

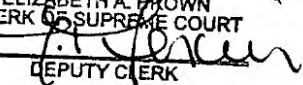
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

BRIAN CHARLES KERZETSKI,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84193-COA

FILED

DEC 22 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY: 
DEPUTY CLERK

*ORDER OF AFFIRMANCE AND REMANDING TO CORRECT
JUDGMENT OF CONVICTION*

Brian Charles Kerzetski appeals from a judgment of conviction, entered pursuant to a jury verdict, of three counts each of sexual assault with a minor under 14 years of age and sexual assault with a minor under 16 years of age and one count each of lewdness with a child under the age of 14 years, sexual assault, and use of a minor in the production of pornography. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Chief Judge.

First, Kerzetski claims the State failed to produce sufficient evidence to demonstrate he was guilty of use of a minor in the production of pornography. He claims there is no evidence in the record that the sexual acts were recorded because no witness testified to actually viewing the recordings.

When reviewing a challenge to the sufficiency of the evidence, we review the evidence in the light most favorable to the prosecution and determine whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); accord *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). “[I]t is the function of the jury, not the appellate court, to

weigh the evidence and pass upon the credibility of the witness.” *Walker v. State*, 91 Nev. 724, 726, 542 P.2d 438, 439 (1975). And circumstantial evidence is enough to support a conviction. *Washington v. State*, 132 Nev. 655, 661, 376 P.3d 802, 807 (2016).

At trial, the victim testified that she was directed by Kerzetski to film her and her minor boyfriend having sex. She stated Kerzetski provided her with a camera and that she pushed the record button prior to having sex. After, she would give Kerzetski the camera. The boyfriend testified that there was a camera in the room when they had sex and that the victim told him that Kerzetski asked her to film them. At trial, Kerzetski denied directing the victim to make videos and denied seeing any such videos. However, his recorded interview with police was played during trial. In that interview, he stated that he viewed the videos and erased them. The police did forensic searches of Kerzetski’s electronic devices and did not find any instances of child pornography. Given this testimony at trial, the jury could have reasonably inferred that Kerzetski committed the crime of using a minor in the production of pornography. See NRS 200.710(1) (prohibiting someone from “knowingly us[ing], encourag[ing], entic[ing] or permit[ting] a minor to simulate or engage in or assist others to simulate or engage in sexual conduct to produce a performance”). Therefore, we conclude Kerzetski fails to demonstrate he is entitled to relief on this claim.

Second, Kerzetski argues that he may have been convicted of using a minor in the production of pornography based on an audio recording of a sexual encounter that was played for the jury. While an audio recording of the victim and Kerzetski having sex was played for the jury, Kerzetski was charged with “taking explicit photograph(s) and video(s) of M.B., for the

purpose of producing a pornographic performance.” And the jury was properly instructed that Kerzetski was charged regarding photos and videos. Further, there were no arguments to the jury that the audio recording could be used to convict Kerzetski of using a minor in the production of pornography. Therefore, we conclude Kerzetski is not entitled to relief on this claim.¹ See *Leonard v. State*, 117 Nev. 53, 66, 17 P.3d 397, 405 (2001) (stating that jurors are presumed to follow their instructions).

Finally, we note there are several clerical errors in the judgment of conviction filed on February 11, 2022.² First, the judgment of conviction states that the convictions were based on a guilty plea. However, the convictions were the result of a jury verdict. Second, the judgment of conviction omits count 7. Kerzetski was acquitted of count 7, and that should be reflected in the judgment of conviction. Third, the sentence for sexual assault with a minor under 16 years of age (count 8) states the sentence is life in prison with the possibility of parole after 25 “months,” and the aggregate total sentence indicates a minimum term of 105 “months.” These minimum sentences are at odds with the oral pronouncement of sentence and with the minimum sentence required by NRS 200.366(3)(b). Both parties agree these portions of the judgment of conviction should be corrected to reflect 25 “years” and 105 “years” respectively. Because the district court has the authority to correct clerical

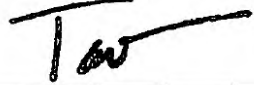
¹Because Kerzetski failed to demonstrate he was convicted of using a minor in the production of pornography based on the audio recording, we decline to reach his claim that NRS 200.710 is ambiguous because it could prohibit audio recordings of sexual encounters.

²The district court filed a judgment of conviction on January 31, 2022. Thereafter, the district court entered another judgment of conviction on February 11, 2022.

errors at any time, *see* NRS 176.565, we direct the district court to enter a corrected judgment of conviction correcting the aforementioned errors. Accordingly, we

ORDER the judgment of the district court AFFIRMED and REMAND to the district court for the limited purpose of correcting the judgment of conviction.


_____, C.J.
Gibbons


_____, J.
Tao


_____, J.
Bulla

cc: Hon. Jerry A. Wiese, Chief Judge
Nevada Defense Group
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk