# STATE V. RABY



**STATE OF NEW MEXICO,**
**Plaintiff-Appellee,**
**v.**
**GINGER RABY,**
**Defendant-Appellant.**

No. 33,910

COURT OF APPEALS OF NEW MEXICO

December 1, 2015

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY, Charles C. Currier, District Judge

## COUNSEL

Hector H. Balderas, Attorney General, M. Anne Kelly, Assistant Attorney General, Joel Jacobsen, Assistant Attorney General, Santa Fe, NM, for Appellee

Jorge A. Alvarado, Chief Public Defender, Matthew O'Gorman, Assistant Appellate Defender, Santa Fe, NM, for Appellant

## JUDGES

JONATHAN B. SUTIN, Judge. WE CONCUR: LINDA M. VANZI, Judge, M. MONICA ZAMORA, Judge

**AUTHOR:** JONATHAN B. SUTIN

## MEMORANDUM OPINION

**SUTIN, Judge.**

**{1}** A jury found Defendant Ginger Raby guilty of three counts of battery upon a healthcare worker, contrary to NMSA 1978, Section 30-3-9.2(E) (2006), and one count

of assault upon a healthcare worker, contrary to Section 30-3-9.2(B)(1), arising out of Defendant's conduct in the emergency room of a hospital. On appeal, Defendant challenges the sufficiency of the evidence supporting her convictions and argues that the district court erred in denying her request to instruct the jury on assault and battery, which she claims were lesser included offenses. Defendant also raises issues of ineffective assistance of counsel and claims of error in regard to the jury instructions given.

**{2}** We hold that Defendant's convictions were supported by sufficient evidence. We also hold that under the circumstances of this case it was appropriate to instruct the jury as to the lesser included offenses of assault and battery and that by denying Defendant's request to do so the district court committed reversible error. As such, we reverse Defendant's convictions and remand for a new trial. We do not consider Defendant's remaining arguments.

## BACKGROUND

**{3}** Defendant went to the emergency room at the Eastern New Mexico Medical Center (Eastern) seeking admittance to its inpatient psychiatric unit. While she was in the emergency room, Defendant hit Carrie Rich, Rick Bentley, and Susi Green, and she attempted to hit David Lee (collectively, the victims), all of whom were healthcare workers. The circumstances surrounding the incident are discussed in greater detail in the discussion section of this Opinion.

**{4}** A jury found Defendant guilty of three counts of battery upon a healthcare worker as a result of her actions toward Ms. Rich, Mr. Bentley, and Ms. Green, and as a result of her actions toward Mr. Lee, the jury found Defendant guilty of one count of assault upon a healthcare worker. Defendant appeals her convictions on a number of grounds, but we consider only two issues, one of which warrants reversal.

**{5}** In regard to Defendant's challenge to the sufficiency of the evidence, we view the evidence presented at trial in the light most favorable to the jury's verdict and conclude that the State presented sufficient evidence to support her convictions. In regard to Defendant's argument that the district court erred by denying her request to instruct the jury on the lesser included offenses of assault and battery, we view the evidence in the light most favorable to Defendant and conclude that the district court committed reversible error by denying Defendant's request to instruct the jury on the lesser included offenses. Accordingly, we reverse Defendant's convictions and remand this matter for a new trial.

## DISCUSSION

### The Sufficiency of the Evidence Issue

**{6}** As to each charge, in addition to other elements, the jury was instructed that the State was required to prove beyond a reasonable doubt that Defendant knew that the

respective victim was a healthcare worker. Defendant challenges the sufficiency of the evidence underlying her convictions on the ground that there was no evidence to support a rational inference that she knew each victim was a healthcare worker. In reviewing a challenge to the sufficiency of the evidence, "[w]e view the [direct and circumstantial] evidence in the light most favorable to the verdict, resolving all conflicts and indulging all permissible inferences to uphold the conviction, and disregarding all evidence and inferences to the contrary." *State v. McGee*, 2002-NMCA-090, ¶ 20, 132 N.M. 537, 51 P.3d 1191. We will not substitute our judgment for that of the fact-finder, nor will we re-weigh the evidence. *Id.*

**{7}** To determine whether Defendant "knew" that the victims were healthcare workers, the jury was required to consider Defendant's state of mind during the relevant time frame. *See State v. Nozie (Nozie II)*, 2009-NMSC-018, ¶ 32, 146 N.M. 142, 207 P.3d 1119 (stating that, in the context of the crime of battery upon a peace officer, "the defendant's mental state . . . is the touchstone of the knowledge requirement"). Since Defendant testified that she did not remember anything except waking up as a result of the sternum rub and seeing "people around," the jury was left to draw its conclusions about her state of mind from circumstantial evidence. *See State v. Castañeda*, 2001-NMCA-052, ¶ 21, 130 N.M. 679, 30 P.3d 368 (recognizing that because "the state of mind of [a] defendant . . . is seldom, if ever, susceptible to direct proof, [it] may be proved by circumstantial evidence" (internal quotation marks and citation omitted)).

**{8}** Viewed in the light most favorable to the jury's verdict, the evidence was sufficient to support a reasonable inference that Defendant knew that the victims were healthcare workers. On the day in question, Defendant went into Eastern's emergency room seeking admittance to Sunrise, the inpatient psychiatric unit of the hospital. Ms. Rich and Mr. Lee worked for Superior Ambulance, and they were at Eastern because they had taken a patient there by ambulance. Ms. Rich testified that when she is working she wears a work shirt with a "Superior Ambulance" patch on the sleeve. A reasonable inference is that when he is working, as he was on the day in question, Mr. Lee wears a similar work shirt.

**{9}** Ms. Rich noticed on the hospital's monitors that Defendant was lying down on the floor of the emergency room lobby, and she asked Mr. Lee to assist her in going to see if Defendant was okay. Ms. Rich and Mr. Lee kneeled beside Defendant, and Ms. Rich attempted to help her first by verbally communicating with her, then by shaking her, and when Defendant was unresponsive to those methods, by performing a sternal rub.

**{10}** After Defendant "woke up" as a result of the sternal rub, five to ten seconds passed during which Defendant looked at Ms. Rich and Mr. Lee before she started screaming and swinging at them, hitting Ms. Rich and attempting to hit Mr. Lee. After that, Ms. Rich and Mr. Lee calmed Defendant enough that they were able to help her into a wheelchair.

**{11}** Defendant was taken in the wheelchair into a hospital room. Ms. Green, a nurse on duty, went into Defendant's room to do a triage for medical clearance. Mr. Bentley,

an emergency room technician, was also in the room to assist in the triage process. Defendant told Ms. Green that she wanted to leave, that she had a right to leave, and that she could sign her name out anytime and leave the hospital. Defendant left her room and went to the nurse's station where Ms. Green presented her with a form and told her that if she signed the form she could leave. Defendant did not sign the form; instead, she cursed at Ms. Green and said, "I don't have to sign it, I don't have to do anything[,]" and she swung and hit Ms. Green on the chest. Mr. Bentley was also at the nurse's station, and after Defendant hit Ms. Green, she turned around and hit Mr. Bentley on the bridge of his nose.

**{12}** From the fact that Defendant went to the emergency room, the jury could infer that she knew that she was in a hospital, a place in which healthcare workers provide medical attention to patients. The jury could also infer that in the five-to-ten-second interval, between the time that Defendant woke up from the sternal rub and looked at Ms. Rich and Mr. Lee and the time that she started swinging at them, Defendant observed that they were kneeling on the floor next to her in the hospital and that they were wearing Superior Ambulance uniforms. From the totality of these circumstances, the jury could reasonably have concluded that Defendant knew that Ms. Rich and Mr. Lee were healthcare workers.

**{13}** Likewise, the jury could reasonably infer that Defendant knew that Ms. Green and Mr. Bentley were healthcare workers. That Defendant communicated to Ms. Green her desire to leave the hospital and that Ms. Green presented Defendant with the paperwork that would allow her to leave supports a reasonable inference that Defendant knew Ms. Green was a healthcare worker employed by the hospital. The jury could also reasonably infer that Defendant knew Ms. Green was a healthcare worker from the fact that their initial interaction occurred when Ms. Green sought to triage Defendant in a room within the hospital. That Mr. Bentley was in the hospital room with Ms. Green assisting in the triage process and that he was also at the nurse's station supports a reasonable inference that Defendant knew that he, too, was a healthcare worker.

**{14}** In sum, viewing the evidence in the light most favorable to the jury's verdicts, we conclude that the evidence was sufficient to support its conclusion that Defendant knew the victims were healthcare workers. Defendant does not challenge the sufficiency of the evidence presented by the State as to the remaining elements. Her challenge to the sufficiency of the evidence is not a ground for reversal.

**The Lesser Included Offense Issue**

**{15}** Defendant argues that assault and battery are lesser included offenses to the crimes of assault upon a healthcare worker and battery upon a healthcare worker. Building on that premise, Defendant argues further that the district court committed reversible error by failing to instruct the jury as to the lesser included offenses of assault and battery.

**{16}** We review de novo the district court's decision not to instruct the jury as to a lesser included offense. *State v. Munoz*, 2004-NMCA-103, ¶ 10, 136 N.M. 235, 96 P.3d 796. In our review, we consider whether (1) "the lesser offense is included in the greater, charged offense"; (2) when viewed in the light most favorable to giving the instruction, "there is a rational view of the evidence that would lead the jury to conclude beyond a reasonable doubt that [the d]efendant committed the lesser included offense while still harboring a reasonable doubt that [she] committed the charged offense"; and (3) the defendant preserved the issue. *State v. Jernigan*, 2006-NMSC-003, ¶¶ 21, 23, 139 N.M. 1, 127 P.3d 537 (internal quotation marks and citation omitted); *State v. Romero*, 1998-NMCA-057, ¶ 19, 125 N.M. 161, 958 P.2d 119 ("We view the evidence in the light most favorable to giving the instruction."). If the foregoing factors are met, the district court's decision not to instruct the jury as to the lesser included offense constitutes reversible error. *Nozie II*, 2009-NMSC-018, ¶ 37.

**{17}** The question presented by the first *Jernigan* factor, whether the lesser offenses are included in the greater, charged offenses is not a point of contention between the parties. Battery, a petty misdemeanor, "is the unlawful, intentional touching or application of force to the person of another, when done in a rude, insolent[,] or angry manner." NMSA 1978, § 30-3-4 (1963). Battery upon a healthcare worker, a fourth degree felony, is the unlawful, intentional touching or application of force to the person of a healthcare worker who is in the lawful discharge of the healthcare worker's duties, when done in a rude, insolent, or angry manner. Section 30-3-9.2(E). Assault, also a petty misdemeanor, is "an attempt to commit a battery upon the person of another[.]" NMSA 1978, § 30-3-1(A) (1963). Assault upon a healthcare worker, a misdemeanor, consists of "an attempt to commit a battery upon the person of a health care worker who is in the lawful discharge of the health care worker's duties[.]" Section 30-3-9.2(B)(1).

**{18}** Thus, it is impossible to commit the crime of battery upon a healthcare worker without committing a battery, and it is impossible to commit the crime of assault upon a healthcare worker without committing assault. *Cf. Nozie II*, 2009-NMSC-018, ¶ 40 (concluding that "it is impossible to commit the crime of aggravated battery upon a peace officer without necessarily committing the crime of battery"). A single element, knowledge of the attendant circumstance of the victims' status as healthcare workers, separates the lesser included offenses from the more serious offenses of which Defendant was convicted in this case. *See State v. Valino*, 2012-NMCA-105, ¶¶ 16-17, 287 P.3d 372 (recognizing that the heightened penalty for battery upon a healthcare worker as distinguished from battery requires a showing that the defendant acted "with knowledge of the victim's identity"); *cf. State v. Nozie (Nozie I)*, 2007-NMCA-131, ¶ 11, 142 N.M. 626, 168 P.3d 756 (explaining that the defendant's state of mind with respect to the victim's status as a peace officer was an "attendant circumstance" that "distinguishes felony aggravated battery on a peace officer from misdemeanor aggravated battery" (internal quotation marks and citation omitted)), *aff'd*, *Nozie II*, 2009-NMSC-018.

**{19}** The second *Jernigan* factor requires us to consider whether there existed a reasonable view of the evidence that could have led the jury to conclude that Defendant

committed assault and battery, while still harboring a reasonable doubt about whether she committed assault upon a healthcare worker or battery upon a healthcare worker. *Jernigan*, 2006-NMSC-003, ¶¶ 21, 23. The State argues that the circumstantial evidence supporting the jury's conclusion that Defendant knew the victims were healthcare workers precludes a conclusion that there is a rational view of the evidence that permits a conclusion that assault and battery were the highest degree of crimes committed by Defendant. Stated differently, the prosecution argues that only an impermissibly speculative view of the evidence would support a conclusion that Defendant did not perceive that the victims were healthcare workers.

**{20}** Viewing the evidence, as we must, in the light most favorable to giving the instruction, we do not agree with the State's argument. Defendant went into the emergency room seeking admission to "Sunrise." Sunrise is the inpatient psychiatric unit of Eastern. Ms. Rich saw Defendant lying on the floor and attempted to help her first by verbally communicating with her, then by shaking her, and when Defendant was unresponsive to those methods, by performing a sternal rub. Defendant woke up and started screaming, cursing, and swinging her arms "wildly," striking Ms. Rich and attempting to strike Mr. Lee. Defendant recalled being scared when she was awakened by the sternal rub, which she described as "very hard," and saw "people around," but she did not remember any of the events that led to the present case. Ms. Rich believed that Defendant smelled of alcohol.

**{21}** Defendant was taken by hospital staff into a "psych hold room" in which patients who wish to go to Sunrise are medically cleared before going to Sunrise. Defendant was lying on the bed in the psych hold room when Ms. Green went into the room and asked Defendant questions, Defendant did not respond to her. When she was left alone in the room, Defendant started screaming "at the top of her lungs[,]" profanely ordering someone to "stop making fun of" her. Ms. Green, who believed that Defendant was reacting to having heard laughter in another part of the emergency room, told Defendant to stop yelling and explained that no one was laughing at her, but Defendant did not stop.

**{22}** Mr. Bentley testified that Defendant "sometimes" appeared coherent and that while hospital staff was trying to help her, Defendant was "ranting and raving," "swearing and cussing," and asking "why am I here, what are you doing?" He also testified that, at times, it is common for psychiatric patients to swing at or act aggressively toward people who are trying to assist them.

**{23}** Based on the foregoing, a jury could reasonably infer that Defendant was intoxicated or that she was experiencing a psychological episode, or both, and that as a result, she may not have realized that the victims were healthcare workers. *See Nozie* I, 2007-NMCA-131, ¶¶ 8, 10 (stating that, where there was evidence that the defendant "was in a dazed, disoriented, and intoxicated state," a reasonable jury could have found that he did not know that the person he attacked was a peace officer). That Defendant entered the emergency room requesting to be admitted to the inpatient psychiatric unit supports a reasonable inference that Defendant was experiencing psychological issues

that she could not address on an outpatient or non-emergency basis. From the fact that Defendant smelled of alcohol during this time, the jury could reasonably infer that the psychological issues that she was experiencing were the result of or in addition to alcohol-induced intoxication. That Defendant was found on the emergency room floor, did not respond to verbal communication and physical touch, thereby leading to the use of a sternal rub to arouse her, and her continuing erratic and irrational behavior once she had been taken to the psych room, could support a reasonable inference that Defendant was so impaired that she did not realize the victims were healthcare workers who were attempting to provide her with medical assistance. Defendant's own testimony that she did not recall any of the events that led to the criminal charges in this case constitutes additional evidence to support that inference.

**{24}** In sum, in regard to the second *Jernigan* factor, there is a reasonable view of the evidence that could have led the jury to conclude that Defendant did not know the victims were healthcare workers. "That there are views of the evidence that support a finding adverse to [the d]efendant is not a reason for denying [her] an instruction so long as the evidence viewed most favorably to [the defense] supported [her] theory of the case." *Nozie I*, 2007-NMCA-131, ¶ 10.

**{25}** The third *Jernigan* factor requires us to consider whether Defendant preserved the issue of the propriety of lesser included instructions by tendering appropriate instructions on the lesser included offenses. 2006-NMSC-003, ¶ 21. Although it appears from the record that Defendant did not tender physical copies of requested instructions on assault and battery, the record reflects that the district court clearly understood that Defendant sought to instruct the jury on the crimes of assault and battery. *See id.* ¶ 10 (stating that the preservation requirement is flexible and does not necessarily require the defendant to tender a correct written instruction provided that the district court was alerted to the defendant's argument).

**{26}** In regard to Defendant's request to instruct the jury on the lesser included offenses, the district court reasoned that it would be appropriate to instruct the jury as to the lesser included offenses "if there was some evidence . . . that [the victims] were not in fact healthcare [workers]" but, in the absence of any "evidence that they were anything other than healthcare workers" the lesser included offense instructions were not appropriate. Defendant argued, in response to the district court's reasoning, that based on the fact that Defendant "does not remember anything," one could infer that Defendant did not know that the victims were healthcare workers, and further that "there is no way that [the State] can prove that she had an idea that [the victims were] healthcare worker[s]." The district court concluded that were the jury to accept Defendant's theory, Defendant would be found not guilty. The court rejected the notion that such a view of the evidence rendered it appropriate to instruct the jury as to the lesser included offenses.

**{27}** Based on the foregoing exchange, the district court appears to have denied Defendant's request for instructions on the lesser included offenses by improperly focusing on the objective fact that the victims were healthcare workers when the issue

whether Defendant "knew" that the victims were healthcare workers was a question of Defendant's subjective state of mind. *See Nozie II*, 2009-NMSC-018, ¶ 32 (stressing that "it is the defendant's mental state, rather than the victim's conduct, that is the touchstone of the knowledge requirement"). Whether Defendant's state of mind was such that she knew the victims were healthcare workers was a factual issue that, under the circumstances of this case, should have been submitted to the jury under the specific assault and battery upon a healthcare worker instructions and the lesser included assault and battery instructions.

**{28}** To summarize our discussion of the lesser included offense issue, we hold that assault and battery are lesser crimes included in the offenses of assault upon a healthcare worker and battery upon a healthcare worker. We further hold that evidence was presented at trial that, when viewed in the light most favorable to giving the lesser included instructions, could have supported a reasonable inference that Defendant did not know that the victims were healthcare workers. Defendant preserved the issue for our review by requesting the lesser included instructions and by arguing that the instructions were appropriate because there was a view of the evidence that supported a reasonable inference that Defendant did not know that the victims were healthcare workers. Under these circumstances, it was reversible error for the district court not to instruct the jury as to the lesser included offenses.

**CONCLUSION**

**{29}** We reverse Defendant's convictions and remand for a new trial.

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

**JONATHAN B. SUTIN, Judge**

**WE CONCUR:**

**LINDA M. VANZI, Judge**

**M. MONICA ZAMORA, Judge**