

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERTO ZUNIGA GONZALES,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 45175

FILED

MAR 16 2006

ORDER OF AFFIRMANCE

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of sexual assault of a child and one count of child abuse causing substantial bodily and/or mental harm. Second Judicial District Court, Washoe County; Jerome Polaha, Judge. The district court sentenced appellant Roberto Zuniga Gonzales to serve two consecutive prison terms of life with the possibility of parole after 20 years for the sexual assault counts and a concurrent prison term of life with the possibility of parole after 15 years for the child abuse count. Gonzales was also ordered to pay \$1,515.00 in restitution and given credit for 337 days time served.

First, Gonzales contends that the evidence presented at trial was insufficient to support the jury's finding that he was guilty beyond a reasonable doubt of child abuse causing substantial bodily and/or mental harm. NRS 200.508(1)(a)(1) provides, in part, that "[a] person who willfully causes a child," who is younger than 14 years of age, "to suffer unjustifiable physical pain or mental suffering" as the result of sexual assault, "is guilty of a category A felony." In the criminal information, the

State alleged that Gonzales committed the crime of child abuse causing substantial bodily and/or mental harm by transmitting genital herpes to his 7-year-old daughter. Gonzales' daughter was the sexual assault victim. On appeal, Gonzales argues that he did not intend to transmit genital herpes to his daughter, and that the transmission of genital herpes, "in and of itself," does not violate NRS 200.508.

Our review of the record on appeal, however, reveals sufficient evidence to establish guilt beyond a reasonable doubt as determined by a rational trier of fact.¹ In particular, we note that child abuse is a general intent crime, and the State need not prove that the accused possessed the specific intent to injure the child or violate the law.² Therefore, whether Gonzales intended to infect his 7-year-old daughter with genital herpes is of no import. Further, the victim testified at trial that Gonzales, prior to digitally penetrating her vagina, put his fingers to his mouth and spit. The victim noticed bumps around Gonzales' mouth. Gonzales also digitally penetrated the victim's anus and penetrated her vagina with his penis. Within a few days of the assault, the victim began experiencing

¹See Wilkins v. State, 96 Nev. 367, 609 P.2d 309 (1980); see also Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

²Childers v. State, 100 Nev. 280, 282-83, 680 P.2d 598, 599 (1984); see also Rice v. State, 113 Nev. 1300, 1306-07, 949 P.2d 262, 266 (1997), holding modified on other grounds by Richmond v. State, 118 Nev. 924, 59 P.3d 1249 (2002).

intense pain and difficulty both urinating and defecating, reported the pain to her mother, and was taken to the hospital.

Eventually, Bruce Stucki, a medical technologist with Quest Diagnostic Laboratories, tested blood evidence and discovered that Gonzales and his daughter were positive for herpes simplex. Dr. Raymond Swarts, board certified in internal medicine and infectious diseases, testified that the victim's "clinical picture . . . [was] consistent with an acute primary attack of herpes simplex." Dr. Swarts explained that a primary attack, "means the first time the patient has ever demonstrated the presence of a herpes condition clinically." Dr. Swarts also stated that herpes simplex can be transmitted through the saliva of an individual, and that a herpetic breakout around the genital area of a female is very painful and would periodically reoccur over time.

Based on the above, we conclude that the jury could reasonably infer from the evidence presented that Gonzales committed the crime of child abuse causing substantial bodily and/or mental harm.³ It is for the jury to determine the weight and credibility to give conflicting testimony, and the jury's verdict will not be disturbed on appeal where, as

³See NRS 200.508(1)(a)(1); see also *People v. Adames*, 62 Cal. Rptr. 2d 631, 637 (Cal. Ct. App. 1997) (holding that transmission of genital herpes to 11-year-old stepdaughter during course of sexual assault involves "great bodily harm") (citation omitted).

here, sufficient evidence supports the verdict.⁴ Therefore, we conclude that the State presented sufficient evidence to sustain the conviction.

Second, Gonzales contends that the district court abused its discretion at sentencing. Specifically, citing to Johnson v. State for support, Gonzales claims that the district court failed to apply his presentence confinement credit to both of his concurrent sentences.⁵ The State agrees with Gonzales and requests that the case be remanded to the district court for a hearing “designed to ascertain and grant the appropriate amount of credit for time served.” We disagree with both parties.

In Johnson, the district court expressly denied the application of credit to one of two concurrent sentences, and on appeal, we remanded the case with instructions to modify the sentence, stating that “credit for time served in presentence confinement may not be denied to a defendant by applying it to only one of multiple concurrent sentences. To hold otherwise would render such an award a nullity.”⁶ In the instant case, there is nothing in the record on appeal to indicate that Gonzales was expressly and/or improperly denied credit for time served in presentence confinement. The judgment of conviction grants Gonzales 337 days credit

⁴See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981); see also McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).


⁵120 Nev. 296, 89 P.3d 669 (2004).

⁶Id. at 299 & n.8, 89 P.3d at 671 & n.8.

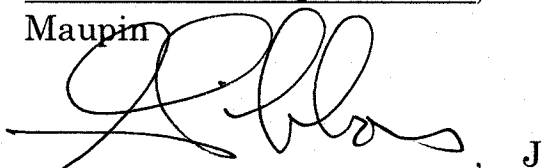
for time served, and the credit shall be applied to both of the concurrent sentences. Therefore, we conclude that Gonzales is not entitled to any further relief.

Having considered Gonzales' contentions and concluded that they are without merit, we

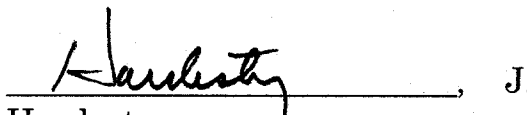
ORDER the judgment of conviction AFFIRMED.⁷

 J.

Maupin

 J.

Gibbons

 J.

Hardesty

⁷Gonzales filed in this court a proper person document titled, "Motion For: Dismissal of Appellate Counsel for Negligence, Conflict of Interest, Stay or Withdrawal of Appeal, Re-assignment of Outside Counsel, Other than Public Defender." The right to counsel of one's own choosing is not absolute, and Gonzales is not entitled to reject his court-appointed counsel and request substitution of other counsel at public expense without first showing adequate cause. See Thomas v. State, 94 Nev. 605, 607, 584 P.2d 674, 676 (1978). Gonzales fails to demonstrate adequate cause, therefore, we conclude that no relief is warranted.

cc: Hon. Jerome Polaha, District Judge
Washoe County Public Defender
Roberto Zuniga Gonzales
Attorney General George Chanos/Carson City
Washoe County District Attorney Richard A. Gammick
Washoe District Court Clerk