STATE V. RENDON

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JULIAN RENDON,
Defendant-Appellant.

No. A-1-CA-37323

COURT OF APPEALS OF NEW MEXICO

December 28, 2018

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY, Lisa B. Riley, District Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, for Appellee

Law Offices of Adrianne R. Turner, Adrianne Turner, Albuquerque, NM, for Appellant

JUDGES

LINDA M. VANZI, Chief Judge. WE CONCUR: JULIE J. VARGAS, Judge, DANIEL J. GALLEGOS, Judge

AUTHOR: LINDA M. VANZI

MEMORANDUM OPINION

VANZI, Chief Judge.

{1} Defendant appeals his convictions for aggravated battery (great bodily harm) and false imprisonment. We issued a calendar notice proposing to affirm. Defendant has filed a memorandum in opposition. We affirm.

Sufficiency of the Evidence

{2} Defendant continues to challenge the sufficiency of the evidence to support his convictions for aggravated battery (great bodily harm) and false imprisonment. [MIO 9] A sufficiency of the evidence review involves a two-step process. Initially, the evidence is viewed in the light most favorable to the verdict. Then the appellate court must make a legal determination of "whether the evidence viewed in this manner could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt." *State v. Apodaca*, 1994-NMSC-121, ¶ 6, 118 N.M. 762, 887 P.2d 756 (internal quotation marks and citations omitted).

{3} Our calendar notice proposed to hold that, notwithstanding the docketing statement's failure to provide any factual description of the evidence presented below, the record indicated that the evidence was sufficient to satisfy the elements of these offenses, which were set out in the jury instructions. [RP 121, 124] Specifically, Defendant confined his estranged wife against her will, he repeatedly assaulted her and choked her to the point where she almost lost consciousness. [RP 39-40]

{4} In his memorandum in opposition, Defendant argues that the State failed to show that death or great bodily harm was likely to result from his conduct. [MIO 10-11] He states that the victim testified that Defendant strangled her about five times by putting his arm around her neck, and that she was having a hard time breathing and lacked the energy to fight back. [MIO 5] An expert testified that strangulation could result in death. [MIO 11; RP 39-40] This evidence was sufficient under out case law. *See State v. Hollowell*, 1969-NMCA-105, ¶ 29, 80 N.M. 756, 461 P.2d 238 (concluding that the victim's testimony that the defendant choked him so that his breath was cut off was sufficient to show that the defendant's conduct created a "high probability of death"). Defendant's description of the incident also indicates that there was sufficient confinement to constitute false imprisonment. [RP 124] To the extent that Defendant is attempting to raise a double jeopardy issue [MIO 13], we deem the issue to be without merit because there were multiple acts of battery in this case. *See State v. Bachicha*, 1991-NMCA-014, ¶ 12, 111 N.M. 601, 808 P.2d 51 (rejecting merger argument where the false imprisonment occurred during multiple acts of aggravated assault).

New Trial

{6} Defendant continues to challenge the district court's denial of his motion for new trial. [MIO 13] The motion was based on an affidavit by Defendant in which he claims that the State did not turn over a videotape of a police interview, and that he was in possession of a cell phone video of his wife assaulting him. [RP 144] The district court agreed with the State that the interview tape did not exist. [MIO 15; RP 153] With respect to the cell phone video, it was in Defendant's possession [RP 145] prior to the trial and therefore could not be considered newly discovered. *See State v. Fero*, 1988-NMSC-053, ¶ 12, 107 N.M. 369, 758 P.2d 783.

Ineffective Assistance

{7} Defendant claims that his counsel was ineffective because she did not retrieve certain evidence. [MIO 15] Defendant states that he had told counsel about this evidence. [MIO 16-17] Defendant also asserts that a language barrier affected certain pre-trial communications. [MIO 17] As Defendant concedes, we are not able to consider these claims on direct appeal because the communications are not part of the record. *See State v. Hunter*, 2001-NMCA-078, ¶ 18, 131 N.M. 76, 33 P.3d 296 ("Matters not of record present no issue for review."). To the extent that this issue may have merit, we believe that it is more appropriately addressed in a habeas proceeding. *See State v. Grogan*, 2007-NMSC-039, ¶ 9, 142 N.M. 107, 163 P.3d 494 (expressing a preference for habeas corpus proceedings to address ineffective assistance of counsel claims).

District Court Erred in Allowing Counsel to Withdraw

{8} Defendant continues to argue that the district court erred in allowing his counsel to withdraw prior to sentencing. [MIO 18] A new attorney from the public defender's office entered an appearance prior to sentencing. [RP 163] We therefore construe his argument as a claim that he had the right to keep his previous attorney. However, "an indigent defendant has no right to choose or substitute his appointed counsel." *State v. Hernandez*, 1986-NMCA-40, ¶ 8, 104 N.M. 268, 720 P.2d 303.

{9} For the reasons set forth above, we affirm.

{10} IT IS SO ORDERED.

LINDA M. VANZI, Chief Judge

WE CONCUR:

JULIE J. VARGAS, Judge

DANIEL J. GALLEGOS, Judge