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IV. CONCLUSION

We find that there was no final, appealable order entered by the district court, because it had not yet entered an order ruling on Samuel's motion for new trial. As such, the consolidated appeals are dismissed for lack of jurisdiction.

APPEALS DISMISSED.

STATE OF NEBRASKA, APPELLEE, V.
KAPIER R. REYES, APPELLANT.
794 N.W.2d 886

Filed February 22, 2011. Nos. A-10-391, A-10-392.

1. **Motions to Suppress: Confessions: Constitutional Law: Miranda Rights: Appeal and Error.** In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, including claims that it was procured in violation of the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. With regard to historical facts, an appellate court reviews the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which an appellate court reviews independently of the trial court's determination.
2. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court 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.
3. **Convictions: Evidence: Appeal and Error.** Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence.
4. **Evidence: Appeal and Error.** Any conflicts in the evidence or questions concerning the credibility of witnesses are for the finder of fact to resolve.
5. **Convictions: Evidence: Appeal and Error.** A conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction.
6. **Sentences: Appeal and Error.** Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion.
7. **Miranda Rights.** *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), requires procedures that will warn a suspect in custody of his right to

remain silent and which will assure the suspect that the exercise of that right will be honored.

8. **Miranda Rights: Waiver.** *Miranda* rights can be waived if the suspect does so knowingly and voluntarily.
9. ____: ____. A valid *Miranda* waiver must be voluntary in the sense that it was the product of a free and deliberate choice and made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.
10. ____: ____. In determining whether a *Miranda* waiver is knowingly and voluntarily made, a court applies a totality of the circumstances test. Factors to be considered include the suspect's age, education, intelligence, prior contact with authorities, and conduct.
11. ____: ____. A defendant's limited command of the English language does not bar a finding of a knowing, intelligent, and voluntary waiver of *Miranda* rights; instead, it should be considered as a factor in the totality of the circumstances to determine whether or not that understanding is sufficient to permit the defendant to waive his or her *Miranda* rights.
12. **Appeal and Error.** Absent plain error, assignments of error not discussed in the briefs will not be addressed by an appellate court.
13. **Sexual Assault: Testimony: Corroboration.** The State is not required to corroborate victims' testimony in order to convict the defendant of first degree sexual assault, provided that the testimony alone is believed by the finder of fact.
14. **Sentences: Appeal and Error.** Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.
15. **Sentences.** The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.
16. ____. When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime.

Appeals from the District Court for Douglas County: JAMES T. GLEASON, Judge. Affirmed.

Thomas C. Riley, Douglas County Public Defender, and Kelly M. Steenbock for appellant.

Jon Bruning, Attorney General, and George R. Love for appellee.

IRWIN, SIEVERS, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Kapier R. Reyes was found guilty by a jury of two counts of first degree sexual assault on a child, a Class II felony, in Douglas County District Court. The district court sentenced Reyes to 14 to 30 years' imprisonment on each count, with the sentences to run consecutively. Reyes has timely appealed both convictions and sentences to this court. For the following reasons, we affirm.

STATEMENT OF FACTS

In two separate cases which were eventually consolidated for trial, Reyes was charged by information with two counts of first degree sexual assault on a child at least 12 years old, but less than 16 years old. The informations in those cases alleged that Reyes had subjected M.R., his daughter, and D.M., his stepdaughter, to sexual penetration and that the crimes took place in Omaha, Douglas County, Nebraska. Reyes pled not guilty to both counts.

In each case, Reyes filed a motion to suppress to exclude any statements made by himself to Tom Rummel, a detective with the Omaha Police Department's special victims unit, alleging that the statements were obtained in violation of his 4th, 5th, and 14th Amendment rights.

At the suppression hearing, Rummel testified that on April 29, 2009, he investigated allegations of sexual assault made by M.R. after receiving a call from a school resource officer indicating that M.R. had made allegations of sexual abuse by her father, Reyes. Rummel first contacted Reyes at Reyes' home and asked Reyes to come to the police department to discuss the allegations of sexual abuse. Reyes agreed to accompany Rummel to the police department for an interview and rode with Rummel in his unmarked vehicle, in the front seat with no handcuffs.

At the beginning of the interview, Reyes indicated to Rummel that he was originally from Micronesia and had lived in the United States for approximately 9½ years. Rummel testified that Reyes spoke "understandable" English and that during the interview, he appeared to understand Rummel and answered

most of his questions appropriately. Rummel explained that throughout the interview, Reyes would ask him to explain if there was something he did not understand.

Rummel testified that once he gathered some background information from Reyes, approximately 2 to 3 minutes into the interview, he advised Reyes of his *Miranda* rights. Rummel utilized an "Omaha Police Department Rights Advisory Form" to go through those rights with Reyes. The advisory form is in English. Rummel testified that he read each section to Reyes and that Reyes indicated in the affirmative that he understood each statement. Rummel testified that the interview continued and that Reyes was responsive to his questions and appeared to understand where he was and what was happening.

The videotape recording of the interview was received into evidence with no objection. The videotape reveals that Reyes' English was somewhat broken, but was understandable. Reyes also appeared to comprehend Rummel's questions and answer them appropriately. The entire interview was conducted in English, and Reyes did not indicate that he was having difficulty understanding Rummel and did not ask for an interpreter. Reyes appeared to understand his *Miranda* rights as explained by Rummel and answered each question in the affirmative, thus waiving those rights. Throughout the interview, if Rummel asked a question which Reyes did not understand, Reyes would ask for clarification. Reyes admitted that the allegations made by M.R. were true. Reyes told Rummel that he had been drinking and, after the incident, had felt bad and apologized to M.R. Reyes admitted that he had had sexual intercourse with M.R. two times and had also used his fingers to penetrate her vagina. Reyes also admitted that he had had sexual intercourse with D.M. four or five times and had also performed oral sex on her. Reyes told Rummel that each incident had occurred at the family home in Omaha and that the girls were both younger at those times.

Reyes adduced no evidence in support of the motions to suppress. The district court denied the motions to suppress, finding that there was no merit to the motions.

A jury trial was held, during which Reyes renewed his motions to suppress. D.M., Reyes' stepdaughter, testified that

she was 24 years old and had lived in Omaha for 12 years. D.M. was born in 1985 in Micronesia. D.M. testified that her mother married Reyes when D.M. was 4 or 5 years old. D.M. explained that the sexual abuse began in Micronesia when she was 7 years old and continued when the family moved to Omaha. D.M. testified that early on, while she and her family were in Micronesia, she told a relative about the abuse and her mother subsequently confronted Reyes, who then threatened to kill D.M. D.M. testified that shortly after the family relocated to Omaha, when she was approximately 14 years old, Reyes began touching her again and the touching escalated to Reyes' having sexual intercourse with her by putting his penis into her vagina. D.M. testified that the intercourse occurred more than 10 times over the course of at least 3 years. D.M. testified that she spoke to Reyes in both Chuukese and English and that he would tell her he was touching her because he loved her.

After D.M.'s testimony, M.R., Reyes' daughter, testified that she was 17 years old and had been born in Micronesia in 1992. M.R. testified that in 2009, she became depressed and started to miss school because of what Reyes had done to her. M.R. testified that she was 12 or 13 years old the first time Reyes touched her at their house in Omaha. M.R. testified that Reyes first touched her with his hand after instructing her to sit on his lap in the living room. M.R. testified that Reyes then instructed her to go to the bedroom and told her to take off her clothes. She testified that Reyes then put his penis in her vagina. M.R. testified that this happened on three or four other occasions and that Reyes would also put his fingers inside of her vagina. M.R. testified that she and Reyes spoke in English and that she had no trouble understanding him. M.R. explained that eventually, she told her mother what was happening and the abuse stopped.

Rummel also testified to the facts as they were set forth at the suppression hearing. Rummel reiterated that when he interviewed Reyes, he was responsive to Rummel's questions and gave no indication that he did not understand Rummel's questions. The rights advisory form and the videotape recording of the interview were offered and received into evidence. The

videotape recording of the interview was played to the jury, and after further testimony, the State rested its case.

Reyes then took the stand and testified entirely in English, without the services of an interpreter. Reyes testified that he was born in 1968 and was from Micronesia, specifically from the island of Chuuk, which was located in the South Pacific. Reyes testified that his native language was Chuukese and that he had graduated from the eighth grade. Reyes testified that prior to moving to Omaha from Micronesia in 1999, he did not know the English language. Reyes testified that he was employed as a sanitation worker on the night shift at a food company and had been employed there since he arrived in Omaha.

Reyes testified that before going to the police station with Rummel, Reyes talked with Rummel about whether Reyes would be permitted to go to work, and Reyes said that Rummel was friendly with him. Reyes explained that when he told Rummel that he had sexually assaulted M.R. and D.M., he did not mean it and had made it up. Reyes denied ever sexually assaulting either M.R. or D.M. Reyes further explained that he did not understand that he would go to jail if he told Rummel he had sexually assaulted them, because he thought he could give a statement and leave. Initially, Reyes was unable to discuss any cultural differences between the United States and Micronesia, but with additional prompting, he testified that he thought that if he said he was sorry, then he would be released. Reyes testified, "At that time, you know, I'm thinking that — I thought that, if I say something like sorry or something like that [the police would] release me because I know where I came from that we always — always do that where I came from."

On cross-examination, Reyes testified that he did not remember specifics from the interview but did not dispute that Rummel had read him his rights and that he told Rummel that he understood those rights. Reyes then testified that although he watched the videotape of the interview as it was played for the jury, he did not understand the questions asked by Rummel at the time of the interview. Reyes restated several times during his testimony that he made up everything he told to Rummel during the interview. Reyes then testified that he

understood what Rummel was saying during the interview and answered those questions, but did not know the meaning of his own answers.

The matter was submitted to the jury, which found Reyes guilty of two counts of first degree sexual assault on a child. Subsequently, the district court sentenced Reyes to 14 to 30 years' imprisonment on each count, to run consecutively, with 322 days' credit for time served. Reyes has timely appealed his convictions and sentences to this court.

ASSIGNMENTS OF ERROR

Reyes assigns that the district court abused its discretion by denying his motions to suppress statements made to law enforcement personnel, by finding that the evidence was sufficient to support the convictions, and by imposing excessive sentences.

STANDARD OF REVIEW

[1] In reviewing a motion to suppress a confession based on the claimed involuntariness of the statement, including claims that it was procured in violation of the safeguards established by the U.S. Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), an appellate court applies a two-part standard of review. With regard to historical facts, we review the trial court's findings for clear error. Whether those facts suffice to meet the constitutional standards, however, is a question of law, which we review independently of the trial court's determination. *State v. Bormann*, 279 Neb. 320, 777 N.W.2d 829 (2010); *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009).

[2-5] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court 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. *State v. Hudson*, 279 Neb. 6, 775 N.W.2d 429 (2009); *State v. Doyle*, 18 Neb. App. 495, 787 N.W.2d 254 (2010). Regardless of whether the evidence is direct, circumstantial, or a combination thereof, an appellate

court, in reviewing a criminal conviction, does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. *State v. Hudson, supra*; *State v. Doyle, supra.* Any conflicts in the evidence or questions concerning the credibility of witnesses are for the finder of fact to resolve. *State v. Hudson, supra*; *State v. Doyle, supra.* A conviction will be affirmed, in the absence of prejudicial error, if the properly admitted evidence, viewed and construed most favorably to the State, is sufficient to support the conviction. *State v. Hudson, supra*; *State v. Doyle, supra.*

[6] Sentences within statutory limits will be disturbed by an appellate court only if the sentences complained of were an abuse of judicial discretion. *State v. Rung*, 278 Neb. 855, 774 N.W.2d 621 (2009); *State v. Branch*, 277 Neb. 738, 764 N.W.2d 867 (2009).

ANALYSIS

Motions to Suppress.

Reyes argues that the district court erred by denying his motions to suppress statements made to law enforcement personnel because he is a foreign national who did not fully understand the *Miranda* warnings and, therefore, did not knowingly, intelligently, and voluntarily waive those rights.

[7-10] There is no dispute that Reyes was interrogated while in police custody and therefore was entitled to be advised of what have come to be known as *Miranda* rights prior to interrogation. "*Miranda* requires procedures that will warn a suspect in custody of his right to remain silent and which will assure the suspect that the exercise of that right will be honored." *Dickerson v. United States*, 530 U.S. 428, 442, 120 S. Ct. 2326, 147 L. Ed. 2d 405 (2000). *Miranda* rights can be waived if the suspect does so knowingly and voluntarily. *State v. Goodwin*, 278 Neb. 945, 774 N.W.2d 733 (2009); *State v. Walker*, 272 Neb. 725, 724 N.W.2d 552 (2006). A valid *Miranda* waiver must be voluntary in the sense that it was the product of a free and deliberate choice and made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. See *State v. Walker, supra*, citing *Colorado v. Spring*, 479 U.S. 564, 107 S. Ct. 851, 93 L. Ed. 2d

954 (1987). In determining whether a *Miranda* waiver is knowingly and voluntarily made, a court applies a totality of the circumstances test. Factors to be considered include the suspect's age, education, intelligence, prior contact with authorities, and conduct. *State v. Bormann*, 279 Neb. 320, 777 N.W.2d 829 (2010); *State v. Goodwin, supra*.

Reyes argues that he is from Micronesia, that English is not his first language, and that he has difficulty understanding the English language. Reyes claims that he did not understand the *Miranda* warnings that were given to him in English. The State contends that Reyes had no difficulty understanding English and the *Miranda* warnings given to him and that thus, there was a proper waiver of those rights. While Nebraska cases have analyzed whether *Miranda* warnings given in a defendant's native language other than English were adequate to fully advise the defendant of the nature of the right and the consequences of waiving it, we have not found any cases discussing the adequacy of *Miranda* warnings given in English when English is not the defendant's first language; nor have the parties cited us to any such cases. See *State v. Fernando-Granados*, 268 Neb. 290, 682 N.W.2d 266 (2004) (Spanish rights advisory form, while not verbatim Spanish translation of language used in *Miranda*, was sufficient to prevent misunderstanding of rights).

Our independent research indicates that federal case law regarding language barriers in the context of *Miranda* waivers is well settled. The general conclusion of federal courts considering the issue is that the existence of limitations on language skills does not necessarily bar a finding of a knowing and voluntary waiver and that courts should consider it as a factor in the totality of the circumstances to determine whether or not a defendant's command of English is sufficient to permit the defendant to waive his or her *Miranda* rights. See, *U.S. v. Al-Cholan*, 610 F.3d 945 (6th Cir. 2010); *U.S. v. Marquez*, 605 F.3d 604, 609 (8th Cir. 2010) (defendant voluntarily and intelligently waived his *Miranda* rights where his first language was Spanish but where he conversed with investigators easily in English and his girlfriend testified that he spoke "conversational" English and that she could converse with him on most subjects most of time in English); *U.S. v.*

Ortiz, 315 F.3d 873 (8th Cir. 2003), and *U.S. v. Guay*, 108 F.3d 545 (4th Cir. 1997) (finding effective waiver where defendant with limited English stated he understood rights delivered in English); *U.S. v. Jaswal*, 47 F.3d 539, 542 (2d Cir. 1995) (defendant was able to give knowing and voluntary waiver where he had "reasonably good command of the English language"); *Campaneria v. Reid*, 891 F.2d 1014, 1020 (2d Cir. 1989) (defendant's waiver of *Miranda* rights was knowing and intelligent even though defendant spoke "broken" English and lapsed into Spanish during his conversation with officers). Compare *United States v. Short*, 790 F.2d 464 (6th Cir. 1986) (court found that English-only *Miranda* warning was insufficient where defendant was West German national, had resided in United States only 3 months, could not drive, had no friends in United States other than her husband, and spoke only broken English).

Similarly, state courts in South Dakota, North Carolina, and Florida have also utilized the totality of the circumstances analysis of a defendant's basic command of English in determining whether or not the defendant knowingly, intelligently, and voluntarily waived his or her *Miranda* rights. See, *State v. Ralios*, 783 N.W.2d 647 (S.D. 2010); *State v. Mohamed*, 696 S.E.2d 724 (N.C. App. 2010); *Chavez v. State*, 832 So. 2d 730 (Fla. 2002).

[11] We conclude that a defendant's limited command of the English language does not bar a finding of a knowing, intelligent, and voluntary waiver of *Miranda* rights and that instead, it should be considered as a factor in the totality of the circumstances to determine whether or not that understanding is sufficient to permit the defendant to waive his or her *Miranda* rights. Thus, even though Reyes' proficiency in the English language may have been limited, that factor alone would not bar him from making a knowing, intelligent, and voluntary waiver of his constitutional rights. Instead, we must review the totality of the circumstances to make such a determination.

In considering the totality of the circumstances in this case, we note that Reyes has lived and worked in the United States for approximately 10 years and conversed with the victims

in English. The record reveals that Reyes was able to easily converse with law enforcement personnel in the investigation of these crimes. Rummel testified that he conversed in English without difficulty with Reyes at his home, in Rummel's vehicle, and during the interview at the police station. Rummel testified that Reyes appeared to understand the questions asked of him and responded appropriately to those questions, which testimony is substantiated by the videotape recording of the interview. During the interview, Reyes did not request an interpreter or express any significant comprehension difficulties during the interrogation process; instead, when Reyes did not understand Rummel, he requested clarification and appeared to understand from the additional explanation given by Rummel. Furthermore, Reyes was able to testify in English at length during the trial without an interpreter.

Based upon the totality of these circumstances, we conclude that there was ample evidence before the district court to support a conclusion that Reyes' English skills were sufficient to enable him to understand the contents of the *Miranda* warnings and that he knowingly, intelligently, and voluntarily waived those rights. Reyes' assignment of error to the contrary is without merit.

Reyes also claims he did not waive his *Miranda* rights because of his "background." Brief for appellant at 7. The discussion of this portion of the alleged error is limited to the following:

> [Reyes] testified to the cultural norm in his home country that police will let you go if you simply agree to what is alleged . . . . Given his background and difficulty with the English language, [Reyes'] waiver of his Fifth Amendment rights was not knowingly, intelligently, and voluntarily given as required by *Miranda*.

Brief for appellant at 7-8.

[12] This brief statement, which cites no law in support thereof and which makes no arguments in support thereof, is insufficient to constitute discussion of the assigned error. Absent plain error, assignments of error not discussed in the briefs will not be addressed by this court. *State v. Bjorklund*, 258 Neb. 432, 604 N.W.2d 169 (2000), *abrogated on other*

grounds, State v. Mata, 275 Neb. 1, 745 N.W.2d 229 (2008). Finding no plain error, we decline to discuss this claim which did not receive even minimal argument in Reyes' brief.

Sufficiency of Evidence.

Reyes argues that the evidence was insufficient to support his two convictions for first degree sexual assault on a child because the only evidence presented was the uncorroborated testimony of M.R. and D.M.

Reyes was charged with and convicted of two counts of first degree sexual assault on a child pursuant to Neb. Rev. Stat. § 28-319(1)(c) (Reissue 2008). This section provides that an individual commits first degree sexual assault on a child by subjecting another person to sexual penetration "when the actor is nineteen years of age or older and the victim is at least twelve but less than sixteen years of age." § 28-319(1)(c).

The evidence adduced by the State established that Reyes, born in 1968, subjected M.R., born in 1992, to sexual penetration on several occasions in Omaha when she was between 12 and 16 years old. The evidence adduced also establishes that Reyes similarly subjected D.M., born in 1985, to sexual penetration on several occasions in Omaha when she was between 12 and 16 years of age. Even if we were not to consider the videotape recording which contains Reyes' interview and confession, the testimony of M.R. and D.M. clearly establishes the necessary elements of first degree sexual assault on a child.

[13] Furthermore, contrary to Reyes' argument, the State is not required to corroborate the victims' testimony in order to convict the defendant of first degree sexual assault, provided that the testimony alone is believed by the finder of fact. See *State v. Davis*, 277 Neb. 161, 762 N.W.2d 287 (2009).

Therefore, we find that the evidence, when viewed in a light most favorable to the State, is sufficient to support Reyes' convictions for first degree sexual assault on a child. This assignment of error is without merit.

Excessive Sentences.

Reyes also argues that the district court abused its discretion by imposing excessive sentences.

[14-16] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed. *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009). The appropriateness of a sentence is necessarily a subjective judgment and includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life. *State v. Epp*, 278 Neb. 683, 773 N.W.2d 356 (2009). When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the amount of violence involved in the commission of the crime. *Id.*

Reyes was convicted of two counts of first degree sexual assault on a child, a Class II felony punishable by 1 to 50 years' imprisonment. See § 28-319 and Neb. Rev. Stat. § 28-105 (Reissue 2008). The district court sentenced Reyes to 14 to 30 years' imprisonment for each count, with those sentences to be served consecutively. These sentences are within statutory limits. Nonetheless, Reyes argues that the sentences were an abuse of discretion because he is older, is the primary means of support for his family, and faces imminent deportation back to Micronesia because he is not a citizen of the United States.

All of this information was available to the district court prior to sentencing and was discussed at the sentencing hearing. Reyes is 42 years old and was the primary supporter for his family. Reyes also had a criminal history, albeit brief, which involved minor traffic violations and a conviction for driving under the influence. However, Reyes' daughter and stepdaughter have suffered greatly from the abuse perpetrated by Reyes. M.R. struggles significantly with depression which has led to difficulties in school and relationships. Based upon the record, we find that the sentences imposed upon Reyes were not excessive and that the district court did not abuse its discretion by

imposing sentences within the statutory limits. This assignment of error is without merit.

CONCLUSION

In conclusion, having found no merit to any of Reyes' assignments of error, we affirm Reyes' convictions and sentences.

AFFIRMED.