STATE V. GARCIA

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
LOUIE GARCIA,
Defendant-Appellant.

No. A-1-CA-34516

COURT OF APPEALS OF NEW MEXICO

December 26, 2017

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Brett R. Loveless, District Judge

COUNSEL

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

Bennett J. Baur, Chief Public Defender, Santa Fe, NM, Steven J. Forsberg, Assistant Appellate Defender, Albuquerque, NM, for Appellant

JUDGES

MICHAEL E. VIGIL, Judge. WE CONCUR: M. MONICA ZAMORA, Judge, J. MILES HANISEE, Judge

AUTHOR: MICHAEL E. VIGIL

MEMORANDUM OPINION

VIGIL, Judge.

{1} Defendant Louie Garcia appeals from the district court judgment affirming Defendant's convictions for driving under the influence of drugs (DUI), driving with a

suspended license, failure to maintain traffic lane, and no insurance in an on-the- record appeal from the metropolitan court. This is a memorandum opinion and because the parties are familiar with the facts and procedural posture of the case, we set forth only such facts and law as are necessary to decide the issues raised. For the following reasons, we affirm in part and reverse in part.

BACKGROUND

{2} Officer Ryan Graves of the Albuquerque, New Mexico Police Department (APD), observed Defendant's vehicle traveling near Coors Boulevard and Central Avenue Southwest. While observing Defendant's vehicle, Officer Graves witnessed Defendant being unable to maintain a lane of travel and swerving back and forth from the left to right-hand lanes. Officer Graves therefore stopped Defendant for failure to maintain a traffic lane. Officer Graves discovered Defendant had an outstanding warrant and a suspended license and arrested Defendant on the warrant. Officer Graves observed that Defendant had bloodshot, watery eyes and Defendant was sweating a lot for no obvious reason, considering the weather conditions. Defendant was also slow to answer questions and was moving around and shuffling his feet. Because Defendant was exhibiting signs of impairment, Officer Graves called for a DWI officer.

{3} Officer Timothy McCarson, an APD certified drug recognition evaluator, arrived at the scene. After Officer McCarson advised Defendant of his *Miranda* rights and asked Defendant questions about substance consumption, Defendant admitted to Officer McCarson that he had smoked a bowl of methamphetamine about thirty minutes prior to the traffic stop. Officer McCarson administered field sobriety tests which Defendant failed, and Officer McCarson took Defendant to the prisoner transport center for a breath alcohol test and further processing. Defendant's breath test yielded a 0.0 result, and Defendant voluntarily submitted to a blood test. Anthony Maestas, an on-call blood technician from Tricore Laboratories, drew Defendant's blood at the prisoner transport center, and gave the sample to Officer McCarson who sent the sample to the State Scientific Laboratory Division (SLD) for testing. Officer McCarson also ran an MVD check on Defendant and discovered that Defendant's license was suspended as of April 2012 due to an "administrative suspension."

{4} Concluding that Defendant was under the influence of a central nervous stimulant, Officer McCarson filed a criminal complaint in the metropolitan court charging Defendant with driving under the influence of drugs, failure to maintain traffic lane, driving with a suspended license, no insurance, and possession of drug paraphernalia because a pipe used to smoke illegal drugs was found in Defendant's car.

{5} A jury trial in the metropolitan court resulted in guilty verdicts for driving under the influence of drugs, failure to maintain lane, driving with a suspended license, and driving without insurance. In an on-the-record appeal, the district court affirmed. Defendant now appeals from the district court judgment.

DISCUSSION

{6} Defendant argues: (1) there was insufficient evidence to support the conviction for driving with a suspended license; (2) the metropolitan court erred when it did not sever for a separate trial the charge of driving with a suspended license; and (3) evidence was admitted in violation of Defendant's constitutional right of confrontation. We address each argument in turn.

A. Sufficiency of the Evidence For Driving With a Suspended License

{7} Defendant asserts that the evidence was insufficient to support the jury verdict finding him guilty of driving with a suspended license, and the State concedes that the evidence was not sufficient. After examining the evidence, we agree.

{8} In reviewing a sufficiency of the evidence argument, we must determine if there is substantial evidence, either direct, or circumstantial, to support a guilty verdict beyond a reasonable doubt with respect to every element of the crime. *See State v. Godoy*, 2012-NMCA-084, ¶ 16, 284 P.3d 410. "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id*. (internal quotation marks and citation omitted). "We review the evidence in the light most favorable to the verdict, resolving all conflicts and indulging all reasonable inferences in favor of the verdict." *Id*. (internal quotation marks and citation omitted).

{9} NMSA 1978, Section 66-5-39(A) (2013) states in pertinent part, "[a]ny person who drives a motor vehicle on any public highway of this state at a time when the person's privilege to do so is suspended and who knows or should have known that the person's license was suspended is guilty of a misdemeanor and shall be charged with a violation of this section." An essential element of the crime which the State was required to prove beyond a reasonable doubt is that Defendant was driving and that he knew or had reason to know that his license was suspended. *See State v. Castro*, 2002-NMCA-093, ¶ 3, 132 N.M. 646, 53 P.3d 413 (holding that an essential element of the crime is that a defendant "knows or should have known" of the status of his license (internal quotation marks and citation omitted)); *State v. Herrera*, 1991-NMCA-005, ¶ 7, 111 N.M. 560, 807 P.2d 744 (holding that the driver's knowledge of his driving status is an essential element of driving on a revoked license).

{10} Proof that Defendant's license was suspended administratively was offered through State's Exhibit 1, Defendant's driving record from the Motor Vehicle Department (MVD), and testimony from Officer McCarson who identified what some of the codes on State's Exhibit 1 meant. However, no evidence was admitted that notice of any administrative suspension was ever mailed to Defendant by MVD, or that Defendant otherwise knew or should have known that his license was suspended. Because the State failed to produce any evidence on this essential element of the crime, we reverse Defendant's conviction for driving with a suspended license. *See State v. Losolla*, 1972-NMCA-085, ¶¶ 3-4, 84 N.M. 151, 500 P.2d 436 (reversing the defendant's conviction where the state failed to prove an essential element of the offense).

B. Denial of Motion for Severance

{11} Defendant argues that it was reversible error for the metropolitan court to deny his motion to sever for a separate trial the charge of driving with a suspended license. Defendant moved to sever the possession of drug paraphernalia and the driving with a suspended license charge from the remaining charges, contending that evidence of possession of drug paraphernalia and driving while suspended are not relevant to the DUI, and a joint trial on the charges is prejudicial. Defendant added that the jury might incorrectly assume that Defendant's license was suspended as a result of a prior DUI. The metropolitan judge ordered a severance of the paraphernalia charge, but not the driving with a suspended license charge, which was tried together with the DUI charge. Concluding Defendant has failed to demonstrate actual prejudice, we reject Defendant's argument.

{12} We review a trial court's ruling on a motion for severance for an abuse of discretion. *See State v. Lovett*, 2012-NMSC-036, ¶ 10, 286 P.3d 265. An abuse of discretion occurs if prejudicial evidence, inadmissible in a separate trial is admitted in a joint trial. *Id*. ¶ 11. We assume without deciding, that under the facts of this case, evidence that Defendant's driving privileges were suspended would not be admissible in a separate trial for DUI. We assume, without deciding, that it was therefore an abuse of discretion to deny Defendant's motion. However, even if the district court abused its discretion, reversal is not warranted unless the error actually prejudiced Defendant. *See State v. Gallegos*, 2007-NMSC-007, ¶ 18, 141 N.M. 185, 152 P.3d 828. In assessing actual prejudice, we separately assess the effect the error may have had on each conviction because error may be prejudicial as to one conviction but harmless as to the other. *See Lovett*, 2012-NMSC-036, ¶ 54; *see also State v. Tollardo*, 2012-NMSC-008, ¶ 44, 275 P.3d 110. While a case-by-case analysis is required in a harmless error review, *see id*., to determine whether actual prejudice has resulted to a defendant in the failure-to-sever context, the following non-exhaustive factors may be considered:

> Factors weighing in favor of prejudice include: (1) the prosecution intertwining the offenses in opening statement, during its case-in-chief, or in closing argument; (2) the defendant being found guilty on all counts; (3) factual similarities linking the offenses; (4) offenses that are inflammatory in nature; (5) unusually long and complex trials; and (6) a conviction on a charge where the evidence is thin. On the other hand, factors tending to show that a defendant was not prejudiced by going to trial on the joined offenses include: (1) dissimilar offenses such that a jury would not confuse them; (2) the defendant being acquitted of some charges; and (3) proper jury instructions that adequately make clear to the jury that it must not consider evidence inadmissible to a particular count when coming to a verdict on that count.

Lovett, 2012-NMSC-036, ¶ 56 (alteration, internal quotation marks, and citation omitted). However, we only consider those factors which are relevant to this case. *See id.* ¶ 57.

{13} The question before us is whether Defendant was actually prejudiced in defending the DUI charge because the driving with a suspended license was not

severed for a separate trial. We do not consider actual prejudice as to the driving with a suspended license charge because we have reversed that conviction due to insufficient evidence. We see no evidence that the State improperly intertwined the offenses in its trial of the case, and Defendant makes no claim that it did. In addition, other than the actual act of driving (an uncontested fact), there are no factual similarities linking the offenses; driving on an administratively suspended driver's license is not an offense considered to be inflammatory in nature; this was not an unusually long and complex trial; the DUI conviction does not rest on thin evidence; and the offenses are so dissimilar there is little danger that the jury confused them. On balance, we therefore conclude that Defendant was not actually prejudiced in defending the DUI charge in a trial joined with the charge of driving on a suspended license. Defendant's continued assertion that the metropolitan court's ruling "left the jury free to assume that the vague 'administrative' license suspension was due to a previous DUI" is simply speculative with no basis in the record.

C. Violation of Defendant's Right of Confrontation

{14} Defendant contends that evidence was admitted at trial in violation of his constitutional right to confront the witnesses against him. On appeal, we ordinarily review a trial court's decision to admit or exclude evidence for an abuse of discretion. *See State v. Hughey*, 2007-NMSC-036, ¶ 9, 142 N.M. 83, 163 P.3d 470. However, a trial court's ruling concerning a defendant's confrontation rights is reviewed de novo. *See State v. Gurule*, 2013-NMSC-025, ¶ 33, 303 P.3d 838.

{15} Anthony Maestas, the on-call blood technician at the prisoner transport center, collected samples of Defendant's blood in Officer McCarson's presence. Mr. Maestas gave the samples to Officer McCarson, who tagged the samples into evidence, and then sent them to the SLD for testing. An analyst named Mr. Valdez received the samples and performed a drug screening, which was positive. A second analyst, Michele Garcia, performed a gas chromatograph and mass spectrometer (GC/MS) test. Both tests are performed by putting a blood sample into equipment which produces a printout of the results.

{16} The only witness the State tendered at trial to testify about the blood tests was Protiti Sarker, an SLD supervisor, who had not performed any of the tests. Ms. Sarker testified in a hearing outside the presence of the jury that she could determine if the proper procedures were followed and independently formulate her own opinion about the test results based on her examination of the pertinent documents and printouts produced by the machines. The metropolitan court ruled that the machines generated a packet of data and that as an expert, Ms. Sarker would be allowed to analyze the data and give the jury her own opinion of the test results without violating Defendant's confrontation rights because she would be available for cross-examination.

{17} When Ms. Sarker subsequently testified before the jury, Ms. Sarker was qualified as an expert in drug testing and the effects of drugs without objection. While Ms. Sarker was describing the accuracy ensuring procedures at SLD for blood testing, defense

counsel asked to approach the bench and stipulated to the accuracy of the testing procedures and the results of the tests. Ms. Sarker testified that based on her review of the raw data, methamphetamine (0.60 milligrams per liter of blood) and amphetamine (0.08 milligrams per liter of blood) were in Defendant's blood. In addition, the police report of driving indicated "tracking" problems, the inability to follow a line, which in her opinion, was consistent with the amount of the drug found in Defendant's blood.

{18} The parties dispute whether *State v. Dorais*, 2016-NMCA-049, ¶ 32, 370 P.3d 771 (concluding that the defendant's "right to confront the analyst whose certified statement was admitted into evidence was violated") or *State v. Huettl*, 2013-NMCA-038, ¶¶ 34-35, 305 P.3d 956 (concluding that the lab supervisor's testimony about test performed by a non-testifying analyst did not violate the defendant's confrontation rights) governs the admission of Ms. Sarker's testimony. However, we do not reach the merits of the dispute, because Defendant abandoned his objection to Ms. Sarker's testimony on confrontation grounds in the district court.

{19} In Defendant's on-the-record appeal to the district court, Defendant asserted that he received ineffective assistance of counsel when his attorney stipulated to the accuracy of the testing procedures and the results of the tests, thereby waiving the confrontation issue for appellate review. The district court noted its concerns about whether Ms. Sarker could testify about the results of the blood tests consistent with Defendant's right to confront the witnesses against him, and whether Defendant actually waived his confrontation objection at trial. However, the district court limited its analysis to the issue raised on appeal: whether Defendant received ineffective assistance of counsel when defense counsel stipulated to the accuracy of the machine- produced results of the tests. Ultimately, the district court concluded there was a rational trial strategy for defense counsel to stipulate to the test results and argue the methamphetamine did not impair his ability to drive in light of Defendant's admission to Officer McCarson that he had smoked methamphetamine.

{20} This is therefore a case where Defendant raised and preserved a confrontation objection to evidence at the trial in the metropolitan court, abandoned that argument in his appeal to the district court, and now seeks to revive the argument in the appeal to this court. Under similar circumstances, we have held that the defendant abandoned the confrontation issue. In *State v. Vigil*, 2014-NMCA-096, ¶¶ 2, 17, 336 P.3d 380, at a trial for driving while intoxicated in the metropolitan court, the defendant objected, on confrontation grounds and the rules of evidence, to the admission of a police officer's testimony based on a police report that was not admitted into evidence. Following his conviction, in his on-the-record appeal to the district court, the defendant argued that the testimony was inadmissible under the rules of evidence, but he made no argument that his confrontation rights were violated. *Id*. ¶ 17. On appeal from the district court to this Court, the defendant argued that the police officer's testimony was admitted into evidence in violation of his right of confrontation and the rules of evidence. *Id*. Under the circumstances, we held that by failing to raise the confrontation issue in the on-the-record appeal to the district court, the defendant abandoned the issue and we did not address the issue. *Id*. ¶ 18. *Vigil* is directly applicable here. Defendant argues to this

Court that the district court erred in ruling on an issue he did not present to the district court, and we do not address that issue because it was abandoned.

CONCLUSION

{21} The conviction for driving on a suspended license is reversed for a failure of proof. In all other respects, the judgment of the district court is affirmed, and the case is remanded to the district court for further proceedings in accordance with this opinion.

{22} IT IS SO ORDERED.

MICHAEL E. VIGIL, Judge

WE CONCUR:

M. MONICA ZAMORA, Judge

J. MILES HANISEE, Judge