IN THE SUPREME COURT OF THE STATE OF NEVADA

JESSE RAYMUNDO GUTIERREZ,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 58944

FILED

OCT 08 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 counts of sexual assault of a minor under 14 years of age, ten counts of sexual assault of a minor under 16 years of age, one count of lewdness with a child under 14 years of age, six counts of open or gross lewdness, one count of child abuse and neglect, and one count of incest. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge. Appellant Jesse Gutierrez raises two arguments on appeal.

First, Gutierrez argues that the district court erred by precluding the defense from making an analogy during its closing argument to explain the reasonable doubt standard. As we have repeatedly emphasized, it is impermissible for counsel to "explain, elaborate on, or offer analogies or examples based on the statutory definition of reasonable doubt." Evans v. State, 117 Nev. 609, 632, 28 P.3d 498, 514 (2001). Given that counsel did not explain the argument he wanted to make and merely indicated that he wanted to make an analogy, the district court did not abuse its wide discretion respecting the latitude allowed counsel in closing arguments. See Glover v. Dist. Ct., 125 Nev. 691, 704, 220 P.3d 684, 693 (2009) (citing Herring v. New York, 422 U.S. 853, 862 (1975)).

Next, Gutierrez argues that the sentencing court acted vindictively by having his sentences run consecutively because he expressed a desire to appeal his conviction. While a sentencing court is given wide discretion, it cannot increase a defendant's sentence to punish him for pursuing an appeal, Alabama v. Smith, 490 U.S. 794, 798 (1989), or for expressing a desire to appeal. See generally Wasman v. United States, 468 U.S. 559, 564 (1984) ("Because fear of such vindictiveness might chill a defendant's decision to appeal . . . due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." (internal citations omitted) (emphasis added)).

We conclude that there is not a reasonable likelihood that Gutierrez's sentences were run consecutively because he expressed a desire to appeal and that he has failed to demonstrate actual vindictiveness. See Alabama, 490 U.S. at 801-803 (holding that vindictiveness is presumed if there is a reasonable likelihood that the sentencing authority increased the sentence to punish a defendant for exercising his rights, and if there is no reasonable likelihood, the burden remains upon the defendant to prove actual vindictiveness). While the prosecutor in this case inappropriately raised Gutierrez's intent to appeal as an indication that he lacked remorse, the record does not demonstrate that the district court considered it or that any consideration was the sole basis for running the sentences consecutively rather than concurrently. United States v. Goodwin, 457 U.S. 368, 384 (1982) (stating that "a mere opportunity for vindictiveness" does not create a presumption of vindictiveness). Moreover, we have consistently afforded the district court wide discretion in its sentencing decision, see, e.g., Houk v. State, 103

Nev. 659, 664, 747 P.2d 1376, 1379 (1987), and it is within that discretion to impose consecutive sentences. See NRS 176.035(1); Warden v. Peters, 83 Nev. 298, 303, 429 P.2d 549, 552 (1967).

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

ORDER the judgment of conviction AFFIRMED.

Saitta, J.
Saitta

Pickering, J.
Pickering

Hardesty, J.
Hardesty

cc: Hon. Linda Marie Bell, District Judge
Sandra L. Stewart
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk