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Summary of Rosas v. State, Nev. Adv. Op. No. 106

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*Rosas v. State, Nev. Adv. Op. No. 106 (Dec. 21, 2006)*¹

CRIMINAL LAW – JURY INSTRUCTIONS

Summary

The district court convicted Appellant of committing battery upon an officer and rejected Appellant's proffered jury instruction on the crime resisting a public officer, a lesser-included offense of battery upon an officer.

Disposition/Outcome

The Nevada Supreme Court reversed Appellant's conviction. Further, the Court overruled all cases that required a defendant to present a defense or evidence consistent with, or to admit culpability for, a lesser-included offense to obtain an instruction on a lesser-included offense.

Factual and Procedural History

The State charged Appellant Carlos Mendes Rosas with battery upon an officer causing substantial bodily harm, a felony, which the State later reduced to the misdemeanor charge of battery upon an officer.

The district court rejected Rosas's proffered jury instructions on the lesser misdemeanor offense of resisting a public officer because he had not admitted to any wrongdoing.

The district court convicted Rosas of battery upon an officer, a gross misdemeanor, and he was sentenced to six months in jail. He appealed his conviction to the Nevada Supreme Court, arguing that the district court erred when it denied all of his proffered jury instructions.²

Discussion

1. Definition of Lesser-Included Offenses

A greater offense includes a lesser-included offense "when all of the elements in the lesser offense are included in the elements of the greater offense."³ Because battery upon an officer under NRS 200.481 includes all of the elements of resisting a public officer under NRS 199.280, resisting a public officer is a lesser-included offense of battery upon an officer.

2. Appellant's Jury Instruction on Lesser-Included Offense

¹ By Sherry Moore

² Because the Nevada Supreme Court focuses on the jury instruction relating to lesser-included offenses, the Court's discussion on Rosas' other two denied proffered jury instructions will not be discussed herein.

³ *Barton v. State*, 30 P.3d 1103, 1106 (Nev. 2001).

A defendant is entitled to an instruction on a lesser-included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater offense.⁴

For the defendant to obtain an instruction on a lesser-included offense, the lesser-included offense must be “necessarily included” in the charged offense.⁵ Nevada courts also require that there be in existence some evidence that could reasonably support the lesser-included offense.⁶ Thus, if the defendant can present some evidence in support of a lesser-included offense, no matter how weak or incredible, he is entitled to an instruction on the lesser-included offense.⁷

Since the *Ruland*⁸ case, the Nevada courts have cited it along with *Lisby*⁹ as standing for the proposition that a defendant must present evidence of, or admit culpability for, a lesser-included offense before he can proffer a lesser-included jury instruction. This is in error because as the Nevada Supreme Court stated in *Allen v. State*,¹⁰ a defendant is entitled to an instruction on a lesser-included offense as long as there is some evidence to support it, regardless of which side presents said evidence. Thus, if the prosecution presents the evidence that could reasonably support the lesser-included offense, the defendant need not present any evidence; either the prosecution’s or the defendant’s presentation of the evidence will suffice.

Furthermore, denying the defendant the right to an instruction on the lesser-included offense if he has failed to present evidence supporting it or has argued a different theory is contrary to the defendant’s right to a trial by jury.¹¹ It is strictly within the province of the jury to decide whether the presented evidence could support the lesser-included offense.¹²

Because there was evidence that could support the lesser-included offense of resisting a public officer, and because the greater offense of battery upon an officer includes this lesser-included offense, the district court erred when it denied Rosas’ proffered instructions on the lesser-included offense.

Conclusion

The district court reversed Appellant’s conviction. The district court erred in denying his proffered jury instruction on the lesser-included offense of resisting a public officer because: 1) the greater offense of battery upon an officer includes all of the elements of resisting a public officer; and 2) there was some evidence that could have reasonably supported both self-defense and the lesser-included offense.

⁴ *Keeble v. United States*, 412 U.S. 205, 212-13 (1973).

⁵ NEV. REV. STAT. § 175.501 (2005).

⁶ *Crawford v. State*, 121 P.3d 582, 586 (Nev. 2005); *Ruland v. State*, 728 P.2d 818, 819 (Nev. 1986); *Lisby v. State*, 414 P.2d 592, 595 (Nev. 1966); *see also State v. Millain*, 3 Nev. 409, 449-50 (1867)

⁷ *Colle v. State*, 454 P.2d 21, 24 (1969).

⁸ *Ruland*, 728 P.2d 818.

⁹ *Lisby*, 414 P.2d 592.

¹⁰ 632 P.2d 1153, 1155 (Nev. 1981).

¹¹ *See* NEV. CONST. art. 1, § 3; *see also* U.S. CONST. amend. VI

¹² *Millain*, 3 Nev. at 449-50.