STATE V. BUTLER

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STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JAMES BUTLER,
Defendant-Appellant.

No. 33,696

COURT OF APPEALS OF NEW MEXICO

December 10, 2014

APPEAL FROM THE DISTRICT COURT OF CHAVES COUNTY, James M. Hudson, District Judge

COUNSEL

Gary K. King, Attorney General, Margaret McLean, Assistant Attorney General, Santa Fe, NM, for Appellee

Jorge A. Alvarado, Chief Public Defender, Nina Lalevic, Assistant Public Defender, Santa Fe, NM, for Appellant

JUDGES

CYNTHIA A. FRY, Judge. WE CONCUR: LINDA M. VANZI, Judge, M. MONICA ZAMORA, Judge

AUTHOR: CYNTHIA A. FRY

MEMORANDUM OPINION

FRY, Judge.

{1} James Butler (Defendant) appeals from the judgment and order partially suspending the sentence, convicting him, after a jury trial, of one count of criminal

sexual penetration in the first degree (child under 13), two counts of criminal sexual contact in the second degree (child under 13) (CSCM), and bribery of a witness (threats) (reporting). [RP 161-162] In the initial docketing statement, Defendant raised five issues, each contending that he was denied effective assistance of counsel. [DS 7-8] This Court's calendar notice proposed summary affirmance on direct appeal.

{2} In response, Defendant filed a motion to amend the docketing statement to add a new issue, and continued to argue that he received ineffective assistance of counsel. [Def. 1st MIO 1] In a second calendar notice, we granted the motion to amend, proposing summary reversal on the new issue; we again proposed to affirm on direct appeal with regard to the ineffective assistance issues. Having duly considered the State's response to the second calendar notice [State's Response] and Defendant's second memorandum in partial opposition [Def. 2nd MIO], we reverse and remand for resentencing with regard to Count 3, and we affirm on direct appeal on the ineffective assistance of counsel issues.

{3} Defendant's conviction in Count 3 is reversed and remanded for resentencing. In *State v. Trujillo*, we held that "[s]econd degree CSCM as defined in [NMSA 1978,] Section 30-9-13(B) [(2003)] is limited to instances in which *a defendant touches or applies force to the unclothed intimate parts of a minor*." *Trujillo*, 2012-NMCA-092, ¶ 22, 287 P.3d 344 (emphasis added). Thus where, as in *Trujillo* and as in this case with regard to Count 3, the State presented evidence [DS 3] and the jury was instructed [RP 119] that Defendant caused the victim to touch his (Defendant's) unclothed penis, this is third degree not second degree CSCM. *See id.* Since the judgment in this case indicates that the district court sentenced Defendant to a second degree rather than a third degree felony for Count 3 [RP 162], in the second calendar notice, we proposed to reverse the district court and remand for resentencing on this Count.

{4} In its response to the second calendar notice, the State provided that "[t]he State agrees with the proposed disposition for a remand and resentencing by the district court[, because] Count 3 is a third degree offense, not a second degree offense." [State's Response 3]

{5} For the reasons set forth above and in the second calendar notice, we reverse the district court on this issue and remand for resentencing on Count 3.

{6} Ineffective Assistance of Counsel. In his second memorandum, Defendant continues to oppose summary affirmance on direct appeal. [Def. 2nd MIO 1] Defendant indicates, however, that he has no further argument, and he relies on his arguments in the first memorandum in opposition. [Id.]

{7} In his first memorandum, Defendant continued to contend that trial defense counsel was ineffective in his preparation and presentation of Defendant's case. [DS 7-8; MIO 7-9] Defendant also recognized, however, "that where an ineffective assistance

of counsel claim relies on facts not contained in the record, a defendant may be afforded relief, where appropriate, in a habeas corpus proceeding." [MIO 9]

{8} We remain persuaded that Defendant's discussions with trial defense counsel about (1) Defendant's work schedule; (2 and 3) whether or not to call MF's biological father as a witness; and (4 and 5) trial defense counsel's decision about whether or not to have MF's hymen examined and whether to further develop MF's delay in reporting the alleged crimes [MIO 8-9], are all matters that rely on facts not contained in the record on direct appeal, and/or are matters within the ambit of trial defense counsel's strategic judgment or trial tactics. *See Duncan v. Kerby*, 1993-NMSC-011, ¶ 4, 115 N.M. 344, 851 P.2d 466 (observing that the record before the district court "may not adequately document the sort of evidence essential to a determination of trial counsel's effectiveness because conviction proceedings focus on the defendant's misconduct rather than that of his [trial counsel but] habeas corpus is specifically designed to address such postconviction constitutional claims and is the procedure of choice in this situation"); *see also, e.g.*, *State v. Hunter*, 2006-NMSC-043, ¶ 13, 140 N.M. 406, 143 P.3d 168 (stating that defendant must overcome the presumption that the challenged action might be considered sound trial strategy).

{9} Moreover, trial defense counsel did attempt to bolster Defendant's character and work history with witnesses, and he challenged MF's credibility and her alleged delay in reporting the alleged abuse on cross examination and by presenting other witnesses. [CN1 2-6] *See State v. Hughey*, 2007-NMSC-036, ¶ 16, 142 N.M. 83, 163 P.3d 470 ("It is the role of the factfinder to judge the credibility of witnesses and determine the weight of evidence."). As such, we remain persuaded that Defendant has not made a prima facie case of ineffective assistance of counsel on direct appeal. *See State v. Arrendondo*, 2012-NMSC-013, ¶ 38, 278 P.3d 517 (stating that "[f]or 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"). Thus, "[w]ithout such prima facie evidence, the Court presumes that defense counsel's performance fell within the range of reasonable representation." *Id.*; *see State v. Bernal*, 2006-NMSC-050, ¶ 32, 140 N.M. 644, 146 P.3d 289 (stating that an appellate court will not second-guess counsel's strategic judgment unless the conduct does not conform with "an objective standard of reasonableness" (internal quotation marks and citation omitted)).

{10} Except as noted above with regard to reversing and remanding for resentencing on Count 3, for the reasons set forth above and in the first and second calendar notices, we affirm Defendant's convictions on direct appeal.

{11} IT IS SO ORDERED.

CYNTHIA A. FRY, Judge

WE CONCUR:

LINDA M. VANZI, Judge

M. MONICA ZAMORA, Judge