STATE V. CHAVEZ

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
THERESA CHAVEZ,
Defendant-Appellant.

No. 34,174

COURT OF APPEALS OF NEW MEXICO

December 14, 2016

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Stan Whitaker, District Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, John Kloss, Assistant Attorney General, Albuquerque, NM, for Appellee

Bennett J. Baur, Chief Public Defender, Santa Fe, NM, Steven J. Forsberg, Assistant Appellate Defender, Albuquerque, NM, for Appellant

JUDGES

M. MONICA ZAMORA, Judge. WE CONCUR: JAMES J. WECHSLER, Judge, LINDA M. VANZI, Judge

AUTHOR: M. MONICA ZAMORA

MEMORANDUM OPINION

ZAMORA, Judge.

{1} Defendant Theresa Chavez appealed her conviction in the metropolitan court (trial court) for an open container violation, contrary to NMSA 1978, Section 66-8-138

(2001, amended 2013), to the district court. The district court affirmed the trial court's sentencing order and filed a memorandum opinion. Defendant now appeals to this Court. We reverse Defendant's conviction of an open container violation based on insufficient evidence.

BACKGROUND

{2} On November 13, 2011 Officer Curtis Curran of the New Mexico State Police noticed Defendant's vehicle while both his and Defendant's vehicles were stopped at a stop light and he saw someone throw a lit cigarette out of Defendant's vehicle and onto the street. Officer Curran waited until the light changed to initiate a traffic stop. After Officer Curran activated his emergency lights, Defendant continued past several parking lots and through one traffic light. Defendant turned onto another street and traveled a few more blocks before stopping. Upon approaching the vehicle and making contact, Officer Curran immediately smelled the odor of alcohol and observed that Defendant had bloodshot, watery eyes. Officer Curran asked Defendant if she had been drinking alcohol and she mentioned having two drinks.

{3} Officer Curran decided to conduct a DWI investigation. He administered three standardized field sobriety tests and two alternative sobriety tests. Defendant was unable to complete four of the five tests successfully. Officer Curran placed Defendant under arrest for driving while under the influence of intoxicating liquor or drugs. He then conducted an inventory search of Defendant's vehicle and located what he described as a half-empty, 750ml bottle that appeared to contain vodka on the passenger side floor board. Defendant agreed to submit to a breath test. The results indicated that her blood alcohol concentration (BAC) was .14.

{4} Defendant was charged with littering, driving under the influence (DWI), and an open container violation. After a bench trial, Defendant was convicted on all three charges. Defendant appealed her conviction for the open container violation to the district court. The district court entered a memorandum opinion affirming that conviction. This appeal followed.

DISCUSSION

Waiver and Preservation of Sufficiency Challenges

{5} On appeal, Defendant argues that the State presented insufficient evidence to prove beyond a reasonable doubt that she consumed or possessed an alcoholic beverage in an open container in her vehicle, contrary to Section 66-8-138.

{6} Section 66-8-138 prohibits the consumption or possession of alcoholic beverages in open containers in a motor vehicle. It provides in pertinent part:

> A. No person shall knowingly drink any alcoholic beverage while in a motor vehicle upon any public highway within this state.

> B. No person shall knowingly have in his possession on his person, while in a motor vehicle upon any public highway within this state, any bottle, can or other receptacle containing any alcoholic beverage that has been opened or had its seal broken or the contents of which have been partially removed.
>
> C. It is unlawful for the registered owner of any motor vehicle to knowingly keep or allow to be kept in a motor vehicle, when the vehicle is upon any public highway within this state, any bottle, can or other receptacle containing any alcoholic beverage that has been opened or had its seal broken or the contents of which have been partially removed[.]

Section 66-8-138(A)-(C).

{7} At the close of the State's case in chief, Defendant moved for a directed verdict on the open container charge, challenging the sufficiency of the evidence to sustain a conviction under Section 66-8-138. Defendant argued that: the absence of any testimony that she was drinking precluded conviction under Subsection (A); the absence of any testimony that she had been holding any alcoholic beverage precluded conviction under Subsection (B); and Officer Curran's testimony did not establish that the bottle found in the vehicle contained alcohol, precluding conviction under Subsection (C). The motion was denied. During closing arguments, defense counsel again argued that the evidence did not establish, beyond a reasonable doubt, that the bottle Officer Curran found in the vehicle contained alcohol.

{8} As a preliminary matter, we address the State's argument that Defendant failed to preserve an insufficiency claim for review, or that she waived specific challenges she now makes to the sufficiency of the evidence presented below. The State contends that the sufficiency challenges not reiterated after the close of the evidence have not been preserved, or have been waived. We disagree. "It is well-settled that a defendant who presents evidence waives his claim that the evidence at the close of the [s]tate's case was insufficient for submission to the jury." *State v. Baldwin*, 2001-NMCA-063, ¶ 30, 130 N.M. 705, 30 P.3d 394 (alteration, internal quotation marks, and citation omitted). Thus, any challenge to the sufficiency of the evidence that was presented in the State's case in chief was waived by the defense presenting its own evidence. "However, deficiencies in the [s]tate's case can be made up in the defense's case[.]" *State v. Hornbeck*, 2008-NMCA-039, ¶ 25, 143 N.M. 562, 178 P.3d 847 (internal quotation marks and citation omitted). A defendant can challenge the sufficiency of the evidence after the state has been afforded this opportunity. *See id.*

{9} The State appears to conflate sufficiency challenges brought at the close of the State's case, which are waived when the defense presents its own evidence, and sufficiency challenges that are brought at the close of all the evidence, which are not. In the present case, the arguments that Defendant made in support of a directed verdict at the close of the State's case were waived when she presented her own evidence. However, because the State had an opportunity to make up the deficiencies in its case during the defense's case, specifically that the bottle Officer Curran found in the vehicle

contained an alcoholic beverage, Defendant is now free to challenge the sufficiency of *all* the evidence, and is not limited in any respect by the arguments that she made, or did not make in her initial motion for a directed verdict. *See State v. Stein*, 1999-NMCA-065, ¶ 9, 127 N.M. 362, 981 P.2d 295 (noting that the question of sufficiency of the evidence implicates a criminal defendant's right not to be convicted when innocent, therefore it "may be raised for the first time on appeal").

{10} With regard to preservation, this Court has held that challenges to the sufficiency of the evidence may be raised at any time, including for the first time on appeal. *See State v. Sotelo*, 2013-NMCA-028, ¶ 30, 296 P.3d 1232.

Sufficiency of the Evidence to Support a Conviction Under Section 66-8-138

A. Standard of Review

{11} "The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction." *State v. Torrez*, 2013-NMSC-034, ¶ 40, 305 P.3d 944 (internal quotation marks and citation omitted). Our Supreme Court has expressly established a two-step process for applying this test. *State v. Garcia*, No. 35,451, 2016 WL 4487786, 2016-NMSC-___, ¶ 24, ___ P.3d ___ (Aug. 25, 2016). First we must "draw every reasonable inference in favor of the jury's verdict." *Id.* Then we "evaluate whether the evidence, so viewed, supports the verdict beyond a reasonable doubt." *Id.* To the extent we are required to construe Section 66-8-138, our review is de novo. *State v. Allen*, 2014-NMCA-111, ¶ 7, 336 P.3d 1007.

B. Section 66-8-138

{12} As we noted earlier, Section 66-8-138 prohibits the consumption or possession of alcoholic beverages in open containers in a motor vehicle. The trial court determined that the bottle found by Officer Curran contained vodka, which is an essential element of an open container violation under Subsections A, B, and C of Section 66-8-138. While we give deference to the determinations of the fact-finder, we have an independent responsibility to ensure that a conviction is supportable by evidence in the record, rather than mere guess or conjecture. *See State v. Slade*, 2014-NMCA-088, ¶ 14, 331 P.3d 930; *see also State v. Vigil*, 2010-NMSC-003, ¶ 4, 147 N.M. 537, 226 P.3d 636. Therefore we must distinguish between conclusions based on speculation and those based on inferences, a task that is not always straightforward. *See Romero v. State*, 1991-NMCA-042, ¶ 38, 112 N.M. 291, 814 P.2d 1019 ("[T]he line between speculation and reasonable inference is not always clear."), *aff'd in part, rev'd in part*, 1991-NMSC-071, 112 N.M. 332, 815 P.2d 628. "[T]his Court has made clear that an inference must be linked to a fact in evidence." *Slade*, 2014-NMCA-088, ¶ 14. "A reasonable inference is a conclusion arrived at by a process of reasoning[,] which is a rational and logical deduction from facts admitted or established by the evidence." *Id.* (alterations, internal quotation marks, and citation omitted); *Bowman v. Inc. Cty. of Los Alamos*, 1985-NMCA-040, ¶ 9, 102 N.M. 660, 699 P.2d 133 ("An inference is more than a supposition

or conjecture. It is a logical deduction from facts which are proven, and guess work is not a substitute therefor." (internal quotation marks and citation omitted)). A reasonable inference "may not be based on a series of inferences." *Slade*, 2014-NMCA-088, ¶ 14; *see Hisey v. Cashway Supermarkets, Inc.*, 1967-NMSC-081, ¶ 7, 77 N.M. 638, 426 P.2d 784 ("It is true that [the] plaintiff is entitled to [resolution of] all inferences in [its] favor but such inferences must be reasonably based on facts established by the evidence, not upon conjecture or other inferences."). "[E]ven when a permissible logical inference may be drawn from the facts, if it must be buttressed by surmise and conjecture in order to convict, the conviction cannot stand." *Slade*, 2014-NMCA-088, ¶ 14 (internal quotation marks and citation omitted).

{13} In this case, Officer Curran testified that he conducted an inventory search of the vehicle and located "a 750ml bottle that *appeared* to be some sort of vodka." The State argues that because Officer Curran had served as an officer with the New Mexico State Police for twelve years, the last eight of which he had spent assigned to that agency's DWI Unit, had received around 400 hours of training, and had conducted approximately 1,000 DWI investigations, his testimony, combined with the evidence that Defendant's BAC was .14, supports the conclusion that the bottle found in the vehicle contained an alcoholic beverage.

{14} However, regardless of his qualifications, Officer Curran's testimony does not constitute direct evidence that the content of the bottle was in fact vodka. Officer Curran did not testify as to any measures he took to verify that the bottle in fact contained vodka, or any other type of alcoholic beverage. Nor did he testify regarding the characteristics of the bottle or its contents, which made it appear to him to be vodka. Even indulging all reasonable inferences in favor of the trial court's determination, we see no factual basis from which to infer that the bottle contained an alcoholic beverage. There are simply no facts in evidence from which to draw an inference concerning the contents of the bottle. *See State v. Maes*, 2007-NMCA-089, ¶ 18, 142 N.M. 276, 164 P.3d 975 (stating that "if the correlation between the facts and the conclusion is slight, . . . the inference is less reasonable. At some point, the link between the facts and the conclusion becomes so tenuous that we call it speculation" (internal quotation marks and citation omitted)). Accordingly, we conclude that the evidence was insufficient to support Defendant's open container conviction.

CONCLUSION

{15} For the foregoing reasons we reverse Defendant's conviction for consumption or possession of an alcoholic beverage in an open container in a motor vehicle.

{16} IT IS SO ORDERED.

M. MONICA ZAMORA, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

LINDA M. VANZI, Judge