STATE V. BACA

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
BERNARDO BACA,
Defendant-Appellant.

No. A-1-CA-36155

COURT OF APPEALS OF NEW MEXICO

December 11, 2017

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY, Matthew E. Chandler, 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, Appellant

JUDGES

J. MILES HANISEE, Judge. WE CONCUR: LINDA M. VANZI, Chief Judge, MICHAEL E. VIGIL, Judge

AUTHOR: J. MILES HANISEE

MEMORANDUM OPINION

HANISEE, Judge.

{1} Defendant appeals from his convictions for possession of a controlled substance and shoplifting. We previously issued a notice of proposed summary disposition in which we proposed to uphold the convictions. Defendant has filed a combined

memorandum in opposition and motion to amend the docketing statement. After due consideration, we deny the motion, and affirm.

{2} We will begin with the issue originally raised in the docketing statement, by which Defendant contends that he was denied a fair trial as a consequence of the admission of evidence of prior bad acts. [DS 5; MIO 9-17] There were two sources of this evidence. First, defense counsel asked a witness for the State whether Defendant had been given prior notice that he was not allowed to enter the store in which the events forming the basis for his conviction for shoplifting occurred. [MIO 5] In response the witness explained that Defendant had been banned "because of a prior shoplifting incident." [MIO 5] Second, a police officer was permitted to testify that Defendant was arrested at the scene pursuant to a warrant. [MIO 6]

{3} Although the evidence at issue clearly implicates Rule 11-404(B) NMRA, it seems reasonably clear that it was offered to explain the basis for Defendant's knowledge and for the witness' actions, by placing these matters into context. *See generally State v. Otto*, 2007-NMSC-012, ¶ 12, 141 N.M. 443, 157 P.3d 8 (observing that "context may be a proper purpose under Rule 11-404(B)"); *State v. Jones*, 1995-NMCA-073, ¶ 8, 120 N.M. 185, 899 P.2d 1139 ("New Mexico allows use of other bad acts for many reasons, including those not specifically listed in [Rule] 11-404(B)."). However, even if we were to assume that the State's witness ventured improperly into unduly prejudicial matters, we remain unpersuaded that Defendant is entitled to a new trial.

{4} "When assessing the probable effect of evidentiary error, courts should evaluate all of the circumstances surrounding the error. This includes the source of the error, the emphasis placed on the error, evidence of the defendant's guilt apart from the error, the importance of the erroneously admitted evidence to the prosecution's case, and whether the erroneously admitted evidence was merely cumulative." *State v. Serna,* 2013-NMSC-033, ¶ 23, 305 P.3d 936 (internal quotation marks and citation omitted)). In this case, both the defense and the prosecution contributed to the claimed error. We find no indication that either the prior shoplifting incident or the warrant was emphasized, and neither of these matters appears to have been of importance to the prosecution. Strictly speaking, the challenged evidence does not appear to have been cumulative. However, the evidence of Defendant's guilt, including the surveillance footage of Defendant taking items from the shelves, [MIO 4] the eyewitness testimony that Defendant exited the store without paying, [MIO 4] the officer and expert witness testimony about the controlled substance obtained from Defendant, [MIO 6-7] and Defendant's own admission to possession of methamphetamine, [MIO 6] was overwhelming and essentially undisputed. *See generally State v. Moncayo*, 2012-NMCA-066, ¶ 16, 284 P.3d 423 (observing that although it cannot be the "singular focus" of the harmless error analysis, consideration of other evidence of the defendant's guilt will often be necessary, insofar as this "will provide context for understanding the role the error may have played in the trial proceedings" (internal quotation marks and citation omitted)). Under these circumstances, we conclude that there is no reasonable probability that the claimed evidentiary errors affected the verdict. *See State v. Tollardo*,

2012-NMSC-008, ¶ 36, 275 P.3d 110 (“[N]on-constitutional error is harmless when there is no reasonable probability the error affected the verdict.” (emphasis, internal quotation marks, and citation omitted)).

{5} Finally, we turn to the motion to amend, by which Defendant contends that he was effectively denied the right to present defense evidence. [MIO 17-20] The argument concerns defense counsel’s inability to present a “booking sheet” which might have indicated that an individual who accompanied Defendant had possession of items taken from the store. [MIO 17] Defendant contends that the district court should have granted a continuance to permit counsel to obtain the booking sheet, and/or that trial counsel was ineffective. [MIO 17-20]

{6} We review a trial court’s denial of a motion for a continuance under an abuse of discretion standard. *State v. Salazar*, 2007-NMSC-004, ¶ 10, 141 N.M. 148, 152 P.3d 135. The factors we consider when reviewing the denial of a motion for continuance include the length of the requested delay, the likelihood that a delay would accomplish the movant’s objectives, the existence of previous continuances in the same matter, the degree of inconvenience to the parties and the court, the legitimacy of the motives in requesting the delay, the fault of the movant in causing a need for the delay, and the prejudice to the movant in denying the motion. *State v. Torres,* 1999-NMSC-010, ¶ 10, 127 N.M. 20, 976 P.2d 20.

{7} Assessing the trial court’s decision under the *Torres* factors, we note that the length of the requested delay is indeterminate. [MIO 18] We cannot determine whether the delay would have accomplished Defendant’s objectives because the booking sheet does not appear in the record; consequently, we have no way of knowing whether it would have substantiated the defense in any way. The trial court had already granted numerous continuances at Defendant’s request. [MIO 19] Insofar as the jury had been impaneled and the State had fully presented its case, granting a continuance would have significantly inconvenienced the court. Although the motive may have been legitimate, Defendant was clearly at fault insofar as he had failed to make reasonable efforts to obtain the evidence prior to trial. Finally, absent any indication in the record that the booking sheet would have supported the defense, the prejudice to Defendant is entirely speculative. In light of these considerations, we conclude that the court did not abuse its discretion in denying the requested continuance.

{8} Defendant’s claim of ineffective assistance of counsel is unavailing for similar reasons. “For a successful ineffective assistance of counsel claim, a defendant must first demonstrate error on the part of counsel, and then show that the error resulted in prejudice.” *State v. Arrendondo*, 2012-NMSC-013, ¶ 38, 278 P.3d 517 (internal quotation marks and citation omitted). In this case, nothing in the record before us indicates that the booking sheet would have supplied anything material to the defense. As a result, he cannot make a prima facie showing. *See, e.g., State v. Cordova*, 2014-NMCA-081, ¶ 11, 331 P.3d 980 (rejecting a claim of ineffective assistance based upon trial counsel’s failure to present evidence, where the record did not indicate precisely what that evidence would have been or whether it would have benefitted the defendant).

Under the circumstances, habeas proceedings are the appropriate avenue. *See Arrendondo*, 2012-NMSC-013, ¶ 38 (indicating that there is a preference that "these claims be brought under habeas corpus proceedings, so that the defendant may actually develop the record with respect to defense counsel's actions").

{8} For the reasons stated, we conclude that the issues Defendant seeks to raise are not viable. We therefore deny the motion to amend the docketing statement. *See, e.g., State v. Sommer*, 1994-NMCA-070, ¶ 11, 118 N.M. 58, 878 P.2d 1007 (illustrating that where issues are not viable, motions to amend docketing statements will be denied).

{9} Accordingly, for the reasons stated above and in the notice of proposed summary disposition, we affirm.

{10} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:

LINDA M. VANZI, Chief Judge

MICHAEL E. VIGIL, Judge