

STATE V. SHARPE

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STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
RICHARD SHARPE,
Defendant-Appellant.

NO. 29,718

COURT OF APPEALS OF NEW MEXICO

January 14, 2010

APPEAL FROM THE DISTRICT COURT OF EDDY COUNTY, Jane Shuler Gray,
District Judge

COUNSEL

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

Hugh W. Dangler, Chief Public Defender, Adrienne R. Turner, Assistant Appellate
Defender, Santa Fe, NM, for Appellant

JUDGES

JAMES J. WECHSLER, Judge. WE CONCUR: MICHAEL D. BUSTAMANTE, Judge,
ROBERT E. ROBLES, Judge

AUTHOR: JAMES J. WECHSLER

MEMORANDUM OPINION

WECHSLER, Judge.

Defendant is appealing from a district court judgment and sentence entered after a bench trial finding Defendant guilty of battery against a household member. We issued

a calendar notice proposing to affirm. Defendant has responded with a memorandum in opposition. We affirm.

Issue 1: Defendant continues to challenge the validity of the magistrate court's reliance on the written waiver of the right to a jury trial. [MIO 1] However, Defendant received a de novo trial in district court, and we do not review any alleged defects in the magistrate court proceeding. See *State v. Foster*, 2003-NMCA-099, ¶9, 134 N.M. 224, 75 P.3d 824 (observing that in a de novo trial, "a district court conducts a new trial as if the trial in the lower court had not occurred").

Issue 2: Defendant contends that the district court erred in concluding that he waived his right to a jury trial. [MIO 3] Defendant states that he did not raise an objection below, but he claims that the matter may be raised for the first time on appeal because it involves a fundamental right. [MIO 4] However, fundamental rights may be waived or lost by failing to timely invoke the ruling of the district court. See *State v. Pacheco*, 2007-NMSC-009, ¶ 10, 141 N.M. 340, 155 P.3d 745. Accordingly, our calendar notice proposed to affirm for lack of preservation. Alternatively, our calendar notice proposed to affirm on the merits.

The district court judge informed the parties at a pre-trial conference that they were scheduled for a jury trial. [MIO 2] The prosecutor informed the judge that Defendant had waived his right in magistrate court, and the judge responded by stating that the jury trial setting was a mistake and that Defendant would be given a bench trial date. [MIO 2] Defense counsel did not object. [MIO 2]

As we observed in our calendar notice, it appears that the judge was simply noting that Defendant had previously waived his right to a jury trial, and the judge would likewise proceed with a bench trial in district court. The prosecutor then concurred with a bench trial. [DS 3] Given this context, we believe that Defendant's behavior amounted to a knowing concurrence as well. See *State v. Aragon*, 1997-NMCA-087, ¶ 24, 123 N.M. 803, 945 P.2d 102 (observing that a defendant may waive jury trial if done voluntarily, knowingly, and intelligently). To the extent that Defendant is claiming that he in fact wanted a jury trial, there is no indication to that effect on the record. Matters not of record cannot be reviewed on appeal. See *State v. Martin*, 101 N.M. 595, 603, 686 P.2d 937, 945 (1984). In the absence of any indication in the record that Defendant timely indicated that he wanted a jury trial, we do not believe that Defendant has established a mistake in the process that would amount to fundamental error. See *State v. Barber*, 2004-NMSC-019, ¶ 17, 135 N.M. 621, 92 P.3d 633 (providing that fundamental error includes both "cases with defendants who are indisputably innocent, and cases in which a mistake in the process makes a conviction fundamentally unfair notwithstanding the apparent guilt of the accused").

For the reasons set forth above, we affirm.

IT IS SO ORDERED.

JAMES J. WECHSLER, Judge

WE CONCUR:

MICHAEL D. BUSTAMANTE, Judge

ROBERT E. ROBLES, Judge