

STATE V. SMITH

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STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
STEVEN RAY SMITH,
Defendant-Appellant.

No. 32,867

COURT OF APPEALS OF NEW MEXICO

December 4, 2013

APPEAL FROM THE DISTRICT COURT OF OTERO COUNTY, Jerry H. Ritter, Jr.,
District Judge

COUNSEL

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

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

JUDGES

MICHAEL D. BUSTAMANTE, Judge. WE CONCUR: LINDA M. VANZI, Judge, M.
MONICA ZAMORA, Judge

AUTHOR: MICHAEL D. BUSTAMANTE

MEMORANDUM OPINION

BUSTAMANTE, Judge.

{1} Defendant appeals from convictions for forgery and conspiracy. We previously issued a notice of proposed summary disposition in which we proposed to uphold the convictions. Defendant has filed a combined motion to amend the docketing statement

and memorandum in opposition. After due consideration, we remain unpersuaded by Defendant's assertions of error. We therefore affirm.

{2} We will begin with the motion to amend, by which Defendant seeks to challenge the jury instruction on forgery. [MIO 5-7]] Because no argument to this effect was advanced below, the issue is presented as one of fundamental error. [MIO 6] We reject Defendant's alternative suggestion, [MIO 7] that the district court's query whether a more specific statutory offense might apply [MIO 5] somehow preserved Defendant's challenge to the jury instruction. *See generally State v. Skippings*, 2011-NMSC-021, ¶ 25, 150 N.M. 216, 258 P.3d 1008 (“[I]f the record reflects that the judge clearly understood the type of instruction the Defendant wanted and understood the tendered instruction needed to be modified to correctly state the law, then the issue is deemed preserved for appellate review.” (internal quotation marks and citation omitted)).

{3} The applicable uniform jury instruction requires the State to prove that “[t]he defendant gave or delivered to the victim a _____ (*name of writing*), knowing it to be a false _____ (*name of writing*), intending to injure, deceive or cheat the victim or another.” *See* UJI 14-1644 NMRA. The jury instruction utilized below took essentially this form. However, the reference to “a false document” was omitted, and in the blanks the words “counterfeit U.S. Currency” were inserted. [RP 127] Defendant contends that this was improper, for two reasons. First, the instruction does not explain the meaning of the word counterfeit. [MIO 6] Second, Defendant contends that the instruction had the effect of “instructing the jury at the outset that the bills were counterfeit,” thereby “usurp[ing] the role of the jury and remov[ing] the question of whether the bills” passed by Defendant were in fact counterfeit. [MIO 5-6]

{4} In our estimation, the word counterfeit has a common meaning, signifying false similitude. As such, no definitional instruction was required, *see State v. Carnes*, 1981-NMCA-126, ¶ 17, 97 N.M. 76, 636 P.2d 895 (“Where the issue is the failure to instruct on a term or word having a common meaning, there is no error in refusing an instruction defining the word or term.”), and additional reference to falsity would have been both redundant and confusing. We are also unpersuaded that the instruction took the question of falsity away from the jury. Insofar as the jury was informed that the State was required to prove beyond a reasonable doubt all of the elements of the offense, [RP 122, 127] and insofar as giving or delivering counterfeit (*i.e.*, false) U.S. Currency was incorporated in the elements instruction, [RP 127] the jury was required to make a finding to this effect. The cases upon which Defendant relies are inapposite, [MIO 7] insofar as they deal with situation-specific use of deadly weapons, which has no bearing on the offense at hand.

{5} In summary therefore, we conclude that Defendant's challenge to the jury instruction is not viable. We therefore deny the motion to amend. *See, e.g., State v. Lara*, 1989-NMCA-098, ¶ 5, 109 N.M. 294, 784 P.2d 1037 (denying a motion to amend where the issue was both unpreserved and not viable).

{6} Turning to the issues originally raised in the docketing statement, Defendant renews his challenges to both the sufficiency of the evidence and the propriety of the amendment to the indictment. [MIO 8-11] Because we previously set forth the pertinent background information in the notice of proposed summary disposition, we will avoid unnecessary reiteration here. Instead, we will focus on the substantive material advanced in the memorandum in opposition.

{7} With respect to the sufficiency of the evidence, Defendant suggests that the testimony of the cashier to whom Defendant tendered the counterfeit bills should have been rejected because “her testimony was ever-changing and unclear.” [MIO 9] However, on appeal we cannot re-weigh the evidence or second-guess the factfinder’s credibility determinations. *See State v. Ryan*, 2006-NMCA-044, ¶ 20, 139 N.M. 354, 132 P.3d 1040 (“It is the factfinder’s prerogative to weigh the evidence and to judge the credibility of the witnesses.”). Defendant also suggests that the cashier’s failure to take greater care in relation to the counterfeit bills, such as by marking them to signify which were tendered by Defendant and which were tendered by Defendant’s co-conspirator, rendered the evidence inadequate. [MIO 9] However, such matters go to the weight of the evidence, rather than sufficiency. *See generally State v. Peters*, 1997-NMCA-084, ¶ 26, 123 N.M. 667, 944 P.2d 896 (observing that demonstrative evidence must be identified either visually or by establishing custody of the object from the time of seizure to the time it is offered into evidence, and that questions concerning any possible gap in the chain of custody affect the weight of the evidence, rather than admissibility).

{8} Finally, Defendant continues to challenge the amendment to the indictment. [MIO 10-11] However, nothing new in the way of material argument is advanced. Therefore, for the reasons previously stated, we reject Defendant’s assertion of error.

{9} Accordingly, for the reasons stated above and in the notice of proposed summary disposition, we affirm.

{10} IT IS SO ORDERED.

MICHAEL D. BUSTAMANTE, Judge

WE CONCUR:

LINDA M. VANZI, Judge

M. MONICA ZAMORA, Judge