STATE V. BARELA

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JOSHUA BARELA,
Defendant-Appellant.

NO. A-1-CA-34851

COURT OF APPEALS OF NEW MEXICO

December 6, 2017

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY, Marci E. Beyer, District Judge

COUNSEL

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

Bennett J. Baur, Chief Public Defender, J.K. Theodosia Johnson, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

LINDA M. VANZI, Chief Judge. WE CONCUR: STEPHEN G. FRENCH, Judge, EMIL J. KIEHNE, Judge

AUTHOR: LINDA M. VANZI

MEMORANDUM OPINION

VANZI, Chief Judge.

{1} Defendant Joshua Barela appeals from his conviction for felony possession of a controlled substance (heroin), contrary to NMSA 1978, Section 30-31-23(E) (2011).

Defendant argues that (1) his right to remain silent was violated when an officer testified at trial that Defendant invoked his right to an attorney; (2) the district court abused its discretion when it agreed to read a portion of Defendant's testimony to the jury but refused to give a limiting instruction; and (3) his sentence was improperly enhanced based, in part, on an offense he committed as a juvenile. For the reasons that follow, we reject Defendant's assertions of error and affirm his conviction.

BACKGROUND

{2} Defendant's conviction is based on events that took place in the Doña Ana County Detention Center (DACDC), where Defendant was an inmate. Arturo Perea, a corrections officer at DACDC at the time of the incident, testified that he observed Defendant drop a folded-up piece of paper and attempt to kick it under a nearby door. Another corrections officer, Daniel Lozoya, testified that Officer Perea summoned him to retrieve the paper and when he opened it, he discovered a black substance wrapped in plastic. Officer Lozoya turned the paper and substance over to his supervisor, Lieutenant Fernando Corral. The substance was turned over to the to the sheriff's department, which submitted it to the state laboratory for testing, and the lab determined that it was heroin. Thereafter, Defendant was charged with and convicted of possession of a controlled substance pursuant to Section 30-31-23(E), and he was sentenced to eighteen months incarceration. Additionally, pursuant to NMSA 1978, Section 31-18-17(B) (2003), Defendant's sentence was enhanced by four years, following his admission to two prior felony convictions—one of which was an offense he committed as a juvenile. This appeal followed. Additional facts will be discussed when pertinent to the issue being addressed. We address each of Defendant's issues in turn.

Defendant's Motion for a Mistrial

{3} Defendant contends that the district court abused its discretion in denying his motion for a mistrial after the investigating officer commented on Defendant's invocation of his right to counsel while testifying at trial. During defense counsel's cross-examination of Officer Aaron Solis, the following exchange took place:

[Defense counsel:] Now you got me intrigued. What was the first thing you did?

[Officer Solis:] The first thing I did was, of course, review the reports. . . . conducted a telephone interview with Arturo Perez, one of the officers, just clarifying what had occurred at that time. . . . I also did attempt to speak with [D]efendant . . . but he invoked his rights to have a lawyer present with him. So there was no interview conducted.

Defense counsel moved for a mistrial, which the district court denied. The court did, however, give a curative instruction, specifically instructing the jury that it could not consider the testimony at issue.

{4} We review the denial of a mistrial for an abuse of discretion. *See State v. O'Neal*, 2008-NMCA-022, ¶ 28, 143 N.M. 437, 176 P.3d 1169. We review the legal question of whether there has been an improper comment on a defendant's silence de novo. *See State v. Pacheco*, 2007-NMCA-140, ¶ 8, 142 N.M. 773, 170 P.3d 1011.

{5} Defendant contends—and the State agrees—that Officer Solis's testimony regarding Defendant's invocation of his right to counsel is a comment on Defendant's right to remain silent.[1] Because both parties agree on this point, our analysis assumes that they are the same and examines the issue under the standards we have articulated with respect to comments on a defendant's right to remain silent.

{6} It is a violation of the Fifth Amendment to allow a defendant's invocation of his right to remain silent to be used against him after he has been arrested and informed of this right. *See State v. DeGraff*, 2006-NMSC-011, ¶ 12, 139 N.M. 211, 131 P.3d 61. Consequently, a prosecutor is not permitted to intentionally elicit statements from a witness that the defendant invoked his right to remain silent nor is a prosecutor permitted to use a defendant's silence to impeach his or her credibility or create an inference of guilt in the minds of the jury. *See State v. Foster*, 1998-NMCA-163, ¶ 11, 126 N.M. 177, 967 P.2d 852. Here, however, and significantly, Officer Solis's statement was not elicited by the prosecutor, but instead was volunteered in response to questioning from defense counsel. Under these circumstances, we disagree that Defendant's exercise of his right to remain silent was violated. *See State v. Herrera*, 2014-NMCA-007, ¶ 22, 315 P.3d 343 (recognizing that it is a flawed argument that a witness impermissibly commented on a defendant's Fifth Amendment right to remain silent when the witness's comment was made in response to questioning by the defense counsel, rather than from the prosecutor). As we pointed out in *Herrera*, we know of no authority that stands for the proposition that a constitutional violation occurs when defense counsel, as opposed to a prosecutor, elicits comments on a defendant's silence. *Id.*; *see In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (holding that where a party cites no authority to support an argument, we may assume no such authority exists).

{7} Moreover, the officer's comment was unsolicited insofar as it was given in response to an open-ended question and was followed by a curative instruction to the jury with no further references to the statement. Under these circumstances, reversal is not warranted. *See, e.g.*, *State v. Wildgrube*, 2003-NMCA-108, ¶¶ 23-24, 134 N.M. 262, 75 P.3d 862 (holding that when a police officer made an unsolicited comment regarding the defendant's post-*Miranda* silence and the prosecutor did not exploit the reference by asking related questions or referring to it in closing argument, there was no prosecutorial misconduct requiring reversal); *DeGraff*, 2006-NMSC-011, ¶ 8 (recognizing that comments that are inadvertently elicited by the prosecutor from a witness are less likely to call a jury's attention to the defendant's exercise of his rights).

Request for a Limiting Instruction Following the Reading of Testimony

{8} Next, Defendant contends that the district court abused its discretion in (1) reading back a portion of Defendant's testimony that was requested by the jury; and (2) once the court decided to grant the jury's request, failing to instruct the jury on the use of impeachment evidence.

{9} During Defendant's cross-examination, he admitted that he was a convicted felon when the prosecutor impeached him as permitted by Rule 11-609(A) NMRA. *See id.* (permitting use of a criminal conviction for purposes of "attacking a witness's character for truthfulness"). Defendant made no request at that time—or any other time before jury instructions were submitted to the jury—for a limiting instruction for purposes of instructing the jury that the prior conviction should be considered only as it relates to Defendant's credibility. *See* UJI 14-5022 NMRA (limiting instruction for use when evidence of a prior conviction is admitted for impeachment purposes). Subsequently, after closing arguments and during jury deliberations, the jury sent a note to the district court, requesting to be read the portion of the transcript of Defendant's cross-examination about his prior felony conviction. Defense counsel objected to the request, arguing that the jury should be made to rely on their memory instead. Nonetheless, relying on Rule 5-610(A) NMRA and *State v. Montoya*, 1974-NMCA-044, 86 N.M. 316, 523 P.2d 814, the district court decided that it was appropriate to read the requested portion of the transcript to the jury. The court brought the jurors back into the courtroom and read the following portion of Defendant's testimony to them, as requested:

[Prosecutor:] Good afternoon, Mr. Barela.

[Defendant:] Good afternoon.

[Prosecutor:] I'd like to just ask you a few questions. But before we really get started, isn't it true that you're a felon?

[Defendant:] Yes, sir.

[Prosecutor:] Okay. Isn't it true that you were convicted of this felony in 2012?

[Defendant:] I thought—no. I thought it was 2013. I'm not aware.

[Prosecutor:] Either 2012 or 2013?

[Defendant:] I'm not—I'm not knowledgeable at this moment. From what I can remember, I'm not sure, sir.

[Prosecutor:] Okay, if I showed you something, could it maybe refresh your memory?

[Defendant:] Most likely, yeah, I'll remember.

[Prosecutor]: Your Honor, may I approach?

[Defense counsel]: Your Honor, I think the question was asked and answered. I don't think we need any further questioning on that. He has admitted that he has a criminal conviction, felony conviction.

The Court: Overruled. I'm going to let him ask the questions about the date.

[Defendant]: I don't remember exact dates, but—

[Prosecutor:] Okay. If I showed you this, you check out the date on that.

[Defendant:] I don't know if that's a 12 sir or—

[Prosecutor:] I believe if you turn to the last page or the next to the last page, it might be more helpful.

[Defendant:] Could you point out what you're wishing for me to see, sir?

[Prosecutor]: Your honor, may I approach again?

The Court: You may.

[Prosecutor:] Actually, it's okay. It's on the very first page there.

[Defendant:] 2012. November 13, 2012.

Following the reading, the district court acknowledged Defendant's objection and told him that it would be considered timely as if it had been made before the testimony had been read to the jury. At that time, defense counsel argued that *Montoya* was distinguishable and reiterated his position that the jurors should have been made to rely on their memory of the testimony. However, since the testimony had already been read, Defendant also requested a limiting instruction. The district court inquired about whether there was any uniform jury instruction on the issue and referred to UJI 14-5022, which the State contended would not work because of the way that it was drafted. The district court expressed uncertainty about whether such an instruction could be given at that point in the proceedings. Ultimately, the court decided that it would not give the requested instruction, stating, "I would definitely have given it if you had asked me to give it earlier. We would have figured out how to make it work, but at this point I'm not going to give the instruction."

Preservation

{10} As a threshold matter, we must first determine whether Defendant adequately preserved this issue for review. The State contends that Defendant failed to preserve this issue because he failed to tender a correct instruction and because he "abandoned" his request for the instruction. We disagree. Although Defendant did not tender an instruction, he properly objected to the reading of the testimony, stated the basis for the

objection, and described, generally, what the limiting instruction should do, i.e., inform the jury that the evidence relating to Defendant's conviction should be used only as it relates to Defendant's credibility. Under these circumstances, we conclude that no more was necessary to preserve this issue for appellate review. *See State v. Baxendale*, 2016-NMCA-048, ¶ 14, 370 P.3d 813 (holding that the defendant preserved the issue regarding a request for a jury instruction where, although he did not tender a correct instruction, the court "understood the type of instruction the defendant wanted and understood the tendered instruction needed to be modified to correctly state the law"). Further, we disagree that Defendant abandoned his request for an instruction. "In order to preserve an issue for appeal, a defendant must make a timely objection that specifically apprises the trial court of the nature of the claimed error and invokes an intelligent ruling thereon." *State v. Montoya*, 2015-NMSC-010, ¶ 45, 345 P.3d 1056 (internal quotation marks and citation omitted). In this case, Defendant fulfilled the foregoing requirements—that defense counsel responded "no" when asked if he had anything else to say does not mean that he subsequently "abandoned" his request.

Harmless Error

{11} Although Defendant may have legitimate arguments regarding the district court's decision to read back the requested testimony without also giving a limiting instruction, we need not resolve this issue because we conclude that whatever error there may have been in failing to give a limiting instruction was harmless. We explain.

{12} "Absent a constitutional violation, we look to whether there is a reasonable probability that the error affected the verdict." *State v. Astorga*, 2015-NMSC-007, ¶ 43, 343 P.3d 1245. On appeal, it is Defendant's burden to demonstrate that he was prejudiced by the error. *See id.* Neither Defendant nor the State address the potential that the district court's failure to give the limiting instruction was harmless error. Defendant's assertions of prejudice relate generally to the use of a prior felony for purposes other than impeachment. We agree with Defendant that the sole purpose of the testimony at issue was to impeach his credibility, and any use beyond that would have been improper. *See generally* Rule 11-609(A) (permitting the use of a prior conviction to attack a witness's character for truthfulness); UJI 14-5022 (jury instruction limiting the use of evidence of a defendant's prior conviction to "determining whether the defendant told the truth when he testified in this case and for that purpose only"). This is precisely why limiting instructions are appropriate when evidence is admitted for a specific purpose only. However, the unique circumstances in this case lead us to conclude that the failure to give a limiting instruction amounted to harmless error.

{13} Often when engaging in a harmless error analysis, we are considering the impact of improperly admitted evidence and its impact on the outcome of a case. Significantly, in this case, we are not dealing with improperly admitted evidence. As we noted above, evidence related to Defendant's prior conviction was admissible for the purpose of impeaching his credibility consistent with Rule 11-609. Therefore, we determine the impact of the district court's failure to limit the use of the evidence to its proper scope.

{14} We note it significant that Defendant was on trial for a crime that took place while he was incarcerated. Therefore, even had Defendant not testified that he had a prior felony conviction, the jury was well aware, based on the evidence presented, that Defendant had been incarcerated. The logical inference drawn from that information is that he had been previously convicted of some offense. In other words, the inference that Defendant had a prior conviction was already before the jury, and the attendant potential for misuse of that information was already a possibility. A limiting instruction to the jury that it could only consider Defendant's testimony about his prior conviction as it relates to his credibility would have been undermined without an additional instruction limiting their use of the fact that the alleged crime took place while Defendant was an inmate in DACDC. However, Defendant did not request an instruction that might limit the jury's use of that information. Therefore, the jury could use that information as it saw fit since there was nothing limiting their ability to use it for any and all purposes, including for the improper purpose of evidence of Defendant's propensity to commit crimes. Under these circumstances, we conclude that there is no reasonable probability that the failure to give the limiting instruction affected the outcome of this case because the potential for misuse of the information that Defendant had a criminal record was inherent in this case and would have been present with or without the requested limiting instruction. *Cf. State v. Duffy*, 1998-NMSC-014, ¶¶ 48-51, 126 N.M. 132, 967 P.2d 807 (concluding that any prejudice arising from witness's reference to inadmissible evidence related to the defendant's prior convictions was mitigated where the defendant had already mentioned that he had a prior conviction and no undue emphasis was placed on the comment by the witness or the prosecutor), *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ¶ 37 n.6, 275 P.3d 110.

Enhancement of Sentence Based on an Offense Committed as a Juvenile

{15} Following trial, the State filed a supplemental criminal information, seeking to enhance Defendant's sentence based on two prior felonies. As noted in the supplemental criminal information, one of those offenses was committed when Defendant was a juvenile, but Defendant was sentenced as an adult for the crime. Defendant admitted to the prior felonies. Accordingly, the district court enhanced his sentence by four years pursuant to Section 31-18-17. Defendant argues that the district court should not have used the felony he committed as a juvenile to enhance his sentence.

{16} "Whether [a d]efendant's previous felony conviction can be used for the purposes of sentence enhancement under Section 31-18-17 is a question of law that we review de novo." *State v. Leon*, 2013-NMCA-011, ¶ 43, 292 P.3d 493. Defendant's argument is foreclosed by this Court's decision in *Leon*, in which we held that a felony offense committed as a juvenile can be used to enhance a sentence under our Habitual Offender Act if the defendant was sentenced as an adult for that offense, rather than adjudicated delinquent. *Id.* ¶¶ 42-43. In this case, as in *Leon*, Defendant was sentenced as an adult for the prior felony. Accordingly, the district court properly enhanced Defendant's sentence.

CONCLUSION

{17} Defendant has failed to demonstrate that any reversible error occurred in the proceedings below. Accordingly, we affirm.

{18} IT IS SO ORDERED.

LINDA M. VANZI, Chief Judge

WE CONCUR:

STEPHEN G. FRENCH, Judge

EMIL J. KIEHNE, Judge

1Undoubtedly, the right to silence and the right to an attorney are distinct—otherwise, there would be no need when giving a *Miranda* warning to inform a suspect of both the right to remain silent *and* the right to the presence of an attorney during a custodial interrogation. *See, e.g.*, *State v. Barrera*, 2001-NMSC-014, ¶ 22, 130 N.M. 227, 22 P.3d 1177 (setting forth the warnings that must be given to a suspect in custody prior to questioning). Regardless, improper comments relating to either right are problematic and potentially infringe on a defendant's right to a fair trial. *See generally State v. Allen*, 2000-NMSC-002, ¶ 32, 128 N.M. 482, 994 P.2d 728 (noting that when a defendant invokes his right to counsel when questioned by the police, testimony about the invocation of that right may deprive a defendant of a fair trial in the same manner as a comment on a defendant's invocation of his right to remain silent).