

STATE V. MARTINEZ

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STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JOSHUA MARTINEZ,
Defendant-Appellant.

No. 33,809

COURT OF APPEALS OF NEW MEXICO

December 10, 2014

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY, Marci Beyer,
District Judge

COUNSEL

Gary K. King, Attorney General, Santa Fe, NM, for Appellee

Law Offices of the Public Defender, Jorge A. Alvarado, Chief Public Defender, Kathleen T. Baldrige, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

JONATHAN B. SUTIN, Judge. WE CONCUR: RODERICK T. KENNEDY, Chief Judge,
TIMOTHY L. GARCIA, Judge

AUTHOR: JONATHAN B. SUTIN

MEMORANDUM OPINION

SUTIN, Judge.

{1} Defendant appeals his conviction for battery upon a peace officer. We issued a summary calendar notice proposing to affirm. Defendant has responded with a memorandum in opposition. Not persuaded, we affirm the district court's judgment.

{2} Defendant continues to claim that the jury should have been instructed on the lesser-included offense of simple battery. Specifically, Defendant, who is a prisoner, claims that the battery occurred when the corrections officer was acting outside of the scope of his duties because he called Defendant a “bitch.” “In order to obtain an instruction on a lesser[-]included offense, there must be some view of the evidence pursuant to which the lesser offense is the highest degree of crime committed, and that view must be reasonable.” *State v. Brown*, 1998-NMSC-037, ¶ 12, 126 N.M. 338, 969 P.2d 313 (alteration, internal quotation marks, and citation omitted).

{3} As we observed in our calendar notice, we believe that this case is controlled by our Supreme Court’s analysis in *State v. Doe*, 1978-NMSC-072, 92 N.M. 100, 583 P.2d 464. In *Doe*, the issue was whether a person who uses force against an officer to resist a search after an illegal arrest may be convicted of battery on a police officer. *Id.* ¶ 17. Battery upon a peace officer consists of “the unlawful, intentional touching or application of force to the person of a peace officer while he is in the lawful discharge of his duties, when done in a rude, insolent[,] or angry manner.” NMSA 1978, § 30-22-24(A) (1971). The defendant in *Doe* had attacked officers who were searching him at the police station after he had been illegally arrested. *Doe*, 1978-NMSC-072, ¶ 2.

{4} The Supreme Court in *Doe* concluded that “a private citizen may not use force to resist a search by an authorized police officer engaged in the performance of his duties whether or not the arrest is illegal.” *Id.* ¶ 11. The Supreme Court then addressed the element of the crime that the officer was acting within the “lawful discharge of his duties[.]” *Id.* (internal quotation marks and citation omitted). It concluded that he was within the lawful discharge of his duties because he was still acting within his authority, even though there was no probable cause for the arrest. *Id.* ¶¶ 14-15. In determining that the defendant committed a battery upon a peace officer, the Court held that the officer was acting within his authority as long as he was acting “within the scope of what he was employed to do.” *Id.* ¶ 15.

{5} The facts of this case are analogous to *Doe* in that the battery occurred while the officer was acting within his authority, even if the officer was using provocative language during that time. In his memorandum in opposition, Defendant has not cited us to any authority that would sanction a lesser penalty simply based on the use of profanity. See *State v. Garcia*, 2005-NMCA-065, ¶ 7, 137 N.M. 583, 113 P.3d 406 (recognizing that an appellate court will not consider an issue if no authority is cited in support of the argument). To the extent that Defendant believes that the officer’s “oral frolic” was not within the scope of his duties [MIO 6-7], this view is inconsistent with *Doe*, in that the officer in that case was not tasked with the mission of effectuating illegal arrests. In summary, we conclude that the district court properly refused to instruct the jury on the lesser-included offense.

{6} For the reasons stated in this Opinion and in our calendar notice, we affirm the district court.

{7} **IT IS SO ORDERED.**

JONATHAN B. SUTIN, Judge

WE CONCUR:

RODERICK T. KENNEDY, Chief Judge

TIMOTHY L. GARCIA, Judge