

STATE V. JOHNSON

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**STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
BRANDON JOHNSON,
Defendant-Appellant.**

NO. A-1-CA-36605

COURT OF APPEALS OF NEW MEXICO

December 20, 2017

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY, Dustin K. Hunter,
District Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, for Appellee

L. Helen Bennett, Albuquerque, NM, for Appellant

JUDGES

LINDA M. VANZI, Chief Judge. WE CONCUR: MICHAEL E. VIGIL, Judge, STEPHEN G. FRENCH, Judge

AUTHOR: LINDA M. VANZI

MEMORANDUM OPINION

VANZI, Chief Judge.

{1} Defendant Brandon Johnson entered into a conditional plea agreement, pleading no contest to driving while under the influence of intoxicating liquor (DWI) and possession of an open container, and reserving his right to appeal the denial of his motion to dismiss these counts based on destruction of evidence. [DS 2; RP 102-08;

see also RP 66-72, 84-87, 115-17] On appeal, Defendant challenges the district court's denial of his motion to dismiss. In this Court's notice of proposed disposition, we proposed to summarily affirm. Defendant filed a memorandum in opposition, which we have duly considered. Remaining unpersuaded, we affirm.

{2} In his docketing statement, Defendant asked this Court to determine (1) whether the State had a duty to record the entire encounter between the state police officer and Defendant, and (2) whether the State's failure to preserve evidence or maintain properly functioning equipment provides a basis for dismissal of his case. [DS 5] As discussed in our notice of proposed disposition, these issues are different than the arguments that he presented in his motion to dismiss. [CN 3] See *State v. Ware*, 1994-NMSC-091, ¶ 16, 118 N.M. 319, 881 P.2d 679 (“Usually, the failure to gather evidence is not the same as the failure to preserve evidence, and . . . the State generally has no duty to collect particular evidence at the crime scene.”); see *id.* ¶ 17 (acknowledging “[t]he distinction between the failure to preserve evidence gathered and the State's failure to collect evidence during the investigation of a crime scene”).

{3} We proposed to conclude that the issues set forth in the docketing statement were not preserved for appellate review. [CN 3] See Rule 12-321(A) NMRA (“To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked.”); see also *State v. Leon*, 2013-NMCA-011, ¶ 33, 292 P.3d 493 (“We generally do not consider issues on appeal that are not preserved below.” (internal quotation marks and citation omitted)). Nevertheless, we considered whether the district court erred in denying Defendant's motion to dismiss based on his argument that the evidence had been lost or destroyed, as this was the issue that was preserved in the conditional plea agreement. [CN 3-5; RP 68, 87, 103] On this issue, we proposed to affirm. [CN 5]

{4} In his memorandum in opposition, Defendant does not address the preservation issue or the analysis set forth in our notice of proposed disposition. [See generally MIO] See *Hennessy v. Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683 (“Our courts have repeatedly held that, in summary calendar cases, the burden is on the party opposing the proposed disposition to clearly point out errors in fact or law.”); *State v. Mondragon*, 1988-NMCA-027, ¶ 10, 107 N.M. 421, 759 P.2d 1003 (stating that a party responding to a summary calendar notice must come forward and specifically point out errors of law and fact, and the repetition of earlier arguments does not fulfill this requirement), *superseded by statute on other grounds as stated in State v. Harris*, 2013-NMCA-031, ¶ 3, 297 P.3d 374. Instead, Defendant argues that the test set forth in *Ware* addressing the failure to gather evidence is deficient. [MIO 1-3] We decline to address this argument because it was not preserved.

{5} For the reasons stated in our notice of proposed disposition and herein, we affirm.

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

LINDA M. VANZI, Chief Judge

WE CONCUR:

MICHAEL E. VIGIL, Judge

STEPHEN G. FRENCH, Judge