

STATE V. BATISTA-CARRASCO

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**STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
HEVER U. BATISTA-CARRASCO,
Defendant-Appellant.**

No. A-1-CA-35220

COURT OF APPEALS OF NEW MEXICO

December 6, 2018

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Christina P.
Argyres, District Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, Charles J. Gutierrez, Assistant Attorney General, Albuquerque, NM, for Appellee

Bennett J. Baur, Chief Public Defender, Allison H. Jaramillo, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

M. MONICA ZAMORA, JUDGE. WE CONCUR: MICHAEL E. VIGIL, Judge, STEPHEN G. FRENCH, Judge

AUTHOR: M. MONICA ZAMORA

MEMORANDUM OPINION

ZAMORA, Judge.

{1} A jury convicted Defendant Hever U. Batista-Carrasco of trafficking heroin (by possession with intent to distribute), contrary to NMSA 1978, Section 30-31-20 (2006),

and conspiracy to commit trafficking heroin (by possession with intent to distribute), contrary to NMSA 1978, Section 30-28-2 (1979). Defendant appeals on three grounds: first, that the district court erred in not suppressing incriminating statements Defendant made to officers because they were not recorded prior to his arrest; second, that the State presented insufficient evidence to support both convictions; and third, that the district court erred in not excluding a witness from testifying at his trial. We affirm.

BACKGROUND

{2} In 2012, Deputy Ramon Maestas of the Bernalillo County Sheriff's Office (BCSO) Narcotics Unit received information that Defendant was selling heroin throughout the Albuquerque area. The investigation included fourteen days of intermittent surveillance of the home of Defendant's brother, Angel Batista-Carrasco (Angel), and Defendant was seen going there more than twelve times. As a result of the investigation, a search warrant was obtained for Defendant's home, Angel's mobile home, and two vehicles.

{3} Just as Deputy Maestas and other officers were about to execute a search warrant on Angel's home, Defendant drove into the trailer park where Angel lived and Deputy Maestas stopped him. Deputy Maestas placed Defendant in handcuffs, advised him of the investigation, and read him his *Miranda* rights. While standing outside of Angel's home, Defendant was, at first, hesitant to answer questions posed by Deputy Maestas. Eventually, however, Defendant stated that there were drugs inside of his brother's home, and he further admitted that he and his brother would cut heroin and distribute it throughout the city for a profit. Defendant told Deputy Maestas and Sergeant Chris Romero that it was Angel who had the "connect" with the heroin supplier and that Defendant did not know that person's identity. Deputy Maestas did not record his encounter with Defendant. During the search of Angel's home, officers found 280 grams of heroin, along with three digital scales and a ledger.

{4} A grand jury indicted Defendant on charges of trafficking heroin (by possession with intent to distribute, conspiracy to commit trafficking heroin (by possession with intent to distribute), and one additional charge that is not pertinent to this appeal. Angel was also indicted for trafficking a controlled substance (possession with intent to distribute), conspiracy to commit trafficking a controlled substance (possession with intent to distribute) and use or possession of drug paraphernalia. The day after they were each indicted, Defendant and Angel's cases were joined. In February 2015, the Second Judicial District Court's local rule LR2-400.1 NMRA entitled "[p]rocess for cases in the special calendar" went into effect. Pursuant to LR2-400.1, the district court entered a scheduling order, on February 24, 2015, with only Defendant's name in the caption and only Defendant's case number. This order set Defendant's deadline for witness interviews for April 27, 2015, and a deadline for pretrial motions for May 6, 2015. The district court subsequently entered a scheduling order in June 2015 with only Angel's name in the caption and Angel's case number. This order set Angel's deadline to complete witness interviews and pretrial motions for July 24, 2015.

{5} Angel subpoenaed four witnesses for pretrial interviews, including Deputy Maestas, scheduling the interviews to take place July 8, 2015. Defendant's counsel appeared at the interviews scheduled by Angel. Defendant admitted that he "participated in those interviews rather than issuing duplicate subpoenas." Angel's subpoenas list his name only, have only his case number, and only include his counsel's name. Deputy Maestas failed to appear for the pretrial interview. Defendant moved to exclude Deputy Maestas based on his failure to appear for the pretrial interview. The district court denied the motion on the basis that he did not separately subpoena Deputy Maestas. Defendant moved the district court to reconsider, and upon being asked when defense counsel scheduled his pretrial interviews, counsel replied, "I did not schedule them." The district court denied Defendant's motion to reconsider based on his lack of effort to comply with his February scheduling order.

{6} Defendant also filed an omnibus style motion in limine to exclude from evidence the statements he made to Deputy Maestas based exclusively on NMSA 1978, Section 29-1-16 (2005). In his motion, Defendant did not identify exactly which statements he sought to suppress, nor did he provide the district court with any substantive argument. Instead, he wrote that he sought "an order excluding from use at trial any statements not properly recorded pursuant to [Section] 29-1-16[.]" The morning of trial, the district court heard argument from counsel on the motion in limine but did not conduct an evidentiary hearing. Defendant argued that he was questioned in a custodial interrogation and therefore, Section 29-1-16 required Deputy Maestas to record Defendant's statements. Since Deputy Maestas did not record the interrogation, Defendant argued the statements were not admissible. The State objected and argued that Defendant was not in custody and therefore Section 29-1-16 did not apply. The district court agreed with the State and did not exclude the statements, but advised Defendant he would have an opportunity to cross-examine Deputy Maestas as to why he did not record Defendant's statements.

{7} At trial, Deputy Maestas testified about the statements Defendant made to him while standing outside Angel's home. On cross-examination, Defendant asked Deputy Maestas: "Are you aware of the state statute that basically encourages law enforcement to record interrogations of suspects?" Deputy Maestas replied that he was not aware of the statute from any of his duties with BCSO. Defendant asked the district court to take judicial notice of the statute and allow him to read it to the jury. The court denied the request because "[the statute] has nothing to do with this case."

{8} The jury also heard Sergeant Chris Romero testify to his recollection of Defendant's admission to Deputy Maestas and himself that Angel had a "connect" who sold them large amounts of heroin that Defendant and Angel would in turn sell on the street. Deputy Justin Kimbrough testified about his assistance with the execution of the search warrants and what officers found inside of Angel's home, including several bags of a brown, tar-like substance, three digital scales, and a ledger. Manuel Gomez, a forensic scientist with the Albuquerque Police Department, testified about his decision to test the substance seized from Angel's home for heroin. Mr. Gomez further testified that

he tested five bags of a dark, chunky substance (100.066 grams in total) and all five contained heroin.

DISCUSSION

I. Defendant's Statements

{9} Defendant argues that the district court erred in not suppressing his statements made to Deputy Maestas. He asserts three sub-arguments that we address in turn: first, he made his statements under custodial interrogation, and therefore the district court should have suppressed them, pursuant to Section 29-1-16; second, in the alternative that Section 29-1-16 is unconstitutional; and third, pursuant to our state constitution's due process protections, statements made during a custodial interrogation are a violation of due process and should be excluded. In conjunction with these specific arguments, Defendant broadly argues that the admission of his statements resulted in prejudice to him, and constituted plain and fundamental error.

{10} The parties dispute whether the motion was a motion in limine or a motion to suppress, which we do not have to resolve in light of our disposition of the merits which follows.

A. Section 29-1-16 Does Not Provide for Suppression of Defendant's Statements

{11} We begin by addressing Defendant's argument that the district court should have suppressed his statements, pursuant to Section 29-1-16, because Deputy Maestas failed to record them. "New Mexico courts have long honored [the] statutory command [that the text of a statute or rule is the primary, essential source of its meaning] through application of the plain meaning rule, recognizing that when a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation." *Starko, Inc. v. N.M. Human Servs. Dep't*, 2014-NMSC-033, ¶ 46, 333 P.3d 947 (alteration, internal quotation marks, and citation omitted). "When this Court construes statutes, our guiding principle is that we should determine and effectuate the Legislature's intent when it enacted the statute." *State ex rel. Brandenburg v. Sanchez*, 2014-NMSC-022, ¶ 4, 329 P.3d 654. "Our courts have repeatedly observed that a statute's plain language is the most reliable indicator of legislative intent." *Stennis v. City of Santa Fe*, 2010-NMCA-108, ¶ 10, 149 N.M. 92, 244 P.3d 787.

{12} Section 29-1-16(A)(1) in pertinent part mandates that when a law enforcement officer conducts a custodial interrogation, "the custodial interrogation shall be electronically recorded in its entirety" when the law enforcement officer is "reasonably able to do so." The statute mandates that a law enforcement officer comply unless he has "good cause not to electronically record the entire custodial interrogation and makes a contemporaneous written or electronic record of the reasons for not doing so."

Section 29-1-16(B). The statute enumerates the reasons constituting good cause not to record. Section 29-1-16(B).

{13} This issue raised by Defendant is squarely resolved by the plain language of the statute. Section 29-1-16(l) plainly states “[t]his section shall not be construed to exclude otherwise admissible evidence in any judicial proceeding.” Given the clear language of [Section 29-1-16\(l\)](#), we cannot say that the district court erred in refusing to suppress Deputy Maestas’ testimony based on his failure to record Defendant’s statements in accordance with the terms of the statute. We decline to recognize a remedy that is explicitly contrary to the plain language of the statute.

{14} We therefore need not decide whether Defendant made his statements under custodial interrogation whether his statements were voluntary, or whether Deputy Maestas had good cause for not recording Defendant’s statements, because Section 29-1-16 simply does not provide Defendant the remedy he seeks. We therefore hold that the district court did not err in not suppressing Defendant’s statements, pursuant to Section 29-1-16.

B. Defendant Did Not Preserve His Argument That Section 29-1-16 Is Unconstitutional Under Article II, Section 18 of the New Mexico Constitution.

{15} Alternatively, Defendant argues that the statements must be suppressed because Section 29-1-16 is unconstitutional under the New Mexico Constitution Article II, Section 18. The State argues that Defendant failed to preserve his argument because he failed to develop the necessary factual background through a proper evidentiary hearing and failed to raise the applicable constitutional provision he now argues on appeal.

{16} “We generally do not consider issues on appeal that are not preserved below.” *State v. Leon*, 2013-NMCA-011, ¶ 33, 292 P.3d 493 (internal quotation marks and citation omitted). Usually, “[t]o preserve an issue for review, it must appear that a ruling or decision by the [district] court was fairly invoked.” Rule 12-321(A) NMRA; see, *Mitchell v. Allison*, 1949-NMSC-070, ¶ 14, 54 N.M. 56, 213 P.2d 231 (“Unless the [district] court’s attention is called in some manner to the fact that it is committing error, and given an opportunity to correct it, cases will not be reversed because of errors which could and would have been corrected in the [district] court, if they had been called to its attention.”); *State v. Druktenis*, 2004-NMCA-032, ¶ 44, 135 N.M. 223, 86 P.3d 1050 (“It is [the d]efendant’s obligation to provide this Court with a sufficient record proper.”).

{17} “In order for us to [consider the defendant’s] rights under the state constitution, . . . he must have complied with the preservation requirements[.]” *State v. Leyva*, 2011-NMSC-009, ¶ 36, 149 N.M. 435, 250 P.3d 861. Proper preservation requires that the defendant “preserve[] his argument under the state constitution by pleading both the [federal and state constitutional provisions] in his motion to suppress and develop[] a factual record in his motion and at the suppression hearing.” *State v. Ketelson*, 2011-

NMSC-023, ¶ 12, 150 N.M. 137, 257 P.3d 957 (internal quotation marks and citation omitted). In this instance, Defendant failed to assert the legal principle upon which his constitutional claims are based and he failed to develop the necessary factual basis to satisfy either of his preservation requirements to allow us to review his constitutional claim. Consequently, the State had no opportunity to refute Defendant's due process argument below. See *State v. Gomez*, 1997-NMSC-006, ¶ 29, 122 N.M. 777, 932 P.2d 1 (describing the reasons for the preservation requirement are "(1) to alert the trial court to a claim of error so that it has an opportunity to correct any mistake, and (2) to give the opposing party a fair opportunity to respond and show why the court should rule against the objector"). Thus, we conclude that Defendant failed to preserve his argument that Section 29-1-6 is unconstitutional under the New Mexico Constitution Article II, Section 18.

C. Admission of Defendant's Statements was Not Plain or Fundamental Error under Article II, Section 18 of the New Mexico Constitution

{18} Defendant next argues that the admission of his statements was plain or fundamental error under the due process clause of the New Mexico Constitution Article II, Section 18 and that admission of the statements caused him prejudice. Defendant generically argues that the New Mexico Constitution provides greater right than the federal constitution. He contends that "Article II, Section 18, ensuring due process, has been interpreted as providing greater protection than [its] federal counterpart[.]" there is no need for a detailed interstitial analysis. Defendant is mistaken. In cases such as this "when a party asserts a state constitutional right that has not been interpreted differently than its federal analog, a party also must assert in the trial court that the state constitutional provision at issue should be interpreted more expansively than the federal counterpart and provide reasons for interpreting the state provision differently from the federal provision. This will enable the trial court to tailor proceedings and to effectuate an appropriate ruling on the issue." *Gomez*, 1997-NMSC-006, ¶ 23, (emphases omitted). Defendant failed to preserve the specific argument he now makes on appeal.

{19} Even if we were to consider whether plain or fundamental error resulted from the admission of Defendant's unrecorded statements to Deputy Maestas, Defendant's argument would fail. Defendant was afforded a full opportunity to cross-examine Deputy Maestas on the statements and why he did not record them. Moreover, there was no error in admitting the statements into evidence, there was otherwise no error in how the trial was conducted, and as discussed below, the remaining evidence was sufficient to prove Defendant's guilt beyond a reasonable doubt. Under these circumstances, there was no plain or fundamental error. See *State v. Lucero*, 1993-NMSC-064, ¶ 12, 116 N.M. 450, 863 P.2d 1071 (stating that in the case of either plain or fundamental error, "we must be convinced that admission of the testimony constituted an injustice that creates grave doubts concerning the validity of the verdict"); *State v. Gwynne*, 2018-NMCA-033, ¶ 27, 417 P.3d 1157 (stating that we apply the plain error rule "only if we have grave doubts about the validity of the verdict, due to an error that infects the fairness or integrity of the judicial proceeding"(internal quotation marks and citation omitted)); see also *State v. Astorga*, 2015-NMSC-007, ¶ 14, 343 P.3d 1245 (stating that

an error is fundamental when “a defendant’s conviction shocks the conscience because either (1) the defendant is indisputably innocent, or (2) a mistake in the process makes a conviction fundamentally unfair notwithstanding the apparent guilt of the accused” (alterations, internal quotation marks, and citation omitted)).

{20} We hold the district court did not commit plain or fundamental error in allowing Deputy Maestas to testify about Defendant’s unrecorded statements and Defendant’s opportunity to cross-examine Deputy Maestas satisfied his constitutional right to a fair trial.

II. There Was Sufficient Evidence to Support Defendants’ Convictions

{21} Defendant’s challenge to the sufficiency of the evidence on both convictions centers on his argument that the evidence failed to establish that he was in constructive possession of the heroin found in Angel’s house.

{22} “The test for sufficiency of the evidence is whether substantial evidence of either a direct or circumstantial nature exists to support a verdict of guilty beyond a reasonable doubt with respect to every element essential to a conviction.” *State v. Montoya*, 2015-NMSC-010, ¶ 52, 345 P.3d 1056 (internal quotation marks and citation omitted). The reviewing court “view[s] the evidence 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. We “disregard all evidence and inferences” that support a different result. *State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829. “Jury instructions become the law of the case against which the sufficiency of the evidence is to be measured.” *State v. Smith*, 1986-NMCA-089, ¶ 7, 104 N.M. 729, 726 P.2d 883.

{23} Defendant points out that no one testified they saw Defendant with the drugs, no forensic evidence tied Defendant to the drugs, and Defendant did not have any drugs or paraphernalia on himself, his car, or his own house. Further, Defendant argues that his statements to Deputy Maestas admitted to past conduct, not current possession. In support of his argument that he was not currently in constructive possession of the heroin, Defendant relies on *State v. Bankert*, 1994-NMSC-052, 117 N.M. 614, 875 P.2d 370, *State v. Garcia*, 2005-NMSC-017, 138 N.M. 1, 116 P.3d 72, and *State v. Zamora*, 2005-NMCA-039, 137 N.M. 301, 110 P.3d 517.

{24} In *Bankert*, the defendant was convicted of possession with intent to distribute even though he never physically touched the cocaine. 1994-NMSC-052, ¶¶ 15, 18. The Supreme Court upheld the conviction on an accomplice liability theory, which is not at issue in this case, and determined that “[n]o physical contact with the drug was necessary.” *Id.* ¶ 27. In *Garcia*, the defendant was charged with “felon in possession of a firearm” and the Supreme Court upheld the conviction under a constructive possession theory. 2005-NMSC-017, ¶ 6. Defendant had a gun under his seat in his car and he was sitting on an ammunition clip that matched the gun. *Id.* ¶ 15. The driver and the defendant had equal access to the gun so there needed to be “something more than

physical proximity to establish [the d]efendant's control." *Id.* ¶ 21. Accordingly, the court found the ammunition clip underneath the defendant to be the most critical link and "was enough to create an inference of both knowledge and control, particularly when embellished by all the other pieces of incriminating evidence" *Id.* ¶¶ 22, 24. In *Zamora*, law enforcement found a digital scale, a razor blade, and crack cocaine in a hotel room that the defendant was sharing with others. 2005-NMCA-039 ¶¶ 6, 24. The defendant "was convicted of trafficking by possession with intent to distribute cocaine." *Id.* ¶ 2. Although the defendant did not have any drugs or drug paraphernalia on his person, this Court determined there was substantial evidence to support the conviction due to the evidence of the drug paraphernalia in the room and the fact that people came to the door asking for the defendant. *Id.* ¶ 24. Defendant attempts to distinguish these cases from the present case, relying on the argument that Defendant was not convicted under accomplice liability theory, was not in current contact with any of the drugs or paraphernalia, and only admitted to past conduct.

{25} We do not find the cases Defendant cites persuasive to support his theory that the State presented insufficient evidence to find he constructively possessed the heroin. These cases each found substantial evidence existed to support the defendants' convictions and missing from each and that which is present here is Defendant's own admission that he took part in cutting and distributing the heroin.

{26} In response, the State argues that the cases Defendant cited are inapposite and encourages us to focus our attention on "[t]he extent to which Defendant's admission that he distributes heroin obtained through [his brother's] 'connect' was sufficient to allow a reasonable jury to infer constructive possession of the heroin in the trailer." The State refers us to *State v. Phillips*, 2000-NMCA-028, 128 N.M. 777, 999 P.2d 421, in support of its claim that Defendant was in constructive possession of the heroin seized from his brother's home. We find *Phillips* persuasive.

{27} In *Phillips*, the defendant argued that she did not constructively possess drugs found in her bedroom that she shared with one other person who claimed sole ownership of the drugs. 2000-NMCA-028, ¶ 7. This Court recognized that the defendant did not have exclusive control over her bedroom where the drugs were discovered, but it also noted that all of the paraphernalia discovered were in pairs, thus pointing to two individuals being involved. *Id.* ¶¶ 9-10. It also considered the defendant's incriminating statements that she knew of the paraphernalia inside of the bedroom, she conceded to past drug usage, and she quipped of her understanding that to be charged with possession of drugs, one must "actually had to have it on you." *Id.* ¶ 12 (internal quotation marks omitted). Taken together, this Court found that a rational jury could have determined her to be in constructive possession of the drugs. *Id.*

{28} Viewing the evidence in the light most favorable to the verdict, the following facts support the jury's finding that Defendant constructively possessed the heroin found in his brother's home: after receiving information that Defendant was distributing heroin, Deputy Maestas initiated an investigation, of which surveillance of Angel's home was a component. In fourteen days, Defendant visited his brother's home more than one

dozen times. When confronted by law enforcement, Defendant admitted to the fact that there were drugs inside of his brother's home and he further admitted that he and his brother would cut the heroin and distribute it throughout the city for a profit. Though he did not know the identity of the heroin supplier, Defendant admitted that his brother did know and used that connection to get the heroin that he and Defendant would cut and distribute. Although the heroin and related paraphernalia were not in Defendant's physical custody at the time of his arrest, there is ample evidence that he had both knowledge of the drugs and control over them. Like *Phillips*, a rational jury could have considered Defendant's own incriminating statements admitting to knowledge of the heroin inside of his brother's home as proof that he constructively possessed the drugs. Furthermore, his admission that he cut and distributed the heroin evinced control over the drugs. This evidence, along with the physical evidence seized from Defendant's brother's home, including 280 grams of heroin packaged in sixteen bags, three digital scales, and a ledger, supports the jury's finding that Defendant constructively possessed the heroin found in his brother's mobile home. See *State v. Brietag*, 1989-NMCA-019, ¶ 10, 108 N.M. 368, 772 P.2d 898 (noting that "proof of possession may be established by evidence of the conduct and actions of a defendant, and by circumstantial evidence connecting defendant with the crime.").

{29} For these reasons, we determine that substantial evidence supports Defendant's convictions for trafficking heroin (by possession with intent to distribute) and conspiracy to commit trafficking heroin (by possession with intent to distribute).

III. Testimony From the State's Witness

{30} Defendant's final challenge on appeal is aimed at the district court's order denying Defendant's motion to exclude testimony from Deputy Maestas at trial. Defendant argues that the scheduling order entered in Angel's case was an extension in his case as well since they were joined at the time of the order. Defendant argues that the district court abused its discretion in not excluding Deputy Maestas and that its decision resulted in severe prejudice to Defendant. Defendant contends that "[i]t does not make sense for two joined cases to proceed on separate schedules to trial."

{31} "We review the admission of evidence under an abuse of discretion standard and will not reverse in the absence of a clear abuse." See *State v. Sarracino*, 1998-NMSC-022, ¶ 20, 125 N.M. 511, 964 P.2d 72. "An abuse of discretion occurs when the ruling is clearly against the logic and effect of the facts and circumstances of the case. We cannot say the [district] court abused its discretion by its ruling unless we can characterize [the ruling] as clearly untenable or not justified by reason." *Rojo*, 1999-NMSC-001, ¶ 41 (internal quotation marks and citation omitted).

{32} The Second Judicial District's "Special Calendar" rule, LR2-400.1, emphasizes the importance of scheduling orders. See LR2-400.1(J)(2)-(4) (describing sanctions when scheduling orders are not followed). While Defendant and Angel's cases were joined, the district court gave them separate scheduling orders. Defendant failed to comply with the scheduling order in his case by failing to meet the witness interview and

pre-trial motion deadlines. Defendant had the burden below to create a record of the district court's error for our review. See *Michael v. Warner/Chilcott*, 1978-NMCA-043, ¶ 14, 91 N.M. 651, 579 P.2d 183 (“[T]he burden is on the losing party to delineate the proceedings in the court below, preserve a record of the hearing, the comments of the court and seek a clear ruling on the issues involved and determined.”). There is nothing in the record to show that defense counsel: asked the court to revise the two scheduling orders into one since they were joined; sought clarity on the issue of deadlines; or, otherwise requested an extension of time in which to conduct witness interviews and file any pretrial motions. Defendant violated the scheduling order entered in his case by waiting until past his deadline to interview witnesses and file his motion to suppress. We therefore conclude that the district court did not abuse its discretion by refusing to exclude Deputy Maestas as a witness.

CONCLUSION

{33} For the aforementioned reasons, we affirm Defendant's convictions.

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

M. MONICA ZAMORA, JUDGE

WE CONCUR:

MICHAEL E. VIGIL, Judge

STEPHEN G. FRENCH, Judge