

STATE V. ABEYTA

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STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
LUIS ABEYTA,
Defendant-Appellant.

No. 33,485

COURT OF APPEALS OF NEW MEXICO

December 3, 2014

APPEAL FROM THE DISTRICT COURT OF GRANT COUNTY, J.C. Robinson, District
Judge

COUNSEL

Gary K. King, Attorney General, Santa Fe, NM, for Appellee

Jorge A. Alvarado, Chief Public Defender, Nicole S. Murray, Assistant Appellate
Defender, Santa Fe, NM, for Appellant

JUDGES

CYNTHIA A. FRY, Judge. WE CONCUR: JAMES J. WECHSLER, Judge, TIMOTHY L.
GARCIA, Judge

AUTHOR: CYNTHIA A. FRY

MEMORANDUM OPINION

FRY, Judge.

{1} Defendant appeals from a district court judgment and sentence entered after he was found guilty of three counts of aggravated assault (deadly weapon) and one count of unlawful carrying of a deadly weapon. We issued a calendar notice proposing to

dismiss. Defendant has responded with a memorandum in opposition. Not persuaded, we dismiss the appeal.

{2} Defendant is appealing from a district court judgment and sentence entered after he was found guilty of three counts of aggravated assault (deadly weapon) and one count of unlawful carrying of a deadly weapon. The judgment and sentence was filed on December 17, 2013. [RP 159] Defendant filed a pro se “motion for appeal” on December 19, 2013. [RP 166] However, he was represented by counsel, who filed both a motion to reduce sentence and a notice of appeal on December 23, 2013. [RP 171, 188] The motion to reduce sentence was timely filed pursuant to Rule 5-801(B) NMRA. There is no order denying the Rule 5-801(B) motion in the record filed with this Court, and case lookup indicates that the motion has not been ruled on. Accordingly, our calendar notice proposed to dismiss for lack of finality pursuant to *State v. Romero*, 2014-NMCA-063, ¶ 13, 327 P.3d 525 (holding that a pending Rule 5-801 motion renders a judgment non-final for purposes of appeal).

{3} In his memorandum in opposition, Defendant argues that *Romero* is distinguishable because the notice of appeal in this case was filed before the Rule 5-801 motion was filed. [MIO 3] However, pursuant to Rule 12-201(D)(4) NMRA, for purposes of lack of finality, it does not matter whether the motion was filed before the notice of appeal has been filed or whether it was filed thereafter. Accordingly, we dismiss the appeal.

{4} **IT IS SO ORDERED.**

CYNTHIA A. FRY, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

TIMOTHY L. GARCIA, Judge