

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUAN JOSE RODRIGUEZ,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

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Elizabeth A. Brown
Clerk of Supreme Court

Appeal from a Judgment of Conviction in Case Number CR17-0210
The Second Judicial District Court of the State of Nevada
Honorable Connie J. Steinheimer, District Judge

APPELLANT'S OPENING BRIEF

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NEVADA RULES OF APPELLATE PROCEDURE

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I. STATEMENT OF JURISDICTION

This Court's jurisdiction rests on Rule 4(b) of the Nevada Rules of Appellate Procedure (NRAP) and NRS 177.015(3) (providing that a defendant may appeal from a final judgment in a criminal case). The district court filed a criminal judgment of conviction on April 25, 2017. JA 65-66 (Judgment).^{1,2} On May 25, 2017, Appellant Juan Jose Rodriguez (Mr. Rodriguez), timely filed a notice of appeal from that judgment. JA 69-71 (Notice of Appeal).

II. ROUTING STATEMENT

This appeal is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(1) because it is an appeal "from a judgment of conviction based on a plea of guilty." Notwithstanding this presumption the Nevada Supreme Court should retain and hear this appeal because it presents a question of first impression (albeit based on existing precedent). NRAP 17(a)(10).

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¹ "JA" stands for the Joint Appendix. Pagination conforms to NRAP 30(c)(1).

² A Corrected Judgment was filed the next day correcting a clerical error. JA 67-68.

III. STATEMENT OF THE LEGAL ISSUE PRESENTED

Did the district court err in sentencing Mr. Rodriguez on the primary battery offense for both the enhanced felony due to a substantial bodily harm enhancement under NRS 200.481(2)(b), and for an older person enhancement under NRS 193.167?

IV. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction. The State charged Mr. Rodriguez with a single count of battery resulting in substantial bodily harm (committed against an older person), a violation of NRS 200.481(2)(b) and NRS 193.167, a category C felony. JA 1-3 (Information). Mr. Rodriguez pleaded guilty. JA 18 (Transcript of Proceedings: Arraignment). In exchange for Mr. Rodriguez's guilty pleas, the parties were free to argue for an appropriate sentence. JA 6 (Guilty Plea Memorandum) (Paragraph 7); JA 12 (Transcript of Proceedings: Arraignment). The district court judge canvassed Mr. Rodriguez and accepted his guilty plea. JA 13-19. At the sentencing hearing the court sentenced him to a term of 18 to 60 months in the Nevada Department of Corrections on the enhanced battery count, plus a consecutive term of 48 to 120 months on the older person enhancement, for an aggregate sentence of 66 to 180 months. The court credited him 150 days toward the sentence. JA 65-66 (Judgment). The

court also imposed fees, assessments, and restitution. *Id.* Mr. Rodriguez appeals his sentence.

V. STATEMENT OF THE FACTS

The underlying facts speak to the contingency of life. On September 1, 2016, twenty-seven-year-old Juan Rodriguez—who had been out drinking with some friends—slipped away from them and began to graffiti different physical objects including a historical marker located on Virginia Street, near the Courthouse. Sixty-eight year old Henry Sosnowski and his girlfriend, Annalisa Antonowitsch, spotted Mr. Rodriguez and told him to stop. They said they were going to call the police. A verbal and then physical argument ensued and Ms. Antonowitsch stepped between Mr. Rodriguez and Mr. Sosnowski. At some point Mr. Rodriguez's girlfriend arrived and yanked Ms. Antonowitsch to the ground. Mr. Sosnowski turned to look for her. With no one between them, Mr. Rodriguez sucker-punched Mr. Sosnowski, causing him to fall and hit his head. As a result Mr. Sosnowski almost died and he now suffers from permanent life-changing brain damage. JA 24-27 (defense counsel), 33-36 (prosecutor). (Transcript of Proceedings: Sentencing). The State presented the

testimony of three witnesses—including Ms. Antonowitsch—on the devastating impact of those events on Mr. Sosnowski, and on them. JA 44-58.

At the sentencing hearing, Mr. Rodriguez’s counsel recommended a sentence of 12 to 60 months on the enhanced battery and a like 12 to 60 months consecutive sentence on the older person enhancement. JA 30. He did not argue that only one enhancement could apply. The prosecutor recommended a sentence of 24 to 60 months on the enhanced battery and a consecutive sentence of 72 to 180 months on the older person enhancement. JA 41. Similarly, he argued for both enhancements. The district court sentenced on both and imposed an aggregate sentence of 66 to 180 months in the Nevada Department of Corrections. JA 62.

VI. SUMMARY OF ARGUMENT

In Nevada a district court may not impose consecutive sentencing enhancements (plural) for the same primary offense. Yet that occurred in this case. Here, the primary offense was battery; defined as “any willful and unlawful force or violence upon the person of another.” If substantial bodily harm results to the person as a result of a battery,

the act is enhanced to a felony and the punishment befalls that for a category C felony. If the battery is against a person “60 years of age or older,” the offender is subject to a sentencing enhancement in accordance with the primary offense: misdemeanor, gross misdemeanor or felony. Because no objection was made below, Mr. Rodriguez was improperly sentenced on two sentencing enhancements for the primary offense of battery.

VII. ARGUMENT

The district court erred in sentencing Mr. Rodriguez on the primary battery offense for both an enhanced felony due to the substantial bodily harm enhancement under NRS 200.481(2)(b), and for the older person enhancement under NRS 193.167.

Standard of Review and Discussion

District court sentencing decisions are reviewed under an abuse of discretion standard. *Silks v. State*, 92 Nev. 91, 545 P.2d 1149 (1976); *Renard v. State*, 94 Nev. 368, 580 P.2d 470 (1978); *Parrish v. State*, 116 Nev. 982, 12 P.3d 953 (2000). “An abuse of discretion occurs if the district court’s decision is arbitrary or capricious or if it exceeds the bounds of law or reason.” *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005) (footnote omitted) (quoting *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)). “[Q]uestions of statutory

interpretation [are] review[ed] de novo.” *Sharpe v. State*, 131 Nev. Adv. Op. 32, 350 P.3d 388, 389 (2015) (citing *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011)).

In Nevada a district court may not impose consecutive sentencing enhancements for the same primary offense. See *Barrett v. State*, 105 Nev. 361, 364, 775 P.2d 1276, 1278 (1989) (improper to impose sentencing enhancements under both NRS 193.165 and NRS 193.167 for the same primary offense); *Odoms v. State*, 102 Nev. 27, 34, 714 P.2d 568, 572 (1986) (improper to impose sentencing enhancements under both NRS 193.165 and NRS 207.010 for the same primary offense). Yet that occurred here: The “primary offense” in this case was “battery.”

“Battery” means “any willful and unlawful force or violence upon the person of another.” NRS 200.481(1)(a). Under subsection 2 of the statute the offense is punished as a misdemeanor if no substantial bodily harm results. NRS 200.481(2)(a). But, under NRS 200.481(2)(b) a battery that causes substantial bodily harm “shall be punished” as a category C felony. In other words, the existence of substantial bodily harm as a result of a simple battery enhances the battery—for purposes

of sentencing—to a felony. Thus, this was the first sentencing enhancement facing Mr. Rodriguez. The fact that it was filed in the district court as a felony does not change the fundamental nature of the primary battery offense. *Cf. Kimball v. State*, 100 Nev. 190, 191, 678 P.2d 675, 675 (1984) (noting that once district court obtains original jurisdiction of gross misdemeanor or felony charge, it has jurisdiction to convict and sentence on any lesser-included misdemeanor offense).

The second sentencing enhancement facing Mr. Rodriguez was the older person enhancement of NRS 193.167(1)(d), which provides “any person who commits the crime of [b]attery ... against any person who is 60 years of age or older,” is subject to a sentencing enhancement. Under this statute, an older person enhancement can attach to a misdemeanor, gross misdemeanor, or felony offense.

The State failed to choose a single enhancement. It could have filed the battery as a misdemeanor and obtained an older person sentencing enhancement under NRS 193.167(1)(d) (*i.e.* a consecutive term of “imprisonment in the county jail for a term equal to the term of imprisonment for the crime [of battery]”). Or it could have filed the battery as the enhanced category C felony due to substantial bodily

harm. NRS 200.481(2)(b). Both not both. *Barrett v. State*, 105 Nev. 361, 775 P.2d 1276 (1989), and see *Carter v. State*, 98 Nev. 331, 335, 647 P.2d 374, 377 (1982) (reversing based on imposition to multiple enhanced penalties and remanding for resentencing).

VIII. CONCLUSION

This Court should reverse and remand this case to the district court for resentencing, with instructions to the State to elect the enhancement it wishes imposed.³

DATED this 6th day of November 2017.

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³ Mr. Rodriguez's guilty plea constitutes an admission to both of the enhancements, so it is not necessary that he enter a new guilty plea to a charge containing only one of the enhancements.

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 Century in 14-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, even including the parts of the brief though exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains a total of 1,847 words. NRAP 32(a)(7)(A)(i), (ii).

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 of the transcript or appendix where the matter relied upon 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 6th day of November 2017.

/s/ John Reese Petty

JOHN REESE PETTY

Chief Deputy, Nevada State Bar No.10

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 6th day of November 2017.

Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Terrence P. McCarthy, Chief Appellate Deputy,
Washoe County District Attorney

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

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