

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

DANIEL SYLVESTER PORTER,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 70663

FILED

APR 28 2017

ORDER OF AFFIRMANCE

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
E. Wilcox
DEPUTY CLERK

Daniel Sylvester Porter appeals from a judgment of conviction, pursuant to a jury verdict, of sexual assault with use of a deadly weapon, battery with intent to commit sexual assault with use of a deadly weapon, first degree kidnapping with use of a deadly weapon, and robbery with use of a deadly weapon. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Porter was convicted for sexually assaulting the victim and stealing items from her car.¹ On appeal, Porter asserts (1) the district court abused its discretion by denying his motion to continue trial to conduct further DNA analysis; (2) insufficient evidence supports his convictions for sexual assault, kidnapping, and battery; (3) his three convictions for sexual assault are redundant, and (4) his sentence constitutes cruel and unusual punishment. We disagree.

Evidence is sufficient to support a verdict if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Higgs v. State*, 126 Nev. 1, 11, 222 P.3d 648, 654 (2010) (quoting *Rose v. State*, 123 Nev. 194, 202, 163 P.3d 408, 414 (2007))

¹We do not recount the facts except as necessary to our disposition.

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(internal quotations omitted)). Here, our review of the record reveals that a reasonable jury could find the State proved each element of sexual assault with use of a deadly weapon, kidnapping with use of a deadly weapon, and battery with intent to commit sexual assault with use of a deadly weapon beyond a reasonable doubt. See NRS 193.165; NRS 200.310; NRS 200.364; NRS 200.366; NRS 200.481.

The victim testified at trial that Porter, a stranger, accosted her as she sat in her vehicle, pointed a gun at her, forced her to drive to a secluded area, sexually assaulted her, and hit her with the firearm. A victim's testimony alone is sufficient to uphold a conviction. *Rose*, 123 Nev. at 203, 163 P.3d at 414. Though Porter argues the victim is not a credible witness, "[i]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of the witness." *Id.* at 202-03, 163 P.3d at 414 (internal quotations omitted). Furthermore, DNA evidence conclusively corroborated the identification of Porter as the perpetrator.

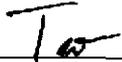
We further conclude that the separate sexual assault convictions are not redundant and do not implicate double jeopardy. "The great weight of authority supports the proposition that separate and distinct acts of sexual assault committed as a part of a single criminal encounter may be charged as separate counts and convictions entered thereon." *Deeds v. State*, 97 Nev. 216, 217, 626 P.2d 271, 272 (1981). While multiple counts constituting "a hypertechnical division of what was essentially a single act [are] not sustainable[.]" *Townsend v. State*, 103 Nev. 113, 121, 734 P.2d 705, 710 (1987), separate and distinct acts of sexual assault do not merge into one offense. *Peck v. State*, 116 Nev. 840, 849, 7 P.3d 470, 475 (2000) *overruled on other grounds by Rosas v. State*,

122 Nev. 1258, 147 P.3d 1101 (2006). In this case, Porter committed three distinct acts of sexual assault—digital penetration along with anal and vaginal penetration using his penis.

Having carefully considered the remaining arguments, we conclude they are without merit.² Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, C.J.
Silver


_____, J.
Tao


_____, J.
Gibbons

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

²The district court did not abuse its discretion by denying Porter's motion to continue trial made on the morning of trial as Porter announced ready for trial at calendar call. Further, Porter failed to present any other compelling reasons for a continuance. *See Rose*, 123 Nev. at 206, 163 P.3d at 416 (footnote omitted) ("This court reviews the district court's decision regarding a motion for continuance for an abuse of discretion."). And, Porter's sentence is not cruel or unusual as it falls within statutory guidelines and is not grossly disproportionate to Porter's crimes. *See Chavez v. State*, 125 Nev. 328, 347-48, 213 P.3d 476, 489-90 (2009).