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Manning v. State, 132 Nev. Adv. Op. 67 (September 15, 2016)

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CRIMINAL LAW: JURY INSTRUCTIONS, LESSER-INCLUDED OFFENSES

Summary

A request for a jury instruction on a lesser-included offense is sufficient if there is any evidence the defendant can be convicted of the lesser crime. Failure to give such an instruction is reversible error. Further, although NRS 175.161(6) allows district courts to settle jury instructions in chambers,² district courts should solicit written copies of proposed jury instructions to ensure a clear record on appeal.

Background

In March, 2013, James Manning collided with 62 year-old Thor Berg on a crowded bus, causing Berg to fall. Before he fell, Berg claimed he felt a hand reach in his pocket. His wallet and other pocketed items went missing after the encounter. Manning admitted to walking “rough” past Berg, but denied taking Berg’s belongings. The State charged Manning with robbery and battery with intent to commit a crime. At trial, Manning requested a jury instruction on battery as a lesser-included offense. The district court denied Manning’s request. The jury found Manning guilty of battery with intent to commit a crime, but not guilty of robbery.

Discussion

The Court agreed with Manning that the district court’s failure to give that instruction constituted reversible error; however, identifying Manning’s request was difficult due to the lack of preserved record. District courts should solicit written copies of proposed jury instructions from each party, in order to clarify the record on appeal. Here, the Court only had scant in-court dialogue between the judge and defense counsel to determine whether Manning sufficiently requested a lesser-included offense instruction.

Review of the record showed the district court misunderstood Manning’s request as an objection to redundant convictions.³ Further, the parties agreed that battery was not a lesser-included offense to robbery.⁴ Despite the confusion, the record creates a reasonable understanding that Manning requested battery as a lesser-included offense to battery with intent to commit a crime.

“A defendant is entitled to a jury instruction on a lesser-included offense if there is any evidence at all...under which the defendant might be convicted of the lesser offense.”⁵ The Court determined that the lesser-included offense instruction was consistent with Manning’s theory of defense. Manning’s testimony of walking “rough” past Berg, coupled with his denial of attempting to pickpocket, provided sufficient evidence to support the conclusion that he could be

¹ By Andrew S. Clark.

² NEV. REV. STAT. §175.161(6) (2015).

³ In footnote three of the opinion, the court notes defense counsel’s failure to correct the court’s misapprehension of the request, and reiterates that the district court should have addressed the issue correctly.

⁴ See *Barton v. State*, 117 Nev. 686, 694, 30 P.3d 1103, 1108 (2001) (defining lesser-included offense as an offense whose elements are entirely included in the charged offense).

⁵ *Rosas v. State*, 122 Nev. 1258, 1264-65, 147 P.3d 1101, 1106 (2006).

convicted of simple battery. Therefore, the district court's error was not harmless when it declined to instruct the jury on battery as a lesser-included offense of battery with intent to commit a crime.

Conclusion

The district court erred when it denied Manning's request for a lesser-included offense instruction of battery because there was sufficient evidence to warrant the instruction. Therefore, the Court reversed the judgment of conviction and remanded the case for a new trial. Further, the Court advised the district courts to solicit written copies of proposed jury instructions to ensure clarity of the record on appeal.