

STATE V. BENAVIDEZ, 1999-NMCA-054, 127 N.M. 206, 979 P.2d 251

**STATE OF NEW MEXICO, Plaintiff-Appellee,
vs.
SALVADOR BENAVIDEZ, Defendant-Appellant.**

Docket No. 18,699

COURT OF APPEALS OF NEW MEXICO

1999-NMCA-054, 127 N.M. 206, 979 P.2d 251

March 17, 1999, Filed

APPEAL FROM THE DISTRICT COURT OF MCKINLEY COUNTY. Jay G. Harris,
District Judge.

Certiorari Granted, No. 25,548, April 27, 1999.

COUNSEL

Patricia A. Madrid, Attorney General, Steven S Suttle, Assistant Attorney General,
Albuquerque, NM, for Appellee.

Paul J. Kennedy, Albuquerque, NM, for Appellant.

JUDGES

RUDY S. APODACA, Judge. WE CONCUR: HARRIS L HARTZ, Judgem M.
CHRISTINA ARMIJO, Judge.

AUTHOR: RUDY S. APODACA

OPINION

APODACA, Judge.

{1} Defendant filed a motion for rehearing after this Court filed its opinion on December 23, 1998. That opinion reversed the substantive perjury convictions against Defendant because of the trial court's failure to instruct on the essential element of materiality.

{2} In his motion for rehearing and supporting memorandum, Defendant points out that a jury in a conspiracy prosecution must be instructed on all of the essential elements of the crime Defendant is alleged to have conspired to commit unless those essential elements are covered by the instructions relating to the substantive offenses. The jury in

this case was not instructed on those essential elements, either in conjunction with the conspiracy instruction or in the instruction relating to the substantive offenses. Consequently, Defendant argues in his motion that the conspiracy conviction under count five of the indictment should have also been reversed based on the rationale contained in this Court's opinion relating to the substantive offenses.

{3} Having considered Defendant's motion, as well as the State's response, we agree with Defendant that his conviction of conspiracy to commit perjury under count five should also be reversed for the reasons noted above. The case is therefore remanded to the trial court for a new trial on count five as well as on counts one and three.

{4} Because we are remanding for a new trial on those three counts, it is not necessary to 19 address Defendant's other point for reversal.

{5} IT IS SO ORDERED.

RUDY S. APODACA, Judge

WE CONCUR:

HARRIS L HARTZ, Judge

M. CHRISTINA ARMIJO, Judge