STATE V. PEACOCK

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
JOSHUA N. PEACOCK,
Defendant-Appellant.

NO. A-1-CA-36542

COURT OF APPEALS OF NEW MEXICO

December 7, 2017

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY, Gary L. Clingman, District Judge

COUNSEL

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

Bennett J. Baur, Chief Public Defender, Allison H. Jaramillo, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

LINDA M. VANZI, Chief Judge. WE CONCUR: JONATHAN B. SUTIN, Judge, STEPHEN G. FRENCH, Judge

AUTHOR: LINDA M. VANZI

MEMORANDUM OPINION

VANZI, Chief Judge.

{1} Defendant Joshua N. Peacock appeals from his convictions, after a jury trial, of receiving or transferring a stolen motor vehicle, contrary to NMSA 1978, Section 30-16D-4(A) (2009), and possession of drug paraphernalia, contrary to NMSA 1978,

Section 30-31-25.1(A) (2001). In this Court's notice of proposed disposition, we proposed to summarily affirm the convictions on the single issue raised: sufficiency. Defendant filed a memorandum in opposition (MIO) and motion to amend the docketing statement (motion), which we have duly considered. Remaining unpersuaded, we deny the motion to amend and affirm.

{2} **Sufficiency:** By his memorandum in opposition, Defendant continues to argue that there was insufficient evidence that he knew the truck was stolen [MIO 6-8] or that he constructively possessed the methamphetamine pipe [MIO 8-9]. First, he argues the only evidence that indicates that he believed he had a right to drive the truck based on permission and the keys given to him by a third party, who he believed owned the truck. [*See* MIO 2, 4, 8] However, Defendant's memorandum in opposition indicates that there was also testimony from the actual owner of the truck that there was a sticker on the truck (presumably indicating the name of the business, Superior Hydrovac Solutions, from whom the truck was stolen [MIO 2]). [MIO 4] It is not unreasonable for a jury to conclude that, at the very least, this should have indicated to Defendant that the truck was not owned by the alleged third party. *See State v. Slade*, 2014-NMCA-088, ¶ 13, 331 P.3d 930 (stating that "appellate courts review sufficiency of the evidence from a highly deferential standpoint"; "[a]ll evidence is viewed in the light most favorable to the [S]tate, and we resolve all conflicts and make all permissible inferences in favor of the jury's verdict"; "[w]e examine each essential element of the crimes charged and the evidence at trial to ensure that a rational jury could have found the facts required for each element of the conviction beyond a reasonable doubt"; and "appellate courts do not search for inferences supporting a contrary verdict or re-weigh the evidence because this type of analysis would substitute an appellate court's judgment for that of the jury" (alterations, internal quotation marks, and citations omitted)); *see also State v. Flores*, 2010-NMSC-002, ¶ 19, 147 N.M. 542, 226 P.3d 641 (stating that "circumstantial evidence alone can amount to substantial evidence" and that "intent is subjective and is almost always inferred from other facts in the case" (alterations, internal quotation marks, and citation omitted)); *State v. Michael S.*, 1995-NMCA-112, ¶ 7, 120 N.M. 617, 904 P.2d 595 (stating that "[i]ntent need not be established by direct evidence, but may be inferred from the [defendant's] conduct and the surrounding circumstances").

{3} Additionally, although Defendant claims that the sticker was not visible on the pictures admitted into evidence [MIO 4], it is not for this Court to determine weight or credibility or re-weigh conflicting evidence, and the jury is free to reject Defendant's version of the facts. *See State v. Salas*, 1999-NMCA-099, ¶ 13, 127 N.M. 686, 986 P.2d 482; *see also State v. Rojo*, 1999-NMSC-001, ¶ 19, 126 N.M. 438, 971 P.2d 829; *State v. Mora*, 1997-NMSC-060, ¶ 27, 124 N.M. 346, 950 P.2d 789; *State v. Griffin*, 1993-NMSC-071, ¶ 17, 116 N.M. 689, 866 P.2d 1156. Thus, for the reasons stated in our calendar notice and herein, we conclude that the evidence was sufficient to support the jury's finding that Defendant knew or had reason to know the truck was stolen or unlawfully taken. [*See* RP 168 (jury instruction for possession of a stolen vehicle)]

{4} Second, Defendant argues that there was insufficient evidence to support the finding that he was in "constructive" possession of the pipe. [MIO 8-9] According to the

memorandum in opposition, "during the investigation, [Defendant] was holding a yellow plastic bag," which was taken from Defendant when he was placed in the back of the police car and put in the front passenger seat. [MIO 2] The bag was open and the officer saw a white, crystal-like substance, which he/they recognized as methamphetamine. [MIO 2] They also later found a glass pipe with burned residue in the bag. [MIO 2] Based on this evidence, we conclude that there was sufficient evidence to support the jury's finding that Defendant was in constructive or actual possession of the pipe. [*See* RP 169 (jury instruction for possession of drug paraphernalia)] *See Rojo*, 1999-NMSC-001, ¶ 19; *Mora*, 1997-NMSC-060, ¶ 27; *Griffin*, 1993-NMSC-071, ¶ 17; *Slade*, 2014-NMCA-088, ¶ 13; *Salas*, 1999-NMCA-099, ¶ 13.

{5} **Motion to Amend:** By his motion, Defendant seeks to raise the following four issues, contending that they constitute fundamental error: "1) confrontation violation for not calling the arresting officer [MIO 9-11]; 2) the district court should have severed the charges [MIO 12-14]; 3) the prosecutor committed misconduct [MIO 14-16]; [and] 4) cumulative error [MIO 16-17]." [MIO 1] In order for this Court to grant a motion to amend the docketing statement, the movant must meet certain criteria that establishes good cause for our allowance of such amendment. *See State v. Moore*, 1989-NMCA-073, ¶¶ 41-42, 109 N.M. 119, 782 P.2d 91, *overruled on other grounds by State v. Salgado*, 1991-NMCA-044, ¶ 2, 112 N.M. 537, 817 P.2d 730; *State v. Rael*, 1983-NMCA-081, ¶¶ 15-16, 100 N.M. 193, 668 P.2d 309. The essential requirements to show good cause for our allowance of an amendment to an appellant's docketing statement are that "(1) the motion be timely, (2) the new issue sought to be raised was either (a) properly preserved below or (b) allowed to be raised for the first time on appeal, . . . [and (3)] the issues sought to be presented must be viable." *Moore*, 1989-NMCA-073, ¶ 42.

{6} Confrontation: Defendant argues that he had a right to confront the arresting officer, who did not testify, and that the "testifying officer had to rely on the out-of-court testimonial hearsay statements of the officer who arrested [Defendant]." [MIO 10] However, Defendant fails to explain what the testimony from the testifying officer was or what out-of-court testimonial hearsay statements he purportedly relied on and, indeed, cites to *State v. Jimenez*, 2017-NMCA-039, ¶ 21, 392 P.3d 668, for the proposition that a defendant's confrontation rights are not violated when no witness's testimony included testimonial hearsay. *See Corona v. Corona*, 2014-NMCA-071, ¶ 28, 329 P.3d 701 ("This Court has no duty to review an argument that is not adequately developed."); *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶ 70, 309 P.3d 53 ("We will not review unclear arguments, or guess at what a party's arguments might be." (alteration, internal quotation marks, and citation omitted)). Moreover, Defendant does not explain how his claim of error would rise to the level of fundamental error, if such error existed, and we therefore decline to find fundamental error in the present case. *See State v. Barber*, 2004-NMSC-019, ¶¶ 8, 14, 135 N.M. 621, 92 P.3d 633 (stating that the "doctrine of fundamental error applies only under exceptional circumstances and only to prevent a miscarriage of justice" and "is to be resorted to in criminal cases only for the protection of those whose innocence appears indisputabl[e], or open to such question that it would shock the conscience to permit the conviction to stand").

{7} Severed Charges: Defendant essentially argues that the district court erred in not severing charges that he never sought to sever because there is prejudice in the jury knowing about all of the charges for which he was tried. [*See* MIO 12-14] Defendant cites cases regarding joinder in support of his argument, apparently arguing that, if joinder of cases would be prejudicial to a defendant, then the lack of severance is not only also prejudicial, but error. [*See* id.] However, Defendant fails to explain why the district court should have *sua sponte* severed the charges when no one sought such severance, and how the court's failure to do so actually arose to *fundamental* error. *See id.* We therefore decline to hold that there was fundamental error.

{8} Prosecutorial misconduct: Defendant contends that it was fundamental error for the prosecutor to present "the perjured testimony of the officer as well as the perjured testimony of the [witness]." [MIO 15] It appears from his memorandum in opposition that this claim of perjury is Defendant's own accusation that the officer and the witness are lying, and his belief that his version of the events is true. [*See* MIO 15-16]. This amounts to nothing more than a conflict in testimony, which the jury was free to resolve. *See Salas*, 1999-NMCA-099, ¶ 13. Additionally, absent some evidence that "affirmatively establish[es] the perjury in such clear and convincing manner as to leave no room for reasonable doubt that perjury was committed," we will not find error or grant a new trial. *See State v. Betsellie*, 1971-NMSC-076, ¶ 12, 82 N.M. 782, 487 P.2d 484. As Defendant has not explained what evidence affirmatively establishes perjury, we find no prosecutorial misconduct based on witness testimony in the present case.

{9} Defendant also claims that the prosecutor committed misconduct by painting Defendant as a meth addict. [MIO 16] Again, Defendant fails to provide any detail regarding what the prosecutor actually stated or any argument as to how this arises to the level of fundamental error. *See Barber*, 2004-NMSC-019, ¶¶ 8, 14; *see also Corona*, 2014-NMCA-071, ¶ 28; *Elane Photography, LLC*, 2013-NMSC-040, ¶ 70. Accordingly, we decline to find error, fundamental or otherwise, in the prosecutor's conduct.

{10} Cumulative Error: Finally, Defendant contends that there was fundamental, cumulative error in the district court's abuses of its discretion "in allowing the State to present perjured testimony, in allowing the State to paint [Defendant] as a meth addict without any scientific evidence or otherwise to support such speculation, and in setting the case too quickly after declaring the mistrial so that his new attorney did not have enough time to prepare." [MIO 16-17; *see also* MIO 1] "In New Mexico the doctrine of cumulative error is strictly applied." *State v. Trujillo*, 2002-NMSC-005, ¶ 63, 131 N.M. 709, 42 P.3d 814 (internal quotation marks and citation omitted). "It cannot be invoked when the record as a whole demonstrates that the defendant received a fair trial." *Id.* (internal quotation marks and citation omitted).

{11} In the present case, we have concluded that Defendant has not asserted reversible or fundamental error on the issues he has raised. Accordingly, we conclude that "there is . . . no error to accumulate, . . . the defendant received a fair trial[,] and . . . the doctrine is not applicable in this case." *See id.* As Defendant makes no argument as to why the cumulative error doctrine should be applied in an extraordinary manner to his

case, we decline to do so. *See State v. Saiz*, 2008-NMSC-048, ¶ 66, 144 N.M. 663, 191 P.3d 521 ("The summary answer to this summary argument is that where there is no error to accumulate, there can be no cumulative error."), *abrogated on other grounds by State v. Belanger*, 2009-NMSC-025, 146 N.M. 357, 210 P.3d 783; *see also State v. Allen*, 2000-NMSC-002, ¶ 117, 128 N.M. 482, 994 P.2d 728 ("We have noted on several occasions that a fair trial is not necessarily a perfect trial."). Having reviewed the record as a whole and finding no accumulating errors that justify reversal, or any indication that Defendant was denied a fair trial, we hold that the doctrine of cumulative error does not apply.

{12} In sum, we are unpersuaded by Defendant's arguments and consider the four issues he seeks to add by his motion non-viable. *See Moore*, 1989-NMCA-073, ¶¶ 42-43. We therefore deny his motion to amend the docketing statement. Accordingly, for the reasons stated in our notice of proposed disposition and herein, we affirm.

{13} IT IS SO ORDERED.

LINDA M. VANZI, Chief Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

STEPHEN G. FRENCH, Judge