

IN THE SUPREME COURT OF THE STATE OF NEVADA

SERGIO ANTHONY LUNA,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 49474

FILED

ORDER OF AFFIRMANCE

MAY 15 2009
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *[Signature]*
DEPUTY CLERK

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of sexual assault and one count of open or gross lewdness. Eighth Judicial District Court, Clark County; Stewart L. Bell, Judge. The district court sentenced appellant Sergio Anthony Luna to three concurrent prison terms of ten years to life.

Luna contends that this court should reverse two of his convictions for the following reasons: (1) his sexual assault convictions are multiplicitous counts, and (2) his open and gross lewdness is incidental to the sexual assault.

Sexual assault

First, Luna contends that this court should reverse one of his sexual assault convictions because they were multiplicitous counts stemming from a single, uninterrupted sexual encounter. Particularly, Luna contends that neither party halted or attempted to halt the sexual episode until the victim ended it and there was no pause between sexual acts and several of the acts occurred simultaneously and thus, he should have been convicted of only one count instead of two. We disagree.

“The great weight of authority supports the proposition that separate and distinct acts of sexual assault committed as a part of a single criminal encounter may be charged as separate counts and convictions entered thereon.” Peck v. State, 116 Nev. 840, 848, 7 P.3d 470, 475 (2000) (quoting Deeds v. State, 97 Nev. 216, 217, 626 P.2d 271, 272 (1981)), overruled on other grounds by Rosas v. State, 122 Nev. 1258, 147 P.3d 1101 (2006); see also generally Hutchins v. State, 110 Nev. 103, 867 P.2d 1136 (1994) (upholding four counts of sexual assault occurring during one attack).

In this case, Luna perpetrated cunnilingus on the victim, followed by digital penetration. There is no merger between the acts because both acts were separate and distinct. Thus, Luna has not demonstrated that he is entitled to relief on this claim.

Open and Gross Lewdness

Second, Luna contends that this court should reverse his open or gross lewdness conviction because it was incidental to the sexual assault counts. We disagree.

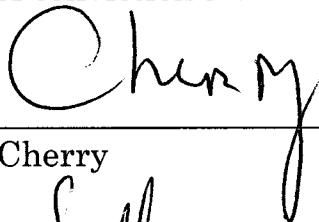
Luna notes two prior cases where we have held that a touching followed by a sexual assault could not support separate convictions for lewdness and sexual assault. Crowley v. State, 120 Nev. 30, 83 P.3d 282 (2004); Braunstein v. State, 118 Nev. 68, 40 P.3d 413 (2002). However, in both of those cases, the lewd act was incidental to the sexual assault because it was performed upon the part of the victim’s body that was also subject to the sexual assault. In Crowley, the defendant touched the victim’s penis with his hands and then performed fellatio on the victim. 120 Nev. at 31, 83 P.3d at 284. In Braunstein, we concluded that a single act of digital penetration of the victim could not support dual


convictions for lewdness and sexual assault. 118 Nev. at 78-79, 40 P.3d at 420. See also Gaxioloa v. State, 121 Nev. 638, 651-53, 119 P.3d 1225, 1234-36 (2005) (defendant touched victim's penis prior to performing fellatio on the victim); Ebeling v. State, 120 Nev. 401, 404, 91 P.3d 599, 601 (2004) (defendant rubbed penis on victim's buttocks prior to anal penetration).


In contrast, Luna was charged with lewdness for kissing the victim's breasts and he was charged with sexual assault for cunnilingus and digital penetration of the vagina. Even if the touching and penetration occurred simultaneously, they involved different acts by the defendant and different parts of the victim's body. Therefore, we conclude that the lewdness was not incidental and did not merge with the sexual assault counts, and thus, Luna has not demonstrated that he is entitled to relief on this claim.

Having considered Luna's contentions and determined they are without merit, we

ORDER the judgment of conviction AFFIRMED.


_____, J.


_____, J.


_____, J.

Gibbons

cc: Eighth Judicial District Court Dept. 7, District Judge
Marchese Law Office
Attorney General Catherine Cortez Masto/Carson City
Clark County District Attorney David J. Roger
Eighth District Court Clerk