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Alotaibi v. State, 133 Nev. Adv. Op. 81 (Nov. 9, 2017) (en banc)

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Alotaibi v. State, 133 Nev. Adv. Op. 81 (Nov. 9, 2017) (en banc)[1]

CRIMINAL LAW: LESSER-INCLUDED OFFENSE ANALYSIS

Summary

The Court clarified that when an element goes only to punishment and is not essential to a finding of guilt, it is not an element of the offense for purposes of determining whether a lesser-included-offense instruction is warranted pursuant to NRS 175.501[2]. Further, the Court determined that where a statute provides alternative ways of committing an uncharged offense, the elements of only one of those alternatives needs to be included in the charged offense for the uncharged offense to be a lesser-included offense.

Background

On December 31, 2012, Mazen Alotaibi encountered A.D., a 13-year-old boy, outside his hotel room at the Circus Circus hotel. Alotaibi offered A.D. money and marijuana in exchange for sex. A.D. testified that he agreed but intended to trick Alotaibi into giving him marijuana without engaging in any sexual acts. After taking A.D. to his hotel bathroom, Alotaibi began kissing and touching A.D. A.D. testified that he told Alotaibi "no" and wanted to leave. A.D. testified that Alotaibi stood between him and the door and forced him to engage in oral and anal intercourse. After leaving Alotaibi's room, A.D. told hotel security that he had been raped.

In a police interview, Alotaibi admitted to meeting A.D., and engaging in sexual acts with him in the bathroom of his hotel room. Alotaibi stated it was A.D.'s idea to have sex in exchange for money and weed, and that A.D. went willingly with him into the bathroom. According to Alotaibi, A.D. initiated the sexual acts.

The State charged Alotaibi with two counts of sexual assault, among other charges. Alotaibi argued that the district court should give a jury instruction for statutory sexual seduction as a lesser-included offense of sexual assault because he presented evidence indicating consent. The district court found that statutory sexual seduction was not a lesser-included offense because it contained the additional element of age, which is not required by sexual assault. The district court offered to give a jury instruction on statutory sexual seduction as a lesser-related offense of sexual assault. Alotaibi declined the instruction, and the jury found him guilty of two counts of sexual assault with a minor under fourteen and other offenses.

Discussion

To determine if a lesser-included offense instruction is warranted pursuant to NRS 175.501, the Court uses the "elements test"[3] to determine if an uncharged offense is a lesser-included offense of the charged offense. A lesser offense is "necessarily included" in a charged offense if "all of the elements of the lesser offense are included in the elements of the greater

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[2] NRS 175.501 provides: "The defendant may be found guilty or guilty but mentally ill of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense." NEV. REV. STAT. § 175.501 (2017).

[3] Blockburger v. United States, 284 U.S. 299 (1932).

offense"[4] in such a way that the greater offense cannot be committed without committing all the elements of the lesser offense. "Thus, if the uncharged offense contains a necessary element not included in the charged offense, then it is not a lesser-included offense and no jury instruction is warranted."

Alotaibi argued that the Court had previously found statutory sexual seduction to be a lesser-included offense of sexual assault with a minor in *Robinson v. State*.[5] The Court found that *Robinson* focused on the certification of a juvenile as an adult for the purposes of statutory seduction and was decided before the Court clarified lesser-included offenses in *Barton.* The Court disavowed any language in *Robinson* and other previous decisions which suggested that statutory seduction was a lesser-included offense of sexual assault.

In 2012, Nevada defined sexual assault as:

> A person who subjects another person to sexual penetration, or who forces another person to make a sexual penetration on himself or another, or on a beast, against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his conduct, is guilty of sexual assault.[6]

A different subsection of the NRS provided for a sentence of life when the offense was committed against a child under the age of 14 and did not result in substantial bodily harm.[7] The State argued that the victim's age was not an element of sexual assault because the victim's age only goes to the sentence for the offense. Alotaibi argued that the when the State charged him with "Sexual Assault with a Minor Under 14 Years of Age" the State inserted the element into the offense.

The Court found that the victim's age in the sexual assault statute is not an element for purposes of the lesser-included-offense analysis. The Court further explained that when an element goes "only to punishment and is not essential to a finding of guilt, it is not an element of the offense for purposes of determining whether a lesser-included-offense instruction is warranted."

The Court identified the elements of the greater offense to be (1) "subject[ing] another person to sexual penetration..." and (2) that it be "against the will of the victim." The Court then considered whether there were corresponding elements in the lesser offense.

In 2012, sexual seduction in Nevada was statutorily defined 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
> (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.[8]

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[4] Barton v. State, 117 Nev. 686, 690, 30 P.3d 1103, 1106 (2001).
[5] 110 Nev. 1137, 1138, 881 P.2d 667, 668 (1994).
[6] NEV. REV. STAT. § 200.366(1) (2007).
[7] NEV. REV. STAT. § 200.366(3)(c) (2007).
[8] NEV. REV. STAT. § 200.364(5) (2009).

Under the statute, there are two alternative means of committing statutory sexual seduction. The State argued that the elements of both alternative means of committing the offense must be included in the greater offense. Alotaibi argued only for the elements of the first section. The Court determined that when the statute provides alternative ways of committing an uncharged offense, "the elements of only one of those alternatives need to be included in the charged offense for the uncharged offense to be lesser included." The Court found that neither of the alternative methods for statutory seduction were elements of the charged offense of sexual assault.

Conclusion

The Court affirmed the district court's refusal to instruct the jury on statutory sexual seduction and affirmed the judgment of conviction because the victim's age was not a required element of the greater charged offense of sexual assault.