

IN THE SUPREME COURT OF THE STATE OF NEVADA

JUAN JOSE RODRIGUEZ,

Appellant,

v.

THE STATE OF NEVADA,

Respondent.

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No. 73154

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RESPONDENT'S ANSWERING BRIEF

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RESPONDENT'S ANSWERING BRIEF

I. Statement of the Issue

A district court may enhance a sentence where the defendant commits a battery against a person who is 60 years of age or older; but a district court may not enhance a defendant's sentence twice. Substantial bodily harm resulting from a battery is an element of NRS 200.481(2)(b); it is not a sentencing enhancement. Did the district court sentence Rodriguez to an unlawful double enhancement when it sentenced him for battery causing substantial bodily harm and enhanced his sentence for committing this crime against an older person?

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II. Statement of Facts

This is an appeal from a judgment of conviction, pursuant to a guilty plea, of battery resulting in substantial bodily harm against an older person.

On September 16, 2016, Henry Sosnowski and his wife saw Rodriguez put graffiti on some property in downtown Reno (Joint Appendix, 33-35) (“JA”). Sosnowski took exception to the graffiti, so Rodriguez hit Sosnowski several times—once with a “sucker punch,” i.e., when Sosnowski was turned away and not looking. *Id.* at 35.

Physicians expected Sosnowski to die. *Id.* at 32. He was in a coma for 15 days and in ICU for 41 days. *Id.* at 46. He required multiple brain surgeries, and physicians removed the right side of his skull for about two months to relieve swelling. *Id.* at 35, 46. He nearly died from an infection after a tracheotomy. *Id.* He still has difficulty walking, talking, and eating. *Id.* at 36. His house has been fitted to accommodate his disabilities, and he will need assisted living for the rest of his life. *Id.* at 36, 47. Sosnowski was 68 years old at the time of sentencing. *Id.* at 49.

The district court sentenced Rodriguez to 18 to 60 months in prison for battery causing substantial bodily harm and a consecutive 48-to-120 month

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sentence for the older person enhancement.

This appeal follows.

III. Summary of the Argument

Rodriguez pleaded guilty to battery resulting in substantial bodily harm against an older person.

Rodriguez argues the district court improperly sentenced him to two enhancements—one because the crime resulted in substantial bodily harm and one because Rodriguez committed the crime against an older person.

The district court did not sentence Rodriguez to a double enhancement. The substantial bodily harm component of NRS 200.481(2)(b) (battery resulting in substantial bodily harm) is an element of that crime, not a sentencing enhancement.

IV. Argument

Rodriguez argues the district court erred by sentencing him to two enhancements—one for committing his crime against an older person and one for causing substantial bodily harm. The claim lacks merit.

A person commits a crime when his conduct violates the essential parts of a defined offense—i.e., elements of the offense. Generally, each element of a charged crime must be set forth in the charging document,

Hamling v. United States, 418 U.S. 87 (1974), and the State must prove the elements beyond a reasonable doubt, *In re Winship*, 397 U.S. 358, 364 (1970), if the defendant invokes his right to a jury trial. *Sullivan v. Louisiana*, 508 U.S. 275, 277–278 (1993). Those requirements do not apply to “factors relevant only to the sentencing of an offender found guilty of the charged crime.” *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998). See also *McMillan v. Pennsylvania*, 477 U.S. 79, 93 (1986). A “ ‘penalty provision prescribes an added penalty to be imposed when the offense is committed under specified circumstances.’ [Citation.] [A] sentencing enhancement or penalty allegation is not a complete offense in itself. It is ‘separate from the underlying offense and does not set forth elements of the offense or a greater degree of the offense charged. [Citations.]’ [Citation.] Conceptually, a penalty provision is an appendage that attaches to an offense and, if proven, prescribes additional punishment for the crime.” *People v. Anderson*, 47 Cal.4th 92, 115, 97 Cal.Rptr.3d 77, 211 P.3d 584 (2009). “[T]he question of which factors are which is normally a matter for Congress,” *Almendarez-Torres v. United States*, 523 U.S. at 228, or in this case, the Nevada State Legislature.

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In Nevada, simple battery is “any willful and unlawful use of force or violence upon the person of another.” NRS 200.481(1)(a). If it is not committed with a deadly weapon, and no substantial bodily harm results to the victim, the crime is a misdemeanor, unless a greater penalty applies. NRS 200.481(2)(a). If the battery is not committed with a deadly weapon and substantial bodily harm results to the victim, the crime is a category C felony. NRS 200.481(2)(b).

The additional sentence for committing a crime against a victim who is an “older person” under NRS 193.167 is an “additional penalty” as the statute declares in its heading and in subsection 5 of the statute. The statute provides that where the underlying crime is a felony, the district court shall impose a consecutive sentence “by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 20 years” after the court considers a number of statutory criteria. NRS 193.167(1)(j)(3)(4). The additional penalty “does not create any separate offense” NRS 192.167(5). The Court has held that a defendant may not be sentenced to more than one enhancement. *Barrett v. State*, 105 Nev. 361, 775 P.2d 1276 (1989).

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The “substantial bodily harm” component of NRS 200.481(2)(b), on the other hand, is an element of that offense—not a sentencing enhancement. Nothing in NRS 200.481 describes “substantial bodily harm” as an “additional penalty” as NRS 193.167 describes the “older person” enhancement. The district court does not make any factual finding at sentencing in determining whether the victim has suffered “substantial bodily harm” or how “substantial bodily harm” affects the defendant’s sentence, unlike how the district court determines, based on criteria set forth in NRS 193.167(3), the length of a sentence for a crime against an older person. Simple battery is a misdemeanor, but where substantial bodily harm results to the victim, a new offense, a category C felony, occurs. In other words, a different kind of battery, a different crime, a felony, exists when substantial bodily harm results. The felony version of battery causing substantial bodily harm is a “greater degree” of the offense, unlike a sentencing enhancement. *Anderson*, 47 Cal. 4th at 115, 97 Cal.Rptr.3d 77, 211 P.3d 584. No new offense is created where the defendant commits a crime against an “older person.” The sentence is merely increased for that type of offender. Accordingly, the district court did not sentence Rodriguez to a double enhancement.

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This Court considers the “substantial bodily harm” component of NRS 200.481(2)(b) as an element of the crime and not a sentencing enhancement. *See Villa v. State*, 2016 WL 4159472, Docket No. 67568, (July 28, 2016) (unpublished disposition) (holding that charges and convictions for first-degree kidnaping, domestic battery (strangulation), and battery causing substantial bodily harm did not result in multiplicitous charges or violate double jeopardy because battery causing substantial bodily harm requires proof of substantial bodily harm as an element of that crime, whereas first-degree kidnapping and domestic battery (strangulation) do not contain that element and can contain other elements not part of battery causing substantial bodily harm).

“If a given statute is unclear about treating a particular fact as an element of the offense or as a penalty aggravator, it makes sense to look at what other statutes have done, on the fair assumption that Congress is unlikely to intend any radical departures from past practice without making a point of saying so.” *Jones v. United States*, 526 U.S. 227, 234 (1999) (provisions of carjacking statute that established higher penalties to be imposed when offense resulted in serious bodily injury or death set forth additional elements of offense, not mere sentencing considerations,

particularly in view of serious questions that would be raised, under due process clause and Sixth Amendment's notice and jury trial guarantees, if provisions were construed as sentencing considerations). This Court considers the use of a deadly weapon during the commission of a battery an element of that crime. See *Rodriguez v. State*, 133 Nev. Adv. Op. 110 (Dec. 28, 2017) (“NRS 193.165 provides enhanced sentences for crimes committed with a deadly weapon, but it does not apply to crimes like NRS 200.481(2)(e) that contain ‘deadly weapon’ as a ‘necessary element’ of the underlying crime.”). The deadly weapon element of NRS 200.481(2)(e) creates a new offense just as the substantial bodily harm element of NRS 200.481(2)(b) creates a new offense—in both cases a misdemeanor offense becomes a felony. Since there is no significant difference between how the Legislature intended the fact of substantial bodily harm and the use of a deadly weapon were to operate when one commits a battery, the fact of substantial bodily harm is an element, not a sentencing enhancement, of battery.¹

¹ Many states use causation of serious bodily injury or harm as an element defining a distinct offense of aggravated robbery.” *Id.* at 236 (citing various state statutes). Accordingly, if it were unclear whether substantial bodily harm is an element of NRS 200.481(2)(b), the authority from other states shows that it is.

V. Conclusion

The “substantial bodily harm” component of NRS 200.481(2)(b) is an element of that crime, not a sentencing enhancement. Thus, the district court did not sentence Rodriguez to a double enhancement when it sentenced him to a consecutive sentence of committing a crime against an older person.

The Court should affirm the judgment of conviction.

DATED: January 8, 2018.

CHRISTOPHER J. HICKS
DISTRICT ATTORNEY

By: JOSEPH R. PLATER
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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 Microsoft Word 2013 in Constantia 14.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages.

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

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the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: January 8, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on January 8, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

John Reese Petty
Chief Deputy Public Defender

/s/ DESTINEE ALLEN
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