IN THE SUPREME COURT OF THE STATE OF NEVADA

RAY MCKINLEY OLIVER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 57191

FILED

MAY 10 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of two misdemeanor counts of battery constituting domestic violence and one count of coercion. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

First, appellant Ray McKinley Oliver contends that insufficient evidence was adduced to support the jury's verdict on the first count of battery constituting domestic violence. In count one, Oliver was charged with felony battery constituting domestic violence by strangulation and the jury instead found him guilty of committing the lesser-included offense of misdemeanor battery constituting domestic violence. Oliver specifically claims that because the jury found him not guilty of the felony that "he was entitled to a complete acquittal" because "[t]here is no longer a 'misdemeanor' form of strangulation in domestic violence cases." Oliver does not question either the alleged domestic nature of his relationship with the victim or the application of the domestic violence statutes.

Initially, we note that Oliver provides no authority or persuasive argument in support of his contention that misdemeanor battery is not a lesser-included offense of felony battery by strangulation.



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See generally Greenwood v. State, 112 Nev. 408, 915 P.2d 258 (1996). And there is no indication in the record that Oliver objected to either the lesser-included offense jury instruction or the inclusion of misdemeanor battery on the verdict form. Additionally, we conclude that the evidence, when viewed in the light most favorable to the State, is sufficient to establish guilt beyond a reasonable doubt as determined by a rational trier of fact. See Jackson v. Virginia, 443 U.S. 307, 319 (1979); Mitchell v. State, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). The victim testified at trial that Oliver tried to stop her from screaming during his attack by placing his hands around her throat and squeezing. The victim stated that she "was able to breathe but not much." It is for the jury to determine the weight and credibility to give conflicting testimony, McNair v. State, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992), and a jury's verdict will not be disturbed on appeal where, as here, substantial evidence supports the verdict, Bolden v. State, 97 Nev. 71, 73, 624 P.2d 20, 20 (1981); see also NRS 33.018(1)(a); NRS 200.481(1)(a). Therefore, we conclude that Oliver's contention is without merit.

Second, Oliver contends that the district court erred by denying his motion for a one-day continuance during the trial in order to call a rebuttal witness. See generally Lobato v. State, 120 Nev. 512, 518, 96 P.3d 765, 770 (2004) (extrinsic evidence attacking defects of memory and perception "is never collateral and thus is always admissible for impeachment purposes"). Oliver claims that the denial of his request "was particularly unfair" considering the pretrial delays which violated his

right to a speedy trial. See NRS 178.556(2).[1] The district court denied Oliver's request because, based on the proffered testimony, the rebuttal witness "would not impeach [the victim's] testimony in any material respect" and "was not critical." We agree and conclude that the district court did not abuse its discretion by denying Oliver's request for a continuance. See Rose v. State, 123 Nev. 194, 206, 163 P.3d 408, 416 (2007) ("[W]hen a defendant fails to demonstrate that he was prejudiced by the denial of a continuance, the district court's decision denying a continuance is not an abuse of discretion.").

Finally, Oliver contends that his conviction on the two battery counts violates the Double Jeopardy Clause and redundancy principles. See U.S. Const. amend. V; Salazar v. State, 119 Nev. 224, 227-28, 70 P.3d 749, 751 (2003) (convictions are impermissibly redundant if the charges involve a single act so that "the material or significant part of each charge is the same" (quotation marks omitted)). We disagree. The two counts were based upon separate and distinct acts of battery. See generally Crowley v. State, 120 Nev. 30, 33, 83 P.3d 282, 285 (2004) ("[T]he facts of a case may support convictions on separate charges 'even though the acts were the result of a single encounter and all occurred within a relatively short time.'" (quoting Wright v. State, 106 Nev. 647, 650, 799 P.2d 548,

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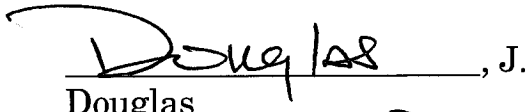
[1]Oliver does not specifically request any relief and to the extent that he claims his speedy trial rights were violated, we conclude that his contention is without merit. See Furbay v. State, 116 Nev. 481, 484-85, 998 P.2d 553, 555 (2000) (setting forth four factors for determining whether the constitutional right to a speedy trial was violated); see also Barker v. Wingo, 407 U.S. 514, 521, 530 (1972).

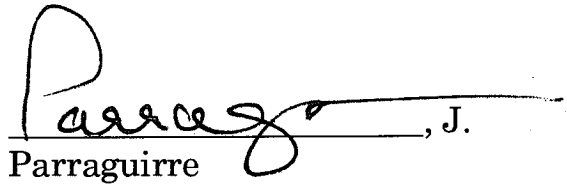
549-50 (1990))). Therefore, we conclude that Oliver's contention is without merit. Accordingly, we

ORDER the judgment of conviction AFFIRMED.



_____, J.
Douglas

_____, J.
Gibbons



_____, J.
Parraguirre

cc: Hon. Kenneth C. Cory, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk