IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES DAEVON MANNING,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

NO. 65856

APPELLANT'S OPENING BRIEF

(Appeal from Judgment of Conviction)

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEF.
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

Attorney for Appellant

STEVEN B. WOLFSON
CLARK COUNTY DIST ATTY
200 Lewis Avenue, 3rd Floor
Las Vegas, Nevada 89155
(702) 455-4711

ADAM LAXALT
Attorney General
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1265

Counsel for Respondent

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES DAEVON MANNING,) NO. 65856
)
Appellant,)
)
vs.)
)
THE STATE OF NEVADA,)
)
Respondent.)

APPELLANT'S OPENING BRIEF

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEF.
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

Attorney for Appellant

STEVEN B. WOLFSON
CLARK COUNTY DIST ATTY
200 Lewis Avenue, 3rd Floor
Las Vegas, Nevada 89155
(702) 455-4711

ADAM LAXALT
Attorney General
100 North Carson Street
Carson City, Nevada 89701
(775) 684-1265

Counsel for Respondent

TABLE OF CONTENTS

PAGE NO.

TABLE OF AUTHORITIES

PAGE NO.

Cases

Misc. Citations

Statutes

IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES DAEVON MANNING, Appellant, vs. THE STATE OF NEVADA, Respondent.	NO. 65856

APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

Appellant, James Manning, appeals from a final judgment under Nevada Rule of Appellate Procedure 4(b) and NRS 177.015. The State filed the Judgment of Conviction on May 15, 2014. Appellant's Appendix Vol. 1, p. 143-44 ("AA I 143-44"). Appellant filed his Notice of Appeal on June 11, 2014. Id. at 145.

ROUTING STATEMENT

Appellant's case is presumptively assigned to the Nevada Supreme Court because he was tried and convicted for a category B felony. Convictions involving category A or B felonies after jury trial are within the original jurisdiction of the Nevada Supreme Court and not the Court of Appeals. *See* NRAP 17(b)(1). Additionally, after fast-

track briefing had been completed in Appellant's case, this Court ordered fulling briefing and advised it would schedule *en banc* oral argument when full briefing is concluded. *See* Order Directing Full Briefing, filed November 4, 2015.

ISSUES PRESENTED FOR REVIEW

I. The district court committed reversible error by failing/refusing to instruct the jury on the lesser-included offense of Battery.[1]

STATEMENT OF THE CASE

On May 21, 2013, the State of Nevada charged Appellant via criminal complaint with: count 1, Robbery; count 2, Battery with the Intent to Commit a Crime (Robbery); count 3, Robbery, Victim 60 Years of Age or Older; and count 4, Battery with the Intent to Commit a Crime (Robbery). Appellant's Appendix p. 1-2 ("AA I 1-2"). The State

[1] This Court's Order Directing Full Briefing advised that full briefing is limited to the sole issue of whether this Court's should reconsider its previous decision in Lisby v. State, 82 Nev. 183, 187, 414 P.2d 592, 595 (1966) which mandates that a district court *sua sponte* instruct the jury regarding lesser-included offenses when evidence has been presented absolving the defendant of guilt for the greater offense while supporting guilt for the lesser offense. *See* Order Directing Full Briefing, filed November 4, 2015.

alleged counts 1 and 2 occurred on March 27, 2013, and counts 3 and 4 occurred on March 29, 2013.[2] Id. at 1-2.

Appellant made his first appearance in Las Vegas Justice Court department 5 on May 22, 2013. Id. at 3. At this initial arraignment the magistrate fixed bail, appointed the Clark County Public Defender to represent Appellant, and scheduled a preliminary hearing for June 5, 2013. Id. However, Appellant was not transported to court for his preliminary hearing on June 5, 2013. Id. at 4. As a result, the magistrate continued the hearing to June 19, 2013. Id.

At the continued preliminary hearing on June 19, 2013, the State of Nevada called one witness, Thor Berg ("Berg"). Id. at 5. At hearing's conclusion, the magistrate dismissed counts 1 and 2 and held Appellant to answer in the district court on counts 3 and 4. Id.

The State filed an Information in district court department 11 on June 27, 2013, charging Appellant with one count of Robbery, Victim over 60 Years of Age and one count of Battery with the Intent to Commit a Crime (Robbery). Id. at 7-8. At his arraignment on July 3, 2013, Appellant pleaded not guilty and invoked his right to a speedy

[2] For the March 27, 2013, incident the State alleged Appellant took a cell phone from Sherry Washington. AA I 1. For the March 29th incident, the State alleged Appellant took personal property from Thor Berg. Id.

trial. Id. at 148. The arraignment hearing master scheduled calendar call for August 14, 2013, and jury trial for August 19, 2013. Id.

The Court subsequently continued Appellant's trial. Also, on October 7, 2013, Appellant's trial counsel became concerned regarding Appellant's mental health so she requested the court evaluate Appellant to determine if he was competent to stand trial. *See* Id. at 153, 189-191. The court agreed and transferred Appellant's case to district court department 7 for the competency evaluation. Id. at 190. The court also stayed all proceedings pending the results of the competency evaluation. Id.

On November 1, 2013, department 7 deemed Appellant competent to stand trial and remanded Appellant's case to department 11. Id. at 154, 193. On November 13, 2013, department 11 re-set Appellant's trial to January 13, 2014. Id. at 155, 201. On January 10, 2014, department 17 assigned Appellant's case to department 3 for trial starting on January 13, 2014. AA I 163.

Appellant's trial lasted three (3) days. Ultimately, the jury acquitted Appellant of count one, Robbery Victim 60 Years of Age or Older but convicted Appellant of count 2, Battery with the Intent to Commit a Crime (Robbery). Id. at 131, 168. After verdict, the court

scheduled a sentencing hearing for March 20, 214. Id. at 168. On January 24, 2014, Appellant filed a Motion for Judgment of Acquittal, or in the Alternative, Motion for a New Trial. Id. at 132. The district court denied the motion after a hearing on February 4, 2014. Id. at 169, AA III 616.

At Appellant's sentencing hearing the court sentenced Appellant to 24 to 60 months in the Nevada Department of Corrections with 362 days credit for time served.[3] Appellant timely filed his Notice of Appeal on June 11, 2014. AA I 145.

STATEMENT OF THE FACTS

On March 29, 2013, Thor Berg ("Berg") rode the CAT bus from Sunset Station Hotel and Casino to Sam's Town Hotel and Casino along Boulder Highway in Las Vegas, Nevada. AA III 369. The bus was crowded. AA II 372. As the bus approached Sam's Town Berg left his seat and walked towards the front exit. Id. at 370. While other persons entered and exited the bus, Berg claimed Appellant reached into Berg's pocket while also applying pressure to the back of Berg's leg which caused Berg to fall. Id. at 370-72, 379. After this alleged

[3] For reasons unclear from the record the court continued Appellant's sentencing hearing from April 24, 2014 to May 13, 2014.

incident, Berg claimed his money ($10.00 to $12.00), CAT bus pass, Clark County Health card, Amazon.com identification card, and various casino players cards were missing from his pocket. Id. at 371, 383. Berg advised he had been carrying the aforementioned property loosely in his pocket. Id. at 384.

The bus driver stopped the bus and waited for paramedics and police to arrive. Id. Responding police officers initially detained three individuals at a pizza restaurant located across the street from the Sam's Town bus stop whom they suspected were involved in the CAT bus incident. Id. at 373. Police took Berg to a "show-up" identification of the suspects where Berg advised that the alleged assailant was not one of the men detained. Id. Berg then completed a voluntary statement. Id.

Callie Mae Borley ("Borley"), a passenger on the CAT bus on March 29, 2013, claimed while riding the bus she noticed Appellant "scoping" other persons, including Berg. Id. at 403-04. Although Berg noted he did not carry a wallet, Borley insisted Berg had a wallet hanging out of Berg's pocket. Id. When the bus stopped at Sam's Town Hotel and Casino Borley alleged Appellant ran to Berg and

punched Berg while also grabbing Berg's wallet. Id. at 405-06, 413. Borely called 911to report the incident. Id. at 413.

Metro patrol officer Steinbach spoke to Berg and allegedly spoke to other witnesses at the scene as well. Id. at 389. However, Stienbach did not remember which other witnesses he spoke with and did not recall whether he spoke to the most important witness -- the bus driver who was sitting a foot away during the alleged incident. Id. at 390, 394. Steinbach failed to take statements from any of the other witnesses he allegedly spoke to who were also on the bus. Id. at 394-96. Most importantly, Steinbach claimed he did not collect the video surveillance from the bus because it wasn't his responsibility to do so. Id. at 399.

The case was eventually assigned to Metro Detective Emby for follow-up investigation. AA III 465. When Emby received the case he initially reviewed the station briefing log. Id. The station briefing log contains details of what occurred during the alleged crime, suspect description, and if there were videos or photographs of the suspect those images would be uploaded to the briefing log as well. Id. Emby noticed that still photographs of a potential suspect, taken from CAT bus video surveillance on March 29, 2013, had been uploaded to the

station briefing log. Id. at 466. Because there were still images from video surveillance in the briefing log Emby assumed Steinbach or some other patrol officer had impounded the video. Id. However, when Emby contacted the evidence vault he was told the video had "never been picked up by patrol." Id. As a result, Emby claimed he contacted the bus surveillance company to procure the video but was told because "the company had gone out of business" they "had no video to achieve [*sic*] and was not able to recover any of the video." Id. at 466-67. Although no video allegedly existed, Emby compared still photos from both the March 27th and March 29th incident and determined the same suspect was involved in both incidents. Id. at 467. After comparing the stills, Emby created a media release using a still image from the March 29th incident. Id. Eventually, an unidentified individual called the crime stoppers hotline and advised the person in the photo was Appellant, James Manning. Id. at 468.

On May 18, 2013, Deputy City of Las Vegas Marshal Joseph Rauchfuss was patrolling Doolittle Park near J Street and Lake Mead Blvd. in Las Vegas, Nevada. AA II 232. While on patrol Rauchfuss noticed Appellant asleep in the park's playground area. Id. Rauchfuss woke Appellant and advised that Appellant was violating park rules.

Id. Rauchfuss detained Appellant and ran a records check. Id. at 233. During the records check, Appellant's SCOPE entry noted that any law enforcement official who had contact with Appellant should immediately contact Detective Emby. Id.

Rauchfuss contacted Metro dispatch who then contacted Emby. Id. Emby eventually called Rachfuss and allegedly told Rachfuss that Emby had probable cause to arrest Appellant, "for two counts of robbery that occurred on the CAT bus."[4] Id. Based solely upon Emby's uncorroborated statement Rauchfuss placed Appellant under arrest and transported him to the Clark County Detention Center.[5] Id. at 233-34. Once at the Clark County Detention center Rauchfuss turned Appellant over to Emby's partner, Detective Kavon. Id. at 234.

After waving his right to remain silent Appellant answered Kavon's questions about the March 27, 2013, incident. AA III 639-40.

---

[4] Rauchfuss's testimony that Emby told him Appellant was wanted "for two counts of robbery" is belied by Kavon's interview with Appellant. During that interview Kavon never explicitly questioned Appellant about the Berg incident but instead only questioned Appellant about the incident on March 27, 2013. Appellant volunteered information regarding other potential incidents that police did not know about, or have evidence for, until Appellant mentioned them. *See* AA III 639-75.

[5] Although Emby allegedly had probable cause to arrest Appellant, there had been no warrants issued for Appellant's arrest as of May 18, 2013, more than 40 days after the alleged CAT bus robberies. AA II 237, 243.

Kavon did not question Appellant about the March 29, 2013, incident involving Berg. *See* Id. at 639-75. During his interrogation, Appellant "confessed" to the March 27, 2013, incident but advised he committed the offense at the behest of Nicholas D. Thompson. Id. at 642, 653-64. Appellant noted Thompson, aka "Baby Insane," was a violent individual who made Appellant commit crimes under threat of death. Id. at 642-75. While Appellant mentioned other alleged incidents involving Thompson, Appellant did not explicitly mention nor confess to the March 29th incident involving Berg. Id.

At trial Appellant testified on direct examination that on March 29th he traveled on the CAT bus from Henderson, NV, to his friend Jeremy Watson's house on Boulder Highway. AA III 493. As the bus became crowded Appellant vacated his seat and moved towards the front of the bus near Berg. Id. at 494. When the bus arrived at Appellant's stop, Appellant walked/ran into Berg while exiting the bus. Id. at 494, 523. Appellant admitted making contact with Berg stating, "I was just trying to get off the bus, you know, like he was kind of in the way, you know. I just kind of walked past him, I didn't mean to like -- I guess he fell kind of dramatic to me, but he had fallen. I caught him because I did kind of go past him rough, but I didn't realize he was

so fragile." Id. at 523. However, Appellant denied stealing anything from Berg or putting his hand in Berg's pocket. Id. at 494.

SUMMARY OF THE ARGUMENT

This Court should reverse Appellant's conviction because the State and district court denied Appellant's requested jury instruction regarding misdemeanor battery as a lesser-included offense. The court had an obligation to *sua sponte* instruct the jury regarding battery after Appellant testified. Even if the court did not have a responsibility to instruct the jury absent a request from the parties, Appellant actually did request the instruction. Because evidence had been presented which conformed to Appellant's theory of defense that he simply battered Berg but did not rob or intend to rob Berg the court could not reject Appellant's requested instruction. The court's erroneous decision mandates reversal.

ARGUMENT

I. The district court committed reversible error by failing/refusing to instruct the jury on the lesser-included offense of Battery.

The State charged Appellant with Robbery and Battery with Intent to Commit a Crime (Robbery). AA I 7-8. To convict Appellant of Battery with the Intent to Commit a Crime (Robbery) the State had

to prove that Appellant committed a battery while also possessing the specific intent to rob Berg. Nevada defines Battery as "any willful and unlawful use of force or violence upon the person of another." NRS 200.481(1)(a). Similarly, Battery with the Intent to Commit a Crime is codified in NRS 200.400(1)(a) and defines battery identically to NRS 200.481(1)(a).

Pursuant to NRS 175.201, "Every person charged with the commission of a crime shall be presumed innocent until the contrary is proved by competent evidence beyond a reasonable doubt; and when an offense has been proved against the person, and there exists a reasonable doubt as to which of two or more degrees the person is guilty, the person shall be convicted only of the lowest." Additionally, NRS 175.501 states pertinently that a defendant "may be found guilty... of an offense necessarily included in the offense charged." An offense is necessarily included in the charged offense when the charged offense "cannot be committed without committing the lesser offense." Estes v. State, 122 Nev. 1123, 1143, 146 P.3d 1114, 1127 (2007) (*internal citations omitted*).

Here, Appellant could not commit Battery with the Intent to Commit a Crime (Robbery) without simultaneously committing

Battery.[6] Therefore, Battery is a lesser-included offense of Battery with the Intent to Commit a Crime. Accordingly, pursuant to NRS 175.201 and 175.501, the jury had the right to find Appellant guilty only of Battery.

1. Nevada law required the district court to instruct the jury on the lesser-included offense of Battery.

In Lisby v. State, 82 Nev. 183, 187, 414 P.2d 592, 594-95 (1966), this Court, interpreting NRS 175.501, noted three situations which implicate the necessity of lesser-included offense jury instructions and corresponding verdict forms.[7] First, this Court noted when evidence is presented which absolves a defendant of guilt for a greater offense yet supports guilt for a lesser offense the district court must instruct the jury on the lesser offense "without request." Id. Second, where the evidence presented would not support guilt for a lesser offense, where the defendant denies culpability in the charged crime, or where the elements of the lesser and greater offense differ, the

---

[6] For other examples of battery as a lesser included offense, see Greenwood v. State, 112 Nev. 408, 915 P.2d 258 (1996) (noting that battery is a lesser-included offense of battery with substantial bodily harm), and Kimball v. State, 100 Nev. 190, 678 P.2d 675 (1984) (also noting that battery is a lesser included offense of battery with substantial bodily harm).

[7] When this Court decided Lisby, NRS 175.501 was codified as NRS 175.455. NRS 175.455, as quoted in Lisby, is identical to the present day version of NRS 175.501. *See* Lisby, 82 Nev. at 187, 414 P.2d at 594.

district court cannot and should not give lesser offense instructions. Id. Finally, this Court held that where evidence had been presented to prove the lesser offense, but the State had met its burden of proof for the greater offense, the district court may properly refuse a request for a lesser-included offense instruction. Id. at 188, 414 P.2d at 595. However, this Court added a caveat noting, "[b]ut, if there is any evidence at all, however slight, on any reasonable theory of the case under which the defendant might be convicted of a lower degree or lesser included offense, the court must, if requested, instruct on the lower degree or lesser included offense." Id.

Years later, this Court revisited lesser-included offenses in Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006). In Rosas, this Court explained that NRS 175.501 is essentially the codification of a prosecutor's common law right to allow the jury to consider a lesser-included offense when the State had failed to present sufficient evidence to convict for the greater offense. Id. at 1264, 147 P.3d at 1105. Rosas further explained that although NRS 175.501 codified a prosecutor's common law right to submit lesser-included offenses to the jury, subsequent court decisions acknowledged the defendant's right to lesser-included offense instructions as well. Id. Rosas noted

Defendants were entitled to lesser-included offense instructions, "because of the 'substantial risk' that a jury will convict despite a failure to prove the charged offense if the defendant appears guilty of some offense." Id. at 1264, 147 P.3d at 1106. While generally re-iterating Lisby's holding, Rosas clarified Lisby in one significant respect. The Rosas Court held that a defendant's right to lesser-included offense instructions exits even if the defendant had denied culpability for the charged crime. Id. at 1267, 147 P.3d at 1107. Essentially, as long as evidence had been presented, by either side, to lay the foundation for a verdict on the lesser-included offense, the district court could not reject lesser-included offense instructions if the defendant denied culpability for the charged crime. Id. at 1267, 147 P.3d at 1108. Moreover, Rosas reaffirmed Lisby's requirement that the district court must offer a lesser-included offense instruction without request when, "there is evidence which would absolve the defendant from guilt of the greater offense ... but would support a finding of guilt of the lesser offense." Id. at 1265 fn. 9, 147 P.3d at 1106 fn.9.

a. The district court was required to give a lesser-included offense instruction regarding battery without request.

Nevada mandates that district courts instruct the jury regarding lesser-included offenses, without request, when evidence has been presented absolving the defendant of guilt for the greater offense while supporting guilt for the lesser offense. Lisby, 82 Nev. at 187, 414 P.2d at 594-95; Rosas, 122 Nev. at 1265 fn. 9, 147 P.3d at 1106 fn.9. This approach is typically referred to as the "trial integrity approach." *See* Catherine L. Carpenter, The All or Nothing Doctrine in Criminal Cases: Independent Trial Strategy or Gamesmanship Gone Awry?, 26 Am. J. Crim. L. 257, 278 (Spring 1999).[8] The trial integrity approach is based upon an acknowledgment that lesser-included offense instructions are "fundamental to the trial process, and as such, the decision whether to instruct on lesser-included offenses rests exclusively with the court." Id.

In contrast, other jurisdictions follow an approach which allows a defendant to reject a lesser-included offense instruction even when the evidence presented would absolve him of guilt for the greater offense but permit conviction for the lesser offense. This approach is

[8] *See* Id. at 264 fn. 17, specifically noting Nevada has codified the trial integrity approach in NRS 175.501.

typically called the "party autonomy approach."[9] Id. at 284. Jurisdictions following the "party autonomy approach" allow the trial participants to forego lesser-included offenses even if the evidence clearly establishes the lesser offense. Moreover, the trial courts have no *sua sponte* duty to instruct on lesser offenses when a party does not request the instructions. Id. Notably however, one party cannot pursue an "all or nothing" strategy over the other party's objection. Id. at 277. Because lesser-included offense instructions can benefit either the prosecution or the defense both parties must agree to forego lesser instructions and pursue an all or nothing approach. Id.

Finally, in capital cases, even in jurisdictions which follow the party autonomy approach, trial courts must *sua sponte* instruct on lesser offenses pursuant to U.S. Supreme Court precedent Beck v. Alabama, 447 U.S. 625 (1980). *See* Carpenter, 26 Am. J. Crim. L. at 275. While the Beck court noted due process mandates trial courts instruct on lesser-included offenses in capital cases, the court declined to extend its holding to non-capital cases and instead left that decision to the individual states. Beck, 447 U.S. at 635.

---

[9] There are some jurisdictions which follow a "hybrid approach" which gives the parties the right request or decline lesser-included offense instructions but preserves the trial court's discretion to *sua sponte* instruct on lesser included offenses. Id. at 288.

i. Nevada is part of a majority of jurisdictions which follow the trial integrity approach.

In Harbin v. State, 14 So.3d 898, 902 (Ct. Crim. App. Al. 2009), the Alabama Court of Appeals analyzed Ala.Code § 13A-1-9(a) which states -- almost identically to NRS 175.501, "[a] defendant may be convicted of an offense included in an offense charged." The Harbin court noted Ala.Code § 13A-1-9(a) essentially gave the trial court the power to overrule a party's desire to pursue an "all or nothing" approach. Id. Moreover, the Harbin court found a majority of jurisdictions "have held that a trial court does not err in instructing the jury on a lesser-included offense that is supported by the evidence, even over a defendant's objection." Id.

Indeed, Harbin cited 26 other jurisdictions which allowed the trial court to overrule a defendant's decision to pursue an "all or nothing" strategy and *sua sponte* instruct on lesser offenses when evidence had been presented which would support a verdict for the lesser offense. Id. Specifically, Harbin cited cases from Alaska, Arkansas, California, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Massachusetts, Michigan, Minnesota, Mississippi, Nebraska, New Hampshire, New Jersey, New Mexico, Ohio,

Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah, and Vermont. Id. Because both Lisby and Rosas require the district courts to *sua sponte* instruct on lesser-included offenses when evidence absolves a defendant of guilt for a greater offense but supports guilt for a lesser offense, Nevada is part of the majority of states noted in Harbin.

California is included in the majority of jurisdictions which follow the trial integrity approach. Appellant contends it cannot reasonably be questioned that Nevada is a trial integrity jurisdiction as well. However, to the extent it could, Appellant believes this Court should look to California for guidance. Indeed, Nevada appellate courts have routinely looked to California decisions interpreting California laws similar to laws found in Nevada.

Recently, the Nevada Court of Appeals looked to California law to provide guidance when analyzing a Nevada Statute with an almost identical California counterpart. Specifically, the Appellate Court noted because the Nevada burglary statute "fundamentally mirror[ed]" the scope and purpose of California's burglary statute, the court could consider "California jurisprudence in defining the 'outer boundary' of a building and analyzing when it has been 'entered[.]'" Merlino v. State,

357 P.3d 379, , 131 Nev. Adv. Op. 65 (Nev. App. Ct. September 10, 2015)(*citing* City of Las Vegas v. Cliff Shadows Prof. Plaza, LLC, 129 Nev. ___, ___ n.4, 293 P.3d 860, 865 n.4 (2013)). Likewise, this Court also looked to California for guidance when resolving whether one could burglarize his own home because California's burglary statute closely mirrored Nevada's. State v. White, 330 P.3d 482, 485-86, 130 Nev. Adv. Op. 56 (July 10, 2014).

With the aforementioned in mind, Cal. Penal Code § 1159 states, "[t]he jury, or the judge if a jury trial is waived, may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense." Almost identically, NRS 175.501 states, "[t]he 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." Accordingly, because NRS 175.501 "substantially mirrors" Cal. Penal Code § 1159, this Court should look to California for guidance regarding whether NRS 175.501 mandates that the trial court *sua sponte* instruct on lesser-included offenses.

When interpreting Cal. Penal. Code § 1159, the California Supreme Court has held:

> California law has long provided that even absent a request, and over any party's objection, a trial court must instruct a criminal jury on any lesser offense 'necessarily included' in the charged offense, if there is substantial evidence that only the lesser crime was committed. This venerable instructional rule ensures that the jury may consider all supportable crimes necessarily included within the charge itself, thus encouraging the most accurate verdict permitted by the pleadings and the evidence.

People v. Smith, 303 P.3d 368, 159 Cal.Rptr.3d 57 (2013)(*citing* People v. Birks, 119 Cal.4th 108, 112, 77 Cal.Rptr.2d 848, 849 (1998)); *see also* People v. Ngo, 170 Cal.Rptr.3d 90, 112-13, 225 Cal.App.4th 126, 155 (2014)(re-affirming Cal. Penal Code § 1159 mandates that the trial court *sua sponte* instruct on lesser-included offenses when evidence is presented absolving a defendant of guilt for the greater offense but supports guilt for the lesser offense). California's adherence to the trial integrity approach is also rooted in the acknowledgement that the trial court has a duty to instruct the jury on the "general principles of law governing the case;" 'i.e., those '"closely and openly connected with the facts of the case before the court." People v. Cook, 111 Cal.Rptr.2d 204, 209, 91 Cal.App.4th 910, 917 (2001)(*citing* Birks, 119 Cal.4th at 118, 77 Cal.Rptr.2d at 853).

Nevada, like California, requires the district court to fully and accurately instruct the jury regarding the law governing the case. *See* Crawford v. State, 121 Nev. 744, 755, 121 P.3d 582, 589 (2005). NRS 175.501 recognizes this principle and essentially gives the jury an opportunity to fairly resolve cases in which the State has chosen to overcharge a defendant but the defendant nevertheless committed some criminal act. This approach promotes confidence and fairness in the trial process and represents the majority view. Accordingly, Nevada should not become a minority jurisdiction that allows a defendant to "gamble" that the jury, which is almost always prone to conviction, may acquit merely because the State made an incorrect charging decision.

ii. This Court should not reconsider Lisby.

Lisby is established precedent in Nevada and has been so since 1966. This Court has an opportunity to modify, overrule, or reject, Lisby as recently as 2006 in Rosas, but chose not to do so. Indeed, this Court should not overrule established precedent lightly. This is especially true when precedent is based upon a law duly passed by the State legislative.

In fact, this Court has acknowledged the importance of *stare decisis* noting, "'we are loath to depart from the doctrine of stare decisis'" and will overrule precedent only if there are compelling reasons to do so." City of Reno v. Howard, 318 P.3d 1063, 1065, 130 Nev. Adv. Op. 12 (February 27, 2014)(*citing* Armenta-Carpio v. State, 129 Nev. Ad. Op. ___, ___, 306 P.3d 395, 398 (2013)). Moreover, "[w]hile courts will indeed depart from the doctrine of stare decisis where such departure is necessary to avoid the perpetuation of error, the observance of the doctrine has long been considered indispensable to the due administration of justice, that a question once deliberately examined and decided should be considered as settled." Holloway v. Barrett, 87 Nev. 385, 389, 487 P.2d 501, 503 (1971)(internal citations omitted).

Likewise, the U.S. Supreme Court has held, "[o]ur reluctance to overturn precedents derives in part from institutional concerns about the relationship of the Judiciary to Congress. One reason that we give great weight to *stare decisis* in the area of statutory construction is that "Congress is free to change this Court's interpretation of its legislation.'" U.S. v. Neal, 516 U.S. 284, 295 (1996)(*quoting* Illinois Brick Co. v. Illinois, 431 U.S. 720, 736 (1977)). Additionally, "[w]e

have overruled our precedents when the intervening development of the law has 'removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies.'" Id. (*quoting* Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989)).

The Nevada Legislature, via NRS 175.501, has mandated that a criminal defendant "may be found guilty... of an offense necessarily included in the offense charged." Furthermore, the Legislature has found that "when an offense has been proved against the person, and there exists a reasonable doubt as to which of two or more degrees the person is guilty, the person shall be convicted only of the lowest." NRS 175.201.

The Nevada Legislature has never substantially changed nor modified NRS 175.201 and 175.501. Lisby first acknowledged the statutes' significance in 1966. Forty (40) years later, in 2006, this Court again recognized Lisby's lasting significance in Rosas. Since Rosas there has been no "intervening development of the law" which has weakened the significance of Lisby's conceptual underpinnings. Moreover, the legislature has not sought to "remedy" any supposed flaws in either NRS 175.201 or 175.501. Finally, the decision of a

minority of jurisdictions to allow defendants to pursue an all or nothing strategy has not rendered Lisby incompatible with competing legal doctrines or principles.

Both NRS 175.201 and 175.501 help ensure that a criminal defendant is neither found guilty of a greater offense merely because the State chose to pursue a charge unsupported by the evidence nor acquitted even though he has some criminal liability. Moreover, both statutes help ensure that the district courts fulfill their obligation to accurately and correctly instruct the jury on the law governing the case. There are compelling reasons for allowing a jury to find a defendant guilty of a lesser-included offense even though a defendant or the State desires to pursue an "all or nothing" strategy. As the Utah Supreme Court has noted:

> If one were to view a trial as a strictly adversarial contest or combat between two parties, one could argue that a defendant should have the right to win or lose solely on the basis of what the prosecution has charged. However, a criminal trial is much more than just a contest between the State and an individual which is determined by strategies appropriate to determining the outcome of a game. A primary purpose of a criminal trial is the vindication of the laws of a civilized society against those who are guilty of transgressing those laws. The process, however, must be based on procedures which

> are consonant with fairness both to the defendant and the State.

State v. Howell, 649 P.2d 91, 94 (1982).

Both Lisby and Rosas acknowledge the aforementioned by requiring the district court to *sua sponte* instruct the jury on lesser-included offenses when there is evidence presented absolving a defendant of guilt for a greater offense while supporting guilt for a lesser offense. If a criminal trial is indeed the search for truth, this Court should not countenance allowing either the State to overcharge a defendant in hopes of securing a conviction for a serious offense even though the evidence is lacking nor allowing a defendant to escape responsibility merely because the State has imprudently chosen a course of action incompatible with its ethical obligations.

Here, at trial Appellant presented evidence which totally absolved him of guilt for the greater offense, Battery with the Intent to Commit a Crime (Robbery), but supported guilt for the lesser-included offense of Battery. Specifically, Appellant testified he made physical contact, i.e. a battery, with Berg when Appellant exited the bus. AA III 494, 523. Appellant noted that Berg "was in the way" when Appellant walked out the door. Id. However, Appellant denied taking anything from Berg or intending to take anything from Berg. Id. Therefore,

Appellant admitted he unlawfully used force upon Berg by purposely walking into Berg which caused Berg to fall but denied taking or intending to take Berg's property.

Appellant's testimony was evidence. Appellant's testimonial evidence absolved him of guilt for the greater offense of Battery with the Intent to Commit a Crime (Robbery) but supported guilt for the lesser-included offense of Battery. Appellant could not commit Battery with the Intent to Commit a Crime without at the same time committing the lesser-included offense of Battery. Therefore, Battery was a lesser-included offense of the charge Appellant faced, Battery with the Intent to Commit a Crime.

Because Nevada follows the trial integrity approach the district court was required to instruct the jury regarding the lesser-included offense of Battery even if Appellant had not requested the instruction. When the court failed to so instruct it committed reversible error. The court's failure totally removed from the jury's consideration an offense for which there was supporting evidence. By precluding the jury from considering this option the district court's error was not harmless and indeed affected Appellant's substantial right to have a fully informed jury consider whether Appellant committed the charged crime. Had the

jury been properly instructed, there is no doubt it would have acquitted Appellant of the greater offense and instead only convicted Appellant of the lesser-included offense as evidenced by the jury's rejection of Berg's and Borely's testimony. Based upon the court's obvious error Appellant respectfully requests this Court reverse his conviction.

iii. If this court overrules Lisby's admonition that the district court *sua sponte* instruct on lesser-included offenses, this Court should not however overrule Lisby's recognition of a defendant's right to a lesser-included instruction when consistent with his theory of the case.

If this Court determines Lisby and Rosas should be overruled and therefore that the district court had no obligation to *sua sponte* instruct Appellant's jury regarding the lesser-included offense of Battery, Appellant submits this Court should not overruled Lisby's recognition of a defendant's right to lesser-included offense instructions consistent with a theory of defense. Indeed, in Lisby this Court specifically noted a defendant would be entitled to a lesser-included offense instruction, "if there is any evidence at all, however slight, on any reasonable theory of the case under which the defendant might be convicted of a lower degree or lesser included offense, the

court must, if requested, instruct on the lower degree or lesser included offense." Lisby, at 188, 414 P.2d at 595.

Overruling Lisby and Rosas requirement that the district court *sua sponte* instruct juries on lesser-included offenses should not affect Lisby and Rosa's acknowledgement that "if there is any evidence at all, however slight, on any reasonable theory of the case under which the defendant might be convicted of a lower degree or lesser included offense, the court must, if requested, instruct on the lower degree or lesser included offense." Lisby, 82 Nev. at 188, 414 P.2d at 595. This rational is repeatedly found in other Nevada cases not exclusively involving lesser-included offenses.

In fact this court has consistently held that a defendant has a right to jury instructions on his or her "...theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." Vallery v. State, 118 Nev. 357, 372, 46 P.3d 66, 77 (2002). Additionally, if a district court fails to instruct the jury on the defense theory of the case when ". . . supported by some evidence which, if believed, would support a corresponding jury verdict, . . . [this omission] constitutes reversible error." Williams v. State, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983). The Ninth Circuit has also held,

"failure to instruct the jury on the defendant's theory of the case, where there is evidence to support such instruction, is reversible per se and can never be considered harmless error." Duckett v. Godinez, 67 F.3d 734, 743 (9th Cir. 1995)(*citing*; U.S. v. Zuniga, 6 F.3d 569, 571 (9th Cir.1993); U.S. v. Escobar de Bright, 742 F.2d 1196, 1202 (9th Cir.1984)).

Here, noting in a modified Lisby or Rosas should change Appellant's entitlement to a lesser-included offense instruction for Battery because Appellant presented evidence, however slight, to support this reasonable theory of defense and thereafter specifically requested the instruction. Having done so Appellant was absolutely entitled to the instruction and the district court's refusal to give the instruction is reversible error.

As previously discussed, Appellant testified it was crowded on the CAT bus on March 29, 2013. Id. at 494, 523. Appellant admitted he made physical contact with Berg when Appellant exited the bus. Id. Appellant noted that Berg "was in the way" when Appellant walked out the door. Id. at 523. While exiting, Appellant physically contacted Berg causing Berg to fall. Id. at 523. However, Appellant denied taking anything from Berg or intending to take anything from Berg. Id.

at 494. Thereafter, in closing argument Appellant summarized this theory of defense by highlighting his testimony: "I pushed into the old man. I ran past him because I was trying to get off the bus. That was rude. That was really rude. [Appellant] should have said, excuse me sir. Or gone out another exit." Id. at 584.

Based upon his testimony Appellant presented evidence -- however slight, to support his reasonable theory of defense that he battered Berg but did not rob nor intend to rob Berg. After presenting this evidence Appellant requested a lesser-included jury instruction for Battery. Id. at 558. The district court clearly abused its discretion by denying Appellant's requested instruction and instead suggesting that if the jury convicted Appellant of both Robbery and Battery with the Intent to Commit Robbery then the court would consider vacating one of the convictions. Id. at 559. The court's reasoning is completely at odds with NRS 175.501 and this Court's precedent.[10]

[10] The district court's logic was probably based upon this Court's decision in Salazar v. State, 119 Nev. 224, 70 P.3d 749 (2003), which prohibited dual convictions for offenses which arise from the same conduct. However, this Court overruled Salazar in Jackson v. State, 291 P.3d 1274, 128 Nev. Ad. Op. 55 (2012). In Jackson, this Court held dual convictions could stand, even when arising from the same conduct, unless the convictions violate double jeopardy.

The district court's refusal to instruct the jury regarding Appellant's defense theory was an abuse of discretion and clearly erroneous. Moreover, the court's refusal to properly instruct the jury totally removed Appellant's defense theory from the jury's consideration. This error is reversible *per se* and therefore Appellant respectfully requests this Court reverse his conviction.

CONCLUSION

Based upon the foregoing argument, Appellant respectfully requests this Court reverse his conviction.

Respectfully submitted,

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By: */s/ William M. Waters*
WILLIAM M. WATERS, #9456
Deputy Public Defender
309 South Third Street, #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 size font.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Proportionately spaced, has a typeface of 14 points or more and contains 6,538 words.

3. Finally, 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)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. 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 4th day of January, 2016.

PHILIP J. KOHN
CLARK COUNTY PUBLIC DEFENDER

By *_/s/ William M. Waters_*
WILLIAM M. WATERS, #9456
Deputy Public Defender
309 South Third Street, Suite #226
Las Vegas, Nevada 89155-2610
(702) 455-4685

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 4th day of January, 2016. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

CATHERINE CORTEZ MASTO
STEVEN S. OWENS

WILLIAM M. WATERS
HOWARD S. BROOKS

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

JAMES MANNING
NDOC No: 1030247
c/o Northern Nevada Correctional Center
P.O. Box 7000
Carson City, NV 89702

BY */s/ Carrie M. Connolly*
Employee, Clark County Public Defender's Office