STATE V. ROMERO

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
DANIEL ROMERO,
Defendant-Appellant.

No. A-1-CA-36031

COURT OF APPEALS OF NEW MEXICO

December 6, 2017

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY, Fernando R. Macias, District Judge

COUNSEL

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

Bennett J. Baur, Chief Public Defender, Kathleen T. Baldridge, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

J. MILES HANISEE, Judge. WE CONCUR: LINDA M. VANZI, Chief Judge, JULIE J. VARGAS, Judge

AUTHOR: J. MILES HANISEE

MEMORANDUM OPINION

HANISEE, Judge.

{1} Defendant Daniel Romero appeals from his convictions for trafficking by distribution, a second degree felony, contrary to NMSA 1978, Section 30-31-20 (2006), for conduct occurring on or about December 12, 2013, and for trafficking by distribution,

a second-degree felony, contrary to Section 30-31-20, for conduct occurring on December 19, 2013. In his docketing statement, Defendant contended that the district court erred in denying his motion for directed verdict. This Court issued a calendar notice reviewing for sufficient evidence and proposing to affirm. Defendant has responded with a memorandum in opposition and motion to amend the docketing statement, challenging this Court's proposed disposition with respect to the sufficiency of the evidence and seeking to raise a speedy trial issue. Having considered Defendant's arguments, we deny Defendant's motion to amend the docketing statement and affirm Defendant's convictions.

Sufficiency of the Evidence

In this Court's calendar notice, we pointed out that the State presented testimony that an undercover officer contacted Defendant via cell phone and text messages in order to set up a controlled purchase of cocaine from Defendant. [CN 3] The undercover officer testified that he met with Defendant near Defendant's home; that when he arrived at Defendant's house, Defendant came down from an upstairs apartment; that Defendant came out to the agent's car; and, that Defendant gave the agent cocaine in exchange for U.S. currency. [CN 3] The officer testified that he purchased cocaine from Defendant on two occasions—December 12, and December 19, 2013, and the lab analyst testified that the substance was cocaine. [CN 3] Based on this evidence, we proposed to conclude that there was sufficient evidence to support Defendant's two convictions. *See State v. Rael*, 1999-NMCA-068, ¶ 27, 127 N.M. 347 (holding that an undercover agent's testimony that he purchased heroin from the defendant provided sufficient support for a conviction for trafficking).

In response, Defendant contends that the State rested its case merely on the officer's allegations and the cocaine. Defendant points out that there was no information in the record concerning the confidential source from whom the undercover officer received Defendant's information; that there was no audio visual of the encounter; and that there was no recovery of the cash purportedly given to Defendant by the officer in exchange for the cocaine. [MIO 13-14] However, the question for us on appeal is whether the fact-finder's "decision is supported by substantial evidence, not whether the [fact-finder] could have reached a different conclusion." *In re Ernesto M., Jr.*, 1996-NMCA-039, ¶ 15, 121 N.M. 562, 915 P.2d 318. Moreover, to the extent Defendant is asking this Court to reweigh the evidence, this is beyond the scope of our appellate review. *See State v. Salas*, 1999-NMCA-099, ¶ 13, 127 N.M. 686, 986 P.2d 482 (recognizing that it is for the fact-finder to resolve any conflict in the testimony of the witnesses and to determine where the weight and credibility lie). Accordingly, we affirm Defendant's convictions.

Motion to Amend the Docketing Statement

Defendant moves this Court to amend his docketing statement to include a speedy trial issue. In cases assigned to the summary calendar, this Court will grant a motion to amend the docketing statement to include additional issues if the motion (1) is timely, (2) states all facts material to a consideration of the new issues sought to be raised, (3)

explains how the issues were properly preserved or why they may be raised for the first time on appeal, (4) demonstrates just cause by explaining why the issues were not originally raised in the docketing statement, and (5) complies in other respects with the appellate rules. *See State v. Rael*, 1983-NMCA-081, ¶¶ 7-8, 10-11, 14-17, 100 N.M. 193, 668 P.2d 309. This Court will deny motions to amend that raise issues that are not viable, even if they allege fundamental or jurisdictional error. *See State v. Moore*, 1989-NMCA-073, ¶¶ 36-51, 109 N.M. 119, 782 P.2d 91, *superceded by rule on other grounds as recognized in State v. Salgado*, 1991-NMCA-044, 112 N.M. 537, 817 P.2d 730. For the reasons discussed below, we deny Defendant's motion to amend on the basis that it is not viable.

"In determining whether a defendant's speedy trial right was violated, [New Mexico] has adopted the United States Supreme Court's balancing test in *Barker v. Wingo*, 407 U.S. 514 . . . (1972)." *State v. Smith*, 2016-NMSC-007, ¶ 58, 367 P.3d 420. "Under the *Barker* framework, courts weigh 'the conduct of both the prosecution and the defendant' under the guidance of four factors: (1) the length of the delay; (2) the reasons for the delay; (3) the timeliness and manner in which the defendant asserted his speedy trial right; and (4) the particular prejudice that the defendant actually suffered." *Id.* (quoting *State v. Garza*, 2009-NMSC-038, ¶ 13, 146 N.M. 499, 212 P.3d 387). "In analyzing these factors, we defer to the district court's factual findings that are supported by substantial evidence, but we independently review the record to determine whether a defendant was denied his [or her] speedy trial right and we weigh and balance the *Barker* factors de novo." *State v. Flores*, 2015-NMCA-081, ¶ 4, 355 P.3d 81.

The New Mexico Supreme Court has held that, where the first three factors do not weigh heavily in a defendant's favor, the defendant will be required to demonstrate actual prejudice beyond the normal anxiety and concern facing a defendant while charges are pending. *See Garza*, 2009-NMSC-038, ¶ 40 (providing that where the first three factors do not weigh heavily in the defendant's favor, he or she must make a particularized showing of prejudice for the Court to conclude that the right to a speedy trial was violated). Without looking at each of the factors, we note that the length of delay was nineteen months at the time of the motion and nearly two years delay at the time of trial. [MIO 3] However, our Courts have previously held that a period of less than a year beyond the presumptively prejudicial time period, does not weigh heavily in a defendant's favor. *See State v. Suskiewich*, 2016-NMCA-004, ¶ 8, 363 P.3d 1247 (holding that a nine-month delay beyond the triggering date weighed moderately against the state); *see also Garza*, 2009-NMSC-038, ¶ 24 (noting in a parenthetical that a three-year and nine-month delay was too short to weigh heavily in the defendant's favor).

Based on the length of delay, alone, it is evident that not all of the first three factors weigh heavily in Defendant's favor; therefore, Defendant was required to make an actual showing of prejudice to demonstrate a speedy trial violation. However, Defendant's motion to amend does not indicate with any specificity whether Defendant made such a showing below. Rather, the motion to amend provides that Defendant testified "generally that he was prejudiced by oppressive conditions of release pending trial." [MIO 4] As we noted above, a showing of actual prejudice must be *particularized*,

thus, general assertions are insufficient. Thus, we conclude that Defendant has failed to demonstrate a speedy trial violation.

Accordingly, we deny Defendant's motion to amend his docketing statement and affirm his convictions.

IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:

LINDA M. VANZI, Chief Judge

JULIE J. VARGAS, Judge