STATE V. MCKINNIS

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ANTHONY MCKINNIS,
Defendant-Appellant.

NO. 35,334

COURT OF APPEALS OF NEW MEXICO

December 20, 2016

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY, Marci Beyer, District Judge

COUNSEL

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

L. Helen Bennett PC, L. Helen Bennett, Albuquerque, NM, for Appellant

JUDGES

JAMES J. WECHSLER, Judge. WE CONCUR: TIMOTHY L. GARCIA, Judge, J. MILES HANISEE, Judge

AUTHOR: JAMES J. WECHSLER

MEMORANDUM OPINION

WECHSLER, Judge.

{1} Defendant appeals from the district court's judgment and order partially suspending sentence, entered following a jury trial, convicting him of one count of battery on a household member. This Court issued a notice proposing summary affirmance. Defendant has filed, pursuant to *State v. Franklin*, 1967-NMSC-151, 78

N.M. 127, 428 P.2d 982, and *State v. Boyer*, 1985-NMCA-029, 103 N.M. 655, 712 P.2d 1, a memorandum in opposition to this Court's notice of proposed disposition, which we have duly considered. Unpersuaded, we affirm.

{2} Defendant raised two issues in his docketing statement: (1) whether the district court erred in denying his motion for a mistrial based on prior criminal history testimony elicited by the State, and (2) whether the district court erred in denying his motion for a mistrial based on a violation by two of the State's witnesses of the district court's admonition not to discuss the case with each other. [DS 5]

{3} With respect to the first issue, we noted in our calendar notice that Defendant's argument centered around his contention that the prosecutor "elicited testimony that an officer had been looking at [Defendant's] prior history[.]" [CN 3] Specifically, according to the docketing statement, Officer Connie Heard testified at trial that "[w]henever we are booking somebody in our system, their prior history comes up. When I was looking at it, I made . . . ." [CN 3] However, we observed that the docketing statement contained no information about what Officer Heard was specifically asked by the prosecutor or whether she offered any other testimony regarding Defendant's criminal history. [CN 3] Consequently, we suggested in our calendar notice that it appeared that no prior bad act evidence was in fact admitted or otherwise put before the jury. [CN 3]

{4} Furthermore, we proposed to determine that any reference made by Officer Heard to Defendant's prior criminal history in this case appears to have been, at most, indirect and ambiguous and did not rise to the level where a curative instruction would not have sufficiently alleviated any prejudice to Defendant. [CN 3-4] *See State v. Armijo*, 2014-NMCA-013, ¶ 9, 316 P.3d 902 ("Generally, a prompt admonition from the court to the jury to disregard and not consider inadmissible evidence sufficiently cures any prejudicial effect which might otherwise result." (emphasis, alterations, internal quotation marks, and citation omitted)). We noted that Defendant had not indicated in his docketing statement whether he requested a curative instruction be given to the jury or whether the district court offered to give a curative instruction. [CN 4] *Cf. State v. Vialpando*, 1979-NMCA-083, ¶ 25, 93 N.M. 289, 599 P.2d 1086 (holding that "an offer to admonish, even though declined, is sufficient to support denial of a motion for mistrial").

{5} Therefore, because Defendant failed to provide us with all the facts material to consideration of whether the district court erred in denying his motion for a mistrial on this point, we proposed to affirm the district court's ruling. [CN 4-5] *See State v. Aragon*, 1999-NMCA-060, ¶ 10, 127 N.M. 393, 981 P.2d 1211 (stating that there is a presumption of correctness in the rulings or decisions of the trial court, and the party claiming error bears the burden of showing such error); *see also State v. Chamberlain*, 1989-NMCA-082, ¶ 11, 109 N.M. 173, 783 P.2d 483 (providing that the defendant's failure to provide the court with a summary of all the facts material to consideration of the issue on appeal necessitated a denial of relief).

{6} In his memorandum in opposition to our notice of proposed disposition, Defendant notably does not point out specific errors in fact or law. *See Hennessy v.*

Duryea, 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683 ("Our courts have repeatedly held that, in summary calendar cases, the burden is on the party opposing the proposed disposition to clearly point out errors in fact or law."). Instead, Defendant continues to argue that "[t]he suggestion by Officer Connie Heard that [Defendant] had a prior criminal history effectively linked [Defendant] to criminality[.]" [MIO 2] As in our calendar notice, we observe that Officer Heard's statement—or as Defendant characterizes it, her "suggestion"—contained no explicit mention of any prior bad act. At most, the jury had before it an indirect and ambiguous reference to "prior history." Defendant's memorandum in opposition does not address our concern whether a curative instruction would have been sufficient to cure any potential prejudice, or indeed whether such an instruction was sought or offered. Thus, we remain unconvinced that Defendant has met his burden on appeal with respect to this point.

{7} As to the second issue, we proposed to conclude in our calendar notice that because Defendant's docketing statement was silent with regard to the importance of the aspects of the case discussed by the witnesses in contravention of the district court's admonition, we were not convinced that Defendant had demonstrated that the district court abused its discretion in permitting the witnesses to testify. [CN 6-7] *Cf. State v. Padilla*, 1974-NMCA-029, ¶ 14, 86 N.M. 282, 523 P.2d 17 (concluding that there was nothing indicating that the trial court abused its discretion where there was no indication that the information discussed by the witnesses "was other than an insignificant aspect of the case"); *see also State v. Kijowski*, 1973-NMCA-129, ¶ 5, 85 N.M. 549, 514 P.2d 306 ("[P]ermitting a witness to testify who has violated the court's instruction not to discuss the case with [anyone] other than the attorneys is within the trial court's discretion."); *Aragon*, 1999-NMCA-060, ¶ 10 (stating that there is a presumption of correctness in the rulings or decisions of the trial court, and the party claiming error bears the burden of showing such error).

{8} In his memorandum in opposition, Defendant again does not point out specific errors in fact or law with respect to our notice of proposed disposition. *See Hennessy*, 1998-NMCA-036, ¶ 24. Instead, Defendant argues that "[i]f there are no negative consequences for the violation of rules, then there is no reason for the rules" and that "impropriety calling into question the fundamental fairness of the proceedings should be presumed." [MIO 5] This argument—essentially calling for a per se witness exclusion rule—is unavailing, however, given our jurisprudence holding that permitting a witness to testify after violating the court's admonition is within the discretion of the trial court. *See Kijowski*, 1973-NMCA-129, ¶ 5. Because we remain unconvinced that Defendant has met his burden of demonstrating that the district court in this case abused its discretion in allowing the witnesses to testify, we are not persuaded that the district court erred in denying Defendant's motion for a mistrial.

{9} Therefore, for the reasons stated in this opinion, as well as those provided in our calendar notice, we affirm.

{10} IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

TIMOTHY L. GARCIA, Judge

J. MILES HANISEE, Judge