STATE V. SAIENNI

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
FRANCIS SAIENNI,
Defendant-Appellant.

No. 33,013

COURT OF APPEALS OF NEW MEXICO

December 16, 2014

APPEAL FROM THE DISTRICT COURT OF TAOS COUNTY, Sarah C. Backus, District Judge

COUNSEL

Gary K. King, Attorney General, Santa Fe, NM, Kenneth H. Stalter, Assistant Attorney General, Albuquerque, NM, for Appellee

Law Offices of the Public Defender, Jorge A. Alvarado, Chief Public Defender, Nicole S. Murray, Assistant Appellate Defender, Kimberly Chavez Cook, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

LINDA M. VANZI, Judge. I CONCUR: M. MONICA ZAMORA, Judge. RODERICK T. KENNEDY, Chief Judge (dissenting)

AUTHOR: LINDA M. VANZI

MEMORANDUM OPINION

VANZI, Judge.

{1} Defendant Francis Saienni was convicted at trial of burglary, conspiracy to commit burglary, and larceny. He appeals his conviction on three grounds: (1) the district court erred in admitting an out-of-court statement by Defendant's brother, who did not testify; (2) comment by a witness on Defendant's silence requires a new trial; and (3) the evidence was insufficient to support his convictions. We affirm.

BACKGROUND

{2} For purposes of this appeal, the parties do not dispute the following facts. Tom Dodd owns a vacation home at 34 Monte Vista Estates Road. The house is in a somewhat remote vacation community in Red River, New Mexico. In January 2011, Defendant helped his father perform repair work on the heating system at Mr. Dodd's home. Mr. Dodd was out of town during the time of the repairs. As a result, Defendant's father was given an access code to open a lock box containing a key to the house. Defendant's father had the code written in his work notebook. On the night of February 3, 2011, after the repair work was complete, a neighbor and resident of Monte Vista Estates Road saw Defendant and another person parked outside of Mr. Dodd's house in Defendant's small sedan. Defendant told the neighbor he and the driver were trying to locate their uncle's house. By the time the neighbor returned to his home, the men had left. The following day, two 52" flat-screen television sets were discovered missing from Mr. Dodd's residence. Mr. Dodd's caretaker visits the home only weekly and, as a result, the crime was believed to have occurred between January 31 and February 4. The house did not show any signs of forced entry, and the televisions were never recovered.

{3} Sometime after discovery of the burglary, Deputy Greg Trujillo, the investigating, deputy determined that Defendant and Defendant's brother, Nicholas Saienni, were suspects, and Deputy Trujillo conducted voluntary interviews of each of them. During the interview with Deputy Trujillo, Defendant initially denied going back to the residence after the repair work was complete. When confronted with the account of the neighbor who saw him outside of Mr. Dodd's house, Defendant admitted to Deputy Trujillo that he did not have an uncle in that neighborhood. Defendant claimed he and Nicholas had actually been in the area that night to poach deer. Nicholas denied being in the area of Mr. Dodd's house at all that night. When Deputy Trujillo told Defendant about Nicholas's denial, Defendant again implicated Nicholas and refused to answer any more questions without an attorney. Defendant was charged with burglary, conspiracy to commit burglary, and larceny. At trial, Deputy Trujillo testified that Nicholas and Defendant's accounts were inconsistent. Deputy Trujillo also testified that Defendant had refused to answer more questions without an attorney. Nicholas was not charged and did not testify at trial. The jury convicted Defendant of all three counts. This appeal followed.

DISCUSSION

Admission of the Out-of-Court Statement by Nicholas

{4} We begin with Defendant's assertion that the district court erred by allowing Deputy Trujillo to repeat statements made by Nicholas during an interview. Deputy Trujillo testified at trial that he interviewed Defendant and Nicholas separately at the Sheriff's Office sometime after the burglary occurred. Deputy Trujillo testified that, during his interview, Defendant first denied going back to Mr. Dodd's house after completing the repair work in January. After confronting Defendant with the account of a neighbor who saw Defendant at the house the night before the discovery of the burglary, Defendant admitted he had been there. Defendant said Nicholas was also with him. Deputy Trujillo testified that Nicholas was not very cooperative in his interview and that Nicholas's account was inconsistent with Defendant's statement that Nicholas was with Defendant. While Deputy Trujillo did not quote Nicholas at trial, the contents of Nicholas's statement could be deduced from the whole of Deputy Trujillo's testimony. Deputy Trujillo testified he talked to Defendant again to confront him with the discrepancies in the brothers' stories. Defendant again said that Nicholas was with Defendant, and Nicholas was lying if he denied it.

{5} At trial, defense counsel objected to Deputy Trujillo's testimony that the brothers' stories were inconsistent regarding whether Nicholas was also at the house the night Defendant was seen. As grounds for the objection, counsel argued that Deputy Trujillo's testimony about Nicholas's statement violated Defendant's confrontation rights and that testimony about Nicholas's denial constituted inadmissible hearsay. The district court overruled the objection and allowed the statement, finding it was not offered for the truth of the matter asserted. We first address whether admission of the testimony violated Defendant's rights under the Confrontation Clause. We then consider whether the testimony was inadmissible hearsay.

{6} Defendant argues his confrontation rights were violated because Nicholas's denial that he was outside of Mr. Dodd's house was a testimonial, out-of-court statement offered for its truth; Nicholas was not unavailable to testify on behalf of the State; and Defendant did not have a prior opportunity to cross-examine Nicholas. *See State v. Navarette*, 2013-NMSC-003, ¶ 7, 294 P.3d 435. The appellate courts review claimed violations of the Confrontation Clause de novo. *State v. Gurule*, 2013-NMSC-025, ¶ 33, 303 P.3d 838.

{7} A testimonial, out-of-court statement offered to prove the truth of the matter asserted may not be admitted into evidence unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Navarette*, 2013-NMSC-003, ¶ 7. A statement is testimonial when it is the result of a police interrogation whose primary purpose is to "prove past events potentially relevant to later criminal prosecution." *Id.* ¶ 8 (internal quotation marks and citation omitted). As we have noted, Deputy Trujillo interviewed Nicholas after determining him to be a suspect in the burglary and larceny. The interview was conducted at the Sheriff's Office sometime after the burglary and during Deputy Trujillo's ongoing investigation. Because Nicholas's denial arose during a law enforcement interview whose purpose was to gather information for use in later prosecution for the burglary and larceny, we agree that Nicholas's statement was testimonial.

{8} Whether Nicholas's statement was out-of-court is not in dispute. Contrary to the State's position, however, Defendant argues Nicholas's statement was offered for its truth. Specifically, Defendant contends that, because the statement was offered to show the discrepancy regarding Nicholas's whereabouts, the statement was actually offered to prove Nicholas was lying. Defendant goes on to argue that a statement offered to prove its falsity is actually being offered for its truth; however, he does not cite any authority in support of this assertion. We assume where arguments in briefs are not supported by cited authority, no authority exists. *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329.

{9} To determine whether Nicholas's denial was offered for its truth, we must examine the meaning of the term "truth." This Court has interpreted a term not defined by statute according to its usual and ordinary meaning, unless a different intent is clearly indicated. *Chee Owens v. Leavitts Freight Serv., Inc.*, 1987-NMCA-037, ¶ 8, 106 N.M. 512, 745 P.2d 1165. Because "truth" is not defined by statute and there is no clear intent in our case law that the term should not be interpreted according to its usual and ordinary meaning, we apply the ordinary meaning of "truth" in the context of an alleged violation of confrontation rights. *See Navarette*, 2013-NMSC-003, ¶ 14.

{10} *Black's Law Dictionary* 1657 (9th ed. 2009) defines "truth" as "[a] fully accurate account of events; factuality." Thus, for Nicholas's denial to have been offered for its truth, it must have been offered as a factual, fully accurate account of events. If not offered for its truth, an out-of-court statement is admissible to establish the fact that the statement was made. *Glass v. Stratoflex, Inc.*, 1966-NMSC-153, ¶ 17, 76 N.M. 595, 417 P.2d 201. Here, Nicholas's denial that he was outside Mr. Dodd's house was not offered to prove he was not, in fact, at the house. Rather, Deputy Trujillo's testimony regarding Nicholas's denial provided context for Defendant's re-implication of Nicholas in the crimes and for Defendant's admission that he was at the house.

{11} Because Nicholas's denial that he was at Mr. Dodd's house was not offered for its truth, the denial is not the type of statement prohibited by *Navarette*, 2013-NMSC-003, ¶ 7, and Defendant's confrontation rights were not violated. Therefore, we need not address Nicholas's unavailability and Defendant's prior opportunity for cross-examination. We next analyze whether the statement was inadmissible hearsay under the rules of evidence.

{12} "Once it has been established that the Confrontation Clause does not bar admission of the statement, the rules of evidence govern whether the statement is admissible." *State v. Aragon*, 2010-NMSC-008, ¶ 6, 147 N.M. 474, 225 P.3d 1280, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, 275 P.3d 110. We review the district court's evidentiary rulings for abuse of discretion. *State v. Sarracino*, 1998-NMSC-022, ¶ 20, 125 N.M. 511, 964 P.2d 72.

{13} In this case, Defendant directs our attention to Rule 11-802 NMRA, the prohibition against the use of hearsay. However, Rule 11-801(C)(2) NMRA defines hearsay as a statement "a party offers in evidence to prove the truth of the matter

asserted in the statement." For the reasons we have already explained, Nicholas's denial was not offered to prove the truth of that statement. Therefore, the statement is not hearsay for the purposes of the prohibition in Rule 11-802. We hold that the district court did not abuse its discretion in admitting Nicholas's statement.

Comment on Defendant's Silence

{14} We next turn to Defendant's argument that the district court erred by allowing Deputy Trujillo to testify during direct examination that, after being confronted with Nicholas's statement, Defendant invoked his rights to remain silent and to the assistance of counsel. The comment Defendant contends to have been improperly elicited occurred during the following exchange between the prosecutor and Deputy Trujillo:

> Prosecutor: What else, the second time that you talked to [Defendant], did you talk to him about?
>
> Deputy Trujillo: I don't recall if I asked him anything else [be]cause he said that he wanted to consult a lawyer, pretty quick.

Upon defense counsel's immediate objection and a brief bench conference, the district court sustained the objection and instructed the jury on *Miranda* warnings and told them not to consider the comment "as any evidence whatsoever with respect to [Defendant's] innocence or guilt." Defense counsel did not object to the adequacy of the instruction and did not move for a mistrial. Defendant argues for the first time on appeal the admonitory instruction was not sufficient to cure the violation of his right to due process guaranteed by the Fifth Amendment and that a new trial is required. We review this issue of law de novo. *State v. DeGraff*, 2006-NMSC-011, ¶ 6, 139 N.M. 211, 131 P.3d 61.

{15} In determining whether error resulted from the prosecutor's question that led to a comment on Defendant's silence, we apply the framework provided by the Supreme Court in *DeGraff*. "We first consider whether the prosecutor [elicited a comment] on Defendant's silence, contrary to his constitutional rights. We then address whether and how Defendant's silence was protected." *Id.* ¶ 7. Finally, where the defendant has not properly objected at trial, we review for fundamental error. *Id.* ¶ 21. Where the defendant has properly objected, we evaluate whether the State has met its burden of showing the error was harmless beyond a reasonable doubt. *Id.* ¶ 22.

{16} Whether a comment on Defendant's silence violated his constitutional rights depends on "whether the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the accused's exercise of his or her right to remain silent." *Id.* ¶ 8 (internal quotation marks and citation omitted). The statement is evaluated in context to determine the manifest intention of the statement, as well as the impact on the jury. *State v. Isiah*, 1989-NMSC-

063, ¶ 11, 109 N.M. 21, 781 P.2d 293, *overruled on other grounds by State v. Lucero*, 1993-NMSC-064, 116 N.M. 450, 863 P.2d 1071.

{17} The direct examination of Deputy Trujillo lasted twenty-eight minutes, followed by a total of seven minutes of cross-examination and redirect examination. The direct examination begins with a discussion of the deputy's training and experience and continues with a chronological account of the investigation he performed in the case, from the time he responded to the scene of the burglary until the end of his interview with Defendant. The question that elicited Deputy Trujillo's comment at issue here was part of a series of questions whose purpose was to outline events in the order they took place. In other words, the prosecutor's question was not directed at eliciting the comment, as he was simply asking what else Deputy Trujillo talked to Defendant about. Moreover, the prosecutor did not ask any other questions on the subject and did not refer to the comment in his closing argument. Accordingly, we conclude that the comment on Defendant's silence was not directly solicited by the prosecutor on direct examination, but rather, was inadvertently elicited. We next determine whether Defendant's silence is protected.

{18} The protection given to a defendant's silence depends on whether the silence was "before arrest; after arrest, but before the warnings required by *Miranda* . . . have been given; after *Miranda* warnings have been given; and at trial." *DeGraff*, 2006-NMSC-011, ¶ 11. Defendant appeared at the Sheriff's Office at the request of Deputy Trujillo and was not under arrest at the time of his interview. Neither the briefs nor the record indicate whether Defendant had been given *Miranda* warnings. This Court has in the past decided comment-on-silence issues under the assumption that *Miranda* warnings were given. *See State v. Gutierrez*, 2003-NMCA-077, ¶ 10, 133 N.M. 797, 70 P.3d 787. We apply the same assumption here and analyze Defendant's silence under the third scenario outlined in *DeGraff*.

{19} Due process guaranteed by the Fifth Amendment protects pre-arrest, post-*Miranda* silence if a suspect invokes his or her right to remain silent in response to a non-custodial interrogation. *DeGraff*, 2006-NMSC-011, ¶¶ 12, 14. Evidence of a defendant's silence is not admissible to prove guilt when the defendant does not testify at trial. *Id.* ¶ 15. Because Defendant is assumed to have been given *Miranda* warnings and did not testify at trial, his refusal to answer any more questions without the presence of an attorney was protected from comment during his trial. Finally, we determine whether the comment and following curative instruction resulted in error.

{20} Where the prosecutor is found to have elicited a comment on the defendant's protected silence and the defendant fails to make a proper objection at trial, we review whether the comment resulted in fundamental error. *DeGraff*, 2006-NMSC-011, ¶ 21. Where a defendant does make a proper objection at trial, the conviction must be reversed unless the State can demonstrate that the error was harmless beyond a reasonable doubt. *Id.* ¶ 22.

{21} "In order to preserve an error for appeal, it is essential that the ground or grounds of the objection or motion be made with sufficient specificity to alert the mind of the trial court to the claimed error or errors, and that a ruling thereon then be invoked." *State v. Varela*, 1999-NMSC-045, ¶ 25, 128 N.M. 454, 993 P.2d 1280 (internal quotation marks and citation omitted). This Court may not award a new trial when the defendant has waived such relief in the district court. *State v. Musgrave*, 1984-NMCA-127, ¶ 11, 102 N.M. 148, 692 P.2d 534. Where no request for mistrial was made, we have previously held that the district court did not err in not declaring a mistrial. *Davila v. Bodelson*, 1985-NMCA-072, ¶ 15, 103 N.M. 243, 704 P.2d 1119. On appeal, the reviewing court will not consider issues not raised in the district court unless the issues involve matters of jurisdictional or fundamental error. *In Re Aaron L.*, 2000-NMCA-024, ¶ 10, 128 N.M. 641, 996 P.2d 431.

{22} Deputy Trujillo's comment was followed immediately by Defendant's objection. No specific relief was requested at that time, and the district court gave the jury an admonitory instruction. Defense counsel did not object to the adequacy of the instruction or move for a mistrial. On appeal, Defendant does not argue either in his brief in chief or in his reply brief that an objection to the admonitory instruction was properly made and that a harmless error standard should apply. Instead, Defendant argues for the first time that the admonitory instruction was insufficient to cure any prejudice caused by Deputy Trujillo's comment, and he now requests a mistrial. Because we conclude Defendant did not properly object to the adequacy of the admonitory instruction by moving for a mistrial, we review Deputy Trujillo's comment and the admonitory instruction that followed for fundamental error.

{23} Fundamental error review consists of two parts. "We first determine whether any error occurred, i.e., whether the prosecutor commented on [or elicited a comment on] the defendant's protected silence. If such an error occurred, we then determine whether the error was fundamental." *DeGraff*, 2006-NMSC-011, ¶ 21. An error is fundamental where, after consideration of the entire record, "there is a reasonable possibility that the [error] might have contributed to the conviction." *State v. Alvarez-Lopez*, 2004-NMSC-030, ¶ 25, 136 N.M. 309, 98 P.3d 699 (internal quotation marks and citation omitted). Having already determined a comment on Defendant's silence was elicited by the prosecutor, we consider whether there is a reasonable possibility that the comment contributed to Defendant's convictions.

{24} Deputy Trujillo's comment on the Defendant's invocation of his Fifth Amendment rights came during a narrative of events and in response to the final question of his direct examination. As we have noted, Deputy Trujillo's comment was not directly attributable to the prosecutor and was, at most, inadvertently elicited. Even Defendant concedes the comment was unsolicited. Defendant's immediate objection was sustained after a brief bench conference. The jury was instructed on *Miranda* warnings and to not consider the comment "as any evidence whatsoever with respect to [Defendant's] innocence or guilt." Defense counsel did not object to the adequacy of the instruction and did not move for a mistrial. There was no other reference to Defendant's invocation of his rights.

{25} Indirect comments, including those inadvertently elicited from a witness by the prosecutor, "are less likely to call a jury's attention to the defendant's exercise of his rights." *DeGraff*, 2006-NMSC-011, ¶ 8. A mistrial or reversal is not required in every case where there has been some comment on the defendant's silence. *State v. Wildgrube*, 2003-NMCA-108, ¶ 23, 134 N.M. 262, 75 P.3d 862. "[A] prompt admonition from the court to the jury to disregard and not consider inadmissible evidence sufficiently cures any prejudicial effect which might otherwise result." *State v. Newman*, 1989-NMCA-086, ¶ 19, 109 N.M. 263, 784 P.2d 1006. Moreover, where inadmissible testimony is not intentionally elicited by the prosecutor, a prompt admonitory instruction is sufficient to cure any prejudicial effect. *State v. Armijo*, 2014-NMCA-013, ¶ 9, 316 P.3d 902, *cert. granted*, 2013-NMCERT-012, 321 P.3d 127. Here, the comment was inadvertently elicited by the prosecutor and followed promptly by an admonitory instruction. While we do not take lightly improper comment on a defendant's silence, given the circumstances of the comment, we find the violation in this case among those less egregious. We conclude the admonitory instruction was sufficient to cure any prejudice to Defendant, and any error resulting from the comment was not fundamental. Although we need not address harmless error because the issue was not adequately preserved, we nevertheless hold that the result would be the same.

Sufficiency of the Evidence

{26} Defendant argues there was not sufficient evidence at trial to support any of his convictions. A sufficiency of the evidence review involves a two-step process. First, the evidence is viewed "in the light most favorable to the guilty verdict, indulging all reasonable inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. Then the appellate court must make a legal determination of "whether the evidence viewed in this manner could justify a finding by any rational trier of fact that each element of the crime charged has been established beyond a reasonable doubt." *State v. Apodaca*, 1994-NMSC-121, ¶ 6, 118 N.M. 762, 887 P.2d 756 (internal quotation marks and citation omitted). We discuss first the sufficiency of the evidence with respect to the burglary and larceny conviction and then turn to the sufficiency of the evidence with respect to the conspiracy conviction.

{27} Defendant was convicted of burglary and larceny. As to burglary, the jury was instructed the State must prove:

1. [D]efendant entered the dwelling without authorization;

2. [D]efendant entered the dwelling with the intent to commit a theft when inside[.]

See UJI 14-1630 NMRA; NMSA 1978, § 30-16-3 (1971). As to larceny, the jury was instructed the State must prove:

1. [D]efendant took and carried away; to-wit: 2 Sanyo flat screen TV[s] belonging to another, which had a market value of over $500.00;

2. At the time he took this property, [D]efendant intended to permanently deprive the owner of it[.]

See UJI 14-1601 NMRA; NMSA 1978, § 30-16-1(A), (D) (2006).

{28} The State presented the following evidence at trial: Defendant helped his father with repair work at Mr. Dodd's vacation house in a somewhat remote area of Red River, during the weeks preceding the burglary; because Mr. Dodd was not staying at the house during the time of the repairs, Defendant's father accessed the house by entering a code in a lock box and retrieving a key; Defendant was present when his father unlocked the lock box; Defendant's father did not know whether Defendant overheard the access code, saw it entered, or wrote it down; a car matching the description of Defendant's car was seen driving around the neighborhood between nine and ten o'clock at night on February 3, 2011, the night before the burglary was discovered; Defendant was seen in the passenger seat of the car, as it was parked in front of the walkway to the house; when approached by a neighbor, Defendant told him they were in the area looking for their uncle; Defendant appeared to the neighbor to be manipulating the car's dome light to keep the passenger compartment dark; during his interview with Deputy Trujillo, Defendant first denied that he had been in Red River; Defendant then admitted being at the house when Deputy Trujillo told him a neighbor had seen him there; Defendant told Deputy Trujillo he did not have an uncle in the area, and he had lied to the neighbor about looking for his uncle; Defendant told Deputy Trujillo he had really been in the area to poach a deer, even though it was nighttime, the area was residential, and Defendant's car was too small to transport a deer; Defendant's and Nicholas's versions differed in who was present outside the house the night Defendant was seen; Defendant was not authorized to be in the house except during the time he was helping his father with repairs; the repair work was complete at the time Defendant was seen outside the house; two televisions were discovered missing the day after Defendant was seen at the house; Mr. Dodd paid approximately $1,200 for each of the televisions; and the house did not show any signs of forced entry.

{29} "Just because the evidence supporting the conviction was circumstantial does not mean it was not substantial evidence." *State v. Rojo*, 1999-NMSC-001, ¶ 23, 126 N.M. 438, 971 P.2d 829 (internal quotation marks and citation omitted). "[C]ircumstantial evidence alone can amount to substantial evidence." *State v. Flores*, 2010-NMSC-002, ¶ 19, 147 N.M. 542, 226 P.3d 641. While each component alone may not be sufficient to support the conviction, evidence can combine to form substantial support for the conviction when viewed as a whole. *Rojo*, 1999-NMSC-001, ¶ 23. An attempt to deceive police may be considered evidence of consciousness of guilt. *State v. Martinez*, 1999-NMSC-018, ¶ 30, 127 N.M. 207, 979 P.2d 718. Viewed in the light most favorable to the verdict, the jury could reasonably infer from the evidence presented that Defendant had the opportunity to obtain the lock box code while legitimately at the property and later used the code to enter the house, take the televisions, and permanently deprive Mr. Dodd of them. The jury could also reasonably infer Defendant's attempt to deceive Deputy Trujillo was a result of his consciousness of guilt.

{30} Though Defendant argues a lack of direct evidence of guilt and inadequate followup investigation, this Court does not weigh contrary theories or evidence and will not substitute its judgment for that of the finder of fact. The appellate courts do "not weigh the evidence and may not substitute its judgment for that of the fact finder so long as there is sufficient evidence to support the verdict." *State v. Griffin*, 1993-NMSC-071, ¶ 17, 116 N.M. 689, 866 P.2d 1156 (internal quotation marks and citation omitted). "Contrary evidence supporting acquittal does not provide a basis for reversal because the jury is free to reject [the d]efendant's version of the facts." *Rojo*, 1999-NMSC-001, ¶ 19. We therefore decline to re-weigh the evidence or consider contrary theories and hold the evidence presented at trial was sufficient for a rational trier of fact to find Defendant guilty of burglary and larceny.

{31} Defendant was also convicted of conspiracy to commit burglary. For conspiracy, the jury was instructed the State had to prove:

1. [D]efendant and another person by words or acts agreed together to commit burglary;

2. [D]efendant and the other person intended to commit burglary[.]

See UJI 14-2810 NMRA; NMSA 1978, § 30-28-2(A) (1979). The agreement may "be in the form of a mutually implied understanding and may be inferred from circumstantial evidence." *State v. Johnson*, 2004-NMSC-029, ¶ 49, 136 N.M. 348, 98 P.3d 998.

{32} The State presented the following evidence at trial: Defendant was the passenger in what appeared to be his own car, when a neighbor saw the car parked in front of the burglarized house; Defendant told the neighbor they were looking for their uncle's house; the driver of the car did not offer any explanation, contradict Defendant's explanation of looking for their uncle, or talk to the neighbor at all, even though Defendant later admitted to Deputy Trujillo that he did not have an uncle in the neighborhood; Defendant admitted to Deputy Trujillo that his brother, Nicholas, was with him on the night of February 3, 2011; and Nicholas denied being at the house with Defendant that night.

{33} "A conspiracy may be established by circumstantial evidence. Generally, the agreement is a matter of inference from the facts and circumstances." *State v. Gallegos*, 2011-NMSC-027, ¶ 26, 149 N.M. 704, 254 P.3d 655 (internal quotation marks and citation omitted). As we previously stated, "circumstantial evidence alone can amount to substantial evidence." *Flores*, 2010-NMSC-002, ¶ 19. An attempt to deceive police tends to show consciousness of guilt as an accomplice. *State v. Lujan*, 1985-NMCA-111, ¶ 36, 103 N.M. 667, 712 P.2d 13. When the evidence is viewed in the light most favorable to the guilty verdict, it is reasonable to infer from Defendant's admitted presence with Nicholas outside Mr. Dodd's house that Nicholas was driving Defendant's car. The jury could also reasonably infer from Nicholas's acquiescence in Defendant's lie about looking for their uncle that Defendant and Nicholas intended to commit a burglary. The jury could reasonably infer consciousness of guilt from evidence of the

discrepancy in the brothers' stories regarding who was at the house the night before discovery of the burglary. We conclude the evidence presented at trial was sufficient to support a conviction for conspiracy.

CONCLUSION

{34} The district court did not err in admitting the out-of-court statement by Nicholas, who did not testify at trial. Any error resulting from a witness's comment on Defendant's silence and the following admonitory instruction was not fundamental error. The evidence presented was sufficient to support Defendant's convictions for burglary, conspiracy to commit burglary, and larceny. Accordingly, we affirm.

{35} IT IS SO ORDERED.

LINDA M. VANZI, Judge

I CONCUR:

M. MONICA ZAMORA, Judge

RODERICK T. KENNEDY, Chief Judge (dissenting)

DISSENTING OPINION

KENNEDY, Judge (dissenting).

{36} I disagree with the analysis of Nicholas's statement. The admission of the statement is troubling, mostly because it created an unnecessary problem that the prosecutor could have avoided. The Opinion seems to adopt the position that Nicholas's denying of being at the scene is a verbal act, and its truth is irrelevant. Majority Op. ¶¶ 10, 13. This is so because Defendant's presence and participation in a burglary with any other person does not require Nicholas's participation. Although no conspiracy or crime was admitted by Defendant or Nicholas, the circumstantial evidence from the independent witness that Defendant was present at the scene with any other person is enough evidence, together with the rest, to support a necessary element of conspiracy. Section 30-28-2(A) (defining conspiracy in pertinent part as "knowingly combining with another for the purpose of committing a felony"). Defendant's convictions for burglary and larceny require no other actor. Thus, the identity of the "other" actor is irrelevant to the charges, and "[i]rrelevant evidence is not admissible." Rule 11-402 NMRA.

{37} However, according to the majority, Nicholas's statement establishes "context" with Defendant's other statements. This context establishes Defendant's "consciousness of guilt" by lying and, in the State's closing argument, Nicholas's allegation that Defendant was lying figured into the "context" of Defendant's changing stories to establish this "consciousness." This is borne out when the majority constructs an inference that the discrepancy between Defendant's truthful admission of being at

the scene and Nicholas's lie about not being there that somehow inferentially establishes Defendant's consciousness of guilt. Majority Op. ¶ 33. In this use, the statement's truth is quite important because it asserts that Defendant is a liar and was lying to the officer. Thus, the district court judge was wrong, and the truth of the matter asserted in the statement is truly the essence of its admissibility. This inference of Defendant's own "consciousness of guilt" cannot be said to be harmless in such a circumstantial case. This is unfortunate since whether the other person was Nicholas is irrelevant to Defendant's guilt as is the majority's assumption. I would hold that a sense of the truth of Nicholas's statement was necessary to impeach Defendant on the way to establish his consciousness of guilt that admission of the statement violated Defendant's confrontation rights and that the violation was harmful.

{38} I respectfully dissent.

RODERICK T. KENNEDY, Chief Judge