of assault with a deadly weapon. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Judge. The district court sentenced appellant to a prison term of 12 to 30 months.

Appellant's sole contention is that the district court erred by refusing to give a proffered jury instruction. Appellant argues that the jury should have been instructed regarding the crime of drawing a deadly weapon in a threatening manner as a lesser included offense of assault with a deadly weapon.

This court has previously held that an offense is a lesser included offense only if "the elements of the lesser offense are an entirely included subset of the elements of the charged offense."<sup>1</sup> Assault with a deadly weapon is defined as using a deadly weapon to "intentionally plac[e] another person in reasonable apprehension of immediate bodily harm."<sup>2</sup> Drawing a deadly weapon in a threatening manner is defined as the drawing or exhibiting of a deadly weapon "in the presence of two or

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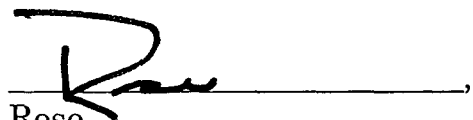
<sup>1</sup>Barton v. State, 117 Nev. 686, 694, 30 P.3d 1103, 1108 (2001) (citing Schmuck v. United States, 489 U.S. 705, 716 (1989)).

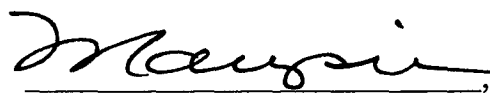
<sup>2</sup>See NRS 200.471(1)(a).

more persons . . . in a rude, angry or threatening manner not in necessary self-defense . . . or [using the deadly] weapon in any fight or quarrel."<sup>3</sup> The elements of drawing a deadly weapon in a threatening manner are not an entirely included subset of the elements of robbery. Specifically, drawing a deadly weapon requires the presence of two or more persons. We therefore conclude that drawing a deadly weapon in a threatening manner is not a lesser included offense of assault with a deadly weapon, and the district court did not err by refusing the instruction.

Having considered appellant's contention and concluded that it is without merit, we

ORDER the judgment of conviction AFFIRMED.

  
\_\_\_\_\_, J.  
Rose

  
\_\_\_\_\_, J.  
Maupin

  
\_\_\_\_\_, J.  
Douglas

cc: Hon. Joseph T. Bonaventure, District Judge  
Clark County Public Defender Philip J. Kohn  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>3</sup>NRS 202.320(1).