

**STATE V. ROMERO**

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**STATE OF NEW MEXICO,  
Plaintiff-Appellee,  
v.  
EMILIO ROMERO,  
Defendant-Appellant.**

No. 34,264

COURT OF APPEALS OF NEW MEXICO

December 17, 2015

APPEAL FROM THE DISTRICT COURT OF LEA COUNTY, Mark T. Sanchez, District  
Judge

**COUNSEL**

Hector H. Balderas, Attorney General, Santa Fe, NM, Jane A. Bernstein, Assistant  
Attorney General, Albuquerque, NM, for Appellee

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

**JUDGES**

JONATHAN B. SUTIN, Judge. WE CONCUR: JAMES J. WECHSLER, Judge, LINDA  
M. VANZI, Judge

**AUTHOR:** JONATHAN B. SUTIN

**MEMORANDUM OPINION**

**SUTIN, Judge.**

{1} Defendant Emilio Romero appeals his sentence on the ground that the district court erred in refusing to continue his sentencing hearing. Defendant wanted more time

to “secure expert testimony in support of mitigation of the sentence.” We affirm the court’s ruling.

## **BACKGROUND**

{2} Defendant pleaded guilty to second degree murder, tampering with evidence, and child abuse charges, pursuant to a plea and disposition agreement. The plea agreement, dated September 15, 2014, and approved by the district court the same day, stated that “[t]here are no agreements as to sentencing.” Defendant suggested that the sentencing hearing be set for November because he anticipated that he would have his mental health evaluator testify. He had arranged for an evaluator to testify at trial, and after the plea, he needed to “regroup to present mitigation evidence.” On September 16, 2014, the district court set the sentencing hearing for October 20, 2014, and ordered a pre-sentence report. On October 17, 2014, Defendant filed a motion to vacate that sentencing setting because he had “just received the [p]re-[s]entence [r]eport and had not had adequate time to review [it] with . . . Defendant[.]” and he was “also attempting to obtain an expert for mitigation purposes.” In the motion, defense counsel represented that the prosecution did not oppose the motion.

{3} The district court addressed Defendant’s motion for continuance at the sentencing hearing. Defense counsel stated that he intended to call a Dr. Rivera to testify and that the doctor would offer mitigation testimony, but the doctor still needed to “come down and perform” an evaluation of Defendant. Defense counsel also stated that Defendant did not have the means to pay the doctor and that he (counsel) was having trouble securing the necessary funding for the doctor but was diligently working to accomplish that. Defense counsel also raised the late receipt of the pre-sentence report. Defense counsel argued that the State would not be prejudiced by the delay. In his brief in chief on appeal, appellate counsel footnotes that Defendant was indigent, incarcerated, and represented by the public defender.

{4} At the hearing on October 20, the prosecution opposed the motion and was ready to proceed. The prosecutor read a statement prepared by family members of the victim. The court also heard testimony from Defendant’s mother, who said that Defendant was not a bad kid, has a big heart, and did not mean to do what he did, and that she was very sorry for the victim and his surviving family. Defendant did not testify.

{5} The district court denied the motion for continuance, stating that it had bifurcated the plea and sentencing hearing at Defendant’s request and that Defendant had represented that he would be ready for the October 20 hearing. The court then proceeded to sentence Defendant.

## **DISCUSSION**

### **Standard of Review**

{6} We review the denial of a motion for continuance for abuse of discretion. *State v. Salazar*, 2007-NMSC-004, ¶ 10, 141 N.M. 148, 152 P.3d 135. Under the circumstances here, Defendant must show that the district court “acted unfairly or arbitrarily[] or committed manifest error[,]” *State v. Martinez*, 1989-NMCA-036, ¶ 5, 108 N.M. 604, 775 P.2d 1321, and in doing so, must also show prejudice. See *Salazar*, 2007-NMSC-004, ¶ 10.

### **The District Court Did Not Abuse Its Discretion**

{7} A district court is required to make a careful and independent evaluation of a defendant’s rehabilitative potential and to hear mitigating evidence. See *State v. Cabezuela*, 2015-NMSC-016, ¶ 8, 350 P.3d 1145; *State v. Montoya*, 2015-NMSC-010, ¶ 68, 345 P.3d 1056; *State v. Bonilla*, 2000-NMSC-037, ¶ 10, 130 N.M. 1, 15 P.3d 491; see also NMSA 1978, § 31-18-15.1(A)(1) (2009) (“The judge may alter the basic sentence as prescribed [by statute] upon . . . a finding . . . of any mitigating circumstances surrounding the offense or concerning the offender[.]”).

{8} Defendant’s trial counsel did not and his appellate counsel does not show any prejudice in regard to the timing of trial counsel’s receipt of the pre-sentence report. The report is not in the appellate record. We are not shown that Defendant by document, testimony, or even argument presented any detail to the district court in regard to Defendant’s or his trial counsel’s attempts to obtain the expert’s testimony for the sentencing hearing. We have not been shown and have not seen in the record where Defendant presented what the expert might say if he testified at the sentencing hearing. Defendant states on appeal that he “had arranged for a mental health evaluator to testify at trial,” presumably in connection with his request for a competency-to-stand-trial hearing and his notice of incapacity to form specific intent. But Defendant offers nothing more than this unadorned assertion, including why the mental health evaluator never appeared to testify at the sentencing hearing.

{9} Defendant’s due process and equal protection case for a continuance of his sentencing hearing and opportunity to present mitigation evidence was vague, insufficient in factual detail, and missing the critical evidence of prejudice. Defendant is left arguing only indigence, but offers no authority to support an abuse of discretion under that circumstance here. Defendant received a basic sentence that was supported by the evidence.

<sup>1</sup> Defendant was sentenced to fifteen years, enhanced by one year under the firearm statute on his second degree murder conviction (Count 1), three years on his tampering with evidence conviction (Count 2), three years on his third degree abuse of a child not resulting in death or great bodily harm conviction (Count 3), with the sentences imposed on Counts 1, 2, and 3 ordered to run consecutively.

<sup>1</sup> Under the circumstances and the record, we cannot say that the district court’s denial of the motion for continuance was an abuse of discretion.

**{10} IT IS SO ORDERED.**

**JONATHAN B. SUTIN, Judge**

**WE CONCUR:**

**JAMES J. WECHSLER, Judge**

**LINDA M. VANZI, Judge**