

STATE V. MUELLER

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STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
KYLE MUELLER,
Defendant-Appellant.

NO. 31,423

COURT OF APPEALS OF NEW MEXICO

January 19, 2012

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY, Steven L. Bell,
District Judge

COUNSEL

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

Jacqueline L. Cooper, Chief Public Defender, Kathleen T. Baldrige, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

CYNTHIA A. FRY, Judge. WE CONCUR: RODERICK T. KENNEDY, Judge, LINDA M. VANZI, Judge

AUTHOR: CYNTHIA A. FRY

MEMORANDUM OPINION

FRY, Judge.

We issued a second notice, proposing to reverse the district court's enhancement of Defendant's sentence for the use of a firearm. We agreed with Defendant that the

district court erred in enhancing Defendant's sentence without first issuing a special interrogatory to the jury concerning Defendant's use of the firearm. Because the special interrogatory is required under NMSA 1978, Section 31-18-16(C) (1993), we proposed to conclude that the omission was a "mistake in the process" that rendered the enhancement of Defendant's sentence fundamentally unfair, and therefore reversible under a fundamental-error analysis. [CN2 7]

The State has responded to our second notice, and we have duly considered the State's response. While the State argues that a fundamental-error analysis is misplaced under the facts and procedure of this case, [MIR 2-4] it concedes, for other reasons, that the omission of the special interrogatory constituted reversible error with regard to the enhancement of Defendant's sentence. [MIR 2, 4] Because the State does not oppose our proposed disposition, we hereby reverse the enhancement of Defendant's sentence for use of a firearm, and remand to the district court for entry of a sentence that does not include the firearm enhancement.

CONCLUSION

For the reasons set forth above, and in our second notice of proposed summary disposition, we reverse the district court's enhancement of Defendant's sentence for the use of a firearm, and remand to the district court for the entry of a sentence that does not incorporate the firearm enhancement.

IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:

RODERICK T. KENNEDY, Judge

LINDA M. VANZI, Judge