STATE V. HARVEY

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
GARY L. HARVEY,
Defendant-Appellant.

No. 32,933

COURT OF APPEALS OF THE STATE OF NEW MEXICO

December 20, 2013

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY, Teddy L. Hartley, District Judge

COUNSEL

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

Jorge A. Alvarado, Chief Public Defender, Will O'Connell, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

TIMOTHY L. GARCIA, Judge. WE CONCUR: RODERICK T. KENNEDY, Chief Judge, MICHAEL D. BUSTAMANTE, Judge

AUTHOR: TIMOTHY L. GARCIA

MEMORANDUM OPINION

GARCIA, Judge.

{1} Defendant appeals his conviction for driving under the influence of intoxicating liquor (DWI). We issued a calendar notice proposing to affirm, and Defendant has filed a memorandum in opposition. We have carefully considered the arguments raised in the

memorandum in opposition, and are not persuaded that the proposed affirmance is incorrect. Therefore, as discussed below, we affirm Defendant's conviction.

{2} Defendant first contends the evidence was insufficient to support his conviction. He argues that the only evidence that his blood-alcohol level exceeded .08 was the testimony of the arresting officer, and contends that testimony should bear little weight due to various issues that arose with the State's evidence. For example, the Intoxilyzer printout was illegible, there was no video recording of the arrest, and the arresting officer was the only officer who testified at the trial. [MIO 5] Defendant maintains there was no objective evidence supporting the arresting officer's accusation concerning the results of Defendant's breath tests, and in the absence of such objective evidence we should find the evidence insufficient to support Defendant's conviction.

{3} As Defendant acknowledges, on appeal we must view the evidence in the light most favorable to the verdict and indulge all reasonable inferences in favor of the verdict, resolving all conflicts in the evidence in favor of that verdict. *See State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711, 998 P.2d 176. As we pointed out in the calendar notice, the arresting officer's testimony concerning the results of the breath tests was corroborated by log-book entries, made by the officer contemporaneously with the breath tests, showing test results of .11 for each of two tests. This evidence was sufficient to support the jury's verdict convicting Defendant of driving a motor vehicle with a blood-alcohol content higher than .08, in violation of the applicable statute, NMSA 1978, Section 66-8-102(C)(1) (2010). This is true despite the fact that the usual means of proving breath-test results, a legible BAT card, was not available at trial. It was up to the jury to weigh the absence of such evidence against the evidence that was provided, and the jury reached a conclusion we will not disturb on appeal. *See Cunningham*, 2000-NMSC-009, ¶¶ 26-30.

{4} Defendant argues the district court committed fundamental error when it failed to suppress the evidence obtained as a result of the stop and the resultant arrest. He contends there was no reasonable suspicion for the stop and no probable cause for the arrest. Defendant raises these issues as matters of fundamental error because, as we pointed out in the calendar notice, he did not move to suppress the evidence in question, either orally or in a written motion. Defendant is necessarily arguing, therefore, that the district court should have suppressed the evidence sua sponte. According to our case law, such a claim implicates the doctrine of plain error rather than fundamental error. *See State v. Torres*, 2005-NMCA-070, ¶ 9, 137 N.M. 607, 113 P.3d 877. Although this doctrine is not as strict in application as fundamental error, it is to be used sparingly. *Id.* The rule should be applied only if we have grave doubts about the validity of the verdict, because an error has been made that infects the fairness or integrity of the judicial proceeding. *Id*.

{5} Where, as here, the claim of plain error is based on the district court's failure to suppress evidence sua sponte, the doctrine will be applied only if suppression is the only result rationally supported by undisputed facts in the record. *Id.* ¶¶ 11, 12. If the claim depends on factual determinations that the district court was never asked to

make, we will not apply the doctrine on appeal. *Id*. That is the situation here; Defendant points to evidence conflicting with the arresting officer's testimony in support of his arguments that reasonable suspicion did not exist for the original stop of his vehicle, and that probable cause did not exist to support his arrest. [MIO 1-4] However, the officer testified that he stopped Defendant because one of his taillights was not working, which provided reasonable suspicion for the stop. [MIO 1-2] In addition, the officer testified that he smelled alcohol on Defendant's breath, and that Defendant performed unsatisfactorily on field-sobriety tests, which provided probable cause for the arrest. [MIO 1-3] *See State v. Granillo-Macias,* 2008-NMCA-021, ¶ 12, 143 N.M. 455, 176 P.3d 1187 (holding that the odor of alcohol, lack of balance at the vehicle, and failure to satisfactorily perform field sobriety tests supported an objectively reasonable belief that the defendant had been driving while intoxicated, and thus constituted probable cause to arrest). Although Defendant attacks the arresting officer's credibility and, thus, the persuasiveness of his testimony, Defendant did not ask the district court to resolve the conflicting factual issues by moving to suppress the evidence obtained pursuant to the stop and arrest. In sum, because there was conflicting evidence concerning the legal issues and a finding of lack of reasonable suspicion or probable cause is not the only one rationally supported by the record, we find no plain error in the district court's failure to sua sponte suppress the evidence in question. *See Torres*, 2005-NMCA-070, ¶¶ 9-12.

{6} The same result applies with respect to Defendant's next argument, that the district court committed fundamental error by failing to sua sponte suppress the results of the breath test, because Defendant was allegedly denied his request for an independent blood test. [MIO 9] Again, Defendant did not move to suppress the breath-test results on this ground, and there was conflicting evidence as to whether Defendant did or did not request an independent blood test—the arresting officer testified that Defendant made no such request, while Defendant testified that he did do so. [MIO 2-3] Since a finding that Defendant requested such a test is not the only one rationally supported by the record, and Defendant did not ask the district court to resolve the crucial factual dispute, we will not find plain error here. *See Torres*, 2005-NMCA-070, ¶¶ 9-12.

{7} Defendant next contends that the district court should have suppressed the results of the breath tests because the State did not produce a legible BAT card at trial. [MIO 9] We discussed this issue at length in the calendar notice, pointing out that although the BAT card was not legible, the State presented other admissible and competent evidence establishing the results of the breath tests. This evidence included the arresting officer's testimony as well as a log, created contemporaneously with the tests, which corroborated the officer's testimony. As we noted in the calendar notice, the applicable statute does not require the State to submit a BAT card to prove the results of breath tests. *See* NMSA 1978, § 66-8-110(A) (2007). Furthermore, we are aware of no logical reason why the State should not be allowed to prove breath-test results as it did in this case, especially where the BAT card is either illegible or has been accidentally destroyed, and Defendant has not advanced such a justification. Nor has Defendant submitted any authority supporting his contention that the only way the State

may prove the results of a breath test is through presentation of a BAT card. *See State v. Lovett*, 2012-NMSC-036, ¶ 46, 286 P.3d 265 (holding that an appellate court may assume that, where arguments are unsupported by cited authority, counsel was unable to find such authority after diligent search). For the reasons stated in the calendar notice as well as those discussed here, we hold that the district court did not err in refusing to suppress the breath-test results due to the lack of a legible BAT card.

{8} Defendant's final argument is his renewed contention that evidence of the contents of the breath-test log should not have been admitted because the arresting officer, whose testimony provided the basis for that admission, was not established to be a "custodian" of the log book. [MIO 10] In the calendar notice we proposed to reject this argument because the log book qualifies as a record of a regularly conducted activity under Rule 11-803(6)(d) NMRA, and the arresting officer was "another qualified witness" who was competent, under Rule 11-803(6), to testify as to the entries he made into the log. Defendant now attacks the latter portion of this analysis, maintaining that the arresting officer "offered no assurances that he—or anyone else—was knowledgeable about the procedures—if there were any—for recording information in the book." [MIO 10] As a result of this asserted failure, Defendant contends the arresting officer did not qualify as "another qualified witness" for purposes of Rule 11-803(6)(d). However, contrary to Defendant's contention, and as we discussed in the calendar notice, at trial the arresting officer described the procedure for recording information into the log book each time a breath test is administered. [DS Exh. pp. 72-73] The information entered includes the test subject's name, other identifying information, and the result of the test. Furthermore, the officer testified that he followed this procedure with respect to Defendant's tests, entering two results of .11 each. [*Id.* pp. 73, 101] Thus, as we explained in the calendar notice, the arresting officer clearly constituted "another qualified individual" who was competent to testify as to how, when, and by whom Defendant's test results were entered into the log book. *See State v. Wynne*, 1988-NMCA-106, ¶ 22, 108 N.M. 134, 767 P.2d 373 (holding that a witness who described the establishment's regular practice of preparing receipts, and who personally prepared the receipt in question, was a "qualified witness" for purposes of Rule 11-803(6)(d)). For this reason, the district court did not err in allowing admission of the log-book entries showing the results of Defendant's two breath tests.

{9} Based on the foregoing, as well as the discussion in the calendar notice, we affirm Defendant's conviction.

{10} IT IS SO ORDERED.

TIMOTHY L. GARCIA, Judge

WE CONCUR:

RODERICK T. KENNEDY, Chief Judge

MICHAEL D. BUSTAMANTE, Judge