STATE V. LATHAN

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
NORMAN LATHAN,
Defendant-Appellant.

NO. 35,317

COURT OF APPEALS OF NEW MEXICO

December 8, 2016

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY, James Waylon Counts, District Judge

COUNSEL

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

Bennett J. Baur, Chief Public Defender, Kimberly Chavez Cook, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

JAMES J. WECHSLER, Judge. WE CONCUR: MICHAEL E. VIGIL, Chief Judge, M. MONICA ZAMORA, Judge

AUTHOR: JAMES J. WECHSLER

MEMORANDUM OPINION

WECHSLER, Judge.

{1} Defendant Norman Lathan appeals his convictions for child abuse and driving while under the influence of intoxicating liquor or drugs (DWI). This Court issued a notice proposing summary affirmance. Defendant filed a memorandum in opposition to

this Court's notice of proposed disposition and a motion to amend his docketing statement, which we have duly considered. Remaining unpersuaded, we affirm and deny the motion to amend.

{2} Defendant raised a single issue in his docketing statement: whether the district court abused its discretion in denying his motion to continue the jury trial. [DS 5] We proposed to conclude that Defendant had not demonstrated that the district court abused its discretion. [CN 3] *See State v. Rojo*, 1999-NMSC-001, ¶ 41, 126 N.M. 438, 971 P.2d 829 ("An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case." (internal quotation marks and citations omitted)).

Defendant's Motion to Continue Jury Trial

{3} In his memorandum in opposition, Defendant continues to argue that the district court erred in denying his motion to continue to allow him to call Josh Cox, a key witness at trial. [MIO 8-23] Although Defendant includes additional facts in his memorandum in opposition [MIO 1-7], Defendant does not point to any specific errors in fact or in law in our notice of proposed disposition. *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."). To the contrary, the additional facts appear to bolster the district court's decision to deny the motion for continuance. In particular, the record reflects that Defendant did not personally serve Cox with his trial subpoena [MIO 3-4, 17-23], despite the requirement to do so.

{4} The district court found that, because Cox had not been "properly served," his non-appearance at trial was not good cause for a continuance. [MIO 4; RP 142] In light of the foregoing, and for the reasons stated in our notice of proposed disposition, we conclude that the district court did not abuse its discretion in denying Defendant's motion to continue the jury trial. *See Rojo*, 1999-NMSC-001, ¶ 41 ("We cannot say the trial court abused its discretion by its ruling unless we can characterize it as clearly untenable or not justified by reason." (internal quotation marks and citations omitted)).

Motion to Amend the Docketing Statement

{5} Defendant moved to amend the docketing statement to add a double jeopardy issue and a jury instruction issue. [MIO 1] *See* Rule 12-208(F) NMRA (permitting the amendment of the docketing statement based upon good cause shown); *State v. Rael*, 1983-NMCA-081, ¶¶ 15-16, 100 N.M. 193, 668 P.2d 309 (setting out requirements for a successful motion to amend the docketing statement). The essential requirements to show good cause for our allowance of an amendment to an appellant's docketing statement are: (1) that the motion be timely, (2) that the new issue sought to be raised was either (a) properly preserved below or (b) allowed to be raised for the first time on appeal, and (3) that the issues raised are viable. *See State v. Moore*, 1989-NMCA-073,

¶ 42, 109 N.M. 119, 782 P.2d 91, *overruled on other grounds by State v. Salgado*, 1991-NMCA-044, ¶ 2, 112 N.M. 537, 817 P.2d 730.

{6} Also, within Defendant's abuse of discretion arguments, Defendant argues that if trial counsel's failure to properly subpoena Cox justifies denying a continuance in this case, Defendant received ineffective assistance of counsel. [MIO 18-19] We construe the ineffective assistance of counsel argument as a motion to amend the docketing statement even though Defendant did not identify it as a new issue.

Double Jeopardy

{7} Defendant argues that his convictions for both child abuse and DWI violate double jeopardy. [MIO 1, 23-29] Specifically, he claims that multiple punishments for unitary conduct violate double jeopardy. [MIO 1] He contends that his DWI conviction is subsumed within his child abuse conviction, and therefore, his DWI must be vacated. [MIO 23-29]

{8} In *State v. Castañeda*, 2001-NMCA-052, ¶ 1, 130 N.M. 679, 30 P.3d 368, the defendant was convicted of three counts of child abuse and one count of aggravated DWI, among other charges. On appeal, the defendant "argue[d] that her convictions for child abuse should be reversed because the [L]egislature intended the DWI statute to govern in cases of child abuse involving operation of a motor vehicle while intoxicated." *Id.* ¶ 5. The defendant in that case asked this Court "to apply the general/specific statute rule, which states that if one statute addresses a subject generally, and another statute addresses the same subject specifically, the more specific statute controls and a defendant cannot be charged with or punished for violation of both statutes." *Id.* In determining whether the general/specific statute rule applied, we undertook a quasi-double-jeopardy analysis and a preemption analysis. *Id.* We determined that "[t]he jury could have found [the d]efendant guilty of child abuse on the basis of conduct other than DWI, such as her failure to properly restrain the children." *Id.* ¶ 7. [*See also* MIO 24-25] Therefore, we determined that the defendant's conduct was non-unitary. *Id.* We then proceeded to determine whether the Legislature intended to preempt the child abuse statute. *Id.*

{9} Under a preemption analysis, we held that "the [L]egislature did not intend to limit prosecution under either or both statutes." *Id.* ¶¶ 8-11. In reaching this conclusion, we discussed amendments to the child abuse statutes and DWI statutes and stated: "These amendments demonstrate that the [L]egislature intends to protect two distinct interests through two distinct statutory schemes; the child abuse statute protects children from abuse, and the DWI statute protects the general public (including children) from intoxicated drivers." *Id.* ¶ 10.

{10} In the present case, even if Defendant's conduct was unitary, the Legislature intended multiple punishments for child abuse and DWI. *See id.* Consequently, this issue is not viable, and we deny Defendant's motion to amend the docketing statement to add this issue.

Jury Instruction

{11} Defendant makes a general argument, without any development, that the failure to instruct the jury on general intent warrants a retrial. [MIO 1] This Court will not address an undeveloped issue where no authority or argument has been presented on appeal. *See State v. Gonzales*, 2011-NMCA-007, ¶ 19, 149 N.M. 226, 247 P.3d 1111 (stating that "this Court has no duty to review an argument that is not adequately developed"); *State v. Fuentes*, 2010-NMCA-027, ¶ 29, 147 N.M. 761, 228 P.3d 1181 (explaining that this Court does not review unclear or undeveloped arguments on appeal that would require this Court to guess at what a party's arguments might be). As a result, we decline to consider this issue.

Ineffective Assistance of Counsel

{12} Defendant argues that if trial counsel's failure to properly serve Cox justifies denying a continuance in this case, he received ineffective assistance of counsel. [MIO 18-19] To establish a prima facie case of ineffective assistance of counsel, Defendant must demonstrate that: (1) counsel's performance fell below that of a reasonably competent attorney; (2) no plausible, rational strategy or tactic explains counsel's conduct; and (3) counsel's apparent failings were prejudicial to the defense. *See State v. Herrera*, 2001-NMCA-073, ¶ 36, 131 N.M. 22, 33 P.3d 22 (setting out the factors for a prima facie case of ineffective assistance).

{13} Even if trial counsel's performance was deficient by failing to properly serve Cox, Defendant has not demonstrated that personally serving Cox with a trial subpoena would have changed the outcome of the proceedings. *See State v. Hernandez*, 1993-NMSC-007, ¶ 34, 115 N.M. 6, 846 P.2d 312 (holding that "[w]hile trial counsel failed to locate two witnesses that [the d]efendant argue[d] were critical to establish his alibi defense, [the d]efendant . . . failed to demonstrate that the potential witnesses were willing to testify and would have given favorable evidence" and rejecting the defendant's ineffective assistance of counsel claim). Therefore, we conclude that Defendant has not demonstrated a prima facie case of ineffective assistance of counsel.

{14} If Defendant wishes to pursue this matter further, we suggest that he do so in habeas corpus proceedings. *See State v. Crocco*, 2014-NMSC-016, ¶ 13, 327 P.3d 1068 ("Evidence of an attorney's constitutionally ineffective performance and any resulting prejudice to a defendant's case is not usually sufficiently developed in the original trial record. For this reason, a claim of ineffective assistance of counsel should normally be addressed in a post-conviction habeas corpus proceeding, which may call for a new evidentiary hearing to develop facts beyond the record, rather than on direct appeal of a conviction[.]" (internal citation omitted)).

Conclusion

{15} For the reasons stated in this opinion, as well as those provided in our notice of proposed disposition, we affirm and deny the motion to amend the docketing statement.

{16} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

MICHAEL E. VIGIL, Chief Judge

M. MONICA ZAMORA, Judge