

STATE V. BYRD

This memorandum opinion was not selected for publication in the New Mexico Reports. Please see Rule 12-405 NMRA for restrictions on the citation of unpublished memorandum opinions. Please also note that this electronic memorandum opinion may contain computer-generated errors or other deviations from the official paper version filed by the Court of Appeals and does not include the filing date.

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
LEWIS BYRD,
Defendant-Appellant.

NO. 29,721

COURT OF APPEALS OF NEW MEXICO

February 1, 2010

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Reed S.
Sheppard, District Judge

COUNSEL

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

Law Office of Steven P. Archibeque, Steven P. Archibeque, Albuquerque, NM, for
Appellant

JUDGES

MICHAEL D. BUSTAMANTE, Judge. WE CONCUR: RODERICK T. KENNEDY, Judge,
ROBERT E. ROBLES, Judge

AUTHOR: MICHAEL D. BUSTAMANTE

MEMORANDUM OPINION

BUSTAMANTE, Judge.

Defendant appeals his convictions for possession of a firearm by a felon and for false imprisonment, as well as the enhancement of his sentence pursuant to the Habitual Offender Act. **[RP 209, 193, 233, 238]** Our notice proposed to affirm, and Defendant

filed an untimely memorandum in opposition. We remain unpersuaded by Defendant's arguments and therefore affirm.

Issue (A). Defendant continues to argue that the prohibition against double jeopardy was violated when the State used the same prior felony conviction both to convict him of being a felon in possession of a firearm and to enhance his sentence. **[RP 222; DS 6; MIO 4-5]**

In support of his argument, Defendant refers **[MIO 4]** to *State v. Haddenham*, 110 N.M. 149, 152-54, 793 P.2d 279, 282-84 (Ct. App. 1990) (holding that using the same prior felony convictions both to enhance the defendants' sentences for felon in possession of a firearm and to prove that the defendants were felons, an element of the underlying conviction for felon in possession of a firearm, violated the defendants' double jeopardy rights). Defendant refers also to *State v. Franklin*, 78 N.M. 127, 428 P.2d 982 (1967), and *State v. Boyer*, 103 N.M. 655, 712 P.2d 1 (Ct. App. 1985) in support of his argument. **[MIO 5]** As discussed in our notice, because the prior felony that served as the predicate for Defendant's felon-in-possession-of-a-firearm conviction was not also used as a predicate for an habitual-offender enhancement of *the same felon in possession conviction*, no double jeopardy violation took place. See, e.g., *State v. Handa*, 120 N.M. 38, 46, 897 P.2d 225, 233 (Ct. App. 1995) (holding no double jeopardy violation where the same prior felony was used to establish the felon in possession of a firearm conviction and to provide the basis for enhancement of the assault conviction).

Issue (B). Defendant continues to argue that the evidence was insufficient to support his conviction for false imprisonment. **[DS 6; RP 5]** Defendant again refers to *Franklin* and *Boyer* in support of his argument. **[MIO 7]**

We review the evidence to determine "whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilt beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Sutphin*, 107 N.M. 126, 131, 753 P.2d 1314, 1319 (1988). Under this standard, "[w]e view the evidence in the light most favorable to supporting the verdict and resolve all conflicts and indulge all inferences in favor of upholding the verdict." *State v. Hernandez*, 115 N.M. 6, 26, 846 P.2d 312, 332 (1993). We do not re-weigh the evidence, nor substitute our judgment for that of the fact-finder, so long as there is sufficient evidence to support the verdict. *Sutphin*, 107 N.M. at 131, 753 P.2d at 1319.

Defendant's conviction for false imprisonment requires findings that Defendant restrained and/or confined Victim against her will; that Defendant knew he had no authority to restrain or confine Victim; and that this happened on or about November 16, 2006. **[MIO 6; RP 155, 167, 193, 237]** See NMSA 1978, § 30-4-3 (1963); UJI 14-401 NMRA.

The State presented evidence that Victim told police that Defendant restrained and sexually assaulted her in a car after they met at a bar. **[DS 4; MIO 6]** We hold that this

testimony constitutes sufficient evidence to support Defendant's conviction for false imprisonment. See *State v. Sparks*, 102 N.M. 317, 320, 694 P.2d 1382, 1385 (Ct. App. 1985) (defining substantial evidence as that evidence which a reasonable person would consider adequate to support a defendant's conviction). Although Victim's statements to the police had not been recorded [MIO 6], Defendant's DNA was not the source of the DNA collected from Victim's cervix and vaginal area [MIO 6], and Defendant denied having restrained Victim [DS 4; MIO 6], these were matters for the jury to consider and to weigh. See *State v. Gurule*, 2004-NMCA-008, ¶ 38, 134 N.M. 804, 82 P.3d 975 (recognizing that it is up to the jury to weigh the testimony and contradictory evidence and believe or disbelieve any testimony it hears); see also *State v. Sutphin*, 107 N.M. at 131, 753 P.2d at 1319 (holding that the fact-finder may reject defendant's version of events).

Conclusion. Based on our notice and the foregoing discussion, we affirm.

IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

RODERICK T. KENNEDY, Judge

ROBERT E. ROBLES, Judge