STATE V. BACA

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

No. 34,133

COURT OF APPEALS OF NEW MEXICO

December 22, 2015

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

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, Jacqueline R. Medina, Assistant Attorney General, Albuquerque, NM, for Appellee

Jorge A. Alvarado, Chief Public Defender, Santa Fe, NM, Steven J. Forsberg, Assistant Appellate Defender, Albuquerque, NM, for Appellant

New Mexico District Attorneys Association, Robert P. Tedrow, Kari E. Brandenburg, District Attorney, Michelle S. Garcia, Assistant District Attorney, Albuquerque, NM, for Amicus Curiae

JUDGES

LINDA M. VANZI, Judge. WE CONCUR: JAMES J. WECHSLER, Judge, TIMOTHY L. GARCIA, Judge

AUTHOR: LINDA M. VANZI

MEMORANDUM OPINION

VANZI, Judge.

{1} Defendant Joe Baca appeals the district court's affirmance of his Metropolitan Court conviction for driving under the influence of alcohol (DUI) contrary to NMSA 1978, Section 66-8-109 (1993), and leaving the scene of an accident contrary to NMSA 1978, Section 66-7-202 (1978). Defendant makes two arguments. First, he contends that the trial court abused its discretion in admitting the breath alcohol test (BAT) result because the State did not meet the foundational requirement to establish that the equipment used with the Intoxilyzer 8000 (IR 8000) was approved by the Scientific Laboratory Division of the Department of Health (SLD). Second, Defendant argues that he did not violate the statute titled "Accidents involving damage to vehicle." Section 66-7-202. We recently resolved the first issue in *State v. Hobbs*, ___-NMCA-___, ___P.3d___ (No. 33,715, Dec. 22, 2015), concluding that there is no foundational requirement needed for equipment attached to the IR 8000. We therefore affirm Defendant's conviction for DUI. As to the second issue, the State concedes that the jury instruction resulted in fundamental error and does not object to reversal on this issue. We agree and therefore reverse Defendant's conviction for leaving the scene of an accident.

BACKGROUND

{2} In early February 2012, Officer Scott Harmon of the Albuquerque Police Department (APD) was dispatched to the scene of a single-vehicle accident. The dispatch operator told Officer Harmon that the driver of the vehicle (later identified as Defendant) hit a curb, parked behind an apartment building, and left the vehicle and the scene. When he arrived at the location, a witness gave Officer Harmon a description of Defendant and told the Officer that Defendant was in a nearby store. Officer Harmon saw Defendant standing in line at the store and motioned him outside so that they could talk about the accident.

{3} Once outside, Officer Harmon noted that Defendant smelled mildly of alcohol and that his speech was slurred. The officer put Defendant in his police car and drove across the street to Defendant's truck. Defendant told Officer Harmon that he had consumed one mixed drink prior to leaving his house that morning. Officer Harmon then called Officer Daniel Carr to conduct a DUI investigation.

{4} Officer Carr, who had been a member of APD's DUI unit for four years prior to Defendant's arrest, testified as follows. After Officer Carr read Defendant his *Miranda* rights, he asked Defendant questions about the traffic accident. Defendant's eyes were blood-shot and watery, he smelled of alcohol, and consistent with what he had said to Officer Harmon, Defendant told Officer Carr that he had one mixed drink at his home earlier in the day.

{5} Defendant agreed to perform field sobriety tests and during the instruction phase of the walk and turn test, told the officer "I can't do this anyway, let's just go to jail." Officer Carr arrested Defendant for DUI and began the twenty-minute deprivation

period. Defendant appeared to understand the implied consent advisory and agreed to take a BAT.

{6} Officer Carr, who was trained and certified to administer breath tests on the IR 8000, administered Defendant's BAT on an IR 8000 located at the prisoner transport center. A current SLD certificate was affixed to the machine. Officer Carr started the machine, entered information into it, and ran diagnostic tests. The machine then performed air-blank checks which properly returned a .00 result. Air-blank checks ensure there is nothing inside the machine that could affect the results of the BAT such as residual alcohol from a prior test.

{7} Defendant gave two successful breath tests. After the first breath test, the IR 8000 performed a self-calibration check. A self-calibration check must fall between .070 and .090, and the self-calibration check in Defendant's test was .078. After Defendant's second breath test, a final air-blank check came back at .00, which was also appropriate. The BAT results did not appear altered in any way.

{8} On cross-examination, Officer Carr testified that he was not present when the IR 8000 and gas canister were certified; he knew that the IR 8000 was using a dry gas canister and he was certain it was on SLD's approved list. The officer said that although he did not know the serial number of the gas canister, he knew from his training with APD crime lab Key Operator, Wayne DeChano, that the canister was approved by SLD. DeChano is a scientist who worked in the criminalistics department at APD, and he was the head key operator responsible for maintaining the IR 8000.

{9} Defendant objected to the admission of the breath tests arguing that, with regard to the gas canisters, the State failed to lay an adequate foundation because the Officer did not have personal knowledge whether the canister had been "swapped out," how long it had been on the machine, and whether it was "completely certified." The trial court admitted the BAT results over Defendant's objection. Defendant's BAT results were .14 and .13.

{10} After the close of evidence, the jury returned a guilty verdict for the DUI charge, as well as, for driving without registration, driving without insurance, careless driving, and leaving the scene of an accident. Defendant appealed to the Second Judicial District Court, challenging the admission of his breath alcohol tests and the sufficiency of the evidence supporting his conviction for leaving the scene of an accident with damages. The district court affirmed and Defendant timely appealed to this Court.

DISCUSSION

Admission of BAT Results

{11} "The interpretation of an administrative regulation is a question of law that we review de novo," applying the same rules we use to interpret statutes. *State v. Willie*, 2009-NMSC-037, ¶ 9, 146 N.M. 481, 212 P.3d 369. "The principal command of

statutory construction is that the court should determine and effectuate the intent of the [L]egislature, using the plain language of the statute as the primary indicator of legislative intent." *Id.* (alteration, internal quotation marks, and citation omitted). If the plain meaning is "doubtful, ambiguous, or if an adherence to the literal use of the words would lead to injustice, absurdity or contradiction, we will construe the statute according to its obvious spirit or reason." *Id.* (alteration, internal quotation marks, and citation omitted).

{12} "We review an alleged error in the admission of evidence for an abuse of discretion" and will overturn a trial court's evidentiary ruling "only when the facts and circumstances of the case do not support [its] logic and effect." *State v. Martinez*, 2007-NMSC-025, ¶ 7, 141 N.M. 713, 160 P.3d 894 (internal quotation marks and citation omitted).

{13} The admission of the BAT results in this case presents the same issue decided by this Court in *Hobbs*, ___-NMCA-___. In *Hobbs*, we held that the State need not make a threshold showing that the certified operator of a certified breath alcohol instrument confirmed at the time of the test that the equipment—here, the gas canister—attached to the instrument is SLD-approved in order to lay a sufficient foundation under Rule 11-104(A) NMRA for the admission of BAT results into evidence. We specifically noted that "[n]either the plain language nor the 'obvious spirit or reason' of the SLD Rule even suggests that the regulations requiring SLD approval of equipment are 'accuracy ensuring.' " *Hobbs*, ___-NMCA-___, ¶ 22. Thus, the State need not meet any additional foundational requirements other than that the instrument used to administer the BAT was SLD-certified at the time of the test. Applying our holding to the facts of this case, we conclude that admission of Defendant's BAT results by the trial court was not an abuse of discretion.

Sufficiency of the Evidence

{14} Defendant contends there was insufficient evidence to support his conviction under Section 66-7-202, leaving the scene of an accident involving damage to a vehicle. In resolving sufficiency of the evidence issues, we view the evidence in the light most favorable to the verdict, "[w]e determine whether the evidence presented could justify, to a reasonable mind, a finding that each element of the crime charged was established beyond a reasonable doubt." *State v. Martinez*, 2002-NMCA-043, ¶ 9, 132 N.M. 101, 45 P.3d 41. The State concedes that a deficiency in the jury instruction constituted fundamental error that requires reversal. Although we are not bound by the State's concession, we agree. *See State v. Garcia*, 1990-NMCA-065, ¶ 17, 110 N.M. 419, 796 P .2d 1115 (noting that an appellate court is not bound by the prosecution's concession of an issue).

{15} Here, the jury was instructed that, to find Defendant guilty of leaving the scene of an accident with damage to a vehicle, the State had to prove beyond a reasonable doubt, each of the following elements of the crime:

1. [D]efendant drove a motor vehicle;

2. [D]efendant was involved in an accident which resulted in damage to a vehicle which was driven or attended by any person;

3. [D]efendant did not immediately stop his vehicle at the scene or as close as possible without obstructing traffic and remain at the scene until he had given his name, address and registration number and arranged medical transport if needed;

4. This happened in Bernalillo County, State of New Mexico on or about the 17th day of February, 2012.

{16} As is evident, the instruction did not require the jury to find that another vehicle was involved in the accident. Thus, the question we must answer is whether the factual allegations of the State, if proven under the elements above, could constitute the crime under the statute charged. As to our standard of review, this issue presents an issue of statutory interpretation. "Statutory interpretation is 'a question' of law, which we review de novo." *State v. Duhon*, 2005-NMCA-120, ¶ 10, 138 N.M. 466, 122 P.3d 50. "Our primary goal when interpreting statutory language is to give effect to the intent of the [L]egislature." *State v. Torres*, 2006-NMCA-106, ¶ 8, 140 N.M. 230, 141 P.3d 1284. "We look first to the words chosen by the Legislature and the plain meaning of the Legislature's language. When the language in a statute is clear and unambiguous, we give effect to that language and refrain from further statutory interpretation." *Duhon*, 2005-NMCA-120, ¶ 10 (internal quotation marks and citation omitted).

{17} Section 66-7-202 defines the crime of leaving the scene of an accident involving damages in pertinent part as follows:

> The driver of any vehicle involved in an accident resulting only in damage to a vehicle which is driven or attended by any person shall immediately stop such vehicle at the scene of such accident or as close thereto as possible but shall forthwith return to and in every event shall remain at the scene of such accident until he has fulfilled the requirements of Section 66-7-203.

Section 66-7-202.

{18} Section 66-7-203, in turn, provides:

> The driver of any vehicle involved in an accident resulting in injury to or death of any person or damage to any vehicle which is driven or attended by any person shall give his name, address and the registration number of the vehicle . . . *to the person struck or the driver or occupant of or person attending any vehicle collided with* and shall render to any person injured in such accident reasonable assistance[.]

NMSA 1978, § 66-7-203 (1978) (emphasis added).

{19} Because the clear language of Section 66-7-203 refers "to the person struck or the driver or occupant of or person attending any vehicle collided with[,]" Section 66-7-202 necessarily requires an accident involving at least two vehicles. That was not the case here.

{20} At trial, Officer Ball, a certified accident reconstructionist testified that he concluded Defendant had been driving carelessly, taking a turn at too high a rate of speed, and that he skidded into a curb causing one of the tires to instantly deflate. Defendant then parked his truck behind an apartment building, and left the vehicle and the scene. There was no evidence submitted that any vehicle other than Defendant's own truck was involved in an accident. Consequently, we agree with the State that it is fundamental error to convict Defendant of leaving the scene of an accident pursuant to Section 66-7-202. *See State v. Maestas*, 2007-NMSC-001, ¶ 6, 140 N.M. 836, 149 P.3d 933 (reversing the defendant's convictions where the statutory language used by the Legislature cannot be interpreted to impose a criminal offense as charged by the state). Accordingly, Defendant's conviction for leaving the scene of an accident involving damages under Section 66-7-202 is reversed.

CONCLUSION

{21} We affirm Defendant's conviction for DUI. We reverse Defendant's conviction for leaving the scene of an accident involving damages.

{22} IT IS SO ORDERED.

LINDA M. VANZI, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

TIMOTHY L. GARCIA, Judge