

STATE V. BROWN

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**STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JOHNNY L. BROWN,
Defendant-Appellant.**

No. 32,777

COURT OF APPEALS OF NEW MEXICO

December 16, 2015

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY, Mark T. Sanchez, District
Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, Steven H. Johnston, Assistant Attorney General, Albuquerque, NM, for Appellee

Jorge A. Alvarado, Chief Public Defender, J.K. Theodosia Johnson, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

LINDA M. VANZI, Judge. WE CONCUR: RODERICK KENNEDY, Judge, M. MONICA ZAMORA, Judge

AUTHOR: LINDA M. VANZI

MEMORANDUM OPINION

VANZI, Judge.

{1} Defendant Johnny Brown appeals from his conviction for one count of criminal sexual penetration of a child under thirteen, contrary to NMSA 1978, Section 30-9-

11(D)(1) (2009), and one count of conspiracy to commit the same crime, contrary to NMSA 1978, Section 30-28-2(A) (1979). On appeal, Defendant asserts that the district court erred in concluding that it could not compel a material witness to testify after she was granted use immunity and that the error prevented Defendant from presenting his defense to the jury. The State concedes error, but argues that Defendant has not shown prejudice and should not receive a new trial. The State asks that we either affirm or remand for an in-camera proceeding where the district court can determine “whether Defendant suffered prejudice in his trial.” While it is regrettable that reversal will require a new trial in which the victim may have to repeat her testimony about a clearly traumatic experience, we conclude that it is the only appropriate remedy.

BACKGROUND

{2} M.M. (Victim) was thirteen years old when she took the stand to testify against Defendant. She accused Defendant of blindfolding her, removing her clothes, tying her hands to the posts of a bed, and penetrating her vagina with an unknown object. She was seven years old at the time. She initially denied her mother’s (Mother) involvement, but eventually testified that Mother was present during the ordeal, within fifteen feet, and had received payment from Defendant in the form of money and a clear plastic bag containing “little rocks.” This latter accusation was the basis for the conspiracy charge against Defendant. Since Victim was ultimately the only eye-witness to testify to the incident, and since Defendant denied any wrongdoing, Victim’s credibility “would appear to be pivotal at trial.” *State v. Belanger*, 2009-NMSC-025, ¶ 3, 146 N.M. 357, 210 P.3d 783.

{3} Defendant ultimately advanced an alternative perpetrator theory at trial. The theory relied on a recorded statement that was played for the jury, in which Victim had initially identified her abuser as Mother’s ex-boyfriend, Johnny, without specifying a last name. Witnesses for both sides testified that, while Defendant and Mother knew each other, none had ever known Defendant to have dated Mother and that Mother had previously dated a man named Johnny Ponder, who, like Defendant, was African-American. Defendant thus argued to the jury that Victim confused Defendant with Johnny Ponder on various occasions in her testimony, and potentially implicated the wrong man.

{4} Along these lines, defense counsel repeatedly alerted the State and the court during pretrial proceedings that testimony from Mother, as a charged co-conspirator and alleged eye-witness, would be essential to controvert Victim’s version of events, and to undermine Victim’s credibility. As an offer of proof, defense counsel asserted—based on a prior interview with an investigator from the public defender’s office—that Mother would testify that Victim was never alone with Defendant, that Defendant never assaulted Victim in her presence, and that charges against Defendant likely resulted from “bad blood” between Mother and Victim’s father and stepmother, who initially reported the allegations to police.

{5} Thus, all involved were aware of the defense strategy long before trial, and at least one continuance was granted, in part, to ensure Mother's availability to testify for the defense. However, on the final day of trial, and after being advised of her rights by the court, Mother invoked her Fifth Amendment privilege against self-incrimination and refused to take the stand. In response, Defendant filed a written application for use immunity pursuant to Rule 5-116(A) NMRA. That Rule allows a court to grant such a request over the State's objection when the court determines that the witness's testimony is "admissible, relevant and material to the defense and that without it, [the defendant's] ability to fairly present a defense will suffer to a significant degree." *Belanger*, 2009-NMSC-025, ¶ 38. While "[a] court cannot determine whether a judicial grant of use immunity is necessary" without balancing the need for the testimony against the Executive Branch's countervailing interest in opposing immunity, *id.*, the State cited no such interest, and Defendant's application, which specifically reiterated the nature of the proposed testimony, was granted in accordance with the Rule.

{6} After issuing a written order granting use immunity "for the purposes of testifying in this proceeding[.]" the district court explained to Mother that her testimony could no longer be used against her in a subsequent proceeding, other than to prosecute her for perjury if she lied on the stand. Nevertheless, the court then erroneously informed Mother that it could not compel her to testify if she chose not to. Both the State and defense counsel attempted to correct the court on this point to no avail. The witness chose not to testify, the court released her, and the jury—after submitting a note to the court asking why Mother "was not questioned"—found Defendant guilty on both counts.

DISCUSSION

{7} The State acknowledges on appeal that the district court erred in its determination that it lacked the authority to compel Mother to testify. See Rule 5-116(A) ("[T]he district court . . . may issue a written order requiring the person to testify . . . notwithstanding the person's privilege against self-incrimination."). It is also undisputed that this error was a misapplication of the law and an abuse of discretion. The State's only argument is that Defendant has not adequately demonstrated prejudice.

{8} In order to grant Mother use immunity over the State's objection, the district court was required to find that her proposed testimony would be "relevant and material to the defense and that without it, [Defendant's] ability to fairly present a defense will suffer to a significant degree." *Belanger*, 2009-NMSC-025, ¶ 38. The State has not challenged that determination on appeal. In fact, the State now concedes that the court "properly granted [Mother] use immunity[.]" which would seem to foreclose any argument that Defendant has not adequately demonstrated prejudice.

{9} The only explanation the State offers for these apparently contradictory positions is that Defendant should be faulted for asserting only hearsay statements of counsel in his application below and "enter[ing] no evidence as to what [Mother] would have said if she had been compelled to testify." According to the State, it would be pure speculation

for this Court, in our review of the effect of the error below, to assume that Mother's testimony would be exculpatory absent non-hearsay evidence in the record describing the substance of that testimony. Thus, it is the underlying offer of proof—the reliability of defense counsel's description of the proffered testimony in Defendant's application for use immunity—that is now being attacked for the first time on appeal.

{10} Defense counsel, as an officer of the court, asserted in his application for use immunity that Mother was “interviewed by an investigator for the defense and has indicated that she was unaware of the incident alleged in this matter, that she was never [Defendant's] girlfriend, and that she did not notice anything about [Victim] or her clothing that would indicate any sexual assault.” There was no objection to the veracity of defense counsel's assertion below, and all parties and the district court appeared to assume that Mother would testify to its effect.

{11} We can locate no foundational requirements for proffering testimony in a defendant's application for use immunity. Generally, an offer of proof need only be “sufficiently specific to allow the district court to determine in the first instance whether the evidence is admissible and to allow appellate courts in the second instance to review the determination made by the district court.” *State v. Rosales*, 2004-NMSC-022, ¶ 19, 136 N.M. 25, 94 P.3d 768. While “assertions and arguments of counsel are not evidence[,]” *Muse v. Muse*, 2009-NMCA-003, ¶ 51, 145 N.M. 451, 200 P.3d 104, we have previously relied on an “offer of proof through counsel that sufficiently apprised the trial court” of the substance of the excluded evidence. *See, e.g., State v. Salgado*, 1991-NMCA-111, ¶ 9, 112 N.M. 793, 819 P.2d 1351. And when a defendant seeks relief on appeal because his defense was foreclosed by an evidentiary ruling, “no more prejudice need be shown than that the trial court's order may have made a potential avenue of defense unavailable to the defendant.” *State v. Campbell*, 2007-NMCA-051, ¶ 14, 141 N.M. 543, 157 P.3d 722 (alteration, internal quotation marks, and citation omitted). The authorities cited by the State for holding Defendant to any more demanding standard of proving prejudice are matters of substantive law that apply only in the unique contexts of severe discovery sanctions, and speedy trial disputes, and have no bearing of any sort on this case. *See State v. Spearman*, 2012-NMSC-023, ¶ 39, 283 P.3d 272; *State v. Harper*, 2011-NMSC-044, ¶ 16, 150 N.M. 745, 266 P.3d 25 (“[T]he party claiming prejudice must prove prejudice—it is not enough to simply assert prejudice.”).

{12} In all events, there was no real way for Defendant to meet the foundational requirements the State now suggests. The State asserts that Defendant “could have called the investigator who interviewed [Mother] as a witness and made a thorough record regarding the prejudice [Defendant] suffered.” Of course, the investigator would have been testifying about Mother's statements during the interview, which would not have overcome the hearsay issue the State now raises. Defendant could have requested limited immunity for Mother to describe her proposed testimony on the record in an in-camera proceeding. *See Belanger*, 2009-NMSC-025, ¶ 39. But that request would have been redundant and futile since the district court actually *granted* Mother use immunity for trial, and then failed to compel her testimony anyway. In other words, the court apparently believed that Mother had an absolute Fifth Amendment right,

despite her grant of immunity, and she could not be compelled to incriminate herself at trial, in an in-camera proceeding, or otherwise. The practical effect of this misapprehension of the law was to eliminate any option for supporting Defendant's application with non-hearsay evidence about Mother's testimony, even if such support would have been preferable.

{13} We reject the State's suggestion that this case can be remanded for the district court to determine whether Defendant suffered any prejudice. Remand of that sort was ordered in *Belanger*, where the case was appealed prior to trial, and in-camera proceedings were necessary to determine whether the witness's testimony would be material to the defendant's theory of the case. See *id.* ¶¶ 39, 60. Here, a trial has already been completed, defense counsel has already explored Mother's testimony when its investigator interviewed her, and the district court has already ruled on the importance of that testimony when it granted use immunity. That decision has not been challenged or cross-appealed by the State.

{14} Like the parties below, we will assume that Mother's testimony would be in conformance with defense counsel's offer of proof. We review the district court's ultimate failure to compel that testimony for harmless error. See Rule 11-103(A) NMRA ("A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party[.]"). "When an error is preserved, we review for harmless error, and our inquiry depends on whether the error was constitutional." *State v. Astorga*, 2015-NMSC-007, ¶ 42, 343 P.3d 1245. The decision not to compel material testimony potentially implicates a defendant's constitutional rights to compulsory process and due process guaranteed by the Sixth and Fourteenth Amendments. See *Belanger*, 2009-NMSC-025, ¶¶ 8, 39. However, since we ultimately conclude that nonconstitutional error in the district court's application of Rule 5-116(A) requires reversal, we need not determine whether Defendant's constitutional rights were violated in this case.

{15} Violation of Rule 5-116(A) can be deemed harmless only if we can say that "there is no reasonable probability the error affected the verdict." *State v. Tollardo*, 2012-NMSC-008, ¶ 36, 275 P.3d 110 (emphasis, internal quotation marks, and citation omitted). We conduct our analysis on a case-by-case basis and "evaluate all of the circumstances surrounding the error." *Id.* ¶¶ 43-44.

{16} As discussed above, the defense strategy for controverting Victim's testimony was to call Mother to the stand on the third and final day of trial, where she would testify that, despite being an alleged eye-witness, "she was unaware of the incident alleged[.]" she had never been Defendant's girlfriend, and that "she did not notice anything about [Victim] or her clothing that would indicate any sexual assault." Thus, the entire trial proceeded with the understanding that Mother would provide critical support to Defendant's case. The theory that was advanced, which involved a potential alternative perpetrator who, like Defendant, was an African-American man named Johnny, the defense witnesses that were called, and the questions that were asked were all tied

inextricably to Mother's testimony as an alleged eye-witness, which would presumably have undermined Victim's identification of Defendant as the perpetrator.

{17} In short, the district court's error significantly impacted Defendant's ability to present his defense and probably spoiled the entire trial. During deliberations the jury even indicated that it considered Mother's testimony important when it sent a note to the judge asking why she "was not questioned." For these reasons, we cannot say there is no reasonable probability the error affected the verdict.

CONCLUSION

{18} We reverse Defendant's convictions and remand for a new trial.

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

LINDA M. VANZI, Judge

WE CONCUR:

RODERICK KENNEDY, Judge

M. MONICA ZAMORA, Judge