

STATE V. GALLEGOS

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STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
MELVIN GALLEGOS,
Defendant-Appellant.

No. 35,185

COURT OF APPEALS OF NEW MEXICO

June 15, 2016

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Stan Whitaker,
District Judge

COUNSEL

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

Bennett J. Baur, Chief Public Defender, Will O'Connell, Assistant Appellate Defender,
Santa Fe, NM, for Appellant

JUDGES

MICHAEL D. BUSTAMANTE, Judge. WE CONCUR: JAMES J. WECHSLER, Judge, M.
MONICA ZAMORA, Judge

AUTHOR: MICHAEL D. BUSTAMANTE

MEMORANDUM OPINION

BUSTAMANTE, Judge.

{1} Defendant Melvin Gallegos appeals from a judgment and sentence entered pursuant to a jury trial at which he was found guilty of (1) shoplifting and (2) resisting, evading, or obstructing an officer. [RP 139] Unpersuaded by Defendant's docketing

statement, we entered a notice of proposed summary disposition, proposing to affirm. Respondent has filed a memorandum in opposition to our notice. We remain unpersuaded and therefore affirm.

{2} On appeal, Defendant raises two issues, both of which he pursues under the demands of *State v. Franklin*, 1967-NMSC-151, 78 N.M. 127, 428 P.2d 982, and its progeny. First, he argues that he was denied the right to a fair trial when a lapel video was admitted into evidence over his objections that it was prejudicial. [DS 4] Second, he challenges the sentence imposed by the district court, asserting that it is inappropriate. [DS 5] Our notice set forth the relevant facts for each issue and set forth the law that we believed controlled. Specifically, relevant to the first issue, we proposed that the district court did not abuse its discretion in admitting the lapel video contrary to Rule 11-403 NMRA in light of Defendant's failure to explain how the evidence was unduly prejudicial to him and since the evidence appeared to have high probative value. [CN 1-2] With respect to the second issue, we explained that the sentence imposed was authorized by law and consistent with our sentencing guidelines. [CN 4-5] We further noted that upon consideration of the mitigating factors presented by Defendant, the district court could have, but was not obligated to give Defendant a shorter sentence. [CN 4-5]

{3} In response, Defendant clarifies some of the factual background regarding the admission of the lapel video, and asserts that it was prejudicial to him because it contained a self-incriminating statement. [MIO 1, 3] We agree that this sort of evidence is in fact prejudicial to Defendant; however, "[t]he fact that competent evidence may tend to prejudice defendant is not grounds for exclusion of that evidence." *State v. Hogervorst*, 1977-NMCA-057, ¶ 46, 90 N.M. 580, 566 P.2d 828. "The purpose of Rule 11-403 is not to guard against any prejudice whatsoever, but only against the danger of unfair prejudice." *State v. Otto*, 2007-NMSC-012, ¶ 16, 141 N.M. 443, 157 P.3d 8 (alteration, internal quotation marks and citation omitted). Defendant's one paragraph response to our calendar notice makes no claim or argument as to why the lapel video unfairly prejudiced him. [MIO 3] Accordingly, we reject his claim that the district court abused its discretion in admitting the lapel video.

{4} With respect to his second issue, Defendant continues to argue that the district court should have granted his motion to reduce his sentence given the "great strides he made towards rehabilitation while the case was pending." [MIO 3] Defendant's arguments have already been addressed by this Court's notice, and we decline to address them further in this opinion because Defendant has not provided any new legal or factual argument that persuades us that our analysis was incorrect. See *State v. Mondragon*, 1988-NMCA-027, ¶ 10, 107 N.M. 421, 759 P.2d 1003 (stating that "[a] party responding to a summary calendar notice must come forward and specifically point out errors of law and fact," and the repetition of earlier arguments does not fulfill this requirement), *superseded by statute on other grounds as stated in State v. Harris*, 2013-NMCA-031, ¶ 3, 297 P.3d 374. Accordingly, for the reasons set forth in our notice of proposed disposition and in this opinion, we affirm.

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

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

M. MONICA ZAMORA, Judge