FREDDY A. MARTINEZ,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

Case No. 49608

RESPONDENT'S ANSWERING BRIEF

Appeal From Judgment of Conviction
Eighth Judicial District Court, Clark County

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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STATEMENT OF THE ISSUES

1. Whether Defendant was convicted of two crimes for a single transaction;
2. Whether the prosecution committed prosecutorial misconduct; and
3. Whether there was sufficient evidence to sustain the kidnapping conviction.

STATEMENT OF THE CASE

On September 29, 2006, and Indictment was filed accusing Freddy Martinez, hereinafter "Defendant," with the following charges: Count I – Burglary While in Possession of a Deadly Weapon (Felony – NRS 205.060); Count II – Battery With the Use of a Deadly Weapon (Felony – NRS 200.481); Count III – First Degree Kidnapping With Use of a Deadly Weapon (Felony – NRS 200.310, 200.320, 193.165); and Count IV – Sexual Assault With Use of a Deadly Weapon (Felony – NRS 200.364, 200.366, 193.165).

Thereafter, the Defendant pled not guilty on January 25, 2007, and was tried before the Honorable Stewart L. Bell. The jury trial lasted two days commencing on April 11, 2007, and the jury convicted the Defendant of Counts I-III and found him

not guilty of Count IV. The corresponding Judgment of Conviction was filed on May 31, 2007. The Defendant was thereby sentenced to the Nevada Department of Corrections as follows: as to Count I – a maximum of one hundred eighty (180) days with a minimum parole eligibility of sixty (60) months; as to Count II – a maximum of one hundred twenty (120) days with a minimum parole eligibility of forty-eight (48) months; as to Count III – to life with the minimum parole eligibility of sixty (60) months, plus an equal and consecutive term of life with the minimum parole eligibility of sixty (60) months for the use of a deadly weapon. Counts I-III were to run concurrent. Defendant received two hundred eighty-one (281) days credit for time served. The aforementioned penalties were in addition to the $25.00 Administrative Assessment Fee and $150.00 DNA Analysis Fee.

On June 4, 2007, Defendant filed a Notice of Appeal. The State is now herein responding to Appellant's Opening Brief.

STATEMENT OF THE FACTS

The Defendant and Bianca Hernandez (hereinafter "Victim") were once related as the Victim was married to the Defendant's brother, David Martinez. The Victim and David Martinez had a son together who was sixteen at the time of the incident in question. (Appellant's Appendix "AA" at p. 221). David Martinez and the Victim at one point separated and David moved out of the couple's home that they shared with their son and the Defendant. Defendant continued to reside at the home. (AA at p. 222). At some point, the Victim became romantically involved with Jose Quiroz-Castillo (hereinafter "Quiroz-Castillo"). The two decided to move in together and were still in a committed relationship at the time of trial. Again, the Defendant remained at the home which the Victim owned despite the change in circumstances. (AA at p. 223). The Defendant claimed to be romantically involved with the Victim over the duration of her relationship with Quiroz-Castillo, but the Victim vehemently denies any such claim.

On or about one morning in August 2006, the Victim waited in her car outside the home she shared with Quiroz-Castillo. As she was waiting to take Quiroz-Castillo to work, the Defendant jumped in the vehicle and held her at knifepoint. There, he stabbed her in the right thigh, threatened her, and forced her to drive. (AA at p. 224). The two proceeded until he insisted on driving. At that time, he forced her into the backseat and began driving. Shortly thereafter, she saw a police vehicle to which she attempted to honk and swerve the vehicle in hopes of catching the officers attention, but her efforts were to no avail. The Defendant drove on I-15 until he had long left the city limits, all the while beating the Victim, shoving her, and pulling her hair. (AA at p. 227).

The Defendant drove the Victim until he was able to pull off onto a quiet, empty side road off of I-15. There, he forced the victim into the backseat and had sex with her. After he was finished, he continued this drive towards Mesquite, Nevada. (AA at p. 230). After filling up with gas, the Defendant pulled into an apartment complex. At this time, the Victim was able to flag down assistance and she then was able to phone police and seek treatment at the hospital. The Defendant was then arrested. (AA at p. 234).

ARGUMENT

I

BATTERY AND KIDNAPPING ARE SEPARATE OFFENSES WITH THEIR APPLICABLE SENTENCES SERVING SEPARATE INTERESTS

A. Defendant has failed to satisfy the Blockburger elements test.

NRS 200.481(1)(a) defines battery as "***any willful and unlawful use of force or violence*** upon the person of another." (emphasis added). Particular attention must now be drawn to the elements of kidnapping which is defined under NRS 200.310(1) and provides, in relevant part, "A person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps, or carries away a person by any means whatsoever ***with the intent to hold or detain***, or who holds or detains, ... for the

purpose of committing sexual assault .... or for the purpose of killing the person or inflicting substantial bodily harm upon him .... is guilty of kidnapping." (emphasis added). The State accepts the application of the Blockburger test as the double jeopardy test set forth therein has been adopted by the Nevada Supreme Court in Zgombic v. State, 106 Nev. 571, 798 P.2d 548 (1990) (overruled on other grounds); see also Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180 (1932) ("The applicable rule is that, where the same act or transaction constitutes 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 a fact which the other does not.") (quoting Gavieres v. United States, 220 U.S. 338, 342, 31 S.Ct. 421 (1911)).

The Defendant has incorrectly applied the Blockburger test to the facts of his case, since separate elements were required for the State to seek convictions on the separate offenses of battery with the use of a deadly weapon and kidnapping with the use of a deadly weapon.

Whereas battery requires unlawful use of force or violence upon the person, kidnapping does not require such force. "Battery requires actual physical contact." Zgombic, 106 Nev. at 578. Kidnapping, on the other hand, does not require direct contact. In addition, kidnapping presents an intent element for the perpetrator to possess the mens rea of the intent to hold or detain the victim. Since each of these crimes demands proof of separate elements, "there is no double jeopardy problem under Blockburger." Id. Thus, it is clear both crimes, as in this case, can be committed independent of each other since each requires the proof of an additional element.

In this case, Defendant committed the battery when he stabbed the victim, beat her, and pulled her hair. Despite the fact that unreasonable force and violence was exerted on the Victim, thereby validating the battery claim, the conduct was independent of the mens rea required in the kidnapping statute which requires the intent to hold or detain. Such intent in this case was evidenced by the Defendant

driving to Mesquite and telling the Victim to forget about her son, Jose, and David, and that she is not going to come back to Las Vegas. (AA at p. 230). The kidnapping conviction did not require unlawful use or force or violence upon her, and the battery conviction did not require the intent to hold or detain her. As such, separate elements were proven by the State and the Defendant's convictions for battery with the use of a deadly weapon and kidnapping with the use of a deadly weapon should be affirmed.

B. Battery and kidnapping are not redundant convictions.

The Blockburger test has also previously been applied in other jurisdictions for determining whether battery is a lesser included offense of kidnapping. See Arnold v. State, 514 So.2d 419, 421 (Fla. App. 1987) (convictions for aggravated battery and attempted kidnapping during the same transaction upheld, because "the legislative intent in a case such as this is to impose separate convictions and punishments because the societal interests being protected include a liberty interest affected by the attempted kidnapping, ..., and a bodily integrity interest offended by the aggravated battery."); State v. Hall, 310 S.E.2d 429, 431 (S.C. 1983) (convictions for kidnapping and battery did not constitute double jeopardy because "there is no constitutional barrier to the conviction of a defendant for kidnapping, for restraining his victim, and also of another felony to facilitate which such restraint was committed, provided the restraint, which constitutes the kidnapping, is a separate, complete act, independent of and apart from the other felony.").

This Court has expressly stated the three factors to be considered when determining whether two crimes are redundant: (1) when the facts for the two crimes overlap, (2) when the statutory language indicates one rather than multiple criminal violations was contemplated, and (3) and when legislative history shows that an ambiguous statute was intended to assess one punishment. Wilson v. State, 121 Nev. 345, 114 P.3d 285, 292 (2005). As such, it is understood the Court will reverse redundant convictions that do not comport with legislative intent. Id. The question of the Legislature's intent in this particular circumstance has not been addressed by this

Court. However, it is not the first time a court has been presented with this situation. As evidenced by the holding in Arnold, legislative intent is to punish the Defendant for depriving the Victim of her liberty interest and also for the offense to her bodily integrity interest. Therefore, the Defendant's convictions should not be overturned, since the legislative intent is for the two convictions to serve separate, independent purposes.

The Defendant's application of Salazar v. State, 119 Nev. 224, 70 P.3d 749 (2003), is misplaced as the redundant convictions complained of in that case were for battery with use of a deadly weapon and mayhem with use of a deadly weapon. "Redundancy does not, of necessity, arise when a defendant is convicted of numerous charges arising from a single act. Id. at 227, quoting Skiba v. State, 114 Nev. 612, 616, 959 P.2d 959, 961 (1998). The gravamen of the two charges in Salazar was the same, whereas the kidnapping and battery charges and the corresponding sentences serve entirely different functions. As stated earlier, the holding in Arnold properly represents the positive effect of enforcing punishment against a defendant for both (1) depriving a person of his or her liberty interest, and (2) violating their bodily integrity interest.

II
THE PROSECUTION DID NOT COMMIT PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENTS

The Defendant's claim that the prosecutor's comment was improper and violated appellant's rights to a fair trial and due process under state and federal law, as well as the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution is without any merit whatsoever. The defense complains of the prosecutor's comments when he stated the following during closing:

> "And it really doesn't make a whole heck of a lot of sense, ladies and gentleman why someone who has been kidnapped would have been taken all this way at knifepoint would suddenly feel aroused enough at this point, Well, I

> think I'm going to have sex. Let's pull over on the side of the freeway. If you believe that, if you believe that's the case, find Freddy Martinez not guilty. Mark that box. That makes absolutely no sense, and it's offensive."

(AA at p. 227). The defense now claims these comments "belittled" and "ridiculed" the defense theory of their case.

The standard of review and relevant inquiry is whether the prosecutor's statements so contaminated the proceedings with unfairness as to make the result a denial of due process. Darden v. Wainwright, 477 U.S. 168, 181 (1986). This is based on a defendant's right to have a fair trial, not necessarily a perfect one. Ross v. State, 106 Nev. 924, 927, 803 P.2d 1104, 1105 (1990). In determining whether a defendant has been deprived of a fair trial as a result of prosecutorial misconduct, this Court will inquire as to "whether the prosecutor's statements so infected the proceedings with unfairness as to make the results a denial of due process." Greene v. State, 113 Nev. 157, 169, 931 P.2d 54, 62 (1997).

In Flanagan v. State, 104 Nev. 105, 107, 754 P.2d 836, 837 (1988), this Court reasoned that if a guilty verdict was free from doubt, even aggravated prosecutorial remarks will not justify reversal. In order for the prosecutorial misconduct to constitute reversible error, it must be prejudicial and not merely harmless. In Dotson v. State, 80 Nev. 42, 46, 389 P.2d 77, 80 (1964), the prosecutor, in closing, stated that defendant's counsel had resorted to trickery. The defense immediately objected to the comment and the judge sustained the objection. Id. The Court determined none of the comments amounted to prejudice to the defendant especially in light of the fact that the comments were stricken from the record and the judge admonished the jury to disregard them. Id.

Similarly, a like exchange took place in the instant case in reference to the alleged prejudicial statements made by the prosecutor during the opening of the State's closing argument, and the District Judge found it was not disparaging:

MS. HAMERS: Judge, I'm going to object to that comment. It's disparaging to the Defense to say that that's offensive.

MR. BATEMAN: That's not – I didn't say anything –

THE COURT: It's not disparaging to the Defense, but I'm going to strike the words "it's offensive." They're here to do their job, and they're going to do it the best way they know how. Whatever they decide, we're going to respect. Go ahead. (AA at p. 398).

In context, the statement is not directed at defense counsel, but is in support of the State's burden to prove a sexual assault occurred. Any finding by the jury that the sex was consensual would "offend" good reason and common sense as instructed by Jury Instruction No. 31 which states, in pertinent part, ".... you must bring to the consideration of the evidence your everyday common sense and judgment as reasonable men and women." (AA at p. 107). In this case, similar to Dotson, the defense objected to the prosecutor's comments to which the objection was sustained and the Court struck the words from the record. In addition, the District Court Judge assured the jurors their verdict, even if that may be not guilty, would be afforded the utmost respect. The prosecutor's comments did not affect the Defendant's rights to a fair trial, since there was no prejudice that resulted. In addition, the prosecutor's statement was in reference to the charge for sexual assault, for which the Defendant was acquitted. Such reference was, therefore, harmless since the jury was not swayed by the statement as evidenced by their not guilty verdict to the sexual assault charge. The judge took the appropriate action during closing to ensure no such prejudice resulted.

III
THERE WAS SUFFICIENT EVIDENCE AT TRIAL TO SUSTAIN THE KIDNAPPING CONVICTION

The defense contends that since the jury found the Defendant not guilty on the sexual assault charge, he thereby lacked the intent to commit the offense. As such, he

should have been convicted of second degree kidnapping as opposed to first degree kidnapping.

The standard for reviewing the evidence to support a jury verdict has previously been set by this Court in Bias v. State, 105 Nev. 869, 872, 784 P.2d 963, 965 (1989), when it stated "in reviewing the evidence supporting a jury's verdict, the question is not whether this Court is convinced of the defendant's guilt beyond a reasonable doubt, but whether the jury, acting reasonably, could have been convinced to that certitude by the evidence it had a right to consider." (quoting Wilkins v. State, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980)). NRS 200.310(1) states:

> "A person who willfully seizes, confines, inveigles, entices, decoys, abducts, conceals, kidnaps or carries away a person by any means whatsoever with the intent to hold or detain, or who holds or detains, the person .... ***for the the purpose of committing sexual assault,*** .... is guilty of kidnapping in the first degree." (emphasis added).

The Defendant's contention is factually incorrect. The acquittal on the sexual assault charge is not necessarily inconsistent with the conviction for first degree kidnapping, since the jury may have found the Defendant intended to commit the sexual assault but that no sexual assault occurred due to the absence of some other element, such as consent. However, even if there were some inconsistency in the verdicts, the Nevada Supreme Court has already determined inconsistent verdicts are not rendered invalid. See Bollinger v. State, 111 Nev. 1110, 1116, 901 P.2d 671, 675 (1995) (citing United States v. Powell, 469 U.S. 57, 64, 105 S.Ct. 471, 476 (1984), for the proposition that the U.S. Supreme Court does not give relief on appeal for inconsistent verdicts); See also Brinkman v. State, 95 Nev. 220, 592 P.2d 163 (1979) (inconsistent verdict upheld where there was sufficient evidence to maintain the conviction).

CONCLUSION

Based on the foregoing, Defendant's conviction should not be overturned.

Dated this 10th day of January, 2008.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 10th day of January, 2008.

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CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing Respondent's Answering Brief to the attorney of record listed below on this 10th day of January, 2008.

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