IN THE SUPREME COURT OF THE STATE OF NEVADA

GERMAN GONZALEZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 42599

FILED

MAY 12 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY [signature] CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, upon a jury verdict, of two counts of lewdness with a minor. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge. The jury also returned guilty verdicts on two counts of statutory sexual seduction, but the district court dismissed those counts.

Appellant German Gonzalez engaged in two acts of sexual intercourse with a thirteen-year-old child. After being arrested, Gonzalez admitted to the incidents. For these two acts, Gonzalez was charged by information with two counts of statutory sexual seduction and two counts of lewdness with a child under fourteen. The jury convicted Gonzalez on all four counts. At sentencing, the district court dismissed the seduction counts for redundancy, upheld the lewdness counts, and sentenced Gonzalez to two concurrent life sentences with eligibility for parole after ten years. The court also denied Gonzalez's motion for a new trial and to disqualify the Clark County District Attorney's Office, which Gonzalez claimed had tried, rather than negotiated, his case in order to satisfy the office's in-house quota/standard of five trials per deputy district attorney per year. Gonzalez appeals.

05-09279

On appeal, Gonzalez first argues that the court should have dismissed the lewdness counts rather than the seduction counts because lewdness is a lesser-included offense of seduction. Gonzalez reasons that statutory sexual seduction requires proof of an additional fact, namely sexual penetration, while lewdness encompasses non-penetration activity only.

NRS 200.364(3) defines statutory sexual seduction as:

> (a) Ordinary sexual intercourse, anal intercourse, cunnilingus or fellatio committed by a person 18 years of age or older with a person under the age of 16 years; or
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> (b) Any other sexual penetration committed by a person 18 years of age or older with a person under the age of 16 years with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of either of the persons.

The severity of the punishment for statutory sexual seduction depends upon the age of the perpetrator. If the perpetrator is under twenty-one years, he shall be punished for a gross misdemeanor.[1] If he is twenty-one years or older, he shall be punished for a category C felony, resulting in imprisonment for 1 to 5 years.[2]

NRS 201.230 defines lewdness with a child under 14 years as:

> 1. A person who willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust or

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[1]NRS 200.368(2).

[2]NRS 200.368(1); NRS 193.130(2)(c).

> passions or sexual desires of that person or of that child, is guilty of lewdness with a child.

Lewdness is a category A felony, punishable by life imprisonment with parole eligibility after 10 years, or 20 years in prison with parole eligibility after 2 years.[3]

"The Double Jeopardy Clause of the United States Constitution protects defendants from multiple punishments for the same offense."[4] "This court utilizes the test set forth in Blockburger v. United States to determine whether multiple convictions for the same act or transaction are permissible."[5] "[W]here 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 an additional fact which the other does not."[6] "[I]f the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser-included offense and the Double Jeopardy Clause prohibits a conviction for both

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[3]NRS 201.230(2).

[4]Salazar v. State, 119 Nev. 224, 227, 70 P.3d 749, 751 (2003) (citing Williams v. State, 118 Nev. 536, 548, 50 P.3d 1116, 1124 (2002); U.S. Const. amend. V).

[5]Id. (citing Blockburger v. United States, 284 U.S. 299 (1932)).

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

offenses."[7] "A lesser offense is an included offense when the greater offense cannot be committed without committing the lesser offense."[8]

Even if multiple convictions for the same act are permitted under Blockburger, one conviction may still be set aside under a separate redundant convictions analysis.[9] When considering redundant convictions,

> [t]he issue . . . is whether the gravamen of the charged offenses is the same such that it can be said that the legislature did not intend multiple convictions. "[R]edundancy does not, of necessity, arise when a defendant is convicted of numerous charges arising from a single act." The question is whether the material or significant part of each charge is the same even if the offenses are not the same. Thus, where a defendant is convicted of two offenses that, as charged, punish the exact same illegal act, the convictions are redundant.[10]

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[7]Barton v. State, 117 Nev. 686, 692, 30 P.3d 1103, 1107 (2001) (emphasis added); see also Williams, 118 Nev. at 548, 50 P.3d at 1124.

[8]Meador v. State, 101 Nev. 765, 769, 711 P.2d 852, 855 (1985), overruled on other grounds by Talancon v. State, 102 Nev. 294, 721 P.2d 764 (1986).

[9]See Salazar, 119 Nev. at 227, 70 P.2d at 751 (applying redundant convictions analysis after finding separate offenses and no double jeopardy violation under Blockburger); see also State of Nevada v. District Court, 116 Nev. 127, 136 n.7, 994 P.2d 692, 697 n.7 (2000) (noting that the Blockburger "same offense analysis" is distinct from the redundant convictions analysis first utilized in Albitre v. State, 103 Nev. 281, 738 P.2d 1307 (1987)).

[10]State of Nevada, 116 Nev. at 136, 994 P.2d at 698 (internal citation omitted) (quoting Skiba v. State, 114 Nev. 612, 616 n.4, 959 P.2d 959, 961 n.4 (1998)).

"The gravamen of an offense typically is the material act being punished . . . ."[11]

This court will reverse redundant convictions that do not comport with legislative intent.[12] The Legislature is empowered to define crimes and determine punishments, and this court "[does] not encroach upon that domain lightly."[13] Furthermore, when one of two convictions must be set aside, the less severely punished one is vacated.[14] A trial judge has wide discretion in imposing a prison sentence, and we review the sentence for an abuse of that discretion.[15]

In this case, we conclude that each of Gonzalez's acts of sexual intercourse with the thirteen-year-old child victim constitute two separate offenses, not a single offense, under Blockburger because each crime requires proof of a fact that the other does not.

Seduction requires sexual penetration, while lewdness requires a "lewd or lascivious act" (other than that which would constitute sexual assault). If the analysis focused only on the action of the crimes, it would seem that lewdness is indeed a lesser-included offense of seduction because committing the act of sexual penetration would necessarily be

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[11]Id. at 138 n.9, 994 P.2d at 699 n.9.

[12]Salazar, 119 Nev. at 227, 70 P.2d at 751 (permitting State to bring multiple charges based upon a single incident, but noting that this court will reverse redundant convictions that do not comport with legislative intent).

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

[14]Meador, 101 Nev. at 771, 711 P.2d at 856 (citing People v. Brown, 320 P.2d 5, 15 (Cal. 1958), superseded by Cal. Penal Code § 654).

[15]Deveroux, 96 Nev. at 390, 610 P.2d at 723.

committing a lewd act. One action is included within the other. However, lewdness also requires a child-victim under the age of fourteen, while seduction only requires a victim under the age of sixteen. The age requirement for lewdness is more restrictive than that of seduction. One could commit seduction if the child-victim was fourteen or fifteen, but not lewdness. If the analysis focused only on the victim's age, seduction would be the lesser-included offense because its age requirement of sixteen or younger is necessarily satisfied by lewdness's under-fourteen age requirement. Thus, an application of the Blockburger test to the elements of the offenses shows that lewdness is not a lesser offense of seduction and vice versa, and each of Gonzalez's acts of consensual sexual intercourse with the child victim can spawn two separate offenses.

Gonzalez relies on Meador v. State to argue that lewdness is a lesser-included offense of seduction under Blockburger and, therefore, barred by the double jeopardy clause. On this point, Gonzalez's reliance on Meador is misplaced. In Meador, a 1985 case, we concluded that lewdness was a lesser-included offense of sexual assault because sexual assault required proof of penetration, while lewdness did not; therefore, the lewdness conviction was barred by the double jeopardy clause.[16] Meador is distinguishable because, in that instance, we compared lewdness to sexual assault, not seduction.[17] Furthermore, we

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[16]See Meador, 101 Nev. at 770-71, 711 P.2d at 855-56; but see Townsend v. State, 103 Nev. 113, 120, 734 P.2d 705, 710 (1987) ("[I]t is clear that lewdness with a child under the age of fourteen cannot be deemed an included offense of the crime of sexual assault.").

[17]Sexual assault and seduction are different crimes. See Husney v. O'Donnell, 95 Nev. 467, 469, 596 P.2d 230, 231 (1979) (stating in dictum

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concentrated on a single element of those crimes, specifically the act of sexual penetration.

In Barton v. State, a 2001 case, we adopted the Blockburger test and specifically stated that one crime is a lesser-included offense of another crime when all the elements of the lesser offense are included in the elements of the greater offense, which in this case would include such elements as the requisite characteristics of the victim and the perpetrator, or the criminal intent required. As noted above, elements of lewdness are not included in the elements of seduction and vice versa. Therefore, we conclude that lewdness is not a lesser-included offense of seduction.

However, these two offenses, while separate, are redundant. The gravamen or material act of both the seduction and lewdness charges is the same. Gonzalez had unlawful sexual intercourse with a minor child. Thus, we further conclude that while the lewdness and seduction counts are two crimes, not one, they are redundant and one set of crimes must be set aside.

The relevant statutes allow both lewdness and seduction to be charged when an adult consensually sexually penetrates a victim under age fourteen, as is the case here. Gonzalez argues that the statutes are ambiguous and ambiguous statutes should be resolved in favor of the accused.

We disagree. The relevant statutes are not ambiguous. Lewdness applies because its punishment–up to life in prison–indicates that the legislature considered lewdness to be the more serious offense.

. . . continued
that "[t]he crime of sexual assault is different than the crime of statutory sexual seduction and carries a different penalty").

Also, per Meador, when one of two convictions must be set aside, the less severely punished one is vacated. Therefore, we conclude that the district court did not abuse its discretion by setting aside the lesser redundant offense of seduction and sentencing Gonzalez on the more severely punished crime of lewdness.

Next, Gonzalez contends that the district court erred when it denied his motion for a new trial and to disqualify the Clark County District Attorney's Office. Gonzalez asserts that he was tried in contrast to the Office's practice of negotiating pleas in cases of comparable severity. Gonzalez submits that the prosecutor tried his case in order to satisfy the Office's quota/standard of five trials, which creates a conflict between a prosecutor's personal interest in promotion and increased compensation and the defendant's and public's interest in an impartial prosecutor. Gonzalez argues that his constitutional right to due process was violated.

"Whether to grant or deny a motion for a new trial is within the trial court's discretion."[18]

The Supreme Court of the United States has stated that "there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial. It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty."[19] We have acknowledged the Supreme Court's stance.[20]

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[18]Rippo v. State, 113 Nev. 1239, 1250, 946 P.2d 1017, 1024 (1997).

[19]Weatherford v. Bursey, 429 U.S. 545, 561 (1977).

[20]See Young v. District Court, 107 Nev. 642, 645 n.2, 818 P.2d 844, 846 n.2 (1991).

A district attorney has immense discretion in deciding whether to prosecute a particular defendant and it is presumed that he acts in good faith.[21] However, "[t]he Equal Protection Clause constrains the district attorney from basing a decision to prosecute upon an unjustifiable classification, such as race, religion or gender."[22] Also, "a prosecutor may not file charges based merely on vindictiveness, even if the charges are otherwise warranted, nor may a prosecutor threaten or file charges solely to gain advantage in a civil proceeding."[23]

Here, the prosecutor was well within his broad discretion in withdrawing the plea offer and prosecuting Gonzalez for lewdness and seduction. Gonzalez has not claimed that the prosecutor selectively prosecuted him on the basis of an unjustifiable classification, vindictiveness, or to gain an advantage in a civil proceeding. Gonzalez has also failed to demonstrate how the District Attorney's Office's five trial rule warps a prosecutor's incentive to the point that Gonzalez's right to due process has been violated, especially in light of the fact that he was tried, found guilty by a jury, and makes no claims of impropriety or error at trial. Gonzalez has failed to overcome the presumption that the district attorney prosecuted him in good faith. Therefore, we conclude that the district court did not abuse its discretion by denying Gonzalez's motion for

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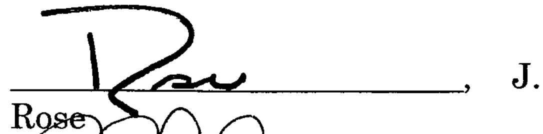
[21]See Salaiscooper v. Dist. Ct., 117 Nev. 892, 902-03, 34 P.3d 509, 516 (2001).

[22]Id. at 903, 34 P.3d at 516.

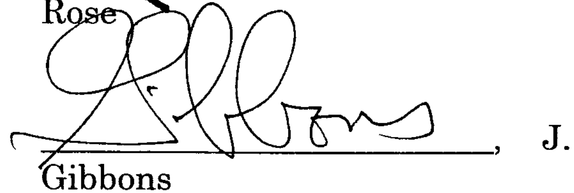
[23]State v. Moen, 76 P.3d 721, 724 (Wash. 2003); see also Albury v. State, 551 A.2d 53, 61 n.13 (Del. 1988).

a new trial and to disqualify the Clark County District Attorney's Office.[24] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



_______________, J.
Rose



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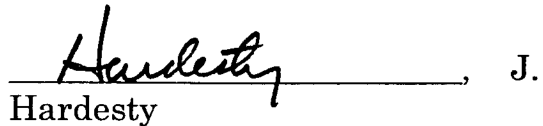

_______________, J.
Hardesty

cc: Hon. Lee A. Gates, 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

[24]We have considered Gonzalez's argument that the five trial quota/standard creates a divided loyalty situation that should lead to the disqualification of the District Attorney's Office on ethical grounds, but we conclude that it is without merit. Furthermore, we conclude that Gonzalez's assertion that the quota/standard threatens the public's trust and confidence in the criminal justice system also lacks merit.