IN THE SUPREME COURT OF THE STATE OF NEVADA

CLINT ESPINOSA,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

No. 37932

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying appellant Clint Espinosa's post-conviction petition for a writ of habeas corpus.

Espinosa was convicted, pursuant to a jury verdict, of one count of sexual assault. The district court sentenced Espinosa to serve a prison term of 10 to 25 years. Espinosa filed a direct appeal, and this court affirmed his conviction.[1] Thereafter, Espinosa filed a post-conviction petition for a writ of habeas corpus, claiming that his trial and appellate counsel were ineffective. After conducting an evidentiary hearing, the district court denied his petition. This appeal followed.

[1]Espinosa v. State, Docket No. 32976 (Order Dismissing Appeal, March 11, 1999).

Espinosa's sole contention on appeal is that the district court erred in rejecting his claim that his appellate counsel was ineffective for failing to challenge the sufficiency of the evidence supporting the conviction. In particular, Espinosa argues that there is insufficient evidence that the victim's express consent to engage in sexual activity was "limited in scope to certain acts" or revoked during the vaginal and anal sexual activity, which Espinosa describes as a "continuous course of conduct."[2] We disagree.

A claim of ineffective assistance of appellate counsel is reviewed under the two-part test set forth in Strickland v. Washington.[3] We have explained that "[a]n attorney's decision not to raise meritless issues on appeal is not ineffective assistance of counsel."[4] Moreover, to succeed on a claim of ineffective assistance of appellate counsel, a

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[2]We note that this court has held that distinct acts of sexual assault committed as part of a single criminal encounter may be charged as separate counts and convictions entered thereon even though occurring within a relatively short period of time. See Wicker v. State, 95 Nev. 804, 805-06, 603 P.2d 265, 266-67 (1979) (holding that defendant was properly convicted of one count of forcible rape and two counts of infamous crime against nature for different sexual acts, including vaginal intercourse, sodomy, and fellatio, involving the same victim and occurring within a relatively short period of time).

[3]466 U.S. 668 (1984); Kirksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1113 (1996).

[4]Kirksey, 112 Nev. at 998, 923 P.2d at 1114.

petitioner "must show that the omitted issue would have a reasonable probability of success on appeal."[5]

We conclude that there is no reasonable probability that this issue would have been successful on appeal. When reviewing a claim of insufficient evidence, the relevant inquiry is "'whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"[6]

Our review of the record on appeal reveals that there was sufficient evidence before the jury to establish guilt beyond a reasonable doubt. In particular, the victim testified that Espinosa penetrated her anal cavity with his penis without her consent and that it hurt her. The victim testified that while Espinosa was attempting to penetrate her anal cavity, she told him "no," but he did not stop and continued penetrating her for a couple of minutes. Finally, the victim testified that after the incident, Espinosa apologized.

Although the victim's police statement and trial testimony were inconsistent, the State explained that the victim was a reluctant witness who was changing her testimony with regard to the incident to

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[5]Id.

[6]Koza v. State, 100 Nev. 245, 250, 681 P.2d 44, 47 (1984) (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)) (emphasis in original omitted).

protect Espinosa because the couple had reconciled. It was for the jury to determine the weight and credibility to give conflicting testimony, and this court would not have disturbed the jury's verdict on appeal where, as here, substantial evidence supported the verdict.[7] Therefore, the district court did not err in rejecting appellant's claim that his appellate counsel was ineffective.

Having considered Espinosa's contention and concluded that it lacks merit, we

ORDER the judgment of the district court AFFIRMED.[8]

_____, J.
Shearing

_____, J.
Rose

_____, J.
Becker

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[7]See Bolden v. State, 97 Nev. 71, 624 P.2d 20 (1981).

[8]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

cc: Hon. Janet J. Berry, District Judge
Attorney General/Carson City
Washoe County District Attorney
Scott W. Edwards
Washoe County Clerk