

STATE V. GARDNER

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STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JACKSON OREN GARDNER,
Defendant-Appellant.

NO. 27,234

COURT OF APPEALS OF NEW MEXICO

May 18, 2010

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY, Thomas J. Hynes,
District Judge

JUDGES

Gary K. King, Attorney General, Santa Fe, NM, Ralph E. Trujillo, Assistant Attorney General, Albuquerque, NM, for Appellee

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JUDGES

JAMES J. WECHSLER, Judge. WE CONCUR: RODERICK T. KENNEDY, Judge,
ROBERT E. ROBLES, Judge

AUTHOR: JAMES J. WECHSLER

MEMORANDUM OPINION

WECHSLER, Judge.

Pursuant to the mandate of the Supreme Court, the memorandum opinion filed in the Court on May 14, 2009, is hereby withdrawn and the following is substituted in its place.

Defendant Jackson Oren Gardner appeals his convictions for possession of methamphetamine and possession of drug paraphernalia. On appeal, Defendant contends that (1) the district court erred in admitting the laboratory report of a forensic scientist into evidence, (2) the district court improperly prohibited him from pursuing a relevant line of questioning with the forensic scientist regarding the quality and quantity of the methamphetamine tested, and (3) the State failed to present evidence sufficient to support his convictions. We affirm.

BACKGROUND

In February 2006, the Farmington Police Department's dispatch contacted Sergeant Keith McPheeters and informed him that Defendant was inside a retail store in Farmington and had an outstanding arrest warrant. Sergeant McPheeters then located Defendant and arrested him. While performing a search incident to arrest, Sergeant McPheeters discovered that Defendant was carrying a small tin container that held a substance that he presumed to be methamphetamine. Sergeant McPheeters also discovered that Defendant was carrying plastic baggies, a small scale, and a long glass pipe. Defendant was subsequently charged with possession of methamphetamine and possession of drug paraphernalia.

At trial, James Midkiff, a forensic scientist employed at the Northern Forensic Laboratory of the New Mexico Department of Public Safety, testified regarding the analysis that he performed on the substance that Sergeant McPheeters confiscated from Defendant. Midkiff provided testimony about the procedure that he implemented in creating drug analysis reports, and then the State moved to admit Midkiff's laboratory report regarding the substance that Sergeant McPheeters found in Defendant's possession. Defendant initially objected on the grounds of lack of foundation, relevance, and hearsay. The district court admitted the laboratory report under the business records exception to the hearsay rule, see Rule 11-803(F) NMRA, and Midkiff proceeded to testify about the tests that he performed on the substance found in Defendant's possession and concluded that it was 0.11 grams of methamphetamine.

Following Midkiff's testimony on direct examination, the jury was temporarily excused, and Defendant reiterated his request to the district court to cross-examine Midkiff regarding the topic of quantitative testing. Although the district court denied Defendant's request, concluding that testimony regarding Midkiff's failure to quantitatively test (in other words, test the purity of) the substance that he determined to be methamphetamine would only serve to confuse the jury, Defendant was permitted to make an offer of proof outside the presence of the jury. Defendant's offer of proof indicated that Midkiff's laboratory does not perform quantitative testing to determine the percentage of purity of the substances that it tests, that Midkiff did not believe that quantitative testing would have "increased scientific reliability," and that Midkiff only tested the substance found in Defendant's possession to determine if it was a controlled substance of any percentage of purity. Following Defendant's offer of proof, the jury returned to the courtroom, and Defendant was permitted to cross-examine Midkiff on topics other than his failure to perform quantitative testing.

Ultimately, the jury convicted Defendant of possession of methamphetamine and possession of drug paraphernalia. This appeal followed.

ADMISSIBILITY OF LABORATORY REPORT

Defendant first argues that the district court erred in admitting Midkiff's laboratory report into evidence because it constituted inadmissible hearsay. We examine the admission or exclusion of evidence for abuse of discretion, and the district court's determination will not be disturbed absent a clear abuse of that discretion. *State v. Worley*, 100 N.M. 720, 723, 676 P.2d 247, 250 (1984). "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case." *State v. Woodward*, 121 N.M. 1, 4, 908 P.2d 231, 234 (1995) (internal quotation marks and citation omitted).

Here, the district court ruled that the report was admissible under the business records exception to the hearsay rule. See Rule 11-803(F). Our Supreme Court ruled in *State v. Aragon*, 2010-NMSC-008, ¶ 17, 147 N.M. 474, 225 P.3d 1280, and *State v. Bullcoming*, 2010-NMSC-007, ¶ 16, 147 N.M.487, 226 P.3d 1, that such forensic reports are not admissible under either the business records exception or the public records exception to the hearsay rule. The district court erred in admitting the report as a business record.

However, when that chemist who prepared the report testifies at trial, the report is admissible. See *Camino Real Mobile Home Park P'ship v. Wolfe*, 119 N.M. 436, 448, 891 P.2d 1190, 1202 (1995) (concluding experts' reports were inadmissible unless the experts who prepared the documents testified under oath and were subject to cross-examination). Cf. *Aragon*, 2010-NMSC-008, ¶ 36 (concluding that chemist's testimony about his own report was sufficient evidence to support the conviction, noting that the defendant abandoned his argument that the report was hearsay).

We conclude that, although the basis for the district court's admission of the report was incorrect, the report was nonetheless admissible because Midkiff testified under oath and was subject to cross-examination about the report. See *State v. Ruiz*, 2007-NMCA-014, ¶ 38, 141 N.M. 53, 150 P.3d 1003 (stating that as a general rule, we will uphold the decision of a district court if it is right for any reason). We cannot say that the district court abused its discretion in admitting the report under the circumstances here.

EXCLUSION OF QUANTITATIVE TESTING TESTIMONY

Defendant next argues that the district court erred in prohibiting him from cross-examining Midkiff in front of the jury regarding the lack of quantitative testing on the substance confiscated from Defendant. Although Defendant seems to suggest in his brief in chief that the district court prevented any and all testimony concerning Defendant's assertion that the sample that Midkiff tested had been contaminated, it appears that the only testimony of Midkiff that the district court excluded was testimony concerning the specific subject of quantitative testing.

A district court is permitted to exclude, sua sponte, the testimony of a witness, provided that the parties are first informed of the decision and the district court's "specific concerns" so that the proponent of the evidence is afforded "a fair opportunity to respond to the court's concerns and to make the necessary offer of proof." *State v. Balderama*, 2004-NMSC-008, ¶ 20, 135 N.M. 329, 88 P.3d 845. We review such an exclusion for an abuse of discretion and consider whether "the ruling is clearly against the logic and effects of the facts and circumstances of the case, is clearly untenable, or is not justified by reason." *Id.* ¶ 22. In undertaking our review, we must consider whether the excluded testimony was relevant and, if relevant, whether the reason given by the district court for the exclusion was proper. *Id.*

This issue arose at trial following the State's direct examination of Midkiff and after the jury had been dismissed for a brief recess. In response to Defendant's request, the district court informed Defendant that he would not be permitted to cross-examine Midkiff on the topic of quantitative testing because such questioning would "do nothing but confuse the jury." However, the district court permitted Defendant to make an offer of proof so that he could make a record for appeal.

According to Midkiff's responses during Defendant's offer of proof, quantitative testing can be performed to determine "the percentage of purity" of a tested substance. Midkiff also stated that although the Southern Forensic Laboratory receives federal funding to perform quantitative testing, such testing is not performed at the Northern Forensic Laboratory. Finally, Midkiff stated that he tested the substance confiscated from Defendant for "any" presence of methamphetamine and that performing quantitative testing would not have led to "increased scientific reliability."

We interpret the district court's concern that testimony regarding quantitative testing would "confuse the jury" as an invocation of Rule 11-403 NMRA. Rule 11-403 allows for the exclusion of otherwise relevant evidence if, among other things, the danger of "confusion of the issues or misleading the jury" substantially outweighs the probative value of the offered evidence. Based on our review of Midkiff's testimony during Defendant's offer of proof, we cannot say that the district court abused its discretion in excluding testimony regarding quantitative testing. It appears that Midkiff's lack of quantitative testing had absolutely no bearing on whether the substance confiscated from Defendant was, in fact, determined to be methamphetamine. As the district court noted, a determination of the percentage of purity of the methamphetamine found in the substance tested, as long as some amount of methamphetamine was discovered, would have been irrelevant for purposes of Defendant's criminal liability. See NMSA 1978, § 30-31-23(D) (2005) (specifying no minimum amount required to find a defendant guilty of possession). Furthermore, we note that Defendant was permitted to undertake a lengthy cross-examination of Midkiff in which he primarily focused on Midkiff's alleged inadequacies in performing the tests on the substance confiscated from Defendant in furtherance of his theory that the substance had become contaminated with trace amounts of methamphetamine while in the laboratory. We conclude that the district court did not abuse its discretion.

SUFFICIENCY OF THE EVIDENCE

Finally, Defendant argues that the evidence presented at his trial was insufficient to support his convictions. In addressing Defendant's argument, "[w]e must view the evidence in the light most favorable to the State, resolving all conflicts and indulging all permissible inferences in favor of the verdict[s,]" and we must conduct our review "to determine whether *any* rational jury could have found the essential facts to establish each element of the crime[s] beyond a reasonable doubt." *State v. Reed*, 2005-NMSC-031, ¶ 14, 138 N.M. 365, 120 P.3d 447.

Defendant was convicted of one count of possession of methamphetamine, see § 30-31-23(D), and one count of possession of drug paraphernalia, see NMSA 1978, § 30-31-25.1(A) (2001). At Defendant's trial, Sergeant McPheeters testified that he found a long glass pipe, plastic baggies, a digital scale, and a small tin container that held a "crystalline substance." Next, Midkiff testified that he performed tests on the substance found in the tin container and that he concluded that it was 0.11 grams of methamphetamine. The jury subsequently considered the evidence and concluded that Defendant knowingly possessed methamphetamine and drug paraphernalia. Defendant offers no explanation in support of an argument that no rational jury could have found him guilty on both counts. Therefore, considering the evidence in the light most favorable to the verdicts, we conclude that Defendant's convictions were adequately supported by the evidence presented at his trial.

CONCLUSION

We affirm.

IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

RODERICK T. KENNEDY, Judge

ROBERT E. ROBLES, Judge