STATE V. REED

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
RUSSELL REED,
Defendant-Appellant.

No. 33,426

COURT OF APPEALS OF NEW MEXICO

December 7, 2015

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY, Lisa B. Riley, District Judge

COUNSEL

Hector H. Balderas, Attorney General, Yvonne M. Chicoine, Assistant Attorney General, Santa Fe, NM, for Appellee

Jorge A. Alvarado, Chief Public Defender, Nina Lalevic, Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

CYNTHIA A. FRY, Judge. WE CONCUR: JAMES J. WECHSLER, Judge, RODERICK T. KENNEDY, Judge

AUTHOR: CYNTHIA A. FRY

MEMORANDUM OPINION

FRY, Judge.

{1} Defendant appeals his conviction for aggravated battery with a deadly weapon. This is the fourth appeal filed in this case. Defendant argues that the district court erred

in entering an order on remand convicting him of aggravated battery (deadly weapon) after this Court reversed his earlier conviction for aggravated battery (deadly weapon) against a household member because there was insufficient evidence that Victim was a household member. For efficiency's sake we will refer to these separate offenses as aggravated battery and aggravated battery against a household member unless the context otherwise requires. The basis of Defendant's contention is that because the jury was never instructed on the alternate charge of aggravated battery, the district court was precluded from entering a conviction for that offense. Defendant further argues that in the event we agree, double jeopardy bars retrial on any lesser-included offenses. Because we agree with Defendant, we reverse. We also address the State's arguments that review of Defendant's appeal is improper.

{2} Because this is a memorandum opinion and the parties are familiar with the facts of this case, we reserve discussion of the pertinent facts for our analysis. However, we briefly provide the following procedural history.

BACKGROUND

{3} Defendant was initially convicted of aggravated battery (deadly weapon) against a household member. Defendant appealed his conviction, and this Court held that there was insufficient evidence for the household member element and accordingly reversed. On remand, Defendant filed a motion to dismiss his conviction. The district court denied Defendant's motion on October 21, 2011. On July 26, 2012, the district court entered a second judgment and sentence against Defendant, presumably by mistake, for aggravated battery against a household member, the same conviction that this Court had reversed on appeal. Defendant then filed a notice of appeal from that judgment and sentence. On September 14, 2012, Defendant filed notice with this Court withdrawing his appeal. Defendant then filed a motion to set aside the defective judgment and sentence in district court. Before this Court formally dismissed Defendant's appeal, the district court entered an amended judgment and sentence convicting Defendant of both aggravated battery (deadly weapon) and aggravated battery (great bodily harm), its third judgment and sentence in this case. Defendant filed a notice of appeal from this judgment and sentence. On appeal, this Court held that the district court did not have jurisdiction to enter the third judgment and sentence because it was filed while Defendant's case was pending in this Court. *State v. Reed*, No. 32,491, mem. op. ¶ 2 (N.M. Ct. App. Mar. 28, 2013) (non-precedential). On remand, the district court entered its fourth judgment and sentence on November 21, 2013, convicting Defendant of aggravated battery. Defendant now appeals the fourth judgment and sentence.

DISCUSSION

I. The State's Jurisdictional Arguments

{4} The State argues that we should not reach the merits of Defendant's appeal for three reasons. First, the State argues that the district court did not have jurisdiction to enter the fourth judgment and sentence convicting Defendant of aggravated battery.

Second, the State argues that Defendant waived his right to this appeal. Third, the State argues that Defendant's appeal conflicts with our public policy against piecemeal appeals.

A. This Court has Jurisdiction Over Defendant's Appeal

{5} As to the State's first contention, the State claims that the district court lost jurisdiction as early as November 20, 2011, but at the latest by August 24, 2012. The November 20, 2011 date arises from an order denying Defendant's motion to dismiss filed (on remand after the first appeal) by the district court on October 21, 2011, in which the district court stated that "[j]udgment [is] entered against . . . Defendant on the crimes of [a]ggravated [b]attery with a [d]eadly [w]eapon and [a]ggravated [b]attery with [g]reat [b]odily [h]arm." The State contends that this October 21, 2011 order was a final, appealable order from which Defendant had thirty days to file a notice of appeal. *See* Rule 12-201(A)(2) NMRA. The second date—August 24, 2012—is the date that Defendant filed a notice of appeal from the district court's second judgment and sentence. This notice of appeal was Defendant's second appeal. The State contends, relying on Rule 5-801(A) NMRA, that once this Court dismissed Defendant's second appeal, the district court on remand was limited to either entering an order reducing Defendant's sentence or correcting an illegal sentence. Ultimately, the State argues that these events deprived the district court of jurisdiction to enter the fourth judgment and sentence Defendant is currently appealing, which was filed on November 21, 2013. Thus, the State argues, because the district court did not have jurisdiction to enter the fourth judgment and sentence, this Court does not have jurisdiction over Defendant's current appeal. *See McCuistion v. McCuistion*, 1963-NMSC-144, ¶ 5, 73 N.M. 27, 385 P.2d 357 ("If the district court was without jurisdiction to enter the judgment appealed from, [the appellate] court is likewise without jurisdiction to determine the validity of that judgment upon its merits."). We address these points in turn.

{6} As to the district court's October 21, 2011 order denying Defendant's motion to dismiss, even assuming this was a final, appealable order—which we do not decide—it is well settled that a defense counsel's failure to file a timely notice of appeal does not preclude this Court from reviewing the defendant's appeal on the merits. *State v. Dorais*, ___-NMCA-___, ¶ 7, ___P.3d___ (No. 32,235, May 21, 2014), *petition for cert. filed* (No. 34,777, July 2, 2014) (recognizing that this Court conclusively presumes "ineffective assistance of counsel where defense counsel fails to timely file either a notice of appeal or an affidavit of waiver of appeal" and that "[w]hen the presumption applies, this Court may hear an appeal on the merits notwithstanding the untimely filing of the notice of appeal" (internal quotation marks and citation omitted)). Defense counsel filed a notice of appeal following the judgment and sentence entered in July 2012. The State makes no argument as to why this presumption would not apply and excuse Defendant's allegedly untimely filing of the notice of appeal in July 2012 should the October 21, 2011 order be considered a final, appealable order. Accordingly, we are unpersuaded that the district court lost jurisdiction on November 20, 2011.

{7} As for the August 23, 2012 date, we are unpersuaded that this Court's dismissal of Defendant's second appeal forever deprived the district court of jurisdiction. The second judgment and sentence Defendant appealed from was undisputedly legally deficient in that it convicted Defendant of aggravated battery against a household member in direct contravention of this Court's mandate in Defendant's first appeal. In the midst of Defendant's attempt to withdraw his appeal from the second judgment and sentence, Defendant moved in district court to dismiss the judgment and sentence due to its obvious defect. Unfortunately, the district court entered its third judgment and sentence before this Court dismissed Defendant's second appeal. Thus, in Defendant's third appeal, and in this Court's second opinion in this case, we held that the district court was without jurisdiction to enter the second judgment and sentence and remanded to the district court to specifically consider whether *State v. Villa*, 2004-NMSC-031, 136 N.M. 367, 98 P.3d 1017, precluded the district court from entering a judgment and sentence convicting Defendant of aggravated battery. *Reed*, No. 32,491, mem. op. ¶ 4. The State's argument on this point fails to incorporate these subsequent proceedings or address the propriety of this Court's remand to the district court to consider the issue now before us in this appeal. In other words, despite any alleged effect of Defendant's withdrawn appeal from a legally defective judgment and sentence, the fact remains that the judgment and sentence Defendant is presently appealing arose from this Court's mandate to the district court to consider that very question. *Cf. Vinton Eppsco Inc. of Albuquerque v. Showe Homes, Inc.*, 1981-NMSC-114, ¶ 4, 97 N.M. 225, 638 P.2d 1070 ("[T]he duty of a lower court on remand is to comply with the mandate of the appellate court, and to obey the directions therein without variation[.]").

B. Defendant's Waiver of an Earlier Appeal Does Not Preclude Review

{8} The State further argues that this Court does not have jurisdiction to consider Defendant's current appeal because Defendant filed a waiver of appeal. The waiver was attached to the withdrawal of Defendant's second appeal in which Defendant was appealing the district court's second judgment and sentence that erroneously reconvicted him of aggravated battery against a household member.

{9} We decline to construe Defendant's waiver filed in connection with a withdrawal of an appeal from a void judgment and sentence as creating a jurisdictional bar to our review of Defendant's current appeal. Defendant withdrew his appeal and simultaneously sought to correct in district court the clear error in the district court's judgment and sentence reconvicting him of aggravated battery against a household member after this Court held there was insufficient evidence for that conviction. Given this context, we infer that Defendant's intent was not to waive review of his conviction but to ensure that an eventual appeal arose from a valid judgment and sentence that would permit this Court to address the issue presently before us. The State's trial counsel apparently understood this was the case because the State does not provide any citation to the record where it objected to Defendant's attempt to amend the erroneous judgment and sentence in district court. In arguing that these events should preclude our review of Defendant's case now that the district court has entered a judgment and sentence reflecting the conviction the State sought on remand, the

State's argument insists on an overly technical adherence to form in the midst of what is otherwise a procedural nightmare. Accordingly, we reject the State's argument. *See State v. Foster*, 2003-NMCA-099, ¶ 10, 134 N.M. 224, 75 P.3d 824 (emphasizing our policy to not "exalt form over substance" where doing so perpetuates injustice).

C. Our Policy Against Piecemeal Appeals Provides No Basis to Deny Review of Defendant's Appeal

{10} The State argues that this Court's review of Defendant's appeal conflicts with New Mexico's policy against piecemeal appeals. *See Principal Mut. Life Ins. Co. v. Straus*, 1993-NMSC-058, ¶ 12, 116 N.M. 412, 863 P.2d 447 ("There is a strong policy in New Mexico of disfavoring piecemeal appeals . . . and of avoiding fragmentation in the adjudication of related legal or factual issues[.]" (citation omitted)). We are unpersuaded, however, that this policy precludes review of Defendant's claim. The policy against piecemeal appeals is often directed against a party's use of the appeal process to challenge unfavorable rulings before the case has reached an adequate level of finality. *See Ranch del Villacito Condos., Inc. v. Weisfeld*, 1995-NMSC-076, ¶ 16, 121 N.M. 52, 908 P.2d 745 (stating that a party should not be allowed "to bring piecemeal appeals and to test alternative theories in the appellate courts"). That is certainly not the case here. Far from raising discrete issues, Defendant has continuously appealed erroneous judgments and sentences entered against him following the reversal of his conviction in his first appeal. It would be a disservice to our system of justice to apply our policy against piecemeal appeals to preclude review of the issue he has sought to appeal all along the tortuous path this case has taken.

II. Defendant's Appeal

A. Defendant's Conviction on Remand for Aggravated Battery Was Improper

{11} Defendant argues that the district court's entry of a conviction on remand for aggravated battery was error because the jury was not instructed on this charge. Central to Defendant's contention are the parameters of the "direct-remand rule." As stated in *State v. Haynie*, "appellate courts have the authority to remand a case for entry of judgment on the lesser included offense and resentencing rather than retrial when the evidence does not support the offense for which the defendant was convicted but does support a lesser included offense." 1994-NMSC-001, ¶ 4, 116 N.M. 746, 867 P.2d 416. "The rationale for this holding is that there is no need to retry a defendant for a lesser included offense when the elements of the lesser offense necessarily were proven to a jury beyond a reasonable doubt in the course of convicting the defendant of the greater offense." *Id.*

{12} However, as Defendant notes, our Supreme Court limited the applicability of the direct-remand rule in *Villa*, 2004-NMSC-031, when it held that the rule is inapplicable "where a conviction is reversed based on insufficient evidence to support the greater charge and the jury had not been instructed on the lesser included offense." *State v. Slade*, 2014-NMCA-088, ¶ 38, 331 P.3d 930, *cert. quashed*, 2015-NMCERT-001, 350

P.3d 92. The Court reasoned that the rule does not apply in these circumstances because "a conviction of an offense not presented to the jury would deprive the defendant of notice and an opportunity to defend against that charge and would be inconsistent with New Mexico law regarding jury instructions and preservation of error." *Id.* (quoting *Villa*, 2004-NMSC-031, ¶ 1) (internal quotation marks omitted).

{13} In this case, it was undisputed that the jury was not provided a separate instruction on aggravated battery. Thus, given the holding in *Villa*, it appears that Defendant is correct that his conviction for this crime on remand was error. Nevertheless, the State argues that *Villa* is distinguishable for two reasons. First, the State argues that, unlike *Villa*, all the elements necessary to convict Defendant of aggravated battery were included in the jury instruction on aggravated battery against a household member. Second, the State argues that because Defendant requested a jury instruction for aggravated battery, Defendant was necessarily on notice of the offense and, thus, the reasoning supporting the *Villa* holding is inapplicable. We address these in turn.

{14} First, we are unpersuaded that the cases cited by the State on this point sufficiently distinguish *Villa*. The State relies on *State v. Tafoya*, 2012-NMSC-030, ¶¶ 33-34, 55, 285 P.3d 604 (concluding evidence was insufficient to convict the defendant of felony murder and attempted first degree murder but remanding for entry of judgment on second degree murder and attempted second degree murder); *State v. Notah-Hunter*, 2005-NMCA-074, ¶ 29, 31, 137 N.M. 597, 113 P.3d 867 (concluding that evidence was insufficient to convict the defendant of aggravated DWI and remanding for entry of judgment for DWI); and *State v. Burke*, 1999-NMCA-031, ¶ 2, 126 N.M. 712, 974 P.2d 1169 (same), *overruled on other grounds by State v. Torres*, 1999-NMSC-010, 127 N.M. 20, 976 P.2d 20. However, *Tafoya* does not discuss *Villa*, and neither *Tafoya* nor *Burke* discusses whether jury instructions on the relevant lesser-included offenses were presented at trial. As these cases would seemingly be in contravention of *Villa* if the jury in those cases had not been instructed on the lesser-included offenses, it would be inappropriate to rely on *Burke* and presumptuous to conclude that *Tafoya* departed from *Villa* without an express directive from our Supreme Court that it was doing so. *Fernandez v. Farmers Ins. Co. of Ariz.*, 1993-NMSC-035, ¶ 15, 115 N.M. 622, 857 P.2d 22 ("The general rule is that cases are not authority for propositions not considered." (internal quotation marks and citation omitted)). As for *Notah-Hunter*, in that case there were no jury instructions tendered because it was a bench trial. 2005-NMCA-074, ¶ 27 ("*Villa* addressed the direct-remand rule in the context of a jury trial, whereas we are dealing here with a bench trial."). It would be similarly inappropriate to rely on *Notah-Hunter* for the proposition that a separate jury instruction on aggravated battery was not required to convict Defendant of that offense on remand when no jury instructions were given in that case. We accordingly consider the State's points of distinction from *Villa* immaterial.

{15} Furthermore, the State's argument is more consistent with the test for the direct-remand rule rejected by our Supreme Court in *Villa*. That test required a showing that

> (1) there is a failure of proof of one element of the greater offense; (2) the evidence is sufficient to sustain all the elements of the lesser offense; (3) the lesser offense is included in the greater; and (4) no undue prejudice to the defendant would result.

Villa, 2004-NMSC-031, ¶ 8. In this case, the State is essentially arguing that entry of judgment on the lesser-included offense was proper because there was insufficient evidence of only one element—household member—and the evidence was otherwise sufficient to sustain all the elements of the lesser offense. In rejecting this test, however, our Supreme Court emphasized that in the cases utilizing this test, "the jur[ies] had been instructed on the lesser-included offense[s] at [trial]." *Id.* ¶ 10. Thus, absent clarification by our Supreme Court, we understand *Villa* to require that a jury be specifically instructed on the lesser-included offense in order for a district court to be permitted on remand to forgo a retrial and enter judgment on the lesser-included offense. *See id.*, ¶ 1; *Slade*, 2014-NMCA-088, ¶ 38.

{16} Second, although notice of the lesser-included offense was an important aspect of the *Villa* holding, the fact that Defendant requested, but was denied, an instruction on aggravated battery is not determinative. As our Supreme Court stated in *Villa*, "[e]ven if we were to conclude that [the d]efendant had adequate notice of lesser-included offenses, we would still face the problem of convicting [the d]efendant on appeal of a charge he did not in fact defend at trial." 2004-NMSC-031, ¶ 13. Furthermore, "adopting the expanded direct-remand rule is inconsistent with New Mexico law regarding jury instructions and preservation of error." *Id.* ¶ 15. In this case, the State exclusively pursued the theory of aggravated battery against a household member. In denying Defendant's requested aggravated battery instruction, the district court stated that it had already decided that issue at the directed verdict stage at which the State reiterated its position that Victim was a household member. In such circumstances, it would be inappropriate for the district court to, on the one hand, reject Defendant's request for the lesser-included offense instruction per the State's chosen theory of the case, and, on the other, enter a judgment of conviction on that charge when the State's primary theory has been held insufficient on appeal. *See Slade*, 2014-NMCA-088, ¶ 39 (noting that we do not second guess the State's decision to pursue an "all-or-nothing trial strategy"). Accordingly, we conclude that the district court erred in convicting Defendant of aggravated battery on remand.

B. Double Jeopardy Bars Retrial

{17} Defendant argues that on remand double jeopardy bars retrial on alternate charges. We agree.

{18} "The Double Jeopardy Clause protects against successive prosecutions for the same offense after acquittal or conviction and against multiple criminal punishments for the same offense." *State v. Gonzales*, 2013-NMSC-016, ¶ 15, 301 P.3d 380 (internal quotation marks and citation omitted). The prohibition includes "successive prosecutions for two offenses arising out of the same conduct if either one is a lesser- included

offense within the other." *State v. Meadors*, 1995-NMSC-073, ¶ 5, 121 N.M. 38, 908 P.2d 731. In these circumstances, "reversal of the greater offense . . . for insufficient evidence would also . . . bar a subsequent indictment on the implicit lesser included offenses that were never presented to the jury." *Gonzales*, 2013-NMSC-016, ¶ 19 (alterations, internal quotation marks, and citation omitted).

{19} In this case, because aggravated battery is a lesser included offense of aggravated battery against a household member, and because there was insufficient evidence of the greater offense, double jeopardy precludes retrial of Defendant on this charge. *See id.*

CONCLUSION

{20} For the foregoing reasons, we reverse the district court's judgment and sentence convicting Defendant of aggravated battery and remand to the district court for proceedings consistent with this Opinion.

{21} IT IS SO ORDERED

CYNTHIA A. FRY, Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

RODERICK T. KENNEDY, Judge